

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Paul J. Cromwell :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Year :
1972. :
_____ :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 8th day of July, 1983, she served the within notice of Decision by certified mail upon Paul J. Cromwell, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul J. Cromwell
211 Columbia Dr.
Williamsville, NY 14221

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
8th day of July, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

July 8, 1983

Paul J. Cromwell
211 Columbia Dr.
Williamsville, NY 14221

Dear Mr. Cromwell:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition | : | |
| | : | |
| of | : | |
| | : | |
| PAUL J. CROMWELL | : | DECISION |
| | : | |
| for Redetermination of a Deficiency or for | : | |
| Refund of Personal Income Tax under Article 22 | : | |
| of the Tax Law for the Year 1972. | : | |

Petitioner, Paul J. Cromwell, 211 Columbia Drive, Williamsville, New York 14221, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1972 (File No. 16273).

A small claims hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Part I, Buffalo, New York, on July 13, 1982 at 1:15 P.M. Petitioner appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether petitioner was a resident individual of New York State during the year 1972 within the meaning and intent of section 605 of the Tax Law.

FINDINGS OF FACT

1. Petitioner, Paul J. Cromwell, did not file a New York State income tax return for the year 1972.

2. On May 24, 1976, the Audit Division issued to petitioner, Paul J. Cromwell, and to his wife, Anna Mae Cromwell, a Notice of Deficiency asserting additional tax due for the year 1972 in the amount of \$1,656.09, plus penalties and interest. Anna Mae Cromwell is not a party to this proceeding and the

decision rendered herein does not address the issue of her liability under the asserted deficiency, but rather addresses only the liability of petitioner Paul J. Cromwell.

3. A Statement of Audit Changes also dated May 24, 1976, explained that petitioner's 1972 New York State personal income tax liability was computed on the basis of information on file with the Audit Division. Petitioner's 1972 tax liability was computed on asserted New York income of \$26,986.16, which figure is reported as the Federal adjusted gross income of petitioner and his wife per Form IT-2106 ("New York State Income Tax Bureau Federal-State Match").

4. The above Statement of Audit Changes also noted that the imposition of penalties was based on petitioner's failure to file a return and failure to pay tax when due under sections 685(a)(1) and 685(a)(2) of the Tax Law, respectively.

5. Prior to the period at issue herein, petitioner was employed in the Buffalo, New York area, and resided with his wife and three children at their 211 Columbia Drive, Williamsville, New York home.

6. Petitioner is an expert in the "aluminum dross" process. This process involves melting "scrap" metal, removing impurities or "slag" and, ultimately, recovering aluminum from the scrap metal.

7. In early 1970, petitioner was contacted by Combustion Engineering Corporation ("Combustion") and was offered a position as manager of Rock Creek Aluminum Company ("Rock Creek"), located in Rock Creek, Ohio. Combustion had acquired ownership of Rock Creek prior to contacting petitioner. Petitioner refused Combustion's job offer, and Rock Creek subsequently ceased operations.

8. In early 1971, Combustion again contacted petitioner concerning Rock Creek, and offered petitioner a long-term lease with an option to buy Rock Creek, interim financing at very favorable rates and help in re-starting Rock

Creek's business. Petitioner would be allowed to form his own company, pay off Combustion over a period of years and eventually become sole owner of Rock Creek.

9. Petitioner accepted the above second offer made by Combustion and formed a corporation called Panar (each letter of the name "Panar" corresponding to the first letter of the first names of petitioner, his wife and their three children) under the laws of Ohio with himself as its sole stockholder. In November, 1971, petitioner left New York and moved to Ohio to commence operation of the Rock Creek facility. Petitioner's wife and children refused to move to Ohio, and remained living at their Williamsville, New York home.

10. Petitioner commenced operation of the Rock Creek facility in or about November, 1971, on a seven-day per week, full-time, around-the-clock basis. Petitioner hired local (Rock Creek, Ohio) employees with no experience in the "aluminum dross" process of metal recovery, and trained these employees himself. Due to the nature of the operation of the Rock Creek facility, the potential danger involved with a full-time, around-the-clock metal melting and recovery plant, the then newly trained employees, as well as petitioner's own expertise in the "aluminum dross" process and knowledge of the machinery and equipment involved, it was necessary for petitioner to be constantly available at the plant site.

11. Located on the Rock Creek plant site was a large, remodeled two-story farmhouse, a portion of which, consisting of one large room and two smaller rooms all on the first floor, served as the offices of the company. The remaining portions of the farmhouse consisted of a bathroom, a kitchen and two bedrooms on the first floor and four bedrooms on the second floor and were used

by the petitioner as his living quarters during the entire time he was involved with the operation of the Rock Creek facility.

12. Furnishings for the above farmhouse, including both office equipment and furniture for the living quarters occupied by petitioner, were supplied by the Panar corporation. In accordance with the agreement reached between petitioner and Combustion, petitioner was required to submit information, including monthly financial statements from Panar to Combustion. Combustion controlled and limited petitioner's salary to \$300.00 per week.

13. Petitioner took no vacations during the year at issue and was present at the Rock Creek facility at all times except for occasional weekend trips back to Buffalo, New York. These occasional trips generally covered a three-day period and served the dual purpose of enabling petitioner to meet with Panar's attorneys in Buffalo, as well as to visit his wife and children. During these trips, petitioner stayed at the 211 Columbia Drive, Williamsville, New York address.

14. Travel expenses incurred by petitioner on the above trips were reimbursed by Panar. Petitioner testified his trips to Buffalo were very infrequent and occurred "...on not more than five or six weekends during the year 1972."

15. By an Indenture and Deed dated January 31, 1967, petitioner had transferred ownership to his wife of the house and property located at 211 Columbia Drive, Williamsville, New York. Petitioner testified this transfer of the house and property, previously jointly owned by petitioner and his wife, was made during an "unsettled" period in their marriage. Petitioner did continue to reside in the house with his wife and children following this transfer and up until the time he left New York to begin operation of the Rock Creek facility.

16. At the time he left for Rock Creek, Ohio, petitioner held a New York State driver's license, had his car registered in New York State and had a joint checking account with his wife. When petitioner moved to Ohio, he obtained an Ohio driver's license and registered his car in Ohio. He surrendered his New York license plates and car registration, but not his New York driver's license which, at that time, had two or three years remaining until its expiration date. Petitioner also established bank accounts, in his own name, in Ohio.

17. Petitioner paid no state income tax in Ohio in 1972.

18. Petitioner took his clothing and automobile with him to Ohio, but left all furniture and other personal property in the Williamsville, New York, home with his wife and children.

19. Petitioner testified he did not neglect his "duty" to his wife and children after he left for Ohio, but that he supported them. In addition to his support, petitioner's wife worked part-time as a clerk-typist for the Williamsville School District in 1972.¹

20. Petitioner remained in Ohio and operated the Rock Creek facility at a loss until September, 1975, at which time Panar corporation (as the entity operating Rock Creek) showed its first quarterly profit. Thereafter, in September, 1975, Panar was unable to meet payments due to Combustion on a certain ten-day demand note and, as a result, Combustion took over ownership and operation of Rock Creek from Panar and removed petitioner from the operation. Petitioner left Ohio in September, 1975, and resumed living at the Williamsville, New York house with his wife and children.

¹ No figures or records were provided detailing the amount of income earned by petitioner's wife in 1972.

21. Petitioner testified his intent at the time he left for Ohio in November, 1971, was to take over and rehabilitate the Rock Creek business and, in so doing, acquire sole ownership of the facility. Petitioner further testified that notwithstanding his family's refusal to accompany him to Ohio, he intended to remain permanently in Ohio as owner and operator of this business, did remain there for four years and would be there at present had he not been removed by Combustion from the operation of the plant.

CONCLUSIONS OF LAW

A. That section 605(a) of the Tax Law, in pertinent part, provides:

"...--(a) Resident Individual. -- A resident individual means an individual:

(1) who is domiciled in this state, unless he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state,..., or

(2) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state,..." (emphasis as in original).

B. That "...to effect a change of domicile, there must be an actual change of residence, coupled with an intention to abandon the former domicile and to acquire another." Aetna Nat'l. Bank v. Kramer, 142 A.D. 444, (1st Dep't., 1911).

C. That "[t]he test of intent with respect to a purported new domicile has been stated as 'whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it' (Matter of Bourne, 181 Misc. 238, 246, aff'd. 267 App. Div. 876, aff'd. 293 N.Y. 785)." Matter of Bodfish v. Gallman, 50 A.D.2d 457).

D. That Regulations of the State Tax Commission provide:

"A domicile once established continues until the person in question moves to a new location with the intention of making his fixed and permanent home there. No change of domicile results from the removal to a new location if the intention is to remain only for a limited time'..." [20 NYCRR 102.2(d)(2)].

E. That petitioner Paul J. Cromwell did effect a change of domicile from New York to Ohio. Although petitioner maintained some contacts with New York after his move to Ohio, he evidenced a clear intention to leave New York in 1971, to move to Ohio and to establish himself as the owner of a viable ongoing business there. Petitioner went to Ohio to operate a business he viewed as his own, as opposed to going to Ohio to work for a particular employer as in a job transfer or change of job assignment. His was a permanent commitment, rather than a move for a specified period of duration or purpose, and his work and residence in Ohio was ended only by events over which petitioner had no control, as specified in Finding of Fact "20".

F. That the regulations of the State Tax Commission provide:

"[a] permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by him,..." [20 NYCRR 102.2(e)].

Although petitioner's wife worked in 1972 and refused to move to Ohio with him, petitioner did support and maintain his family at the Williamsville, New York house and, in fact, did stay at that house when he was visiting New York during 1972. Thus petitioner maintained a permanent place of abode in New York in 1972. Finally, although petitioner did return to New York in 1972 (see Findings of Fact "13" and "14"), said trips were very infrequent, consisting of not more than five or six weekends lasting three days each in duration. Accordingly, petitioner was not taxable as a New York State resident individual in 1972

within the meaning and intent of section 605 of the Tax Law and Regulations thereunder.

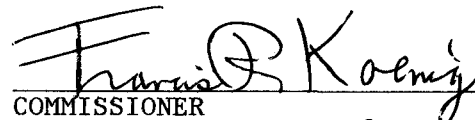
G. That the petition of Paul J. Cromwell is hereby granted and the Audit Division is directed to remove petitioner's name from the Notice of Deficiency dated May 24, 1976.

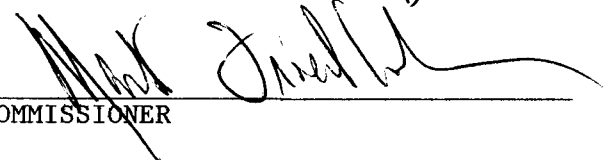
DATED: Albany, New York

STATE TAX COMMISSION

JUL 08 1983


PRESIDENT


COMMISSIONER


COMMISSIONER