

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition of William F. Thomas | : : : : : : : | AFFIDAVIT OF MAILING |
| 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 1977. | | |

State of New York
County of Albany

David Parchuck, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of May, 1983, he served the within notice of Decision by certified mail upon William F. Thomas, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William F. Thomas
2714 S.W. Sixth St.
Boynton Beach, FL 33435

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
27th day of May, 1983.

David Parchuck

Annice G. Hogeland

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
William F. Thomas :
AFFIDAVIT OF MAILING
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 :
1977. :

State of New York
County of Albany

David Parchuck, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of May, 1983, he served the within notice of Decision by certified mail upon Thomas J. Popavero the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas J. Popavero
Lawrence L. Landau, Public Accountant
319 Mill St.
Poughkeepsie, NY 12601

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 representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
27th day of May, 1983.

David Parchuck

James W. Highland

**AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174**

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

May 27, 1983

William F. Thomas
2714 S.W. Sixth St.
Boynton Beach, FL 33435

Dear Mr. Thomas:

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
Thomas J. Popavero
Lawrence L. Landau, Public Accountant
319 Mill St.
Poughkeepsie, NY 12601
Taxing Bureau's Representative

STATE TAX COMMISSION

DECISION

1. Petitioner, William F. Thomas, and his wife, Joan Thomas, filed separate New York State Income Tax Resident returns on a combined form for 1977 showing a balance due of \$11,673.00. No remittance accompanied the return. However, a letter accompanying the return and dated April 11, 1978 stated that petitioner did not think the taxes on the capital gains were correct and requested that the Department of Taxation and Finance check the forms and contact petitioner. Petitioner, by letter dated August 20, 1979, stated that he thought an estimated

tax payment of \$20,000.00 made on September 14, 1977, as a result of a capital gains transaction, should be refunded. Petitioner stated that he had moved to Florida in June, 1977 and the capital gains transaction upon which the estimated tax payment was based occurred in July, 1977, after the move. On January 8, 1980 petitioner filed an amended return claiming a refund of \$20,142.00.

2. On September 19, 1980 the Audit Division issued a Notice of Deficiency against petitioner in the amount of \$11,673.00, plus interest of \$2,393.20, for a total due of \$14,066.20 for the year 1977. A Statement of Audit Changes issued February 6, 1980 set forth the Audit Division's position that to effect a change in domicile there must be both an intent to change and an actual change and that, based on information received, petitioner was being considered a New York State resident for the entire year 1977. No action was taken by the Audit Division on petitioner's refund claim.

3. Petitioner lived in Hyde Park, New York. On June 23, 1977 he purchased a house in Florida and he and his wife moved to that house. At the same time, he offered his house in New York for sale. The New York house did not sell for two years, during which time petitioner's son lived in it. Petitioner did not indicate whether any furniture was moved out of the New York house into his Florida home or whether he left it furnished for his son. Petitioner also did not state whether he used the home in Hyde Park when he visited New York.

4. Petitioner also owned and operated a liquor store in New York. When he and his wife moved to Florida, petitioner left his son to operate the store. At that time, petitioner's son was not old enough to obtain a liquor license and petitioner apparently still owned the store. Petitioner did not provide any evidence as to who owned the business at the time of the move or whether ownership ever changed subsequent to that period. Petitioner stated in a

letter that at some unspecified date his son reached 21 years of age and obtained a liquor license, since which time his son "has had full control of the store". Petitioner never explained whether "full control" entailed ownership.

5. After moving to Florida, petitioner retained his New York driver's license and automobile registration until each expired. Petitioner offered no proof of where he registered to vote after June, 1977 or whether he and his wife filed a declaration of domicile with the appropriate county clerk in Florida certifying that they had become bona fide Florida residents. Moreover, in a cover letter sent with the 1977 tax returns, petitioner stated that "(w)e are living in Boynton Beach, Florida for the winter and all our records are in New York State. We will return to New York State in May." Petitioner has not attempted to explain the meaning or intent of those statements. From the time that he retired, petitioner visited New York State periodically to see his family.

6. As of November, 1982 petitioner and his wife continued to make their home in Florida.

CONCLUSIONS OF LAW

A. That 20 NYCRR 102.2(d)(2) provides that:

"a domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time."

B. That the burden of proof is upon the petitioner to show that the necessary intention to effect a change in domicile existed (Tax Law, §689(e); 20 NYCRR 102.2(d)(2)). "The 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' (citation omitted). The evidence to establish the required intention to effect a change in domicile must be clear and convincing" (Bodfish v. Gallman, 50 A.D.2d 457).

C. That petitioner has not met his burden of proof with respect to a change in domicile. The limited evidence submitted by petitioner did not clearly demonstrate that an intention to effect a change in domicile existed. Petitioner was, therefore, domiciled in New York for the year 1977.

D. That section 605(a)(1) of the Tax Law defines a resident individual as one "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." Since petitioner was domiciled in New York and maintained a home in Hyde Park, New York and spent more than thirty days in New York during 1977, he was a resident of New York in 1977 and subject to tax as such.


E. That the petition of William F. Thomas is denied, the Notice of Deficiency issued September 19, 1980 is sustained, and the claim for refund is denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 27 1983


PRESIDENT


COMMISSIONER


COMMISSIONER