

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Denis M. & Lynne A. Brett :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax  
Law and New York City Nonresident Earnings Tax :  
under Chapter 46, Title U of the Administrative  
Code of the City of New York for the Year 1977. :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of July, 1984, he served the within notice of Decision by certified mail upon Denis M. & Lynne A. Brett, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Denis M. & Lynne A. Brett  
669 Silom Rd., 4th Fl.  
Bangkok 5, THAILAND

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
31st day of July, 1984.

David Parchuck

William A. Hagelbert  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Denis M. & Lynne A. Brett :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law and New York City Nonresident Earnings Tax :  
under Chapter 46, Title U of the Administrative :  
Code of the City of New York for the Year 1977. :

State of New York }  
ss.:  
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of July, 1984, he served the within notice of Decision by certified mail upon John J. Fitzpatrick, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John J. Fitzpatrick  
Ernst & Whinney  
555 California St., Suite 3000  
San Francisco, CA 94104

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
31st day of July, 1984.

*David Parchuck*

*James A. Hays*

Authorized to administer oaths  
pursuant to Tax Law section 174

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

July 31, 1984

Denis M. & Lynne A. Brett  
669 Silom Rd., 4th Fl.  
Bangkok 5, THAILAND

Dear Mr. & Mrs. Brett:

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 & 1312 of the Tax Law and Chapter 46, Title U of the Administrative Code of the City of New York, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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  
John J. Fitzpatrick  
Ernst & Whinney  
555 California St., Suite 3000  
San Francisco, CA 94104  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
DENIS M. BRETT and LYNNE A. BRETT : DECISION  
for Redetermination of a Deficiency or for :  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law and New York City Nonresident :  
Earnings Tax under Chapter 46, Title U of the :  
Administrative Code of the City of New York for :  
the Year 1977.

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Petitioners, Denis M. Brett and Lynne A. Brett, Bangunan Anskasa Raya, 22nd Floor, Kuala Lumpur, Malaysia, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the year 1977 (File No. 41415).

On November 22, 1983, petitioners, by their attorneys Ernst & Whinney, Esqs. (John J. Fitzpatrick, Esq., of counsel), waived a small claims hearing and consented to submission of this matter to the State Tax Commission. The following decision is rendered upon the file as presently constituted.

ISSUE

Whether, during the year 1977, petitioners were domiciled in New York and either maintained a permanent place of abode in New York, maintained no permanent place of abode elsewhere, or spent in the aggregate more than thirty days in New York, and were thus resident individuals under Tax Law section 605(a)(1).

FINDINGS OF FACT

1. Petitioners herein, Denis M. Brett and Lynne A. Brett, timely filed a New York State Income Tax Resident Return for 1977 with a New York City Nonresident Earnings Tax Return and a "Schedule for Change of Resident Status" (CR-60.1) attached. The address shown on said return was c/o Bank of California, 13 Moorgate, London, EC2P 2NX, England.

2. On September 11, 1979, the Audit Division issued a Statement of Audit Changes against petitioners proposing New York State and City personal income taxes<sup>1</sup> due of \$1,244.32, plus interest of \$148.94, for a total due of \$1,393.26. Said statement was issued on the grounds that "[t]emporary removal to a foreign country does not change one's domicile. As a domiciliary of New York State you are considered a full-year resident and taxable on that basis for New York State tax purposes." Accordingly, a Notice of Deficiency was issued on June 26, 1980.

3. Petitioners indicated on Form CR-60.1 that they were New York residents during the period January 1, 1977 to September 14, 1977 and prorated their total exemptions on the basis of the number of months covered by the return. The Audit Division asserted that petitioners were New York State residents for the entire year and computed their tax liability based on federal adjusted gross income less itemized deductions and four (4) exemptions.

4. Petitioner Denis Brett was hired by the Bank of California on January 5, 1970 as a management trainee and was assigned to the bank's San Francisco office. In July of 1971 Mr. Brett was sent to its New York office. A letter from petitioner's employer dated April 23, 1980 stated, in part, that:

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<sup>1</sup> The New York City nonresident earnings tax is not at issue and, therefore, will not be addressed hereinafter.

"Mr. Brett was transferred to New York in July 1971. ... The posting of Mr. Brett to New York was initially intended to be for a period of two years. It was, however, subsequently extended until September, 1977, when he was reassigned to London."

Another letter from petitioner's employer dated October 15, 1982 stated, in part, that petitioner was sent to the New York Office,

"(F)or a temporary period of time to learn the international operation. ... It was always the intentions of the Bank that Denis Brett's assignment in New York was temporary and not for an indefinite period of time. The length of the assignment was extended due to changes in circumstances, but each extension was for a specific period of time, not an indefinite period."

Employee appraisal forms attached to the October 15, 1982 letter did not indicate that petitioner's job assignments were temporary, but did indicate his progress in preparing for future job assignments.

5. Petitioners voted and maintained their automobile registration in New York State from July of 1971 to September of 1977 and asserted that they did not vote or register their automobile in California because their interpretation of the law of said state was that one had to have a resident address there in order to vote and to register an automobile.

6. Petitioners do not dispute their New York resident status prior to September of 1977 but assert that they should not be taxed on the income earned from Denis Brett's foreign assignment after September 14, 1977 because:

"1) he did not maintain a permanent residence within New York after September 14, 1977,

2) he did move his family with him to London to set up a residence in that country in September of 1977,

3) for the 548 consecutive days from September 14, 1977 through March 16, 1979, he was present in a foreign country for at least 450 days,<sup>2</sup> and

4) he was not in New York for more than 90 days during the 548 consecutive day period and his family did not live in New York at any time subsequent to September 14, 1977, and

5) he was not present in New York at all during the period September 15, 1977 through December 31, 1977 and therefore meets the test under Sec. 605 that during this short period he was not present for an amount of days which exceeded the stated ratio in that Section."

7. Petitioners sold their house at 208 Read Avenue in Yonkers, New York on September 13, 1977 and arrived in England on September 14, 1977. They have resided abroad ever since that time. In June of 1980, petitioners, in anticipation of their reassignment to California, purchased a home in said state.

8. Petitioners asserted that when they left New York for England, they had no intention of returning to New York State.

#### CONCLUSIONS OF LAW

A. That petitioners have failed to sustain their burden of proof to show that they were domiciled in a place other than New York prior to the year at issue; therefore, petitioners were domiciled in New York at the time they moved to England. The record does not show where petitioners were domiciled at the time Denis M. Brett started working for the Bank of California, or that his job assignments were temporary rather than indefinite. Furthermore, petitioners resided in New York for six years and owned a home in New York State.

B. That a United States citizen will not ordinarily be deemed to have changed his domicile by going to a foreign country unless it is clearly shown that he intends to remain there permanently. For example, a United States citizen domiciled in New York will not ordinarily be deemed to have changed his

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<sup>2</sup>

It should be noted that items 3 and 4 are included in the definition of a resident under section 605(a)(1)(B) of the Tax Law but that said provision is applicable to taxable years commencing after December 31, 1977.

domicile by going to a foreign country unless it is clearly shown that he intends to remain abroad permanently and not to return (20 NYCRR 102.2(d)(3)).

The evidence to establish the required intention to effect a change in domicile must be clear and convincing and "[t]he presumption against a foreign domicile is stronger than the general presumption against a change of domicile" (Matter of Bodfish v. Gallman, 50 A.D.2d 457,458). "Less evidence is required to establish a change of domicile from one state to another than from one nation to another" (Matter of Newcomb, 192 N.Y. 238,250).

C. That petitioners did not change their domicile to England during 1977. Rather, they remained domiciliaries of the State of New York during said entire year.

D. That any person domiciled in New York during the year 1977 is a resident for income tax purposes for the taxable year, unless for that year he satisfies all three of the following requirements: (1) he maintains no permanent place of abode in this State during such year, (2) he maintains a permanent place of abode elsewhere during such entire year, and (3) he spends in the aggregate not more than 30 days of the taxable year in this State. (Tax Law §605(a)(1) and 20 NYCRR 102.2(b)). That since petitioners failed to satisfy the requirements set forth they are deemed residents of New York State for the entire taxable year 1977.

E. That the petition of Denis M. Brett and Lynne A. Brett is denied and the Notice of Deficiency issued on June 26, 1980, is sustained.

DATED: Albany, New York

JUL 31 1984

STATE TAX COMMISSION

Ranica A. Clev  
PRESIDENT  
Francis R. Koemy  
COMMISSIONER  
Mark J. Smith  
COMMISSIONER