

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Donald C. Fresne :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund :
of New York City Personal Income Tax under Article :
30 of the Tax Law and Chapter 46, Title T of the :
Administrative Code of the City of New York for :
the Years 1976 - 1978. :

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 14th day of March, 1985, he served the within notice of Decision by certified mail upon Donald C. Fresne, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald C. Fresne
825 Fifth Ave. #16D
New York, NY 10021

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
14th day of March, 1985.

David Parchuck

James A. Thompson
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Donald C. Fresne :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of New York City Personal Income Tax under Article :
30 of the Tax Law and Chapter 46, Title T of the :
Administrative Code of the City of New York for :
the Years 1976 - 1978. :

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 14th day of March, 1985, he served the within notice of Decision by certified mail upon Terence J. Devine, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Terence J. Devine
Degraff, Foy, Conway, Holt-Harris & Mealey
90 State St.
Albany, NY 12207

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
14th day of March, 1985.

David Parchuck

James J. O'Hara
Authorized to administer oaths
pursuant to Tax Law section 174

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

March 14, 1985

Donald C. Fresne
825 Fifth Ave. #16D
New York, NY 10021

Dear Mr. Fresne:

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 T 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
Terence J. Devine
Degraff, Foy, Conway, Holt-Harris & Mealey
90 State St.
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	DECISION
	:	
DONALD C. FRESNE	:	
	:	
for Redetermination of a Deficiency or for	:	
Refund of New York City Personal Income Tax	:	
under Article 30 of the Tax Law and Chapter 46,	:	
Title T of the Administrative Code of the	:	
City of New York for the Years 1976, 1977	:	
and 1978.	:	

Petitioner, Donald C. Fresne, 825 Fifth Avenue, #16D, New York, New York, 10021, filed a petition for redetermination of a deficiency or for refund of New York City personal income tax under Article 30 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the years 1976, 1977 and 1978 (File No. 34345).

Petitioner has waived a hearing and submitted his case for decision based on the entire file. After due consideration of the file, the Commission renders the following decision.

ISSUES

Whether the Audit Division properly subjected petitioner to liability for New York City personal income tax during the years 1976, 1977 and 1978.

FINDINGS OF FACT

1. On April 13, 1981, the Audit Division issued to petitioner, Donald C. Fresne, a Notice of Deficiency asserting additional tax due for the years 1976, 1977 and 1978 in the amount of \$31,912.02, plus penalty and interest. This deficiency was based upon the assertion that petitioner was a resident of New

York City during the years in question and, as such, was properly subject to its personal income tax.

2. On or about November 30, 1971, petitioner purchased a home and approximately 221 acres of land located at North Mabbettsville Road, Millbrook (Town of Washington), Dutchess County, New York, at a cost of \$300,000.00. Thereafter, in March of 1977, petitioner purchased additional property adjoining the North Mabbettsville Road property, at a cost of \$188,942.00.

3. Petitioner had been divorced on June 27, 1968, at which time he was a resident of Connecticut. The divorce decree provided, inter alia, that the custody of petitioner's two children, John Fresne and David Fresne, then minors, was to be with petitioner's former wife, and that petitioner was to pay all expenses of the childrens' higher education, including preparatory school, under-graduate and post-graduate college or university schooling. Various documents pertaining to the two children during the years at issue, including medical insurance policies, correspondence with a preparatory school, and a Selective Service registration form carry the North Mabbettsville Road, Millbrook, New York address.

4. Petitioner's automobile was registered and insured under the Millbrook, New York address. Petitioner has maintained a checking account with the Bank of Millbrook in Millbrook, New York continuously since February 22, 1977. Petitioner's will, executed on July 6, 1977, lists Millbrook as his domicile and residence. The Millbrook address is also reflected on correspondence and an insurance policy pertaining to a horse owned by petitioner, and on school tax bills for the years 1977 and 1978.

5. Petitioner timely filed New York State Income Tax Resident Returns (Form IT-201/208) for each of the years at issue, listing his address on each of such returns as North Mabbetttsville Road, Millbrook, New York, 12545. The portions of these returns pertaining to New York City Personal Income Tax and Nonresident Earnings Tax were left blank. Wage and Tax Statements (Forms W-2) reflect that no New York City taxes were withheld by petitioner's employer, Texas Chemical and Plastics Corporation ("TCP"), on behalf of petitioner.

6. Petitioner's employer, TCP, a Delaware corporation, filed New York State Corporation Franchise Tax Reports (Forms CT-3) listing addresses, as shown, for each of the following specified years:

<u>Year</u>	<u>Address</u>
1973	920 E. Maple Birmingham, Michigan
1974	Same
1975	Return not in record
*1976	429 E. 52 St., Rm. 6E New York, New York 10022
*1977	825 - 5th Avenue New York, New York 10021
*1978	Same
1979	Same
1980	Same
1981	Same

Only the first page of each of these returns was included as part of the instant record.

* The years at issue herein.

7. On December 21, 1978, petitioner entered into a proprietary lease of a cooperative apartment (Apartment number 16-D) located on the sixteenth floor at 825 Fifth Avenue in New York City. According to an affidavit submitted by TCP's accountant, one Willard C. Paul (who also served as petitioner's accountant), during the years at issue "[t]he Corporation (TCP) did not enter into a formal sublease with Donald C. Fresne since the rules of the building did not permit a lease to a corporation. The apartment, however, was used for the purposes of the business. Mr. Fresne's attendance was for the convenience of the Corporation, and the carrying charges were paid by the Corporation." Mr. Paul's affidavit further states that TCP's New York office was at 825 Fifth Avenue during each of the years at issue. The record is unclear as to the form of lease of the apartment prior to the above-noted December 21, 1978 date.

8. TCP's New York Office was staffed on a five day per week basis by a secretary, whose duties encompassed answering and making business related telephone calls, meeting with customers, performing secretarial services for petitioner and delivering documents to and receiving documents from petitioner in Millbrook. Business telephone bills from the 825 Fifth Avenue apartment were paid for by TCP, and petitioner had the right to seek reimbursement for business telephone charges incurred in Millbrook.

9. TCP owned an automobile which was garaged in Millbrook and used by a chauffeur to drive petitioner to and from New York City for TCP's business. The car was not garaged in New York City at any time, but rather the chauffeur would return to Millbrook and remain there until petitioner was ready to return to Millbrook.

10. Petitioner's general custom, when he was not out of State, was to schedule business meetings in New York City for the period between Tuesday

afternoons and Thursday mornings and return to Millbrook thereafter for the balance of the week. During holidays and at other times when business did not require petitioner's presence in New York City (or out of state), petitioner could generally be found in Millbrook.

11. Expense reports for petitioner for the years 1978 and 1977 reflect the following:

During 1978, petitioner spent 102 full days and a portion of 65 other days in New York City with the balance of his time spent either in Millbrook or out of New York State (and/or out of the United States);

During 1977 petitioner spent 62 full days in New York City and a portion of 59 other days in New York City with the balance of his time spent either in Millbrook or out of New York State (and/or out of the United States).

For 1976, no information was submitted concerning the number of days worked by petitioner or any locations at which such work was performed, with only expenses and budget figures for Fresne Farm (presumably located at the Millbrook address) submitted. Petitioner asserts, by affidavit, that he spent less than 183 days in New York City during each of the subject years.

12. The documents constituting the record herein do not indicate whether TCP claimed on its return a deduction for the expense of the "carrying charges" at the 825 Fifth Avenue apartment, nor were such charges defined or their amounts specified. It is not clear whether petitioner, as the leaseholder of record, paid the expenses associated with the apartment and was reimbursed or if some other method (e.g. direct payment by TCP) was employed. Petitioner's affidavit asserts petitioner could not locate a copy of the sublease with TCP, while Mr. Paul's affidavit asserts there was no formal sublease since a corporation could not be a leaseholder at 825 Fifth Avenue.

13. Mr. Paul's affidavit also provides, in part, that the (TCP) secretary working at TCP's 825 Fifth Avenue address "...had authority to use the business telephone" (emphasis supplied).

14. Affidavits were submitted from several other persons attesting to petitioner's indications that Millbrook was his permanent home and indicating that he spent more time there than in New York City.

CONCLUSIONS

A. That section 1302 of Article 30 of the Tax Law and section T-46-101.0(a) of the New York City Administrative Code provide for the imposition of tax during the respective years at issue "on the city taxable income of every city resident individual, estate and trust".

B. That section 1305 of Article 30 of the Tax Law and section T-46-105.0 of the New York City Administrative Code define the terms "resident individual" to mean an individual:

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

(2) who is not domiciled in (New York) city but maintains a permanent place of abode in (New York) city and spends in the aggregate more than one hundred eighty three days of the taxable year in (New York) city,..."

C. That regulations of the State Tax Commission (which are applicable to the New York City taxes at issue herein via 20 NYCRR 290.2) provide, in relevant part, as follows:

"Domicile. (1) Domicile, in general, is the place which an individual intends to be his permanent home - the place to which he intends to return whenever he may be absent." 20 NYCRR 102.2(d)(2).

D. That during the years in question, petitioner's domicile was his North Mabbettsville Road home in Millbrook, New York and not the 825 Fifth Avenue apartment in New York City. The evidence presented indicates that the former location was the residence petitioner considered his permanent home, the place to which he intended to return after any temporary absences.

E. That the 825 Fifth Avenue cooperative apartment was a permanent place of abode. The proprietary lease, commencing December 21, 1978, was held in petitioner's name. Petitioner also leased the premises prior to such date, although no lease document for prior periods is in the record,¹ and the terms of such prior lease are unspecified. Moreover, it is not unwarranted to infer that a telephone for petitioner's personal use also existed at the apartment (see Finding of Fact "13"). Finally, TCP did not list this apartment as its New York address during one of the years at issue (see Finding of Fact "6"). In sum, petitioner has failed to establish that the 825 Fifth Avenue apartment was not a permanent place of abode.

F. That since, during 1978 and 1977, petitioner has established that he spent less than 183 days in New York City he is not subject to tax as a resident of New York City during 1978 and 1977. However, petitioner is subject to the earnings tax on nonresidents during each of such years, in accordance with the terms of Title U of the Administrative Code of the City of New York, and the Audit Division is directed to recompute the Notice of Deficiency accordingly.

G. That for 1976, petitioner has submitted no evidence concerning the number of days spent in New York City, and thus has failed to sustain his

1 The proprietary lease term was to commence December 21, 1978 and run through September 30, 2026.

burden of proving that he spent less than 183 days there and was not a statutory resident subject to the New York City Personal Income Tax imposed pursuant to Tax Law Article 30 for such year. Conclusory statements in petitioner's affidavit are insufficient to meet this burden of proof. Thus, the portion of the Notice of Deficiency pertaining to 1976, as issued, is sustained.

H. That petitioner has not presented any facts which warrant abatement or reduction of the penalties asserted pursuant to Tax Law Sections 685(a)(1) and (a)(2).

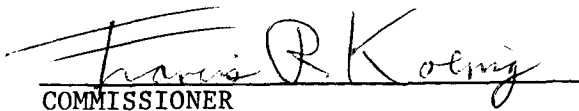
I. That the petition of Donald C. Fresne is granted to the extent that petitioner was not subject to tax as a New York City resident during 1978 and 1977, but is in all other respects denied and the Notice of Deficiency dated April 13, 1981, as recomputed in accordance herewith, together with penalty and interest is sustained.

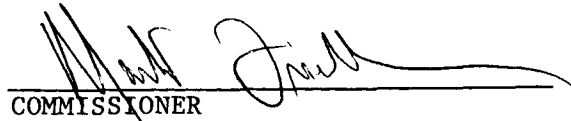
DATED: Albany, New York

STATE TAX COMMISSION

MAR 14 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

TA 26 (9-79)

STATE OF NEW YORK

State Tax Commission

TAX APPEALS BUREAU

STATE CAMPUS

ALBANY, N. Y. 12227

DATE 1/16
1ST NOTICE

2ND NOTICE

Due
PS
Oct 11



REASON CHECKED
Unsubstantiated
Withdrawn
Insufficient evidence
Improperly stated
For more information
Do not refile in this envelope

Donald C. Fresne
825 Fifth Ave. #16D
New York, NY 10021



Handwritten signature: Donald C. Fresne

CERTIFIED

P 693 169 655

MAIL

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

March 14, 1985

Donald C. Fresne
825 Fifth Ave. #16D
New York, NY 10021

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

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Terence J. Devine
Degraff, Foy, Conway, Holt-Harris & Mealey
90 State St.
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
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of	:	DECISION
	:	
DONALD C. FRESNE	:	
	:	
for Redetermination of a Deficiency or for	:	
Refund of New York City Personal Income Tax	:	
under Article 30 of the Tax Law and Chapter 46,	:	
Title T of the Administrative Code of the	:	
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Petitioner has waived a hearing and submitted his case for decision based on the entire file. After due consideration of the file, the Commission renders the following decision.

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York City during the years in question and, as such, was properly subject to its personal income tax.

2. On or about November 30, 1971, petitioner purchased a home and approximately 221 acres of land located at North Mabbettsville Road, Millbrook (Town of Washington), Dutchess County, New York, at a cost of \$300,000.00. Thereafter, in March of 1977, petitioner purchased additional property adjoining the North Mabbettsville Road property, at a cost of \$188,942.00.

3. Petitioner had been divorced on June 27, 1968, at which time he was a resident of Connecticut. The divorce decree provided, inter alia, that the custody of petitioner's two children, John Fresne and David Fresne, then minors, was to be with petitioner's former wife, and that petitioner was to pay all expenses of the childrens' higher education, including preparatory school, under-graduate and post-graduate college or university schooling. Various documents pertaining to the two children during the years at issue, including medical insurance policies, correspondence with a preparatory school, and a Selective Service registration form carry the North Mabbettsville Road, Millbrook, New York address.

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6. Petitioner's employer, TCP, a Delaware corporation, filed New York State Corporation Franchise Tax Reports (Forms CT-3) listing addresses, as shown, for each of the following specified years:

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Only the first page of each of these returns was included as part of the instant record.

* The years at issue herein.

7. On December 21, 1978, petitioner entered into a proprietary lease of a cooperative apartment (Apartment number 16-D) located on the sixteenth floor at 825 Fifth Avenue in New York City. According to an affidavit submitted by TCP's accountant, one Willard C. Paul (who also served as petitioner's accountant), during the years at issue "[t]he Corporation (TCP) did not enter into a formal sublease with Donald C. Fresne since the rules of the building did not permit a lease to a corporation. The apartment, however, was used for the purposes of the business. Mr. Fresne's attendance was for the convenience of the Corporation, and the carrying charges were paid by the Corporation." Mr. Paul's affidavit further states that TCP's New York office was at 825 Fifth Avenue during each of the years at issue. The record is unclear as to the form of lease of the apartment prior to the above-noted December 21, 1978 date.

8. TCP's New York Office was staffed on a five day per week basis by a secretary, whose duties encompassed answering and making business related telephone calls, meeting with customers, performing secretarial services for petitioner and delivering documents to and receiving documents from petitioner in Millbrook. Business telephone bills from the 825 Fifth Avenue apartment were paid for by TCP, and petitioner had the right to seek reimbursement for business telephone charges incurred in Millbrook.

9. TCP owned an automobile which was garaged in Millbrook and used by a chauffeur to drive petitioner to and from New York City for TCP's business. The car was not garaged in New York City at any time, but rather the chauffeur would return to Millbrook and remain there until petitioner was ready to return to Millbrook.

10. Petitioner's general custom, when he was not out of State, was to schedule business meetings in New York City for the period between Tuesday

afternoons and Thursday mornings and return to Millbrook thereafter for the balance of the week. During holidays and at other times when business did not require petitioner's presence in New York City (or out of state), petitioner could generally be found in Millbrook.

11. Expense reports for petitioner for the years 1978 and 1977 reflect the following:

During 1978, petitioner spent 102 full days and a portion of 65 other days in New York City with the balance of his time spent either in Millbrook or out of New York State (and/or out of the United States);

During 1977 petitioner spent 62 full days in New York City and a portion of 59 other days in New York City with the balance of his time spent either in Millbrook or out of New York State (and/or out of the United States).

For 1976, no information was submitted concerning the number of days worked by petitioner or any locations at which such work was performed, with only expenses and budget figures for Fresne Farm (presumably located at the Millbrook address) submitted. Petitioner asserts, by affidavit, that he spent less than 183 days in New York City during each of the subject years.

12. The documents constituting the record herein do not indicate whether TCP claimed on its return a deduction for the expense of the "carrying charges" at the 825 Fifth Avenue apartment, nor were such charges defined or their amounts specified. It is not clear whether petitioner, as the leaseholder of record, paid the expenses associated with the apartment and was reimbursed or if some other method (e.g. direct payment by TCP) was employed. Petitioner's affidavit asserts petitioner could not locate a copy of the sublease with TCP, while Mr. Paul's affidavit asserts there was no formal sublease since a corporation could not be a leaseholder at 825 Fifth Avenue.

13. Mr. Paul's affidavit also provides, in part, that the (TCP) secretary working at TCP's 825 Fifth Avenue address "...had authority to use the business telephone" (emphasis supplied).

14. Affidavits were submitted from several other persons attesting to petitioner's indications that Millbrook was his permanent home and indicating that he spent more time there than in New York City.

CONCLUSIONS

A. That section 1302 of Article 30 of the Tax Law and section T-46-101.0(a) of the New York City Administrative Code provide for the imposition of tax during the respective years at issue "on the city taxable income of every city resident individual, estate and trust".

B. That section 1305 of Article 30 of the Tax Law and section T-46-105.0 of the New York City Administrative Code define the terms "resident individual" to mean an individual:

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

(2) who is not domiciled in (New York) city but maintains a permanent place of abode in (New York) city and spends in the aggregate more than one hundred eighty three days of the taxable year in (New York) city,..."

C. That regulations of the State Tax Commission (which are applicable to the New York City taxes at issue herein via 20 NYCRR 290.2) provide, in relevant part, as follows:

"Domicile. (1) Domicile, in general, is the place which an individual intends to be his permanent home - the place to which he intends to return whenever he may be absent." 20 NYCRR 102.2(d)(2).

D. That during the years in question, petitioner's domicile was his North Mabbettsville Road home in Millbrook, New York and not the 825 Fifth Avenue apartment in New York City. The evidence presented indicates that the former location was the residence petitioner considered his permanent home, the place to which he intended to return after any temporary absences.

E. That the 825 Fifth Avenue cooperative apartment was a permanent place of abode. The proprietary lease, commencing December 21, 1978, was held in petitioner's name. Petitioner also leased the premises prior to such date, although no lease document for prior periods is in the record,¹ and the terms of such prior lease are unspecified. Moreover, it is not unwarranted to infer that a telephone for petitioner's personal use also existed at the apartment (see Finding of Fact "13"). Finally, TCP did not list this apartment as its New York address during one of the years at issue (see Finding of Fact "6"). In sum, petitioner has failed to establish that the 825 Fifth Avenue apartment was not a permanent place of abode.

F. That since, during 1978 and 1977, petitioner has established that he spent less than 183 days in New York City he is not subject to tax as a resident of New York City during 1978 and 1977. However, petitioner is subject to the earnings tax on nonresidents during each of such years, in accordance with the terms of Title U of the Administrative Code of the City of New York, and the Audit Division is directed to recompute the Notice of Deficiency accordingly.

G. That for 1976, petitioner has submitted no evidence concerning the number of days spent in New York City, and thus has failed to sustain his

1 The proprietary lease term was to commence December 21, 1978 and run through September 30, 2026.

burden of proving that he spent less than 183 days there and was not a statutory resident subject to the New York City Personal Income Tax imposed pursuant to Tax Law Article 30 for such year. Conclusory statements in petitioner's affidavit are insufficient to meet this burden of proof. Thus, the portion of the Notice of Deficiency pertaining to 1976, as issued, is sustained.

H. That petitioner has not presented any facts which warrant abatement or reduction of the penalties asserted pursuant to Tax Law Sections 685(a)(1) and (a)(2).

I. That the petition of Donald C. Fresne is granted to the extent that petitioner was not subject to tax as a New York City resident during 1978 and 1977, but is in all other respects denied and the Notice of Deficiency dated April 13, 1981, as recomputed in accordance herewith, together with penalty and interest is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 14 1985


PRESIDENT


COMMISSIONER


COMMISSIONER