

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Stephen L. Johnson :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Years :
1978 & 1979. :
:

AFFIDAVIT OF MAILING

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 May, 1985, he served the within notice of Decision by certified mail upon Stephen L. Johnson, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stephen L. Johnson
Staff Cinciberlant
APO, New York 09678

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 May, 1985.

David Parchuck

Ernie A. Blagovest

Authorized to administer oaths
pursuant to Tax Law section 174

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

May 31, 1985

Stephen L. Johnson
Staff Cinciberlant
APO, New York 09678

Dear Mr. Johnson:

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, 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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
STEPHEN L. JOHNSON	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Years 1978 and 1979.	:	

Petitioner, Stephen L. Johnson, Staff Cinciberlant, APO, New York 09678, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1978 and 1979 (File No. 32673).

On July 11, 1984, petitioner waived a small claims hearing and consented to submission of this matter to the State Tax Commission based on the entire record contained in the file. The following decision is rendered upon the file as presently constituted.

ISSUE

Whether petitioner, a New York domiciliary who resided aboard ship and in government housing outside New York State, was a resident for New York State income tax purposes.

FINDINGS OF FACT

1. Petitioner, Stephen L. Johnson, filed a New York State Income Tax Resident Return on Form IT-200 for each of the years 1978 and 1979 on which he listed his occupation as "U.S. Navy". His home address reported on each return was USS JFK CV-67 V-2 Division, FPO, New York City 09501, for 1978 and 116-25 167th Street, Jamaica, New York 11434, for 1979.

2. The Wage and Tax Statement issued to petitioner by the Navy Finance Center for each year in issue showed the following information:

	<u>State/City</u>	<u>State/City Tax Withheld</u>	<u>State/City Taxable Wages</u>	<u>State/City Identifying Number</u>
1978	New York	\$163.78	\$5,678.40	34-9990000
1979	New York	176.54	6,079.75	34-9990000

3. Petitioner submitted an affidavit with his 1978 resident return in which he attested to the following:

- "1. I have not maintained residence nor have I spent more than thirty (30) day's (sic) within the state of New York.
2. I am residing in the state of Virginia due to my being on active status in the United States Navy.
3. No other income has been collected by me within the state of New York because I have no other income."

Said affidavit was signed on May 9, 1979.

4. Petitioner enlisted in the United States Navy on November 18, 1977. On March 24, 1978, he reported for duty aboard the USS John F. Kennedy ("JFK") CV-67 which was homeported in Norfolk, Virginia. From June 1978 until February of 1979, the JFK was on a Mediterranean cruise and upon its return was in drydock in Portsmouth, Virginia.

5. On April 10, 1980, petitioner filed forms IT-113X, Claim for Credit or Refund of Personal Income Tax and/or Unincorporated Business Tax, on which refunds were claimed for 1978 and 1979 in the respective amounts of \$163.78 and \$176.54. Said claims for refund stated, inter alia, that (1) New York State was his legal state of residence; (2) he did not maintain residence nor had he spent more than thirty days within the State of New York; and (3) since he would be transferred very shortly, all correspondence should be sent to his parents' residence which was located in New York State. On September 3, 1980,

the Audit Division sent petitioner a Waiver of Statutory Notification of Claim Disallowance in which it denied said claim on the grounds that:

"New York State has constantly held that living quarters maintained aboard ship does (sic) not constitute a permanent place of abode.

Since you do not maintain a permanent place of abode outside New York State you are considered to be a resident and held taxable to New York State on income received from all sources."

On November 12, 1980, the Audit Division sent petitioner a formal notice of disallowance of his claim for refund.

6. In a letter dated January 22, 1981, petitioner stated the following:

"From March 1978 until March 1980 I was stationed aboard the USS John F. Kennedy CV 67 homeported in Norfolk, VA. During that time, we (the ship) spent eight months overseas in the Mediterranean Sea. When we were at home I maintained a permanent place at the following address:

7954 Old Ocean View Rd. Apt. 202¹
Norfolk, VA 23513

That Norfolk address was my permanent address outside New York State during my time spent on the USS John F. Kennedy CV 67."

7. In a letter dated June 6, 1984, petitioner stated as follows:

"...From March 1979 until January 1980, I resided in quarters furnished by the government in Portsmouth, Virginia. I did reside at 7954 Ocean View Rd., Apt. 202, Norfolk, Virginia 23513 for a period of time. A lease agreement and payment of rent was not necessary for the convenience of a 'home' so therefore no cancelled checks or rent receipts can be submitted."

In this same letter, he also stated that his military assignments were as follows:

"November 1977 to February 1978	Orlando, Florida
February 1978 to June 1978	Norfolk, Virginia
June 1978 to February 1979	Mediterranean Cruise
February 1979 to January 1980	Portsmouth, Virginia (drydock)."

¹ It should be noted that Finding of Fact "7", supra indicates that petitioner resided in government quarters in Portsmouth presumably from February of 1979 until January of 1980.

8. During the years 1978 and 1979, petitioner spent 19 days and 14 days, respectively, in New York State.

9. Petitioner did not submit any information as to whether his duty assignment(s) was permanent or temporary in nature, a description of the quarters he maintained (furnished, unfurnished, etc.) in Norfolk and in Portsmouth, nor any information as to whether such quarters were maintained by him during the year 1979.

CONCLUSIONS OF LAW

A. That any person domiciled in New York is a resident for income tax purposes for a specific 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 [20 NYCRR 102.2(b) and section 605(a)(1) of the Tax Law].

B. That the determination of whether a serviceman maintains a permanent place of abode outside New York State is not dependent merely upon whether the serviceman lives on or off a military base. This is only one of many factors to be considered in determining whether a permanent place of abode is maintained outside New York State. Some of the other factors include the type and location of quarters occupied by the taxpayer and how and by whom such quarters are maintained. Quarters assigned on vessels generally do not qualify as permanent places of abode maintained by the serviceman, absent proof of significant special indicia of permanency. Further, the maintenance of a place of abode by a serviceman outside New York State generally will not be considered permanent

if it is maintained only briefly during a duty assignment of a temporary nature.

C. That for the years 1978 and 1979, petitioner has met requirements one and three set forth in Conclusion of Law "A" supra; however, he did not meet requirement two for 1978 since he has not adduced any proof that he maintained a permanent place of abode outside New York State during the period January 1, 1978 to March 23, 1978, and he did not sustain his burden of proof that he maintained a permanent place of abode outside New York State for the remainder of 1978. Thus petitioner did not meet all of the statutory criteria for treatment as a nonresident for such year. Petitioner was a resident of New York State for 1978 within the meaning and intent of section 605(a) of the Tax Law.


For the year 1979, petitioner similarly failed to sustain his burden of proof imposed by section 689(e) of the Tax Law to show that the quarters occupied by him in Norfolk and in Portsmouth were permanent places of abode. Therefore, he is considered to be a New York State resident within the meaning and intent of section 605(a) of the Tax Law.


D. That the petition and the claims for refund of Stephen L. Johnson are denied and the Notice of Disallowance issued on November 12, 1980 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 31 1985


PRESIDENT


COMMISSIONER


COMMISSIONER