

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Leonard & Eleanor Weiss :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of NYS & NYC Income :
Tax under Article 22 & 30 of the Tax Law for the :
Years 1978 - 1980.

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 23rd day of May, 1985, he served the within notice of decision by certified mail upon Leonard & Eleanor Weiss, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leonard & Eleanor Weiss
806 The Crescent
Mamaroneck, NY 10543

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
23rd day of May, 1985.

David Parchuck

Connie O. Hagelund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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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 23rd day of May, 1985, he served the within notice of decision by certified mail upon Joseph S. Rosenthal, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph S. Rosenthal
Friedlander, Gaines, Cohen, Rosenthal & Rosenberg
1140 Avenue of the Americas
New York, NY 10036

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
23rd day of May, 1985.

David Parchuck

Constance A. Hagelund
Authorized to administer oaths
pursuant to Tax Law section 174

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

May 23, 1985

Leonard & Eleanor Weiss
806 The Crescent
Mamaroneck, NY 10543

Dear Mr. & Mrs. Weiss:

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, 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
Joseph S. Rosenthal
Friedlander, Gaines, Cohen, Rosenthal & Rosenberg
1140 Avenue of the Americas
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
LEONARD WEISS AND ELEANOR WEISS	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of New York City Personal Income Tax	:	
under Chapter 46, Title T of the Administrative	:	
Code of the City of New York and Article 22 of	:	
the Tax Law for the Years 1978, 1979 and 1980.	:	

Petitioners, Leonard Weiss and Eleanor Weiss, 806 The Crescent, Mamaroneck, New York 10543, filed a petition for redetermination of a deficiency or for refund of New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York and Article 22 of the Tax Law for the years 1978, 1979 and 1980 (File Nos. 37613 and 44261).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 6, 1984 at 10:30 A.M. with all briefs to be submitted by November 20, 1984. Petitioners appeared by Joseph S. Rosenthal, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether petitioners had timely filed petitions for the years 1978, 1979 and 1980.

II. Whether during the years 1978, 1979 and 1980, petitioners were domiciled in New York City and either maintained a permanent place of abode in New York City, maintained no permanent place of abode elsewhere, or spent in the aggregate more than 30 days in New York City, and were thus resident individuals under section T46-105.0(a)(1) of the Administrative Code of the City of New York.

FINDINGS OF FACT

1. Leonard Weiss and Eleanor Weiss (hereinafter "Petitioners") filed a New York State Income Tax Resident Return (with City of New York Personal Income Tax) for each of the years 1978, 1979 and 1980 under filing status "Married filing separately on one return". On each return petitioners' address was reported as 806-Crescent, Mamaroneck, New York 10543. New York City personal income taxes were not paid for any of said years at issue.

2. On January 25, 1982, the Audit Division issued a Statement of Audit Changes to petitioners wherein their income for 1978 was held taxable for New York City purposes based on the explanation that "Information available in this Department indicates that you were domiciled and residing within the City of New York at 180 W. 58th Street". Accordingly, on April 7, 1982, the Audit Division issued two (2) notices of deficiency against petitioners for 1978. One such notice, which was issued against petitioner Leonard Weiss, asserted New York City personal income tax of \$1,359.04, plus interest of \$388.54, for a total due of \$1,747.58. The other notice, which was issued against petitioner Eleanor Weiss, asserted New York City personal income tax of \$140.69, plus interest of \$40.21, for a total due of \$180.90.

3. On January 25, 1982, the Audit Division also issued a Statement of Audit Changes to petitioners wherein their income for 1979 and 1980 was held taxable for New York City purposes based on the same explanation as that stated for the year 1978. Accordingly, on April 8, 1983, the Audit Division issued two (2) notices of deficiency for the years 1979 and 1980. One such notice, which was issued against petitioner Leonard Weiss, asserted New York City personal income tax of \$1,738.33, plus interest of \$547.09, for a total due of \$2,285.42. The other notice, which was issued with respect to the tax liability

determined to be due from petitioner Eleanor Weiss, was erroneously issued against petitioner Leonard Weiss. Said notice asserted New York City personal income tax of \$252.91, plus interest of \$73.11, for a total due of \$326.02.

4. On May 25, 1982, the Tax Appeals Bureau received a petition from petitioner Eleanor Weiss with respect to the year 1978. No petition was received with respect to the deficiency asserted against petitioner Leonard Weiss for the year 1978.

5. According to the Audit Division, petitions were not filed by petitioners for the years 1979 and 1980. However, petitioners' representative submitted copies of two (2) petitions filed for the years 1979 and 1980 by Leonard Weiss, as an addendum to his Memorandum of Law submitted subsequent to the hearing held herein. Said petitions, which bear Tax Appeals Bureau receipt stamp dates of May 24, 1983, were filed with respect to the two (2) notices of deficiency (one being erroneous) issued against Leonard Weiss for said years.

6. Petitioners argued that during the years at issue they were domiciliaries and residents of Mamaroneck, New York rather than of New York City. Accordingly, they contended that their income was exempt from the imposition of New York City personal income tax.

7. During the years at issue petitioners maintained a rent controlled apartment in an apartment building located at 180 West 58th Street, New York City. Sometime in 1979 the landlord attempted to convert the building to a cooperative. Subsequently, on April 17, 1980 petitioners filed a protest against an order issued on March 19, 1980 by the District Rent Director of the Lower Manhattan District Rent Office concerning their apartment. Said protest, which was filed with the City of New York Housing and Development Administration, Department of Rent and Housing Maintenance, Office of Rent Control, was so

filed by petitioners in an attempt to establish that their apartment at said address was their "primary residence".

8. Said protest, which contained the affirmation "I have read the foregoing and I hereby affirm under the penalties provided by law that the contents thereof are true of my own knowledge." was signed by petitioner Eleanor Broderick (Weiss). The content of such protest was as follows:

"The apartment in question (180 West 58th Street) is the primary residence of Mrs. Eleanor Broderick Weiss and her husband, Leonard Weiss. Although the Weisses have a "second home" in Mamaroneck, that house is primarily a summer and vacation house, whereas the apartment in Alwyn Court is used extensively and primarily by them in their active business and social life.

In addition, Alwyn Court (180 West 58th Street) is the primary residence of Peter Broderick Weiss, the 20-year-old son of Mrs. Eleanor Weiss, who is a professional actor and has been for 14 years. Peter Broderick Weiss moved into subject premises with his mother, a widow, and his sister, in 1965. He has resided there continuously since that time. He currently pursues his acting profession on a part-time basis in New York City. His agent is in New York, which of course is the center of the acting community and where it is necessary for him to continue to reside in order to be employed. He attends college in Philadelphia, spending part of the week there and part of the week in New York for business purposes during the school year. During vacations and summers, he is in New York City. He votes in New York City. He belongs to the Screen Actors Guild and the American Federation of Television and Radio Artists in New York City. He has no other residences anywhere except for where he stays at school and occasional visits to the family vacation house in Mamaroneck. In short, Peter Broderick Weiss has no other primary residence and the subject apartment is vital to his profession as an actor.

Eleanor Broderick Weiss has also resided in the apartment continuously since 1965. She has always been and is now registered to vote in New York City. She maintains financial relations with various banks in New York City, including a safe deposit box at Barclay Bank at 9 West 58th Street. She maintains library privileges at the New York Public Library.

In 1973 she was married to Leonard Weiss, who became an additional occupant of subject premises. Both have lived there continuously since that time. In 1975 they acquired the house in Mamaroneck. It is a beachfront house on the Long Island Sound which they acquired for vacation purposes. It is in an area of summer houses, most of which are not occupied during the winter, when snow and flooding frequently cause the area to be unreachable. The house is used most

heavily during June, July and August. During the rest of the year it is used occasionally, but the vast majority of days are spent at subject premises.

Leonard Weiss is the president of Saw Mill River Industries, which manufactures housewares. It has been located in this area since 1950. His office is at 230 Fifth Avenue, to which he walks from subject premises. He is in the office or elsewhere in New York City doing business between one and five days each week. In addition, his business requires him to visit the factory in Yonkers approximately two times a week. The factory in Yonkers is a 22-minute trip from subject premises but cannot be reached quickly or by public transportation at all from Mamaroneck. In addition to his more-than-full-time occupation requiring him to be in New York City during the day, Mr. Weiss, with Mrs. Weiss' assistance, spends many evenings entertaining business associates. They do so at subject premises or go out and return to sleep at subject premises. This business-related entertaining by both the Weisses occurs approximately three nights out of each week. Even if Mr. Weiss' busy schedule permitted him to commute to his daytime obligations from Mamaroneck, which it does not, it would be impossible for the Weisses to accomplish their business obligations in the evening without subject premises. In fact, they spend the majority of nights each week in subject premises. Mr. Weiss' business further requires him to travel to Washington, D.C., Baltimore and Philadelphia from time to time, for which he takes the Amtrak train from New York City, which he cannot do from Mamaroneck. In short, subject premises continues to be the primary residence of both Mr. and Mrs. Weiss, as it has always been.

All the Weisses have their doctors and dentists in New York City.

Leonard Weiss does not vote and so is not registered anywhere.

The Weisses' taxes are paid from the Mamaroneck address for the convenience of their accountant, who resides in Westchester, and for no other reason.

The relative use of the summer home and subject premises has not changed in five years. The only reason for the instant proceeding is the present landlord's attempt to force the tenants into buying their apartments under threat of eviction in order to accomplish his cooperative conversion of the premises. The Weisses are but one of twenty baseless primary-residence and holdover proceedings which were brought by this landlord since the cooperative process commenced last June.

The tenants request a hearing be held, which the District Rent Office failed to do. At a hearing, the tenants will explain more fully each of their relationships to subject premises. It will be clear that this is a primary residence of each of them."

9. On March 24, 1981, an Order and Opinion Denying Protest was issued by the Commissioner of the City of New York Department of Housing Preservation and Development, Office of Rent and Housing Maintenance, Rent Control Division. Such order and opinion held that petitioners' New York City apartment qualified for decontrol since it was determined that said accommodation was not maintained as their "primary residence".

10. Said order and opinion was based on a conference conducted which was attended by petitioners. During such conference "contradictory testimony was given as to where Eleanor and Leonard Weiss resided after their marriage and as to when they acquired a home in Mamaroneck, New York".

11. Petitioners' burden in the instant proceeding is to establish that they were domiciliaries and residents of Mamaroneck, New York. Their burden in the prior rent control proceeding was, for all intents and purposes, directly the opposite: to establish that their New York City apartment was their "primary residence". During the hearing held herein petitioners rendered sworn testimony which was in direct contradiction to virtually all of the statements made in the aforestated Rent Control Division Protest and the subsequent conference which arose therefrom. Petitioners testified at the hearing held herein that the alleged facts, as stated in said rent control protest and conference, were misstatements made on the advice of counsel. They claimed that their testimony rendered with respect to the instant proceeding is true. However, petitioners' testimony is deemed incredible.

12. Petitioners submitted documentation evidencing that:

- a. Leonard Weiss' automobile was registered in Mamaroneck in 1979.
- b. Eleanor Weiss' drivers' license, which carried an expiration date of March 31, 1982, was issued to her at the Mamaroneck address.

- c. Petitioners visited physicians and dentists located in Yonkers and New Rochelle during the years at issue.
- d. Leonard Weiss transacted business at the White Plains Branch of Barclays Bank of New York during the years at issue.

CONCLUSIONS OF LAW

A. That the petitions filed by Leonard Weiss for the years 1979 and 1980 were timely. Additionally, the petition filed by Eleanor Weiss for the year 1978 was timely.

B. That the Notice of Deficiency issued erroneously to petitioner Leonard Weiss for 1979 and 1980 (see Finding of Fact "3", supra) on April 8, 1983, in the amount of \$252.91, is cancelled.

C. That since there was no petition filed by petitioner Leonard Weiss for the year 1978, the Notice of Deficiency issued against him on April 7, 1982, with respect to said year, is sustained.

D. That 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.

E. That section T46-200.0(a) of the Administrative Code of the City of New York provides, in pertinent part:

"(a) Except as otherwise provided in this part, any tax imposed by this part shall be administered and collected by the state tax commission in the same manner as the tax imposed by article twenty-two of the state tax law is administered and collected by such commission...."

F. That pursuant to section T46-189.0(e) of the Administrative Code of the City of New York, the burden of proof, in any case before the tax commission, shall be upon the petitioner except for certain issues, none of which are applicable herein.

G. That petitioners have not sustained their burden of proof, imposed pursuant to section T46-189.0(e) of the Administrative Code of the City of New York, to show that they were domiciled in Mamaroneck, New York during the years 1978, 1979 and 1980. Therefore, it must be held that petitioners were domiciled in the City of New York during the years at issue herein.

H. That section T46-105.0(a) of the Administrative Code of the City of New York provides, in pertinent part, that a city resident individual means an individual:

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

I. That petitioners have failed to sustain their burden of proof to show that they had met the requirements of the exception set forth in section T46-105.0(a). Accordingly, petitioners are deemed to have been New York City resident individuals during the years 1978, 1979 and 1980.


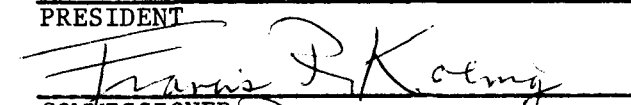
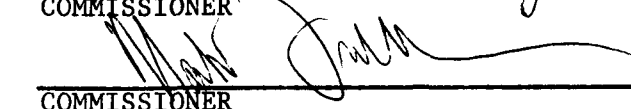
J. That the petitions filed by Leonard Weiss and Eleanor Weiss are granted to the extent provided in Conclusion of Law "B", supra and except as so granted, said petitions are, in all other respects, denied.

K. That the two (2) notices of deficiency issued April 7, 1982 with respect to the year 1978 are sustained and the Notice of Deficiency issued against petitioner Leonard Weiss on April 8, 1983 in the amount of \$1,738.33 with respect to the years 1979 and 1980 is sustained together with such additional interest as may lawfully be owing.

DATED: Albany, New York

MAY 23 1985

STATE TAX COMMISSION


PRESIDENT

COMMISSIONER

COMMISSIONER