

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
John P. & Mary J. Maher :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income Tax
under Article(s) 22 of the Tax Law :
for the Years 1977 - 1983.

State of New York :

ss.:

County of Albany :

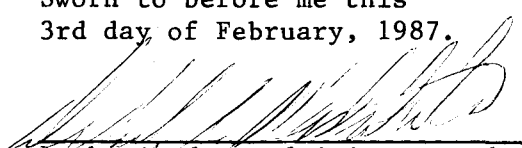
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 3rd day of February, 1987, he/she served the within notice of Decision by certified mail upon John P. & Mary J. Maher the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

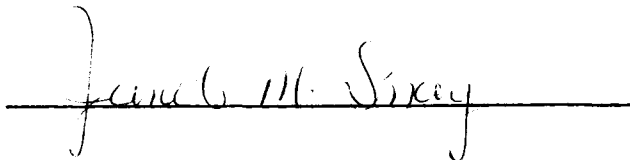
John P. & Mary J. Maher
308 Haines Avenue
Fairbanks, AK 99701

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
3rd day of February, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174


Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

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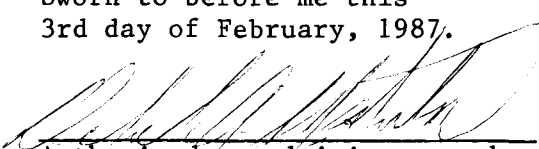
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 3rd day of February, 1987, he served the within notice of Decision by certified mail upon Joseph R. Brennan, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

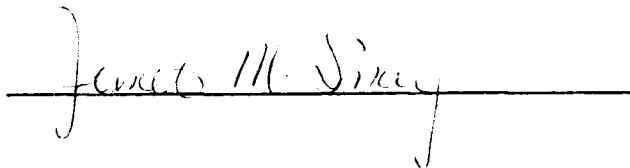
Joseph R. Brennan
McPhilips, Fitzgerald, Meyer & McLenithan
288 Glen Street, P.O. Box 309
Glens Falls, NY 12801

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
3rd day of February, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



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

February 3, 1987

John P. & Mary J. Maher
308 Haines Avenue
Fairbanks, AK 99701

Dear Mr. & Mrs. Maher:

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Joseph R. Brennan
McPhilips, Fitzgerald, Meyer & McLenithan
288 Glen Street, P.O. Box 309
Glens Falls, NY 12801

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
JOHN P. MAHER AND MARY J. MAHER	:	DECISION
	:	
for Redetermination of Deficiencies or for	:	
Refunds of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1977 through 1983.	:	

Petitioners, John P. Maher and Mary J. Maher, 308 Haines Avenue, Fairbanks, Alaska 99701, filed petitions for redetermination of deficiencies or for refunds of personal income tax under Article 22 of the Tax Law for the years 1977 through 1983 (File Nos. 48214 and 63471).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Building #9, W. A. Harriman State Office Campus, Albany, New York, on April 2, 1986 at 10:45 A.M., with all briefs to be submitted by June 13, 1986. Petitioners appeared by McPhillips, Fitzgerald, Meyer & McLenithan (Joseph R. Brennan, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether petitioner John P. Maher changed his domicile from New York to Alaska and thus became a nonresident individual of New York State and, if not, whether petitioner either maintained a permanent place of abode in New York State, maintained no permanent place of abode elsewhere, or spent in the aggregate more than 30 days in New York, and was thus a resident individual under Tax Law §605(a)(1).

FINDINGS OF FACT

1. Petitioners, John and Mary Maher, filed a joint New York State Income Tax Resident Return for the year 1975. They also filed a joint Part-Year or Non-Resident Alaska Individual Income Tax Return for the same year. Petitioners listed their address as Ticonderoga, New York on these returns.

2. Petitioners filed a joint New York State Income Tax Resident Return for the year 1976. They also filed a Part-Year or Non-Resident Alaska Individual Income Tax Return for the year 1976. Petitioners listed their address as Ticonderoga, New York on these returns.

3. John Maher filed a Resident Alaska Individual Income Tax Return for the year 1977. Petitioners did not file a New York State income tax return for this year.

4. John Maher filed an Alaska Individual Income Tax Return as a part-year or nonresident filer for the year 1978. He also filed a New York State Income Tax Resident Return for the year 1978 wherein he reported he was a resident of New York for six months. Mr. Maher attached to his New York return a Schedule for Change of Resident Status wherein he allocated his income between resident and nonresident periods. He reported that his address was in Ticonderoga, New York on each of these returns.

5. John Maher filed a New York State Income Tax Resident Return and a New York State Income Tax Nonresident Return for the year 1979. In each instance, Mr. Maher's address was listed as being in Ticonderoga, New York. Mr. Maher filed an Alaska Individual Income Tax Return as a part-year resident or nonresident for the year 1979 which listed a home address in Ticonderoga, New York. Subsequently, Alaska retroactively eliminated its income tax for the year 1979.

6. Mr. Maher did not file New York State income tax returns for the years 1980 through 1983. However, Mr. and Mrs. Maher filed joint U.S. individual income tax returns for the years 1980 through 1983 and reported, on each of these returns, an address in Ticonderoga, New York.

7. It was Mr. Maher's practice to send his wage and tax statements to his wife, who, in turn, retained the services of an accounting firm to prepare the tax returns. Mrs. Maher was authorized to, and frequently did, sign Mr. Maher's name to the tax returns. Mr. Maher did not discuss his tax returns with the preparer of said returns.

8. On September 25, 1981, the Audit Division issued a Notice of Deficiency to John Maher asserting a deficiency of personal income tax for the years 1977 through 1979 in the amount of \$3,335.40, plus penalty of \$719.53 and interest of \$968.68, for a total amount due of \$5,023.61. On the same date, the Audit Division also issued a Notice of Deficiency to Mary Maher for the years 1978 and 1979 asserting a deficiency of personal income tax in the amount of \$45.47, plus interest of \$8.78, for a total amount due of \$54.25. On May 16, 1985, the Audit Division issued a Notice of Deficiency to John Maher asserting a deficiency of personal income tax for the years 1980 through 1983 in the amount of \$20,750.11, plus penalty of \$8,715.97 and interest of \$5,730.55, for a total amount due of \$35,196.63.¹

9. To the extent at issue herein, the asserted deficiencies of personal income tax were premised upon the Audit Division's position that petitioner was

1 It is recognized that the Notice of Deficiency did not state the years 1980 and 1981. However, it is clear from the Statement of Personal Income Tax Audit Changes that the Notice dated May 16, 1985 asserted a deficiency for the years 1980 through 1983.

subject to personal income tax as a resident of New York. The penalties were asserted against John Maher in the Notice of Deficiency dated September 9, 1981 pursuant to section 685(a)(1) and (a)(2) of the Tax Law for, respectively, failure to file a tax return and failure to pay tax on a return required to be filed for the year 1977. Penalties were asserted for the same reasons against John Maher in the Notice of Deficiency dated May 16, 1985 for the years 1980 through 1983. In addition, the Audit Division asserted a penalty pursuant to section 685(b) of the Tax Law for negligence for the years 1980 through 1983.

10. Mr. Maher was born in Lafayette, New York and raised in Truxton, New York. In 1958, Mr. Maher was married. Following his marriage, Mr. Maher resided with his wife and children in Ticonderoga, New York. During this period of time, Mr. Maher was periodically employed as an operator of heavy equipment, such as bulldozers and cranes.

11. In 1975, Mr. Maher left New York and went to Fairbanks, Alaska. He went to Fairbanks because he was hopeful of obtaining employment on the Alaskan pipeline. At the time Mr. Maher went to Alaska, he did not intend to change his domicile.

12. On August 28, 1975, Mr. Maher began working for Alaskan Contractors, Inc. on the pipeline. This employment continued until November 1977.

13. In 1975, Mr. Maher became a member of the International Union of Operating Engineers Local 302 which had its headquarters in Seattle, Washington. This union local had jurisdiction over Alaska.

14. Upon his arrival in Alaska, Mr. Maher rented living accommodations consisting of a bedroom and a storeroom in a private residence. Mr. Maher had use of the bathroom and kitchen facilities in this residence. Mr. Maher owned the furniture in his bedroom.

15. When he was at the work location, Mr. Maher resided in living quarters provided by his employer. These living quarters consisted of a room in a motel-like structure, shared bathroom facilities and a dining hall.

16. It was the practice of Mr. Maher's employer to permit employees to work continuously for approximately six weeks. Thereafter, an employee was required to take a week's vacation. Alternatively, an employee could work continuously for approximately twelve weeks. However, he would then be required to take a two week vacation.

17. Usually Mr. Maher went to his rented premises in Fairbanks during the breaks in work. However, it was his practice to visit his family in Ticonderoga, New York at least once a year. In 1975, 1976 and 1977, Mr. Maher visited his family for approximately two weeks each year.

18. In 1977, Mr. Maher, after obtaining the agreement of his wife, decided to permanently move to Alaska. As he and his wife did not want to take their children out of school in Ticonderoga and move them to Alaska, they agreed that, after their children had completed their schooling in Ticonderoga, Mrs. Maher would sell her residence, join her husband and become a permanent resident of Alaska.

19. Prior to 1977, Mr. Maher had been registered to vote in the State of New York, but on May 16, 1977, he registered to vote in the State of Alaska and he has been continuously registered to vote in Alaska since that time.

20. In 1977, Mr. Maher obtained a driver's license in the State of Alaska. He had previously surrendered his New York driver's license. In 1977 or 1978, Mr. Maher registered a motor vehicle in the State of Alaska.

21. In 1977, Mr. and Mrs. Maher's joint New York bank account was changed to an account which was solely in the name of Mrs. Maher.

22. On March 20, 1978, Mr. Maher was certified by the State of Alaska as an Alaskan resident. It was necessary to be certified as an Alaskan resident in order to obtain employment on the particular construction projects on which he worked.

23. From the time he went to Alaska, Mr. Maher would send money to his wife for the support of his family.

24. In September 1978, Mr. Maher was unable to obtain employment in Alaska. As a result, Mr. Maher contacted a friend who indicated that work was available in Albany, New York. In order to support his family, Mr. Maher secured this employment in September 1978 and remained in this position until December 1978. During the period he worked in Albany, Mr. Maher resided in a rented room in Albany.

25. In or about the beginning of January 1979, Mr. Maher returned to Alaska. However, he was unable to secure employment. Therefore, in May 1979, he returned to Albany where he worked as an operating engineer. When the job in Albany was completed, he went to work in Oneonta, New York.

26. When Mr. Maher was physically present and employed in New York, he continued to maintain his residence in Fairbanks, Alaska. During the period Mr. Maher was employed in Albany in 1978 and 1979, he remained enrolled as a member of the union local which had jurisdiction over Alaska. He never joined the local union in Albany because he did not intend to remain in New York. When he was working in Albany, he registered a motor vehicle in New York. However, he continued to use his Alaska driver's license.

27. In September 1979, Mr. Maher returned to Alaska. Since that time, Mr. Maher has not been employed in the State of New York. He has returned to

New York once each year. However, he has not been present in New York for more than three weeks during any year since 1979.

28. In 1981 or 1982, Mr. Maher was summoned to appear for jury duty in Alaska.

29. On August 13, 1982, Mr. Maher received a payment from the Alaska Permanent Fund Dividend. He also received a payment from this fund in 1983. One was required to be a resident of Alaska in order to receive a distribution from this fund.

30. At the beginning of the years in issue, the home in which Mrs. Maher and the children resided was owned jointly by Mrs. Maher and Mrs. Maher's sister. In 1982, Mrs. Maher obtained sole title to the property. Mr. Maher did not own any real property in New York during the years in issue.

31. The Mahers' youngest child graduated from Ticonderoga High School in 1983. It had been the intention of Mr. and Mrs. Maher that, upon the graduation of their youngest child from high school, Mrs. Maher would sell her residence in Ticonderoga and join her husband in Alaska. However, in May of 1983, Mrs. Maher's elderly aunt became unable to care for herself because of various physical disabilities. Mrs. Maher has provided a home for her at the residence in Ticonderoga rather than requiring her aunt to be placed in a nursing home which would be necessary if Mrs. Maher moved to Alaska.

32. Mrs. Maher's sole reason remaining in the State of New York since 1983 has been the mandate of her conscience to provide care and a home for her aunt. When free of that obligation, it is her intention to sell her residence in Ticonderoga and to move to Alaska to join her husband.

33. Mr. Maher has acknowledged that he was a resident of New York until 1975.

CONCLUSIONS OF LAW

A. That Mr. Maher was a domiciliary of New York through the year 1975. Once a domicile is established, it continues until the person moves to a new location with the bona fide intention of making his new location his fixed and permanent home (20 NYCRR 102.2[d][2]). In addition, there must be an actual acquisition of a residence in a new locality (Matter of Bodfish v. Gallman, 50 AD2d 457).

B. That upon all of the facts and circumstances presented, it is concluded that Mr. Maher changed his domicile to Alaska on May 16, 1977. This position is buttressed by the facts: that in 1977 Mr. Maher surrendered his New York driver's license and obtained an Alaska driver's license; that in 1977 Mr. Maher's name was removed from the bank account in New York; and that on May 16, 1977, Mr. Maher registered to vote in Alaska. It is noted that Mr. Maher's return to New York in 1978 and 1979 does not alter this result since Mr. Maher's intentions to be a permanent resident of Alaska were disclosed by his decision to remain a member of the union local which had jurisdiction over Alaska and his decision to retain his residence in Fairbanks. Accordingly, Mr. Maher remained a nondomiciliary of New York from May 16, 1977 to the conclusion of the years in issue.

C. That, during the year 1977, Tax Law §605(a)(1) provided, in part, that:

"[a] resident individual means an individual: (1) 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 Mr. Maher did not maintain a permanent place of abode in New York in 1977, maintained a permanent place of abode in Fairbanks and did not spend more


than thirty days in New York during 1977, Mr. Maher was not taxable as a resident of New York during the period January 1, 1977 through May 15, 1977.

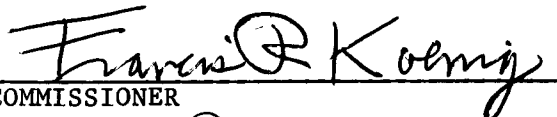
D. That the petitions of John P. Maher and Mary J. Maher are granted to the extent of Conclusions of Law "B" and "C" and the Audit Division is directed to recompute the notices of deficiency on the basis that Mr. Maher was a nonresident during each of the years in issue; and, except as so modified, the notices of deficiency issued September 25, 1981 and May 16, 1985 are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 03 1987


PRESIDENT


COMMISSIONER


COMMISSIONER