

SUPREME COURT OF THE DISTRICT OF COLUMBIA OCT 20 1976

TAX DIVISION

FILED

WILLIAM T. FRIEDEWALD, :  
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 Petitioner :  
 :  
 v. : Docket NO. 2387  
 :  
 DISTRICT OF COLUMBIA, :  
 :  
 Respondent :

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner filed claims for refunds for District of Columbia income taxes which he paid for the taxable years 1971 through 1975. Upon denial of the claims by the District of Columbia, petitioner filed this suit in the Tax Division of this Court. The matter was tried by the Court sitting without a jury. Upon completion of the evidentiary hearing, the parties filed written briefs.

Petitioner seeks to recover income taxes paid to the District of Columbia for the years 1971-1975 on the grounds that, as a regular commissioned officer in the Public Health Service, he is exempt from liability for such taxes under the provisions of D.C. Code 1973, §47-1551c(s). While D.C. Code 1973, §47-1567b imposes the liability for D.C. income tax on every resident, §47-1551c(s) in defining the word "resident" excludes therefrom:

\* \* \* any officer of the executive branch of such Government whose appointment to the office held by him was by the President of the United States and subject to confirmation by the Senate of the United States and whose tenure of office is at the pleasure of the President of the United States, unless such officers are domiciled within the District on the last day of the taxable year. (Emphasis added.)

Since the parties have stipulated to the amount of taxable income earned by the petitioner in the years 1971 through 1975, and have agreed that the petitioner's appointment as an officer

in the Regular Corps of the United States Public Health Service (hereinafter referred to as PHS or Service) was by the President and confirmed by the Senate, the sole issues presented here are (1) whether the petitioner served at the pleasure of the President within the meaning of the statute, and (2) whether the petitioner was domiciled in the District of Columbia during the taxable years in question.

Since a determination that petitioner was actually domiciled in the District of Columbia on the last day of the taxable years in question would result in his being a "resident" within the meaning of §47-1551c(s), and thus subject to tax, even if he met the test of a presidential appointee serving at the "pleasure of the President," it would seem appropriate to consider first the issue of domicile.

## I. DOMICILE

### A. Establishment of a Florida Domicile

Domicile has traditionally been defined as the concurrence of two elements, physical presence (residence) in a locality and the intention to remain at that location indefinitely or the absence of an intention to make one's home elsewhere. District of Columbia v. Murphy, 314 U.S. 441, 451 (1951); Gilbert v. David, 235 U.S. 561, 569-570 (1915); Sweeney v. District of Columbia, 72 U.S. App. D.C. 30, 33, 113 F. 2d 25 (1940); Adams v. Adams, 136 A. 2d 866 (D.C. Mun. App. 1957). The requirements to establish a domicile in the State of Florida are no different. See, e.g., Rosenstiel v. Rosenstiel, 368 F. Supp. 51, 57 (S.D. N.Y. 1973), aff'd, 503 F. 2d 1044 (2d Cir. 1974). It is a fundamental rule of law that all persons have a domicile somewhere and that no person can have more than one domicile at any particular point in time. Restatement, Conflict of Laws §11 (1934); 25 Am. Jur. 2d

Domicile §2 (1966); Jones v. Jones, 136 A. 2d 580, 582 (D.C. Mun. App. 1957) (citation omitted). The law assigns to every child at birth a domicile of origin, that of the parents, which continues until another domicile is lawfully acquired. 25 Am. Jur. 2d §13; Sivalls v. United States, 205 F. 2d 444, 446 (5th Cir.), cert. denied, 346 U.S. 898 (1953); Moss v. National Life and Accident Insurance Co., 385 F. Supp. 1291, 1298 (W.D. Mo. 1974).

The law permits a person to acquire a domicile by his own choosing. In order to establish a domicile of choice, however, the law requires that strict conditions be met. These well-established conditions or requirements for domicile of choice have been succinctly and accurately described by one Court as follows (New York Trust Co. v. Riley; 16 A. 2d 772, 783-784 (Del. 1940), aff'd, 315 U.S. 343 (1942)):

The essentials of domicile of choice are the fact of physical presence at a dwelling place and the intention to make that place home. There must be a concurrence of fact and intent. ... There must be an actual abandonment of the first domicile coupled with an intention not to return to it, and the acquisition of a new domicile by actual residence in another place with the intention of making that place a permanent home. Whether one has changed his domicile from one place to another must depend largely on his intention. The intention must be of permanent or indefinite living at a given place, not for mere temporary or special purposes, but with a present intention of making that place home...; or, negatively expressed, there must be an absence of any present intention of not residing at the place permanently or for an indefinite time.

See, 25 Am. Jur. 2d §§16-27; 28 C.J.S. Domicile §§6, 8, 10 & 11 (1941); Gilbert v. David, 235 U.S. 561, 569 (1915); Gallagher v. Philadelphia Transp. Co., 185 F. 2d 543 (3d Cir. 1950); Stifel v. Hopkins, 477 F. 2d 1116, 1120 (6th Cir. 1973).

When these two facts concur, physical presence of a person at the claimed domicile and the intention of making it a home, domicile or change of domicile is instantaneous. Spurgeon v. Mission State Bank, 151 F. 2d 702, 705-706 (8th Cir. 1945), cert. denied,

327 U.S. 2 (1946); Garner v. Pearson, 374 F. Supp. 580, 589-590 (M.D. Fla. 1974). See, Texas v. Florida, 306 U.S. 398, 424 (1939); Sweeney v. District of Columbia, 72 U.S. App. D.C. 30, 33, 113 F. 2d 25 (1940); Jones v. Jones, 136 A. 2d at 581; 25 Am. Jur. 2d §17.

In order to determine whether petitioner in this case was domiciled in the District of Columbia during the years in question, it is necessary to ascertain his domiciliary status before coming to the District of Columbia, and in this connection it is imperative that we take a closer look at what is meant by the requirements of "physical presence" and "intention." It is generally held that one must be physically present or actually residing in a place to acquire a domicile of choice there. So long as the residence is actual, the character of the living quarters is immaterial. The residence may be a temporary shack, a rented house, a hotel or the house of a relative or friend. 25 Am. Jur. 2d §20; 28 C.J.S. §10(a). Any period of residency, however short, when coupled with intent, will suffice. 25 Am. Jur. 2d §23. A home in a particular building or residence in one particular house as a fixed abode is not essential for the acquisition of a domicile. Restatement, Conflict of Laws §16; 28 C.J.S. §10(a); In re Toler's Estate, 325 S.W. 2d 755, 760 (Mo. 1959). The physical character of the residence is of no importance in fixing the domicile, except insofar as it may have a bearing on the question of intent. 28 C.J.S. §10(a); Irvin v. Irvin, 182 Kan. 563, 322 P. 2d 794, 797 (1958). In Irvin, the Court stated that physical or bodily presence in the locality, in addition to the intent, was all that was necessary to acquire a domicile. The same Court later in Estate of Schoof v. Schoof, 193 Kan. 611, 396 P. 2d 329, 332 (1964), stated that to effect a change of residence, there must be a transfer of bodily

presence to another place coupled with the intention to abide in the new location. The change, it further stated, could be effectuated on the first day of arrival provided the requisite intent was present. See, Smith v. Smith, 289 P. 2d 1086, 1088-1089 (Or. 1955).

Cases have illustrated what particular circumstances have satisfied the requirement of physical or bodily presence in a locality. For example, in In re Toler's Estate, supra, at 760, the person was held to be physically present since he was using a hotel as his dwelling place and regularly kept personal belongings there. The Court quoted the following language as closely descriptive of the circumstances in that case (Id., at 760, quoting Beale, The Conflict of Laws, §16.3):

Thus where a man, never settling down in one place, lives at hotels or clubs in a certain place, he may nevertheless acquire a domicile there.

In another case, a Court upheld a Florida domicile where the person owned and maintained no permanent place or dwelling in Florida but had always stayed at the same hotel for years. He had been married in Florida in 1940, and the following year he declared his citizenship and residence in that state. It is worth noting that this individual had lived in West Virginia since 1927, owned property there and only visited Florida regularly, and was separated from his wife in 1941 while they were still living in West Virginia. Sutton v. Sutton, 36 S.E. 2d 608, 610-611 (Sup. Ct. of App. W. Va. 1945). Although the length of residence or the particular kind of place selected is not material, it is essential that the person desiring to change his domicile by choice physically arrive at the locality before any change can be effective. See, e.g., Reynolds v. Lloyd Cotton Mills, 99 S.E. 240 (N. Car. 1919). In that case, the individual intended

to acquire a new domicile, but died before ever reaching his destination. Moreover, although he had sent his household furniture forward and had secured employment, he had no place of abode. This can be contrasted with a man who before his marriage procures and furnishes a dwelling in a state different from where he is residing. He is considered as being domiciled in that state while on his honeymoon even though he never ate or slept there. See, Restatement, Conflict of Laws §16 (illustration).

As noted previously, the acquisition of domicile of choice centers mainly on the question of intent. It can be said with certainty that an intention to live permanently at the claimed domicile is not required. Spurgeon v. Mission State Bank, *supra*, at 705-706; Gallagher v. Philadelphia Transp. Co., 185 F. 2d 543 (3d Cir. 1950); 25 Am. Jur. 2d §25; Restatement, Conflict of Laws §18. See, District of Columbia v. Murphy, *supra*, at 450, n. 2. If a person capable of making his choice honestly regards a place as his present home, and intends to abandon his former domicile, the change will occur when the intention concurs with physical presence. New York Trust Co. v. Riley, *supra*, at 784; Spurgeon v. Mission State Bank, *supra*, at 705-706; 25 Am. Jur. 2d §24.

The intention required for the acquisition of a domicile of choice is an intention to make a home in fact and not an intention to acquire a domicile. The intention must be to make a home at the moment, not to make one in the future. Restatement, Conflict of Laws §§19, 20; 25 Am. Jur. 2d §24, 25. The motive for such an intention to change domiciles is irrelevant so long as the requisite intent to change exists. 25 Am. Jur. 2d §28; Restatement, Conflict of Laws §22; Beedy v. District of Columbia, 75 U.S. App. D.C. 289, 292, n. 4, 126 F. 2d 647 (1942); Goodloe v. Hawk, 72 U.S. App. D.C. 287, 289, 113 F. 2d 753 (1940); Garner v. Pearson, *supra*, at 590; Rosenstiel v. Rosenstiel, *supra*, at 58.

The fact that one cannot acquire a domicile but must make a home in fact was illustrated in In re Gilbert's Estate, 18 N. J. Misc. 540, 15 A. 2d 111 (1940). This case also is a good example of a Court regarding the character of the dwelling as evidence of intention rather than as evidence of residence. The Court was faced with the question of whether a person's domicile was at a stepdaughter's home in New Jersey or in a hotel in Pennsylvania. In considering the factum of residence in New Jersey, the newly claimed domicile, it observed that the person stayed in New Jersey for a week to ten days on one trip and for short periods of time on several other occasions. Although the Court stated that presence may be brief to satisfy the requisite factum, it did not decide whether the fact of residence was sufficient since it found the intent to be lacking. It implied, however, that the residence at the stepdaughter's was sufficient for the factum. The individual admitted that the reason she wanted to use the New Jersey residence was her anger over the personal property tax in Pennsylvania. The Court found that the intention was more to "acquire a domicile" than to establish a home. Her attitude of being a visitor in New Jersey prior to the year in question was no different after her intention to change, only the label was changed. She did not transfer any of her domestic affairs, did not stay any longer than before, nor did she visit any more often. On the other hand, her home and affairs in the Pennsylvania hotel remained intact. The New Jersey residence was not her home but remained only "someone else's place where [she was] always welcome." Id., at 117.

There must also be the intention to make a residence a home at the present time, not at some time in the future. In McIntosh v. Maricopa County, 73 Ariz. 366, 241 P. 2d 801 (1952), the Court

was faced with this specific issue. It held that a husband and his family did not establish a domicile in Arizona when the family went there for the wife's health and the wife's mother purchased a home for them, all while the husband was in the military service. The applicable rule it believed was stated in a Kansas case where the Court said (241 P. 2d at 804, quoting Hart v. Horn, 4 Kan. 232):

Had the defendant accompanied his wife and children to Kansas, and remained there, though forever so short a time, if long enough to establish them in a new home, even though such new home had been a boarding place in the house of relatives, then indeed intent might have been effectual in giving character and significance to the act.

This issue was also presented in Sivalls v. United States, supra. There, a person in the military service who was in Texas prior to enlisting and whose wife taught school in Texas prior to their marriage, planned on settling in Texas after his discharge. The Court held that, since it was his stated intention to establish domicile in Texas after he was married, and not to establish one while he was in Texas prior to his marriage, the concurrence of physical residence and intention did not occur. At no time prior to his discharge, the Court stated, was he physically present in Texas with a present intent to make that state his domicile. Sivalls v. United States, supra, at 446. A person thus need be able to say that this is now my home, not this is to be my home. See Restatement, Conflict of Laws §20.

The question of domicile is a difficult one of fact to be settled by a realistic and conscientious review of the many relevant and conflicting indicia of where a man's home is. District of Columbia v. Murphy, supra, at 455. No one factor used by courts in their determination of domicile can be considered to be controlling. Some of the factors usually considered are the place where political and civil rights are exercised, the taxes are paid, the real and personal property

are located, the driver's and other licenses have been obtained, the location of social and religious membership and the place of business or employment. Garner v. Pearson, supra, at 589-590. While a person's statements may supply evidence of the intention requisite to establish domicile at a given place of residence, they cannot supply the fact of residence there. Texas v. Florida, supra, at 425.

The respondent contends that since petitioner has never lived in Jacksonville, Florida, he cannot be held to have ever been domiciled there. Petitioner, on the other hand, argues that he established a Florida domicile in 1967 when he and his wife, while residing in Connecticut, decided they would ultimately return to Jacksonville and permanently reside there and thereby never attained a domicile here.

Viewing the totality of the circumstances, we believe that the evidence does not support petitioner's claim that he acquired a domicile in Florida in 1967. The requisite concurrence of physical presence and intention did not take place in order to cause the instantaneous establishment of domicile. Cf., Ellis v. Southeast Construction Co., 260 F. 2d 280, 282-283 (8th Cir. 1958).

Petitioner testified that while he and his wife were living in Connecticut in 1967 they decided to establish a joint permanent residence at the home of her parents in Jacksonville. It is clear that such declaration of their intention while in Connecticut could never work to establish a domicile in Florida since the requisite element of physical presence would be missing. However, even if the physical or bodily presence of petitioner at the home of his in-laws in Florida during that same year might be sufficient for the element of the factum of residence, the character of that "residence" or "presence" necessarily detracts

from the intention which petitioner must show in order to carry his burden. See, In re Gilbert's Estate, supra. See also, In re Dorrance's Estate, 115 N.J. Eq. 268, 170 A. 601, 604-605 (1934), aff'd, 13 N.J. Misc. 168, 176 A. 902 (Sup. Ct. 1935), aff'd, 116 N.J.L. 362, 184 A. 743 (Ct. A. & E.), cert. denied, 298 U.S. 678 (1936).

A person cannot acquire a new residence simply by going to another town with the intention of making it his domicile. He must also go there with the intention of residing there for more or less a definite time and making it his home. Kirby v. Town of Charlestown, 78 N.H. 301, 99 A. 835, 836 (1916) (citations omitted); 25 Am. Jur. 2d §24. The Court in Kirby further stated that by "home" in the law of domicile is meant "what everyone has in mind when he thinks of home; his residence; the place to which he always intends to return or the place he thinks of as home." Id., at 836. See, District of Columbia v. Murphy, supra, at 455, n. 10. In Kirby the decedent did everything she was advised to do, and which she would have been required to do in fact, to establish a domicile of choice. However, she lacked the intention to make the place her present and permanent home. We believe that petitioner here also did not evidence the necessary intention to make the residence in Florida his permanent home in 1967. As in In re Gilbert's Estate, supra, at 117, petitioner's attitude toward the residence was no different after his declared intention than before it. The residence remained only "someone else's place where [he was] always welcome."

We think that, at best, it can be said the petitioner intended in 1967 to establish a Florida domicile in the future, when his appointment to the Public Health Service would terminate. His own testimony, as noted previously, supports this view. The intention to establish a domicile at some time in the future is not sufficient to establish one at the present time. See,

McIntosh v. Maricopa County, *supra*; Elwert v. Elwert, 196 Or. 256, 248 P. 2d 847 (1952); *cf.*, Hardin v. McAvoy, 216 F. 2d 399, 403 (5th Cir. 1954). The fact that petitioner obtained a Florida driver's license and car registration in 1967, and later registered to vote in that state can be viewed as examples of things to do when one wants to establish a residence somewhere. We do not believe that these were done in furtherance of any intention of making Florida his permanent home at that time. See, Kirby v. Town of Charlestown, *supra*, at 836. Moreover, petitioner's current license shows his Washington address, not the residence in Florida.

In reaching the conclusion that petitioner did not establish a Florida domicile, the Court has not considered relevant any motive that he might have had in intending to use the Florida residence as his permanent address. Nor is the Court unmindful of the transitory nature of petitioner's residences during his early adulthood, beginning with his leaving Atlanta at the age of 16 to attend Notre Dame University, and finally concluding with his appointment to the Regular Corps of the Public Health Service in 1971. Although such a background lends some credence to his intention of establishing a Florida domicile, his situation can in no way be said to be unique. It surely does not approximate the circumstances petitioner must demonstrate to meet his burden of showing that he intended to establish a home in Florida in 1967, or at any time during the taxable years in question.

B. Domicile in the District of Columbia

Since we have found that petitioner did not acquire a Florida domicile in 1967, or thereafter, we must next determine whether he was domiciled in the District of Columbia throughout the taxable years in question. Although it is unnecessary for this Court to specifically find where petitioner's legal domicile is,

if other than the District of Columbia, since, in order to qualify for exemption, the statute only requires a finding that he was not domiciled in the District coupled with presidential appointee status, D.C. Code §47-1551c(s), it would have been beneficial to petitioner to show that he effectively established a Florida domicile as he claimed. Since this was not the case and since the law requires a person to have a domicile, the choice of domiciles for petitioner is now between either the District and presumably Georgia, his domicile of origin, or one of the other locations where he had previously resided.

A person does not acquire a domicile in the District of Columbia simply by coming here to live for an indefinite period of time while in the Government service. District of Columbia v. Murphy, supra, at 453-454. To effect a change in domicile, there must be the absence of any present intent of not residing in the District permanently or indefinitely. Beedy v. District of Columbia, supra, at 291-292, citing Gilbert v. David, 235 U.S. 561, 569 (1915). Persons are domiciled in the District of Columbia, however, who live here and who have no "fixed and definite intent to return" and make their homes where they were formerly domiciled. District of Columbia v. Murphy, supra, at 454-455 (emphasis added). Thus, in order to retain his former domicile, one who comes to the District to enter Government service must always have a "fixed and definite intent to return" and take up his home there when separated from the service. Id., at 456. See, Butler v. District of Columbia, 86 U.S. App. D.C. 207, 181 F. 2d 790, cert. denied, 340 U.S. 826 (1950); Arbaugh v. District of Columbia, 85 U.S. App. D.C. 97, 176 F. 2d 28 (1949); Collier v. District of Columbia, 82 U.S. App. D.C. 145, 161 F. 2d 649 (1947); Beckham v. District of Columbia, 82 U.S. App. D.C. 296, 163 F. 2d 701, cert. denied, 332 U.S. 825 (1947); Rogers v. Rogers, 76 U.S. App. D.C. 297, 130 F. 2d 905 (1942); Beedy v. District of Columbia, supra.

The taxing authority is warranted in treating as prima facie taxable any person quartered in the District on tax day whose status seems doubtful. The burden is on the individual who knows best the factors involved to establish that his domicile is elsewhere. District of Columbia v. Murphy, supra, at 455. It is clear that the petitioner physically resided within the District of Columbia on the last day of each of the taxable years in question. The question must be answered whether petitioner sufficiently demonstrated to this Court that throughout that period of time he had a domicile somewhere other than the District of Columbia and had a "fixed and definite intent to return" and take up his home there.

Prior to the Supreme Court's decision in Murphy, the rule in the District of Columbia governing the domicile of persons working in Government service and residing in the District was that one may retain his domicile in the state from which he came until his service terminated, unless he gave clear evidence of his intention to forego his state allegiance. Sweeney v. District of Columbia, supra, at 37. The Court in Murphy did not reject this rule, see Murphy, supra, at 454, but it did change the burden of proof by placing it upon the petitioner. As a result, a person in the Government service quartered in the District must show that he is domiciled elsewhere in order to escape the tax. District of Columbia v. Murphy, supra, at 455-456. See, Beedy v. District of Columbia, supra, at 291; Shilkret v. Helvering, 78 U.S. App. D.C. 178, 181, 138 F. 2d 925 (1944). All Murphy did was to shift the presumption against a change in domicile for the Government employee required to live here for the duration of his service to a presumption of domicile in the District. See, Pace v. District of Columbia, 77 U.S. App. D.C. 332, 334, 135 F. 2d 249, aff'd, 320 U.S. 698 (1944).

The burden shifted to the petitioner to demonstrate the lack of animus manendi here and a fixed and definite intent to return to the domicile from which he came. Beedy v. District of Columbia, supra, at 291.

The rule, reiterated in Murphy, that a person does not acquire a domicile in the District simply by coming here to live for an indefinite period of time while in the Government service is not inconsistent with that Court's holding that, unless such person has a fixed and definite intent to return, he is domiciled here. While the intention to return must be fixed, the Court stated, the date of the return need not be definite; and while the intention to return must be unconditional, the time may be, and in most cases will be, contingent. District of Columbia v. Murphy, supra, at 455 n. 9. The Court in Beedy observed that Sweeney and Murphy were apposite in their holdings. Beedy, supra, at 291-292. Although the situation involving a Government employee is not governed by the usual tests, Murphy, supra, at 454, the Murphy decision does comport with the general view that a domicile once acquired is presumed to continue until shown to have changed, Shilkret v. Helvering, supra, at 180; Dixon v. Dixon, 190 A. 2d 652, 654 (D.C. App. 1963), and that mere absence from a fixed home, however long, cannot of itself work a change in domicile. There must be the intent to change. Pace v. District of Columbia, supra, at 334; Adams v. Adams, 136 A. 2d 866 (D.C. Mun. App. 1957); 28 C.J.S. §13(a). For a Government employee residing in the District, as is the petitioner here, the intent to change his domicile to the District is simply synonymous with his failure to show a "fixed and definite intent to return" to his alleged former domicile. See Arbaugh v. District of Columbia, supra, at 98, where the Court noted that the effect of the rule is that a person without any intent one way or another is domiciled here if he lives here.

Whether the petitioner had, after 1967 and during the taxable years in question, a "fixed and definite intent to return" to Florida after termination of his appointment to the Service and employment at NIH is no longer relevant since we found that petitioner never had a domicile in that state. However, his testimony that, since he began residing in the District in June, 1970, it has been his intention to return to Jacksonville, Florida, and permanently reside there with his family upon the termination of his appointment becomes relevant in the determination of whether petitioner had the "fixed and definite intent to return" to any of the states in which he resided, and in which he might have been domiciled, prior to being assigned to NIH in June, 1967.

This Court was not shown any evidence which would lead it to conclude that petitioner had a "fixed and definite intent to return" to Georgia, where his parents live and where he was raised, and where he was briefly located in 1967. Likewise, we have not been presented evidence which would show that petitioner established a domicile in and intended to return to either Indiana, where he attended undergraduate school, or California, where he attended Stanford University for one year. Nor does it appear that he ever was domiciled in or had any desire to go back to Connecticut. The petitioner received an undergraduate degree from Yale University in 1959. He also attended medical school at Yale, remained there to take his internship and later returned to complete his residency. Moreover, Connecticut was the only state in which he was licensed to practice medicine. Since petitioner testified that before the fall of 1967 his permanent residence was in Atlanta, that becomes the location of any real importance.

It would be difficult, however, to find that petitioner had a fixed intention of returning to Atlanta, Georgia, or any of the other states, in light of his forceful testimony regarding his intention to settle in Florida.

In determining the domiciliary status of an individual, actions are the most persuasive indicia, even more persuasive than words. Weitknecht v. District of Columbia, 90 U.S. App. D.C. 291, 294, 195 F. 2d 570 (1952). See, Texas v. Florida, supra, at 425. Petitioner has owned a home in the District since June, 1970. Although this fact alone would not subject a Government employee in the District to income taxation, see Murphy, supra, at 454, when it is combined with all the other indications of domiciliary status here, a prima facie case for the taxing authority is presented. All of petitioner's personal as well as real property was located in the District of Columbia. He uses the Bank of Bethesda for all his financial matters and has used the NIH Credit Union. He is not a member of any religious, social or civic organizations anywhere, although he attends church in the Washington area and his children attend Maryland schools. Moreover, petitioner testified that he conceivably could spend his whole career at NIH.

The delineation of circumstances which the petitioner's background evidences as bearing upon his domiciliary status differs in important respects from those found in Beedy v. District of Columbia, supra, Pace v. District of Columbia, supra, Beckham v. District of Columbia, supra, and also in Collier v. District of Columbia, supra. In each, the Court found that the petitioner's domicile was not the District of Columbia, based not only upon testimony and statements revealing a "fixed and definite intent to return" to their domicile, but also upon the sturdy bridges to that domicile which each petitioner "kept" and had not "burned"

in coming to the District. District of Columbia v. Murphy, supra, at 457. In Beckham, the petitioner owned no real estate in the District, but did own two tracts of land in Texas, had his cemetery plots, voted and paid taxes there, and was a member of fraternal and religious organizations in that state. In Pace, which dealt with inheritance taxes in the District, the petitioner was the financial clerk of the Senate for over 25 years. He owned no home in Florida, his stated domicile, but his furniture and household goods were stored there, he owned several business, residential and farm properties there, had a substantial sum of money deposited in a Florida bank, and at times apparently only remained in the District at the persuasion of his friends. He lived, on the other hand, in rented apartments and boarding houses the entire time he was in the District and conducted little or no business affairs here. Pace v. District of Columbia, supra, at 334. The many circumstances in Beedy which evidenced a Maine domicile, led the Court to conclude that the factors "demonstrate in act and thought and deed the ever present purpose to return to his home to live among the people he has always known and ultimately to be buried in the soil of his native State." Beedy v. District of Columbia, supra, at 292. We do not believe the same could be said for the petitioner.

Contrary to what the petitioner would have this Court believe, the 1968 decision by the District of Columbia involving Dr. Horner, a former Medical Director with the Public Health Service, is distinguishable. The exhibit which petitioner submitted and relies upon indicates that Dr. Horner was born and raised in Illinois, he personally maintained a home and farm there since 1957, many of his personal belongings and household effects were there, he paid real estate taxes there, and most important, he was licensed to practice medicine in Illinois, and had so

practiced (Petitioner's Ex. 17). This evidence wholly supported his declarations that he would be absent from Illinois only while his employment with the Public Health Service lasted. Clearly, the petitioner's circumstances in no way resemble those of Dr. Horner.

The burden rested with petitioner to establish that his domicile was elsewhere. District of Columbia v. Murphy, supra. He has, in our opinion, failed to meet that burden. The fact that petitioner and his wife had been registered to vote in Florida since 1971 and had in fact voted on several occasions would have been "highly relevant but by no means controlling" to this question had the Court believed that petitioner effectively established a Florida domicile earlier. District of Columbia v. Murphy, supra, at 456. Most important, he has stated no "fixed and definite intent to return" to Georgia, which we believe was his former domicile. See, e.g., Butler v. District of Columbia, supra, at 208-209; Arbaugh v. District of Columbia, supra, at 98.

This Court finds that petitioner has failed to demonstrate his domicile was somewhere other than the District of Columbia to which he had a "fixed and definite intent" of returning.<sup>1/</sup>

<sup>1/</sup> The Court takes note of the fact that Congress, in the Health Research and Health Services Amendments of 1976 which were recently enacted, equated active service of commissioned officers of the Public Health Service with active military service in the Armed Forces for the purposes of all rights, privileges, immunities, and benefits provided under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 App. U.S.C. §501 et seq. (1970). U.S. Cong. & Adm. News, No. 4, 1071, 1118 (May 25, 1976). Health Research and Health Services Amendments of 1976, 90 Stat. 415 (U.S. Cong. & Adm. News No. 4 (May 25, 1976)), amending 42 U.S.C. §213 (1970). Section 574 of Title 50 App. of the United States Code provides that persons covered under the Act do not lose a domicile and acquire another domicile for purposes of state tax while, and solely by reason of being, absent from his domicile in compliance with military or naval orders. Any income received for military service is not deemed to be income for services performed within or from sources within the state to which the person has gone. We make no assumption that, prior to this amendment, commissioned officers in PHS necessarily acquired the domicile of locality at which they were stationed.

We further find, therefore, that petitioner was a "resident" of the District of Columbia within the meaning of §47-1551c(s) during the years in issue and thus subject to income tax liability. His claims for refunds for income taxes paid for the years 1971 through 1975 must, therefore, be denied.

## II. SERVICE AT THE PLEASURE OF THE PRESIDENT

Although our conclusion in the first part of this opinion on the issue of domicile is dispositive of the question of petitioner's liability for income tax for the years 1971 through 1975, we believe a brief discussion of the second issue presented, namely, whether petitioner served at the pleasure of the President, is warranted. The authority by which petitioner was appointed to the Regular Corps of the Service does not specifically provide that commissioned officers serve at the pleasure of the President.<sup>2/</sup> The statute under which petitioner was appointed does provide, however, circumstances under which an officer of the Regular Corps may be separated from the Service. If an officer eligible to take an examination for promotion refuses to take such examination, he may be separated from the Service.<sup>3/</sup> Or, if he is found not qualified after his first three years of service, in accordance with regulations of the President, he shall be dismissed.<sup>4/</sup> Moreover, a commissioned officer of the Service shall be retired upon reaching the age of 64 years.<sup>5/</sup>

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<sup>2/</sup> 42 U.S.C. §204 (1970) provides in pertinent part:

There shall be in the Service a commissioned Regular Corps and ... a Reserve Corps. ... Commissioned officers of the Reserve Corps shall be appointed by the President and commissioned officers of the Regular Corps shall be appointed by him by and with the advice and consent of the Senate. ...

The petitioner's certificate of appointment to the Service provides, however, that "[t]his commission is to continue in force during the pleasure of the President..."

<sup>3/</sup> 42 U.S.C. §211(h) (1970). See 42 C.F.R. §21.154 (1974).

<sup>4/</sup> 42 U.S.C. §211(i) (1970). See 42 C.F.R. §21.151 (1974).

<sup>5/</sup> 42 U.S.C. §212(a)(1) (1970).

The statute also authorizes the President to prescribe regulations with respect to, inter alia, the appointment, retirement, termination of commission and discipline of the Commissioner Corps of the Service.<sup>6/</sup> The regulations promulgated pursuant to that authority set forth additional reasons for the separation of officers of the Regular Corps originally appointed in or above the grade of senior assistant. For example, an officer who is pregnant and not eligible for maternity leave shall be separated from active duty.<sup>7/</sup> The commission of an officer found by a medical review board to have a physical disability which renders him physically unfit to perform the duties of his office shall be terminated in accordance with the regulations.<sup>8/</sup> Moreover, The Secretary of Health, Education and Welfare may suspend or terminate a commission if he finds that it is necessary or desirable in the interests of national security.<sup>9/</sup> The regulations further provide for termination of a commission when an officer is absent without leave for 30 days, for dismissal if an officer is found guilty of certain conduct constituting a ground for disciplinary action and for involuntary retirement.<sup>10/</sup>

The petitioner contends that these provisions constitute alternative methods whereby a commissioned officer may be removed. He believes that they in no way conflict with the President's retained authority, inherent in his authority to appoint, to remove commissioned officers for any reason, which is the sine qua non of an appointment to serve at the pleasure of the President. Respondent, on the other hand, maintains that these statutory and regulatory provisions are exclusive and restrict the authority of the President to dismiss commissioned officers.<sup>11/</sup>

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6/ Id. §216(a).

7/ 42 C.F.R. §21.152 (1974).

8/ Id. §21.153.

9/ Id. §21.155.

10/ Id. §§21.270(b), 21.284 & 21.165.

11/ For support of its argument respondent notes that the statute provides that reserve commissions shall be for an indefinite period and may be terminated at any time by the President. 42 U.S.C. §209 (a)(2). This same language, however, does not apply to appointments to the Regular Corps.

For reasons which we will hereafter discuss, this Court is of the opinion that petitioner does serve at the pleasure of the President within the meaning of D.C. Code §47-1551c(s).<sup>12/</sup> The Supreme Court long ago held that "[t]he power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power." Myers v. United States, 272 U.S. 52, 161 (1926). See, Burnap v. United States, 252 U.S. 512, 515 (1920; Parsons v. United States, supra. This power to remove is given to the President by the Constitution<sup>13/</sup> and it is not subject to the assent of the Senate nor can it be controlled by legislative authority. Myers v. United States, supra, at 119, 125.

The Court in Myers recognized the inherent power of the President to remove for any reason appointees confirmed by the Senate without consent of the Senate, even though appointed for a fixed term and even though the Act creating the office provided for removal only for stated causes. Morgan v. Tennessee Valley Authority, 115 F. 2d 990, 992 (6th Cir. 1940), cert. denied, 312 U.S. 701 (1941). Nine years later, the Court in Humphrey's Executor v. United States, 295 U.S. 602, 630-632 (1935), made it clear that its rationale in Myers applied only to "purely executive officers." In Humphrey's the Court held that President Roosevelt could not remove a member of the Federal Trade Commission, who was a Hoover appointee, before the expiration of member's term. It reasoned that the fixing of a definite term subject to removal for cause (i.e., inefficiency,

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<sup>12/</sup> We agree with petitioner that the power in the President to remove would be the essence of an appointment the tenure of which was at the pleasure of the President. Provisions in statutes to the effect that individuals can be removed "at the pleasure of the President" or are "subject to removal" by him we therefore interpret as tenure at the pleasure of the President. See, Parsons v. United States, 167 U.S. 324, 339 (1897). See, e.g., 28 U.S.C. §541(c) (1970); 10 U.S.C. §1162(a) (1975).

<sup>13/</sup> U.S. Constit., art. 2, §2, cl. 2.

neglect of duty or malfeasance in office), was enough to establish the legislative intent that the term was not to be curtailed absent such cause, without some countervailing provision. Id., at 623.

The restrictions on the President's power to remove was also clear to the Humphrey's Court from the legislative history, as well as the character, of the FTC. The Court noted that it was a nonpartisan Commission whose members serve quasi-judicial and legislative functions as opposed to political or executive duties. Id., at 624. It concluded that "[w]hether the power of the President to remove an officer shall prevail over the authority of Congress to condition that power by fixing a definite term of office and precluding a removal except for cause, will depend upon the character of the office." Id., at 631-632. In Myers, the individual was a postmaster of first class serving a four-year term. The Court in Humphrey's, at 630-631, stated that this "purely executive officer" was responsible to the President alone and in a very definite sense. It recognized that, between the postmaster in Myers on the one hand, and the Federal Trade Commissioner on the other, a wide field of doubt existed. Id., at 632.

The Supreme Court followed the holding in Humphrey's in a more recent decision in 1958. Wiener v. United States, 357 U.S. 349 (1958). There the Court was faced with the dismissal of a Roosevelt appointee to the War Claims Commission by President Eisenhower before the expiration of the appointee's term. The essence of the Humphrey's case, it believed, was the sharp line which it drew between purely executive officers and those "who are members of a body 'to exercise its judgment without the leave or hindrance of any other official or any department of the government.'" Id., at 353, quoting Humphrey's, 295 U.S. at 625-626.

The Court concluded that, "[t]his sharp differentiation derives from the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference." Wiener v. United States, supra, at 353. It held that the War Claims Commissioner was not a "purely executive officer" and thus not removable at the will of the President. See, Soucie v. David, 448 F. 2d 1067, 1072, n. 11 (D.C. C.A. 1971).

United States Marshals have been held to be executive officers and thus subject to removal by the President. Martin v. Tobin, 451 F. 2d 1335 (9th Cir. 1971). There, a Marshal had been removed by the President before the end of his four-year term. He contended that the statute guaranteed him a minimum term of four years. The Court said that, if it interpreted 28 U.S.C. §561(b) the way appellant desired, the section would be unconstitutional. Id., at 1336. See, Farley v. United States, 139 F. Supp. 757, 758, 134 Ct. Cl. 672 (1956), which also held Marshals to be executive officers. The Supreme Court in Parsons v. United States, supra, at 327-344, expertly analyzed the power of the President to remove officers appointed by him by and with the advice and consent of the Senate. It upheld there the President's power to remove an attorney for the United States before the expiration of the attorney's four-year term. See, 28 U.S.C. §541(c) (1970) which provides that "[e]ach United States attorney is subject to removal by the President."

Prior to its decision in Myers, the Supreme Court decided Shurtleff v. United States, 189 U.S. 311 (1903), where it held that, to take away the Presidential power of removal in relation to an inferior office created by statute, would require "very clear and explicit language"; it could not be taken away by mere inference or implication. Id., at 315. Shurtleff was

a general appraiser of merchandise appointed by the President with the advice and consent of the Senate. He could be removed at any time by the President for inefficiency, neglect of duty or malfeasance in office, and he contended that these causes were exclusive. The Court said that, to construe the statute as Shurtleff urged, an appraiser would hold office for life, or at least until he was found guilty of some act specified in the statute. In the face of unbroken precedents against life tenure of office, the Court could not conclude that Congress chose to give appraisers that honor. Id., at 316.

The notion that Congress cannot curtail an inherent power of the President without a clear and explicit indication of legislative purpose was the basis for the Court's decision in Morgan v. Tennessee Valley Authority, supra, at 992-993, upholding the dismissal of a member and Chairman of the Board of Directors of TVA by the President. The Chairman, who had been appointed for a term of nine years, denied the power of the President to dismiss him since the TVA Act provided two methods of removal which, in his opinion, were exclusive. Furthermore, he contended that Congress reserved to itself exclusive discretionary power to remove a director of TVA and gave the President only a mandatory duty to dismiss for the stated causes. Id., at 991. The Court, however, concluded that the Act did not reserve to Congress exclusive power to remove civil officers performing purely executive or administrative functions, but only provided an alternative method. Id., at 993.

We are faced here, then, with that "field of doubt" which the Supreme Court in Humphrey's recognized existed between what was decided in that case and what was held in Myers,

with the determination to be made on a case-by-case basis. Humphrey's, supra, at 632. While we have some misgivings in characterizing the status of commissioned officers of the Regular Corps of PHS as primarily "executive," their function is clearly not quasi-legislative or judicial. In this connection, we also note that Congress apparently has not seen fit to restrict the Presidential power of removal over commissioned officers in PHS, as it has done with respect to commissioned officers in the Armed Forces in time of peace.<sup>14/</sup> We conclude on balance, therefore, that a commissioned officer in the Regular Corps of PHS in the grade of Medical Director can be dismissed by the President for any reason without cause. Nowhere in the Act in which Congress created the Service and provided for the appointment of commissioned officers did it state in "clear and explicit language" that the methods to remove such officers from the Service, set forth in the statute and in the regulations, which the President himself is authorized to promulgate, were the exclusive methods, in derogation of the President's inherent power to remove those executive officers whom he appoints.<sup>15/</sup> Myers, supra. If Congress did restrict the President's power in such a way, it might have been an unconstitutional restraint

<sup>14/</sup> 10 U.S.C. §1161(a) (1975). See, Wallace v. United States, 257 U.S. 541, 544-545 (1922); Allen v. United States, 91 F. Supp. 933, 934-935 (Ct. Cl. 1950). We also note, however, that the validity and effect of statutory restrictions upon the power of the President alone to remove officers of the Army and Navy have been the subject of doubt and discussion, and the issue of their validity has never been directly decided by the Supreme Court. Wallace, supra, at 545. See also, Parsons v. United States, supra, at 334. In an unrelated situation, Congress found no difficulty in placing the Office of Comptroller General beyond the Presidential power of removal. 31 U.S.C. §43 (1976). See, Morgan v. Tennessee Valley Authority, supra, at 993.

<sup>15/</sup> The Civil Service Manual for the Department of Health, Education and Welfare, in a personnel instruction, states that the President retains the authority to terminate on an involuntary basis the commission of a Regular Corps officer, except where such an officer can be terminated by the Secretary under regulations of the President pursuant to 42 U.S.C. §5211(h) and (i). Personnel Manual, Chapter Series CC, Part 3, Section B (August 7, 1967).

on the power of the President to remove executive officers. See, Martin v. Tobin, supra, at 1336; Morgan v. Tennessee Valley Authority, supra, at 993.

A commissioned officer in the Regular Corps of the Service in the grade of Medical Director cannot be likened to a member of the Federal Trade Commission or a commissioner on the War Claims Commission who perform quasi-legislative and judicial functions and who are members of a body which must be independent of any interference from any other official or any other department of the Government and free of any executive encroachment. See, Wiener v. United States, supra, at 353. Rather, we view the status of such an officer as similar to that of the United States Marshal in Martin v. Tobin, supra, or a United States attorney in Parsons, supra. Moreover, since a commissioned officer in the Regular Corps is appointed for no fixed term, the concern of the Supreme Court in Shurtleff, supra, becomes very relevant. To interpret the statute and the regulations as providing the exclusive methods whereby the petitioner could be separated from the Service, as respondent contends, would give petitioner a life tenure, or a tenure at least until any mandatory retirement age. We cannot conclude that Congress intended to give an officer such as petitioner that type of tenure, and we will not assign Congress such an intention absent clear and explicit language to that effect.<sup>16/</sup> We conclude, therefore, that petitioner, as a commissioned officer in the Regular Corps of the Public Health Service, does serve at the pleasure of the President. Notwithstanding such status, however, as a domiciliary of the District of Columbia during the years in issue, he does not fall within the statutory exclusion from income tax liability.

In conjunction with this opinion, we make the following findings of fact and conclusions of law:

16/ The legislative history of the District of Columbia Revenue Act of May 27, 1949, Pub. L. No. 81-76, §401, 63 Stat. 122, amending D.C. Code §47-1551c(s) to read in its present form, offers no insight into what Congress intended to include within the phrase, "officer ... whose tenure of office is at the pleasure of the President." See, S. Rep. No. 260, 81st Cong., 1st Sess. 12 (1949). Although the apparent purpose of the amendment was to narrow the exemption formerly afforded to any "appointive officer" under the District of Columbia Income and Franchise Tax Act of July 16, 1947, ch. 258, §1, D.C. Code 1947, §47-1551c(s) (repealed 1949), id., Congress did not specifically restrict the (footnote continued on following page)

FINDINGS OF FACT

1. Dr. William T. Friedewald, petitioner, is a physician and a commissioned officer in the Regular Corps of the Public Health Service. He is presently assigned to the National Institutes of Health and holds a medical director grade with the title of Branch Chief, Clinical Trials Branch, National Heart, Lung and Blood Institute. Since June, 1970, Dr. Friedewald has resided with his wife and three children at 8126 West Beach Drive, N.W., Washington, D.C. He considers his permanent address to be 4617 Royal Avenue, Jacksonville, Florida, the home of his wife's parents.

2. Dr. Friedewald was born in New York City and reared since the age of six in Atlanta, Georgia, where his parents presently reside. He left Atlanta at the age of 16 to attend the University of Notre Dame. After completing three years of undergraduate study at Notre Dame, he then attended Yale University where he was awarded a B.S. degree. He attended Yale Medical School from 1959 to 1963 in New Haven, remaining there to take his first-year internship at the Yale Medical Hospital in 1963-1964, and his first-year residency from 1964-1965. In 1965, in order to fulfill his military obligation, he applied for and received an appointment as a reserve officer in the Public Health Service.

3. His first orders in the Public Health Service in the summer of 1965 required him to report to the Communicable Disease Center in Atlanta for a five-week training period. In August, 1965, he was sent to NIH in Bethesda where he remained until June, 1967. While on this assignment, he resided in the District of Columbia and paid District of Columbia income taxes.

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(footnote continued from previous page)  
exemption to officers of the executive branch at the highest levels. Cf., D.C. Code 1973, 547-1205, which excludes only cabinet officers in the executive branch from the term "resident of the District of Columbia" for purposes of the intangible personal property assessment.

He was married in April, 1967, in Jacksonville, Florida, where his wife had lived most of her life with her parents. In June of 1967, he returned to New Haven to finish his residency requirements. He remained in New Haven for one year and in 1968 he went to Stanford University in California for special training as an officer of the Public Health Service. In June of 1969 he returned to NIH and resided in Bethesda, Maryland. While he was still a reserve officer, in view of the training given to him, he had a commitment to serve two additional years in the Public Health Service, i.e., until July, 1971.

4. In June, 1970, Dr. Friedewald bought his present home on Beach Drive in Washington, D.C. At that time he knew he still had a commitment to remain in the Public Health Service until 1971. In October, 1970, he applied for a regular commission in the Public Health Service and was appointed to the Regular Corps in November, 1971. He was nominated by the President and confirmed by the Senate.

5. A commissioned Public Health Service officer serves a three-year probationary period at the end of which his competency must be passed upon by a board of his peers. He can be dismissed for lack of competency at that time. A regular commissioned officer may also be dismissed for refusal to submit to an examination for promotion, being absent without leave for more than 30 days, or for physical disability.

6. In 1967, while he was still in Connecticut and believed he would be moving around, he and his wife decided to make Jacksonville, Florida, their permanent residence and adopted her parents' home as their address. Dr. Friedewald has never maintained a home in Florida and only traveled there to visit his wife's parents. In 1967 and to this date, he has no plans to leave the Public Health Service.

7. His wife grew up in Jacksonville and attended college in Tallahassee. On June 23, 1971, petitioner was issued a permanent voting registration identification card for the County of DuVal in the State of Florida. His wife also registered to vote in 1971. Thereafter, he voted in the primary elections held in 1972 and in the Presidential election in that year. He also voted in the primary elections held this year and in a local election in 1974. Petitioner was issued a Florida driver's license in December, 1967. That license was renewed in March, 1969. He currently holds a Florida driver's license issued March 3, 1975, which reflects his address at 8126 West Beach Drive, N.W., Washington, D.C. He presently owns a 1972 Ford and his wife owns a 1966 Ford, both of which have Florida registrations. A 1966 Corvette which he previously owned was also registered in Florida. The State of Florida has no income tax.

8. Dr. Friedewald is licensed to practice medicine only in Connecticut. He is not licensed to practice medicine in the District of Columbia or in Florida. He has never taken any measures required to be licensed to practice medicine in the State of Florida. He has no prospective employment in Florida.

9. Petitioner's only bank accounts are in Maryland. He has no bank accounts in Florida, nor does he own any property there. He goes to Florida only once or twice a year at Christmas and during the summer to visit. Dr. Friedewald and his wife have three children (ages 6 years, 4 years and 11 months); one of his children attends Stoneridge School in Bethesda and the other school-age child attends a Montessori school in Maryland.

10. He intends to remain in his house in the District of Columbia indefinitely as long as his assignment at the National Institutes of Health continues and there is no family need for a larger house.

11. Dr. Friedewald is not a member of any civic organizations in Florida or in the District of Columbia. He does attend church in the District of Columbia and in Maryland.

12. Income taxes for the years 1971 through 1973 were assessed against petitioner on March 15, 1975, and paid on or about May 13, 1975, in the amounts of:

1971	-	\$1,045.91
1972	-	1,118.04
1973	-	1,371.93

Income taxes for 1974 in the amount of \$2,197.49 were paid on or about April 11, 1975, and income taxes for 1975 in the amount of \$2,415.72 were paid on April 13, 1976.

13. On May 13, 1976, petitioner filed claims for refund for the amounts stated above for the years 1971-1975, all of which were denied on the same date. No penalties are included in the taxes assessed.

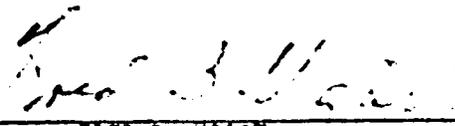
#### CONCLUSIONS OF LAW

1. The petitioner did not establish a domicile in the State of Florida in 1967, or at any time during the years 1971-1975.
2. The petitioner was domiciled in the District of Columbia on the last day of each of the taxable years 1971 through 1975 inclusive.
3. The petitioner was formerly domiciled in the State of Georgia, but during the taxable years 1971-1975 did not have a "fixed and definite intent" to return to that state.
4. The petitioner served at the pleasure of the President in the grade of Medical Director in the Regular Corps of the Public Health Service.

5. The petitioner being a domiciliary of the District of Columbia on the last day of the taxable years 1971-1975, was a "resident" of the District of Columbia within the meaning of 547-1551c(s), and thus subject to income tax liability, and is not entitled to the refund of the taxes paid.

JUDGMENT

Judgment is hereby entered for the respondent and the petitioner's complaint is hereby dismissed.

  
FRED B. UGAST  
Judge

DATED: 10 - 26 - 76

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