

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>CLAY E. AND RITA M. BUZZARD</b>	:	DECISION
for Redetermination of a Deficiency or for	:	DTA No. 808865
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1985 through 1988.	:	

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Petitioners Clay E. and Rita M. Buzzard, 3845 Partridge Place South, Boynton Beach, Florida 33436 filed an exception to the determination of the Administrative Law Judge issued on April 9, 1992 with respect to their petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1985 through 1988. Petitioners appeared by Jaeckel, Fleischmann & Mugel, Esqs. (Paul A. Battaglia, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Petitioners submitted a brief on exception. The Division of Taxation filed a letter brief in response. Petitioners then filed a letter in reply to the Division of Taxation's letter. Oral argument, requested by petitioners, was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether petitioners have established that they were domiciled in the State of Florida and were, therefore, not subject to taxation as residents of the State of New York during the years 1985 through 1988.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for findings of fact "8," "21," "22," "39," "42," "48," and "53" which have been modified. Finding of fact "39" has been modified by incorporating, with a slight modification, the language of finding of fact "44." Additionally, a portion of the information contained in the footnote to finding of fact "21" has been incorporated into the text of finding of fact "8." The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

On October 10, 1989, following an audit, the Division of Taxation (hereinafter the "Division") issued to petitioners, Clay E. and Rita M. Buzzard, a Notice of Deficiency asserting additional personal income tax due of \$340,439.95, plus interest, for the years 1985 through 1988.

With respect to each of the years at issue, petitioners timely filed joint New York State nonresident income tax returns (Form IT-203).

The asserted deficiency results from a Division determination that petitioners were domiciliaries of New York and therefore residents of New York during the years at issue. In accordance with said determination, the Division recomputed petitioners' New York income based upon a change in status from nonresident to resident. The computation of the deficiency is not in dispute.

In April 1963, petitioners and their six children moved from their hometown of Pittsburgh, Pennsylvania to the Buffalo, New York area. The move to Buffalo resulted from Mr. Buzzard's decision to take control of Middle Atlantic Warehouse Distributor, Inc. ("MAWDI"), which at the time was bankrupt.

MAWDI was and is engaged in business as a distributor of automotive parts and supplies. MAWDI sells to wholesale distributors.

Mr. Buzzard acquired 40% of the outstanding stock of MAWDI and became its president at the time he arrived in Buffalo to assume management of the company. By December 1963, Mr. Buzzard had acquired 99% of the outstanding MAWDI stock.

Over the years, MAWDI became a highly successful operation, expanding operations and acquiring facilities throughout the country. MAWDI's headquarters are located in Tonawanda, New York. MAWDI, through its wholly-owned subsidiaries, has warehouse facilities located in Atlanta, Georgia; Boston, Massachusetts; Dallas, Texas; Indianapolis, Indiana; Philadelphia, Pennsylvania; San Antonio, Texas; and Tonawanda, New York. Through these facilities MAWDI sells to customers located in 30 states. In addition, through subsidiary corporations, MAWDI operates wholesale automotive parts stores in Georgia, New York, Pennsylvania and Texas.

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

Petitioners have four sons, all of whom have been active in the family business since the age of 14. Petitioners' oldest son, James E. Buzzard, held the positions of vice-president and executive vice-president of MAWDI from April 1978 through June 1983. He has been president and chief operating officer of MAWDI since June 1983. Petitioners' next oldest son, Robert C. Buzzard, was a vice-president of MAWDI from December 1979 until June 1983. He has been executive vice-president since June 1983 and has also been treasurer and assistant secretary since 1990. Petitioners' next oldest son, Richard A. Buzzard, has been a vice-president of MAWDI since June 1983, and is currently in charge of MAWDI's Texas operations. Petitioners' youngest son, Daniel S. Buzzard, has been a vice-president of MAWDI since 1981 and is responsible for MAWDI's Atlanta, Georgia and Indianapolis, Indiana operations. Petitioners also have two daughters, Karen L. Evanoka and Carol J. Buzzard. Neither of petitioners' daughters has been active in the family business. Petitioners' children reside in the following locations: Karen L. Evanoka resides with her husband and three children in East Amherst, New York; James E. Buzzard resides with his wife and four children in Clarence, New York; Robert C. Buzzard resides with his wife and four children in Williamsville, New York; Richard A. Buzzard resides with his wife and two children in Dallas, Texas; Daniel S. Buzzard resides with his wife and two children in Atlanta, Georgia; and Carol J. Buzzard resides in Dallas, Texas.<sup>1</sup>

Petitioner Clay E. Buzzard was president of MAWDI from April 1963 until June 1983, when he became chairman of the board, a position he continues to hold at the present time. When

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The Administrative Law Judge's original finding of fact "8" was modified by making the footnote in the determination the second to the last sentence and by adding the last sentence.

We modified finding of fact "8" to include all of petitioners' children, grandchildren, and their residences.

petitioner became chairman of MAWDI in 1983, he appointed his son, James, to the office of president.

From 1963 until 1978, MAWDI's board of directors consisted of petitioners and Mr. John Montfort, petitioners' friend and attorney. In 1978, the size of the board was increased to five with the addition of petitioners' sons, James and Robert. In June 1983, the size of the board was increased to seven with the addition of petitioners' sons, Daniel and Richard. In December 1983, the board was reduced to six with Mr. Montfort's departure from the board. In December 1985, the board was increased to seven as petitioners' son-in-law, John S. Evanoka, was added to the board. There have been no changes in the board since December 1985.

As noted previously, by December 1963 Mr. Buzzard had acquired 99 of the 100 shares of common stock of MAWDI which were then issued and outstanding. Mr. Montfort owned the remaining one share of stock. In 1968, the two shareholders received 200 shares of common stock for each share previously owned. Mr. Buzzard's holdings were thereby increased to 19,800 shares and Mr. Montfort's to 200 shares. MAWDI has never been authorized to issue stock other than common stock. Mr. Montfort's stock was purchased by the corporation in 1983 and since that time MAWDI has been owned 100% by the Buzzard family.

In 1975, Mr. Buzzard began a program of making gifts of shares of MAWDI stock to his children. These transfers were made primarily to provide the children with a proprietary interest in the business and, particularly in the case of those children active in the business, to strengthen their commitment to the business. The ownership of MAWDI stock as of March 14, 1991 was as follows:

<u>Shareholder</u>	<u>Number of Shares Owned</u>
Clay E. Buzzard	16,649
Carol J. Buzzard	266
Daniel S. Buzzard	646
James E. Buzzard	646
Richard A. Buzzard	646
Robert C. Buzzard	646
Karen L. Evanoka	<u>301</u>
Total issued and outstanding	<u>19,800</u>

In 1978, petitioners' youngest child, Carol, left home for college. Petitioners determined they were then able to spend time away from Buffalo. Accordingly, in 1978, petitioners purchased a residence at 3655 Royal Tern Circle, Boynton Beach, Florida. The purchase price for this three-bedroom residence was \$90,000.00.

On November 24, 1981, petitioners sold their residence located at 54 Carriage Circle, Amherst, New York. The residence had been acquired in 1965 for \$34,900.00. It was sold in 1981 for \$102,000.00.

On the income tax returns filed by petitioners for 1981, they reported the gain realized on the sale of the New York residence and paid Federal and New York State income tax thereon.

Following the sale of their New York residence in 1981, petitioners took up residence in their home at 3655 Royal Tern Circle, Boynton Beach, Florida, where they continued to reside until the purchase of a new Florida home in March 1989.

The move to Florida in November 1981 was prompted by both personal and business considerations. Petitioners' children were then grown and emancipated. Those children who were active in the family business had attained the age, maturity and experience to permit Mr. Buzzard to turn over much of the day-to-day responsibility for the business to them. Furthermore, the Florida weather during the late fall, winter and spring months was easier on Mr. Buzzard's injured leg, as explained more fully below.

Petitioner Clay E. Buzzard served in the United States Army during World War II. He sustained a combat injury to his lower right leg which resulted in the award of a 40% disability pension benefit from the Veterans Administration, a benefit he continues to receive to this day. The nature of this injury is such that if Mr. Buzzard's leg is exposed to cold for any period of time, he reacts with pain and usually a secondary infection, which requires antibiotic therapy. Since moving to Buffalo in 1963, Mr. Buzzard has been a patient of Robert H. Miller, M.D. He was advised by Dr. Miller that no treatment would ease his condition, and that it was advisable to assume residence in a warm climate to alleviate the problems which the cold caused.

During the summer of 1982, petitioners rented a furnished home in Williamsville, New York, and spent the summer months (when not traveling on business or vacation) in western New York. They had no telephone listing for this address.

During the summer of 1983, petitioners rented a townhouse in Williamsville, New York, and spent the summer months (when not traveling on business or vacation) in western New York. They had no telephone listing for this address.

We modify finding of fact "21" of the Administrative Law Judge's determination to read as follows:

When they sold their Amherst residence in November 1981, petitioners intended to continue to spend significant amounts of time with their children and grandchildren in the Buffalo area, mostly during the spring and summer months and also during the Christmas holiday season. Petitioners explored the possibility of buying or renting property in Canada for use as a summer residence. In this regard, they consulted with Mr. Montfort, who was the owner of a summer residence in Canada. Petitioners ultimately decided against acquiring Canadian property, partly due to the distance between such property and petitioners' children's homes in the Buffalo area. Petitioners believed that they would be unable to see their children and grandchildren as often as they would like.<sup>2</sup>

We modify finding of fact "22" of the Administrative Law Judge's determination to read as follows:

Petitioners were not satisfied with their experience in renting a summer residence during the summer of 1982. Accordingly, in May 1983, petitioners contracted for the purchase of a lot in the Town of Amherst, New York, and the construction of a house thereon. Construction began in June 1983, and the purchase was closed in February 1984. This residence, 3 Stratford Court, Amherst, New York, is still owned by petitioners and is used by them when they are in

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The original Administrative Law Judge's finding of fact "21" was modified by adding "with their children and grandchildren" in the first sentence and changing "childrens" to "children's" in the fourth sentence.

We modified finding of fact "21" to emphasize that petitioners' family was a major factor behind their continued contact with Buffalo.

the Buffalo area. Petitioners' children maintain and use the house in petitioners' absence. The cost of the lot and construction of the residence was \$301,900.00.<sup>3</sup>

Petitioners were dissatisfied with their rented accommodations in 1982 because, in Mr. Buzzard's words, "it was someone else's home." Petitioners thus had to place restrictions on their grandchildren, such as where they could go and what they could touch in the house. Such restrictions did not exist in their new home.

On September 18, 1982, petitioner Clay E. Buzzard executed his Last Will and Testament in which he recited his residence to be the "County of Palm Beach and State of Florida." That Will, which was prepared in New York, has not been amended or revoked.

In October 1982, petitioners each obtained a Florida driver's license and each has held a Florida driver's license since that time.

Petitioners registered to vote in Florida on October 25, 1982 and have voted in Florida since that time. When voting in Florida, petitioners have voted in person, never by absentee ballot. Petitioners last voted in New York in 1980. They believe their New York voter registrations were cancelled in 1982.

On February 2, 1983, petitioners applied for and were granted a homestead exemption for purposes of the Florida real property tax. The exemption continues in effect.

On March 3, 1989, petitioners purchased their current Florida home at 3845 Partridge Place South, Boynton Beach, Florida for a purchase price of \$475,000.00. On September 13, 1989, they sold their old Florida home (i.e., 3655 Royal Tern Circle, Boynton Beach, Florida) for a sale price of \$175,000.00. Pursuant to section 1034 of the Internal Revenue Code, petitioners elected to "rollover" the gain realized on the sale of the old Florida home.

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The original finding of fact "22" was modified by adding the next to the last sentence.

This finding of fact was modified to more fully reflect all the details contained in the record concerning petitioners' Buffalo home.

Petitioners have filed Florida intangible tax returns each year since establishing residence in Florida.

Petitioners have filed nonresident New York personal income tax returns each year since establishing residence in Florida. Prior to establishing residence in Florida, petitioners had filed resident returns in New York.

On all income tax returns filed by petitioners since establishing residence in Florida their address has been shown to be in Florida.

Petitioners' passports have reflected that they are residents of Florida at least since 1985.

Since 1978, petitioners have been members of the Quail Ridge Golf & Country Club in Boynton Beach, Florida.

Since April 1983, petitioners have been members of the Delray Beach Club, Delray Beach, Florida.

Since July 1986, petitioner Clay E. Buzzard's VA disability benefit pension checks have been directly deposited into accounts maintained by petitioners in Florida. These checks were never directly deposited into New York accounts.

As alluded to previously (see, above), before the move to Florida in 1981, it had long been petitioner Clay E. Buzzard's intention that his children would one day take over operation of the family business and eventually come to own the business. To this end, petitioner had gotten his sons involved working for the business at an early age (see, above) and had later begun to make gifts of MAWDI stock to his children (see, above). Accordingly, by the time of the move to Florida in 1981, petitioners' sons, particularly the two eldest sons, were of sufficient age and experience to assume responsibility for the day-to-day operations of the business. Indeed, by November 1981, petitioners' sons had assumed many of the day-to-day responsibilities for the Buffalo MAWDI operation. At that point, petitioners' son, James, had been executive vice-president of MAWDI for nearly two years (see, above). Mr. Buzzard had thus begun to share responsibility for the day-to-day management of the Buffalo operation by the time of the move to Florida in 1981. Subsequent to the move, Mr. Buzzard remained involved with the Buffalo

operation, but his day-to-day involvement in the business diminished as his sons continued to assume a greater share of responsibility for running the company. By June 1983, when James Buzzard became president of MAWDI, Clay Buzzard's involvement in the day-to-day management of MAWDI was ended. At that time, he ceased maintaining an office in Buffalo.

Subsequent to June 1983, Mr. Buzzard has had three (more or less) formal areas of responsibility in connection with the operation of the corporation. As chairman of the board of directors he attends the company's formal board meetings. Mr. Buzzard was also paid as a consultant by MAWDI's Buffalo office. This salary amounted to less than 10% of his total salary during the years in question. He had no assigned duties in connection with this consultant status. Most of his hands-on responsibility with the MAWDI corporation subsequent to 1983 was with the Texas subsidiary. Mr. Buzzard was in close contact with his son, Richard, who was in charge of the Dallas office. Mr. Buzzard also had an office in Dallas during 1983 through 1988, and most of his salary was paid through the Texas corporation. During the years at issue, as a result of certain acquisitions, the Texas subsidiary became the largest of the MAWDI group of corporations.

Throughout the period at issue, Mr. Buzzard's total salary was greater than that paid to his son, James, MAWDI's president. Mr. Buzzard's total salary during the audit period ranged from approximately \$328,000.00 in 1985 to about \$535,000.00 in 1987. A small amount of that salary (\$10,000.00) may have been paid to Mrs. Buzzard. Mr. Buzzard estimated his son James' salary during this same period to have been about \$150,000.00 or \$175,000.00.

We modify finding of fact "39" of the Administrative Law Judge's determination to read as follows:

During the years at issue, Mr. Buzzard served the corporation for the most part in an informal manner. He drew upon his reputation in the industry and made contact with and entertained parts dealers and customers. He was active in industry trade associations and regularly attended industry conventions, shows and meetings. He also entertained customers and suppliers at his homes in Florida and Buffalo. Often such entertainment took the form of playing golf. To this end, petitioners have continued, since 1981, to maintain their memberships in two Buffalo area country clubs: the Country Club of Buffalo and Burke Hill Country Club. Petitioners play golf and have dinner with both friends and clients of MAWDI at these

clubs. Additionally, Mr. Buzzard annually plays in a member-guest tournament each May at the Country Club of Buffalo.<sup>4</sup>

As noted previously, Mr. Buzzard did not maintain an office in Buffalo subsequent to his stepping down as president of MAWDI in June 1983. However, he did have an office in Dallas. He also maintained an office in his Florida home.

During the period at issue, when in Buffalo, Mr. Buzzard generally went to the MAWDI office three or four times per week. He usually spent a few hours there reviewing his mail and conversing with employees.

We modify finding of fact "42" of the Administrative Law Judge's determination to read as follows:

When they left Buffalo for Florida every autumn, petitioners had their Buffalo mail directed to MAWDI's Buffalo office where it was forwarded to the proper address. When petitioners left Florida for Buffalo in the spring, they had their Florida mail forwarded to the Buffalo office where it was held until being picked up by Mr. Buzzard.<sup>5</sup>

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The Administrative Law Judge's finding of fact "39" read as follows:

"During the years at issue, Mr. Buzzard served the corporation for the most part in an informal manner. He drew upon his reputation in the industry and made contact with and entertained parts dealers and customers. He was active in industry trade associations and regularly attended industry conventions, shows and meetings. He also entertained customers and suppliers at his homes in Florida and Buffalo. Often such entertainment took the form of playing golf."

We modified and incorporated finding of fact "44" into finding of fact "39" to more accurately describe one aspect of petitioner Clay Buzzard's activities on behalf of MAWDI during the years at issue, and the relationship these activities had, in part, to petitioners' retention of membership in two Buffalo country clubs.

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The Administrative Law Judge's finding of fact "42" read as follows:

"Petitioners had their mail directed to MAWDI's Buffalo office where it was either held to be picked up by Mr. Buzzard or forwarded to the proper address."

While the record is less than clear, it appears that petitioners received mail at both their Buffalo and Florida residences. While in Buffalo, it seems that petitioners received their Buffalo mail at their Buffalo residence and their Florida mail at MAWDI's Buffalo office. While not in Buffalo, it appears that petitioners received their Florida mail at their Florida residence and had their Buffalo mail forwarded to MAWDI's Buffalo office, which was then sent to petitioners at either their Florida address or another location at which they were staying (as petitioners also had children living in Dallas and Atlanta).

Mr. Buzzard is an avid golfer. During the years at issue, whether in Florida or in Buffalo, he played golf on an almost daily basis.

Since 1981, petitioners have continued to maintain charge accounts in Buffalo stores and their primary bank accounts in Buffalo banks. Petitioners also maintain an account in a Florida bank. Petitioners have continued to engage the services of Buffalo attorneys and accountants. Petitioners' income tax returns have been prepared in Buffalo. Additionally, petitioners' primary physician is located in Buffalo.

Mr. Buzzard owns a 1978 Cadillac Eldorado which is registered and stored in New York. Mr. Buzzard treats this vehicle as a collector's item and drives it infrequently. Petitioners have use of a company car in Florida.

Petitioners' general pattern, commencing in 1982, was to spend the colder months in Florida and then spend from about May through September in Buffalo. Petitioners also had frequent short stays in Buffalo at other times during the year. Petitioners generally did not spend any time in Florida between mid-April through mid-October. Petitioners have also consistently spent two to three weeks in Buffalo during December.

We modify finding of fact "48" of the Administrative Law Judge's determination to read as follows:

Petitioners' records for the years 1985 through 1988 indicate the following with respect to days spent in New York (Buffalo), Florida and elsewhere:<sup>6</sup>

Number of Days In and Out of New York

<u>Location</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>
New York	116	131	156	140
Florida	94	98	115	115
Dallas	50	45	16	18
Atlanta	16	2	8	8
Other	59	59	57	58
Unknown	30	30	13	27 <sup>7</sup>

As may be deduced from the above-noted information, petitioners also travel frequently. From a review of petitioners' records for the 1985 through 1988 period, it appears that on such trips petitioners have traveled from and returned to both their Florida and Buffalo homes.

Petitioners have weak ties to their neighbors in New York. Petitioners have developed substantial social ties to their neighbors in Florida. While in Buffalo, petitioners socialize with friends who are fellow country club members.

Petitioners' children occasionally visit petitioners in their Florida home.

Petitioners purchased their Florida home in 1978 with the intent of living there as much as possible during the winter months. At first, petitioners used their Florida home for perhaps two weeks at a time. Petitioners made frequent trips between Florida and Buffalo during the 1978 through 1981 period. As time passed, petitioners spent more time in Florida.

We modify finding of fact "53" of the Administrative Law Judge's determination to read as follows:

Upon the sale of their Buffalo home in 1981, petitioners put their furniture in storage. Petitioners intended to use this furniture in whatever residence they would later acquire in the Buffalo area. Specifically, at the time of the sale of their home, petitioners actively considered purchasing a house in Canada and intended to use the furniture from their sold Buffalo house at the Canadian location. Ultimately, the purchase of a house in Canada did not take place. Petitioners used this furniture in their rented condominium during the summer of 1983. Petitioners later gave most of this furniture to their children, including the dining room and bedroom

furniture. Petitioners retained and presently use the living room furniture from their former Buffalo home in their present Buffalo home.<sup>8</sup>

### ***OPINION***

The Administrative Law Judge determined that petitioners had failed to demonstrate an intent to abandon their New York domicile and, thus, had failed to establish that they were domiciled in Florida for the years at issue. The Administrative Law Judge focused on petitioners' "general habit of life," concluding that, notwithstanding the sale of their Buffalo home in 1981, petitioners "retained deep and substantial ties to the Buffalo area" (Determination, conclusion of law "G"). Specifically, the Administrative Law Judge noted petitioners' strong familial bond with their children and grandchildren, Mr. Buzzard's continued business ties to Buffalo following the sale of their Buffalo residence, and Mr. Buzzard's retention of membership at two Buffalo country clubs. The Administrative Law Judge reasoned that the sale of the Buffalo residence, though reflective of a major lifestyle change for petitioners, did not support the conclusion that petitioners had changed their domicile to Florida in light of their ongoing connections to the Western New York area.

On exception, petitioners assert that they have demonstrated a change in domicile. Petitioners state that the Administrative Law Judge's conclusion to the contrary is incorrect for the following reasons: insufficient weight was given to the 1981 sale of petitioners' only residence in Buffalo; insufficient weight was given to Mr. Buzzard's medical condition and the impact of this condition on his intent; insufficient weight was given to the formal declarations of petitioners; Mr. Buzzard's level of involvement with Mid-Atlantic Warehouse Distributors, Inc. during the years at issue was not accurately reviewed; and the cumulative effect of the 1981 sale of the residence in conjunction with the reduction of Mr. Buzzard's involvement in the business was not properly considered. Finally, petitioners assert

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The Administrative Law Judge's finding of fact "53" was modified by adding the third and fourth sentences.

This finding of fact was modified to more fully reflect petitioners' continued intent to purchase a house in the Buffalo area notwithstanding the fact that they did not own such accommodations in the Buffalo area from November 1981 to February 1984.

that, since their domicile had changed from New York to Florida in 1981 upon the sale of their Buffalo residence, the burden of proof shifted, requiring the Division to demonstrate that petitioners domicile changed from Florida to New York for the years 1985-1988.

In response, the Division relies upon the determination of the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge for the reasons set forth below.

Former Tax Law § 605(a) states:

"Resident individual. A resident individual means an individual:

"(1) who is domiciled in this state, unless (A) 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 . . . or

"(2) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States."

Domicile, though not defined in the Tax Law, is addressed in the Division's regulations:

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

"(2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only a limited time; this rule applies even though the individual may have sold or disposed of his former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, his declarations will be given undue weight, but they will not be conclusive if they are contradicted by his conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place.

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"(4) A person can have only one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home. In determining his intentions in this manner, the length of time customarily spent at each location is important but not necessarily conclusive" (former 20 NYCRR 102.2[d]).

Creating a change of domicile requires both the intent to make a new location a fixed and permanent home, and actual residence at that location (Matter of Minsky v. Tully, 78 AD2d 955, 433 NYS2d 276). As stated by the Court of Appeals in Matter of Newcomb (192 NY 238):

"Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

"The existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law, and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals . . . . Motives are immaterial, except as they indicate intention. A change of domicile may be made . . . for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another and the acts of the person affected confirm the intention . . . . No pretense or deception can be practiced, for the intention must be honest, the act genuine and the evidence to establish both, clear and convincing" (Matter of Newcomb, *supra*, at 250-251, emphasis added).

The Administrative Law Judge, after considering all of the evidence and testimony presented, concluded that petitioners had failed to demonstrate a change in domicile. Applying the above principles to the facts of this case, we agree that petitioners have not proven, by clear and convincing evidence (Matter of Bodfish v. Gallman, 50 AD2d 457, 378 NYS2d 138), their intention to change their domicile from New York State to Florida.

Petitioners make several arguments on exception. However, these arguments fail to warrant resolution of this matter in favor of petitioners. The underlying tone of all the evidence and testimony in the record is that in or about 1981 petitioners made a significant lifestyle change. However, we agree with the Administrative Law Judge that, despite this change, petitioners retained substantial ties to the Buffalo area. Our concurrence with the Administrative Law Judge is based upon several factors present in the record. First, although petitioners sold their home in Buffalo, and at that time had no other living accommodations at their disposal, they did place their furniture in storage with the intent to use it in another Buffalo area home which they were planning to buy, possibly in Canada. Eventually, some of this

furniture did end up in the \$310,900.00 "summer home" (Tr., p. 33) petitioners had built in Buffalo in 1983. This house was used and maintained by petitioners' children in their absence.

We find this information important because it creates a strong inference that petitioners did not intend to abandon their ties to the Buffalo area after the sale of their home. In our opinion, retention of the furniture with an eye towards purchasing another house in or near Buffalo coupled with the fact that petitioners began building a new residence in Buffalo in 1983 demonstrates petitioners' continued interest in maintaining their contact with the area notwithstanding the sale of their Buffalo home in 1981.

Second, petitioners retained their memberships at two country clubs in Buffalo, as Mr. Buzzard was an avid golfer. Further, these memberships were also used by Mr. Buzzard to entertain clients of MAWDI.

Third, Mr. Buzzard, though removed from the day-to-day operations of MAWDI, did continue to have client contact with suppliers and customers of MAWDI, and did receive compensation for his efforts. Although these activities occurred in several areas of the country, Buffalo continued to be among them.

Fourth, petitioner Clay Buzzard's primary physician was located in Buffalo.

It may be argued that petitioners' life did not continue to focus exclusively on the Buffalo area to the extent it had prior to 1981; indeed, there is ample evidence that petitioner Clay Buzzard did move about extensively for both personal reasons, as well as for the benefit of MAWDI. Further, it is acknowledged that petitioners also owned a home in Florida, belonged to two country clubs in Florida, developed social ties in their Florida neighborhood, demonstrated various formal connections to the State of Florida (e.g., driver's licenses, voter registration, etc.), and, because of Mr. Buzzard's health concerns, were constrained as to where they could spend the winter months.

However, critical to our decision that there has been no change of domicile is petitioners' relationship with their family, an intangible factor which permeates the record. The Buzzards came to Buffalo in 1963, and both their family and their business prospered over the following

years. Three of petitioners' children continue to reside in the Buffalo area. Petitioners have expressed their commitment to spending as much time as possible with their children and grandchildren despite Mr. Buzzard's medical condition and have done so, returning to Buffalo to spend the warmer months and the Christmas holidays with them during the years at issue. This, combined with their continued business and social activity in Buffalo, goes against petitioners' assertion of a change in domicile (see, Matter of Clute v. Chu, 106 AD2d 841, 484 NYS2d 239 [where the Appellate Division, Third Department confirmed a determination of the State Tax Commission which found the petitioner to have retained his New York domicile based on his retention of a permanent place of abode and continuation of business activities in New York]; Matter of Simon, Tax Appeals Tribunal, March 2, 1989 [where the Tribunal found the petitioner to have retained his New York domicile based upon his maintenance of a home and support of his family in New York, as well as his frequent and extended visits to New York]). It appears that but for Mr. Buzzard's medical condition petitioners would have spent an even greater amount of time in the Buffalo area.

As we stated in Matter of Zapka (Tax Appeals Tribunal, June 22, 1989):

"[w]hile it must be granted that petitioners have ties to both New York and Florida which make it possible to formulate arguments in favor of petitioners having the intent to establish domicile in either state, it is New York that must prevail as the domicile under these circumstances. The mere fact that persuasive arguments can be made from the facts in support of both Florida and New York as petitioners' domicile indicates that they have not clearly and convincingly evidenced an intent to change their New York domicile."

We determine that petitioners have not shown, in a clear and convincing manner, an intent to change their domicile to Florida.

We will now address petitioners' assertion that the burden of proof is upon the Division. Tax Law § 698(e) provides that, "[i]n any case before the tax commission under [Article 22], the burden of proof shall be upon the petitioner except" in situations not present in these facts. Therefore, we disagree with petitioners' assertion that the burden is on the Division.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners Clay E. and Rita M. Buzzard is denied;

2. The determination of the Administrative Law Judge is affirmed;
3. The petition of petitioners Clay E. and Rita M. Buzzard is denied; and
4. The Notice of Deficiency issued on October 10, 1989 is sustained.

DATED: Troy, New York  
February 18, 1993

/s/John P. Dugan  
John P. Dugan  
President

/s/Francis R. Koenig  
Francis R. Koenig  
Commissioner

/s/Maria T. Jones  
Maria T. Jones  
Commissioner