

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

BETTY J. BUTLER

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the year 1978.

DECISION

Petitioner, Betty J. Butler, 12041 S.W. 123rd Terrace, Miami, Florida 33186 filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1978. (File No. 40728).

A hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 28, 1986 at 11:00 A.M. Petitioner appeared by Nicholas Carlisi, Esq. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUE

I. Whether petitioner, Betty J. Butler, was a resident individual of New York State during the year 1978.

FINDINGS OF FACT

1. Robert Butler and Betty J. Butler (hereinafter "petitioner") timely filed a New York State Income Tax Resident Return for 1978 under filing status "married filing separately on one return". On such return they reported their address as "830 Shore Rd., Long Beach, NY 11561". Their respective occupations were reported as "Mechanic" and "Housewife". Their combined total New York

	<u>Husband</u>	<u>Wife</u>
Wages	\$23,376.00	
Interest Income	<u>4,552.00</u>	\$4,250.00
Total	<u>\$27,928.00</u>	<u>\$4,250.00</u>
Less: Moving Expense Adjustment	<u>1,004.00</u>	
Total New York Income	<u>\$26,924.00</u>	<u>\$4,250.00</u>

2. On June 16, 1981, the Audit Division issued a Statement of Audit Changes to petitioner wherein an adjustment was made increasing her total New York income by \$29,565.00. Said amount represented a long-term capital gain derived from the sale of her Florida home, which was reported on her Federal return but not her New York State return. Accordingly, a Notice of Deficiency was issued against petitioner on April 7, 1982 asserting additional 1978 New York State personal income tax of \$3,130.75, plus interest of \$895.04 for a total due of \$4,025.79.

3. Subsequently, a Notice of Claim was issued against petitioner asserting a greater deficiency than that asserted in the Notice of Deficiency. The greater deficiency asserted therein resulted from an adjustment made holding the aforestated capital gain subject to the 20% capital gain modification and the imposition of minimum income tax on said gain, which was held to be an item of tax preference. The greater deficiency asserted according to said notice was \$1,908.77. Therefore, the total deficiency at issue herein is \$5,039.52 (\$3,130.75 plus \$1,908.77).

4. Petitioner alleged that although Mr. Butler was a New York State resident during 1978, she was a resident of the State of Florida for such entire year, and as such, the gain derived from the sale of the Florida property is not taxable to New York State.

5. Prior to 1976, petitioner and her husband were residents of the State of New York.

transferred him to New York. Prior to July, 1978, he resided in an apartment at 250 Shore Road, Long Beach, Long Island, New York. In July, 1978, he moved to a condominium which was purchased at 830 Shore Road, Long Beach, where he resided until his transfer back to Florida in December, 1985. Said condominium was only a few blocks from his previously rented apartment.

6. Mr. Butler testified that during 1978 he visited his wife in Florida almost every weekend and during vacations and holidays. He purportedly was issued a pass which allowed him to fly standby, free of charge, **on** Pan American airplanes.

7. Petitioner alleged that she was employed full time in Florida as a real estate broker during 1978. In support of this allegation she submitted letters from her purported employer and a coworker. However, both her Federal and New York State returns for 1978 listed her occupation as "Housewife" and reported no income earned by her other than the interest stated in Finding of Fact "1", supra. Although a portion of the interest was derived from Florida sources, it was all reported on the 1978 New York State return.

8. According to petitioner's Federal form 2119, Sale or Exchange of Personal Residence, petitioner's Florida home, from which the \$29,565.00 gain at issue was derived, was sold **on** October 20, 1977 and the new residence (the New York condominium) was purchased on June 28, 1978 at a cost of \$31,734.00. Said form also indicated that both the Florida and New York properties **were** used as a principal residence.

9. **On August 30, 1983**, petitioner filed an "amended" Federal Schedule D and an "amended" Federal form 2119. According to the "amended" form 2119 the new residence was "constructed" commencing May, 1979 and the cost of **the new** residence was \$68,879.00.

10. No documentary evidence was submitted to establish the dates on which the aforestated purchases and sale actually occurred. Although petitioner contended that all properties (including the Florida property from which the gain at issue was derived) were held jointly by her and her husband, no documentation was submitted to support such contention.

11. During 1978 petitioner rented an apartment located at 12121 Southwest 105 Terrace, Miami, Florida.

12. Petitioner alleged that she purchased a new house in Florida in December, 1979 located at 12041 Southwest 123 Terrace, Miami, Florida. To evidence this she submitted a copy of a "Warranty Deed". The deed, however, indicates petitioner's purchase of property listed as "Lot 9 of Block 3, Pine Meadow Estates" and gives no indication that said listed property was the same as the aforestated Southwest 123 Terrace address.

13. Petitioner maintained a Florida driver's license during 1978.

14. Petitioner testified that she visited her husband in New York from July through September 1978 for reasons relating to the purchase of the New York condominium. She claimed that she spent no other time in New York during 1978.

15. No explanation was provided with respect to the moving expense adjustment claimed for 1978.

CONCLUSIONS OF LAW

A. That domicile, in general, is the place which an individual intends to be his permanent home; the place to which he intends to return whenever he may be absent [20 NYCRR 102.2(d)(1)].

B. That petitioner, Betty J. Butler, was domiciled in the State of Florida during the entire year 1978.

C. That Section 605 of the Tax Law provides that

"(a) Resident individual-A resident individual means an individual:

* * *

(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..."

D. That petitioner has failed to sustain her burden of proof, imposed pursuant to section 689(e) of the Tax Law, to show that she did not maintain a permanent place of abode in New York and spent in the aggregate one hundred eighty-three days or less in New York State during taxable year 1978.

Accordingly, petitioner, Betty J. Butler, was a resident individual of New York State during the entire year 1978.

E. That since petitioner has failed to sustain her burden of proof to show that the Florida residence sold was owned jointly by her and her husband, it is hereby deemed that such property was owned solely by her on her resident return.

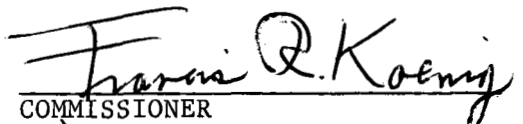
F. That the petition of Betty J. Butler is denied and the Notice of Deficiency dated April 7, 1982, as increased by the subsequently issued Notice of Claim (See Finding of Fact "3", supra) is sustained together with such additional interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 17 1986


PRESIDENT


COMMISSIONER


COMMISSIONER