

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Walter S. & Barton G. Gubelmann :  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Gift Tax under :  
Article 26A of the Tax Law for the Calendar :  
Quarters Ended September, 1973 and December, 1973. :  
:

AFFIDAVIT OF MAILING

State of New York  
County of Albany

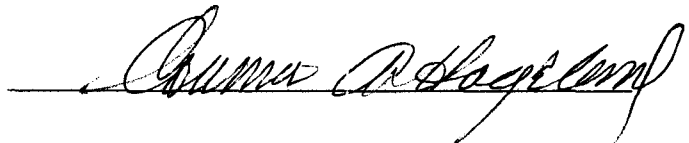
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 21st day of October, 1983, she served the within notice of Decision by certified mail upon Walter S. & Barton G. Gubelmann, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Walter S. & Barton G. Gubelmann  
160 Via Del Lago  
Palm Beach, FL 33480

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
21st day of October, 1983.



Patricia Kupchene

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Walter S. & Barton G. Gubelmann :  
AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
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State of New York  
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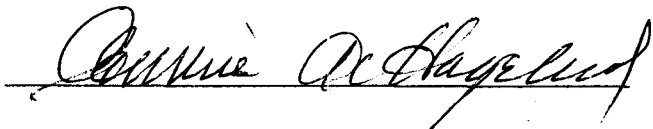
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 21st day of October, 1983, she served the within notice of Decision by certified mail upon Michael S. Barron the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

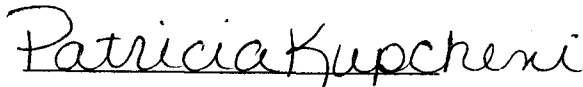
Michael S. Barron  
Zissu, Berman, Halper, Barron & Gumbinger  
450 Park Ave.  
New York, NY 10022

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
21st day of October, 1983.





AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

October 21, 1983

Walter S. & Barton G. Gubelmann  
160 Via Del Lago  
Palm Beach, FL 33480

Dear Mr. & Mrs. Gubelmann:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 & 1007 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Building #9 State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Michael S. Barron  
Zissu, Berman, Halper, Barron & Gumbinger  
450 Park Ave.  
New York, NY 10022  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petitions	:	
	:	
of	:	
	:	
WALTER S. GUBELMANN and BARTON G. GUBELMANN	:	DECISION
	:	
for Redetermination of Deficiencies or for	:	
Refunds of Gift Tax under Article 26-A of the	:	
Tax Law for the Calendar Quarters Ended	:	
September, 1973 and December, 1973.	:	

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Petitioners, Walter S. Gubelmann and Barton G. Gubelmann, 160 Via Del Lago, Palm Beach, Florida 33480, filed petitions for redetermination of deficiencies or for refunds of gift tax under Article 26-A of the Tax Law for the calendar quarters ended September, 1973 and December, 1973 (File Nos. 30817 and 30818).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 3, 1982 at 9:40 A.M., with all briefs to be submitted by March 18, 1983. Petitioners appeared by Zissu, Berman, Halper, Barron & Gumbinger, Esqs. (Michael S. Barron, Esq. and Andrew Panken, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether petitioners effected a change of domicile from New York to Florida prior to the periods at issue herein and thus were not New York residents subject to the imposition of tax upon certain gifts made during such periods.

FINDINGS OF FACT

1. On May 30, 1980, the Audit Division issued a Notice of Deficiency to petitioner Walter S. Gubelmann, asserting deficiencies of \$17.37 and \$18,478.37

for the taxable quarters ended September 30, 1973 and December 31, 1973, respectively, plus penalties and interest. On May 30, 1980, the Audit Division also issued a Notice of Deficiency to petitioner Barton G. Gubelmann, asserting a deficiency of \$17.37 for the taxable quarter ended September 30, 1973, plus penalty and interest.

2. Statements of audit changes pertaining to the above-asserted deficiencies and issued to the petitioners on February 13, 1980, explained the issuance of the deficiencies as follows:

"New York taxable gifts have been adjusted per Federal audit results. 25% penalty has been charged since New York Gift Tax Return had not been filed originally."

3. On August 20, 1980, a petition for redetermination of the above-asserted deficiencies was filed on behalf of Mr. and Mrs. Gubelmann. At the hearing, representatives of the petitioners and of the Audit Division provided a signed stipulation of facts, together with attached documentation in support of the stipulated facts, as follows:

a) Walter S. Gubelmann and Barton G. Gubelmann ("petitioners") made gifts of certain securities during the calendar quarters ended September 30, 1973 and December 31, 1973. These gifts were reported on United States Quarterly Gift Tax Returns (Forms 709). The petitioners stated their residence address on said returns as 160 Via del Lago, Palm Beach, Florida.

b) The gifts made by the petitioners were of intangible personal property not located within New York State and not employed by the petitioners in carrying on any business in New York.

c) Affidavits were executed by each of the petitioners attesting to their change in domicile on January 3, 1973 from Oyster Bay, Long Island, New York, to Palm Beach, Florida.

d) The Palm Beach home in which the petitioners reside is owned by a family corporation controlled by Mr. Gubelmann. The petitioners no longer own the Oyster Bay property.

e) On or about January 3, 1973, according to the petitioners' affidavit, they moved their personal effects from New York to Palm Beach.

f) A Notice of Address Change (Form MV-232) was filed by Mr. Gubelmann with the Department of Motor Vehicles in Albany, New York on January 29, 1973.

g) The petitioners first registered to vote in Palm Beach, Florida on January 5, 1973.

h) On or about January 3, 1973, the petitioners terminated their affiliation with the Christ Church in Oyster Bay and joined the Bethesda-by-the-Sea Church in Palm Beach. A copy of a letter to Mr. Gubelmann from the Rector of Christ Church acknowledging this change was introduced in evidence.

i) Petitioners introduced a copy of a letter from Mr. Gubelmann to a club in New York called Raffles, dated December 31, 1972, submitting his resignation because of his change in residence to Palm Beach.

j) Petitioners introduced a copy of a letter from Seawanhaka Yacht Club in Oyster Bay to Mr. Gubelmann, dated February 6, 1973, concerning his request for non-resident status in the Club.

k) In January of 1973, Mr. Gubelmann notified many of the financial institutions holding his securities to send the interest and dividends to The First National Bank in Palm Beach, Florida. He also requested in that notice that all other mailings formerly made to him in New York be directed to his residence in Palm Beach.

1) The petitioners filed Affidavits of Domicile with the Palm Beach, Florida, County Circuit Court on January 16, 1973. These affidavits were made under the penalties of perjury of up to twenty years in state prison.

m) On February 2, 1973, the petitioners executed wills reciting their residence to be Palm Beach, Florida.

n) The first page of both the joint United States Individual Income Tax Return for 1973 and the joint New York State Income Tax Nonresident Return for 1973 filed by the petitioners stated their residence address as Palm Beach, Florida.

o) The petitioners filed a joint New York State Income Tax Nonresident Return for 1974. This return was audited by the New York State Department of Taxation and Finance in 1977, and the Department determined that no change would be made in their tax liability.

p) Mrs. Gubelmann's cancelled passport issued on June 13, 1973, states her residence address as Palm Beach, Florida.

4. In addition to the foregoing stipulated facts, petitioners' affidavits dated November 30, 1982, submitted in lieu of their testimony and attesting to their allegation of a change of domicile (see Finding of Fact "3-c"), were nearly identical in content and stated, inter alia, (in addition to those facts previously presented) as follows:

a) that petitioners established their domicile in Palm Beach, Florida on January 3, 1983, intending at that time to terminate their residence in Oyster Bay, Long Island, New York and simultaneously make their Florida residence as their fixed and permanent home;

b) that in late 1972, petitioners moved many of their personal effects from New York to their Florida residence;

c) that petitioners had no intent to re-establish their domicile in New York, and retained their property in Oyster Bay for a period of time subsequent to 1973 for use solely as a summer vacation home (petitioners did not specify the date when they disposed of their Oyster Bay property);

d) that petitioner Walter Gubelmann moved his entire business operation from New York to Florida at or about the time of petitioners' move to Florida;

e) that in 1972 petitioners disposed of their yacht, which had been moored in New York, in anticipation of their move to Florida;

f) that in 1973, the bulk of petitioners' personal property was either located in Florida or was on deposit with Florida banks;

g) that in January, 1973, petitioners notified their voting district in Oyster Bay that they no longer resided there and that they had registered to vote in Palm Beach;

h) that petitioners have voted regularly and exclusively in Palm Beach since 1973;

i) that petitioner Walter Gubelmann obtained a Florida driver's license in 1973;

j) that petitioners spent approximately one hundred days at their Oyster Bay property during 1973;

k) and that United States quarterly gift tax returns filed by petitioners during 1973 (see Finding of Fact "3-a") listed their residence as 160 Via del Lago, Palm Beach, Florida.

5. The Notice of Address Change filed by Mr. Gubelmann with the New York State Department of Motor Vehicles (see Finding of Fact "3-f") indicated that Mr. Gubelmann's New York license was not due to expire until June 30, 1975.



6. Petitioners were lifetime members of several New York clubs and, rather than withdraw their membership, they requested nonresident status in these clubs. In the case of one such club (the Seawanhaka Corinthian Yacht Club), this request was denied due to the club's limited period of operation (five months during the summer) and the assumption by club officials that the petitioners would be in New York for a substantial portion of the summer(s). It is unclear as to the result of petitioners' requests for nonresident status with other clubs.

7. Petitioners admit that prior to 1973, they considered their residence at Centre Island, Oyster Bay, Long Island, New York to be their fixed and permanent home.

8. Petitioners occasionally utilized a rented apartment located at 1 East 66th Street, New York, New York during 1973. However, the evidence indicates petitioners used this apartment very infrequently and terminated their lease of the apartment on May 31, 1973.

9. It is asserted that petitioners' move to Florida was precipitated predominantly in consideration of petitioners' age, by a desire to avoid the comparatively harsh climate of New York, and in order to enable petitioners to participate fully in the social life of Palm Beach.

#### CONCLUSIONS OF LAW

A. That during the calendar quarters at issue herein, sections 1003 and 1004 of the Tax Law, in pertinent part, provided:

"Sec. 1003. Resident's New York taxable gifts.--(a) General.-- New York taxable gifts of a New York resident mean his taxable gifts made on or after January sixth, nineteen hundred seventy-two, as determined under the internal revenue code, modified as follows:

(1) reduced by any amount determined under section one thousand five (relating to real and tangible personal property having an actual situs outside New York state) and

(2) increased by any amount claimed as a specific exemption under section two thousand five hundred twenty-one of the internal revenue code. \* \* \*".

"Sec. 1004. Nonresident's New York taxable gifts.-- The New York taxable gifts of a nonresident shall mean his taxable gifts made on or after January sixth, nineteen hundred seventy-two, as determined under the internal revenue code, but limited to transfers of real and tangible personal property having an actual situs in this state and to transfers of money, credits, securities and other intangible personal property within the state employed in carrying on any business therein by the donor. Provided, however, the modification in paragraph two of subsection (a) of section ten hundred three shall apply.".

B. That neither the type of property given (see Finding of Fact "3-b") nor the amount of tax asserted as due are at issue, and thus the sole issue upon which the tax liability rests concerns the determination of petitioners' status as residents or nonresidents of New York during the periods at issue.

C. That the parties herein have treated the term "resident" as equivalent to "domiciliary". The term "resident" is not defined in Article 26-A, nor is there case law defining the term for gift tax purposes. However, the courts, in interpreting the estate tax law, have generally held that "resident" and "domiciliary" are synonymous (Matter of Trowbridge, 266 N.Y. 283 [1935]; In re Daly's Estate, 178 Misc. 943, [Surrogate's Ct., N.Y. Co., 1942]), and the terms are so treated in this decision.

D. That the actions undertaken by petitioners in late 1972 and early 1973 are consistent with and evidence of petitioners' intention to effect a change of their domicile from New York to Florida. Such actions and intent, notwithstanding the retention and use of their former home on Long Island (see Findings of Fact "4-c" and "4-j"), under all the facts in this case indicate that petitioners changed their domicile to Florida prior to the calendar quarters at issue. Accordingly, petitioners, as Florida domiciliaries and nonresidents of

New York (for purposes of Article 26-A), are not subject to tax upon the gifts at issue herein.

E. That the petitions of Walter S. Gubelmann and Barton G. Gubelmann are hereby granted and the notices of deficiency dated May 30, 1980 are cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 21 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER