

STU
October 5, 1979

Roland A. & Ruby N. Whealy
5325 Shalley Circle
Fort Myers, Florida 33901

Dear Mr. & Mrs. Whealy:

The enclosed decision has been reissued by the State Tax Commission due to a typographical error.

Please note, the error was in Conclusion of Law "D" which now reads, "...did not maintain a permanent place of abode here...". It originally read "...he maintained a permanent place of abode here...".

I am sorry for any inconvenience this has caused you. Please note that the date of the decision has been changed to the date of the new mailing.

Sincerely,

John J. Sollecito
Director, Tax Appeals Bureau

Enclosure

cc: Henry W. DeKosmian
Cravath, Swaine & Moore

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Roland A. & Ruby N. Whealy :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

of a Determination or a Refund of

Personal Income Tax :

under Article 22 of the Tax Law

for the Year 1971. :

State of New York

County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 5th day of October, 1979, he served the within notice of Decision by certified mail upon Henry W. DeKosmian the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Henry W. DeKosmian
Cravathi, Swaine & Moore
One Chase Manhattan Plaza
New York, NY 10005

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
5th day of October, 1979.

Victoria Gary

J. J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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of

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Roland A. & Ruby N. Whealy
5325 Shalley Circle
Fort Myers, FL 33901

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Sworn to before me this
5th day of October, 1979.

Victoria Gary

J. J. Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
ROLAND A. WHEALY and RUBY N. WHEALY
for Redetermination of a Deficiency or
for Refund of Personal Income Tax under
Article 22 of the Tax Law for the Year
1971.

CORRECTED
DECISION

Petitioners, Roland A. and Ruby N. Whealy, 5325 Shalley Circle, Fort Myers, Florida 33901, 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 1971 (File No. 12474).

A formal hearing was held before Michael Alexander, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 19, 1977 at 9:15 A.M. Petitioners appeared by Cravath, Swaine & Moore (Henry W. de Kosmian, Esq., of counsel). The Income Tax Bureau appeared by Peter Crotty, Esq. (Richard Kaufman, Esq., of counsel).

ISSUE

Whether petitioners were "resident individuals" of New York State during 1971, within the meaning and intent of section 605(a) of the Tax Law.

FINDINGS OF FACT

1. On July 28, 1975, the Income Tax Bureau issued a Notice of Deficiency against Roland A. and Ruby N. Whealy for \$10,304.00, together with interest of \$2,031.23, for a total of \$12,335.23. The asserted deficiency was premised on petitioners having been domiciled in New York State, and on their having maintained a permanent place of abode in New York during 1971.

2. Roland A. Whealy spent not more than thirty days within the State. Petitioner Ruby N. Whealy spent more than thirty days within New York State

during 1971.

3. In July of 1970, petitioners contracted with realtors for the sale of their New York house, and departed for England shortly thereafter. As of January 1, 1971, the house was vacant and remained so until its sale in May of 1971. During all of 1971, petitioners maintained a permanent place of abode in London, England.

4. Petitioners did not intend to remain in England permanently.

5. On moving to New York State in 1959, petitioners intended to remain only as long as was required by Mr. Whealy's employer. Petitioners resided in New York approximately eleven years, and subsequently resided in England approximately three years. While residing in New York State, petitioners voted in New York elections, joined clubs and a church, and opened bank accounts.

6. No evidence was submitted to indicate petitioners' intention to establish domicile in England. While in England, petitioners maintained their New York State bank accounts.

7. Petitioners sold their jointly-owned New York home in 1971 and realized a \$16,761.00 long-term capital gain on the sale.

8. Petitioners conceded that if petitioner Ruby N. Whealy was deemed to be a New York resident, her total income for 1971 would be computed as follows:

Dividends (Before \$100.00 Exclusion)	\$9,313.00
Interest	71.00
Capital Gain on Sale of New York House (Before 50% Capital Gain Deduction)	8,380.50

9. Petitioners conceded that a nonresident, petitioner Roland A. Whealy had New York source income as follows:

Working Days in New York (1971)	$\frac{13}{240}$	$\times \$58,510.00$	(Salary)=	\$3,168.00
Total Work Days				

New York Salary Income	\$3,168.00
Capital Gain on Sale of New York House (Before 50% Capital Gain Deduction)	8,380.50

10. Petitioners, Roland A. and Ruby N. Whealy, did not file a New York State personal income tax return for 1971.

CONCLUSIONS OF LAW

A. That during the period 1959 through 1970, petitioners were domiciliaries of New York. In determining an individual's intention with regard to domicile, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct. (20 NYCRR 102.2(d)(2))

B. That during 1971, petitioners continued to be domiciled in New York State, in that 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. 20 NYCRR 102.2(d)(2)

C. That during 1971, petitioners did not maintain a permanent place of abode in New York State.

D. That during 1971, petitioner Roland A. Whealy was not a "resident individual" within the meaning and intent of section 605(a) of the Tax Law, in that although domiciled in New York, he did not maintain a permanent place of abode here, did maintain a permanent place of abode elsewhere and was not present in New York for more than 30 days of the taxable year.

E. That during 1971, petitioner Ruby N. Whealy was a resident individual of New York State, inasmuch as she was domiciled in this State and spent more than 30 days within the State.

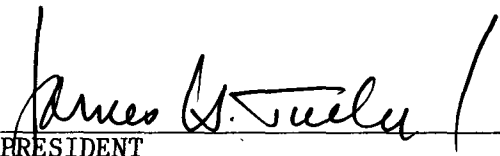
F. That the petition of Roland A. and Ruby N. Whealy is granted to the extent provided in Conclusion of Law "D". The Income Tax Bureau is hereby directed to modify the Notice of Deficiency issued on July 28, 1975, consistent

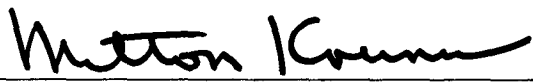
with Finding of Facts "8" and "9" and that, except as so granted, the petition is in all other respects denied.

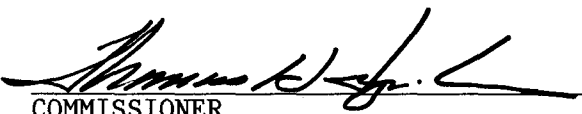
DATED: Albany, New York

STATE TAX COMMISSION

OCT 5 1979


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of

Roland A. & Ruby N. Whealy :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the Year 1971. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1979, he served the within notice of Decision by certified mail upon Roland A. & Ruby N. Whealy, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Roland A. & Ruby N. Whealy
5325 Shalley Circle
Fort Myers, FL 33901

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
28th day of September, 1979.

Nancy Donatelli

STATE OF NEW YORK
STATE TAX COMMISSION

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of

Roland A. & Ruby N. Whealy :

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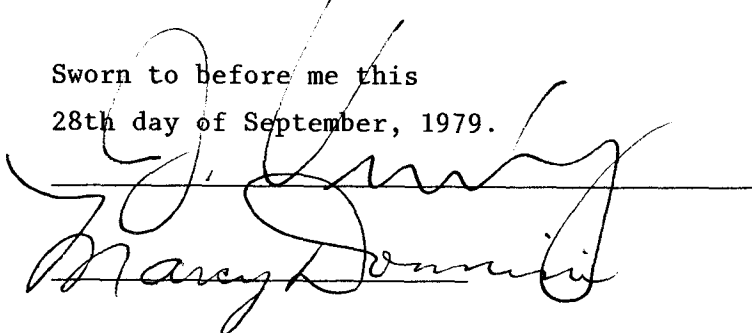
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STATE OF NEW YORK
STATE TAX COMMISSION
TAX APPEALS BUREAU
ALBANY, NEW YORK 12227

STATE TAX COMMISSION

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

JOHN J. SOLLECITO
DIRECTOR

Telephone: (518) 457-1723

September 28, 1979

Roland A. & Ruby N. Whealy
5325 Shalley Circle
Fort Myers, FL 33901

Dear Mr. & Mrs. Whealy:

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

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, 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 Laws 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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

cc: Petitioner's Representative
Henry W. DeKosmian
Cravathi, Swaine & Moore
One Chase Manhattan Plaza
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
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of	:	
	:	
ROLAND A. WHEALY and RUBY N. WHEALY	:	DECISION
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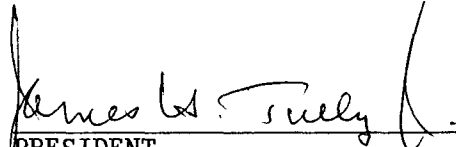
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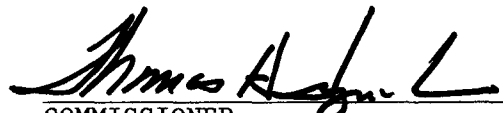
DATED: Albany, New York

SEP 28 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER