

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Katharine P. Cole Trust #2	:	
(Katharine C. Worden Trust)	:	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	:	
1976.	:	

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 9th day of November, 1982, he served the within notice of Decision by certified mail upon Katharine P. Cole Trust #2, (Katharine C. Worden Trust) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

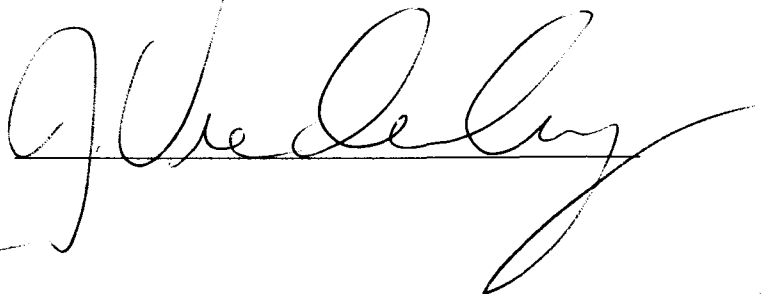
Katharine P. Cole Trust #2
(Katharine C. Worden Trust)
ATTN: James B. Ames, Trustee
Ropes & Gray, 225 Franklin St.
Boston, MA 02110

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
9th day of November, 1982.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

November 9, 1982

Katharine P. Cole Trust #2
(Katharine C. Worden Trust)
ATTN: James B. Ames, Trustee
Ropes & Gray, 225 Franklin St.
Boston, MA 02110

Dear Mr. Ames:

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:

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

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
KATHARINE P. COLE TRUST NO. 2	:	DECISION
(KATHARINE C. WORDEN TRUST)	:	
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Year 1976.	:	

Petitioner, Katharine P. Cole Trust No. 2 (Katharine C. Worden Trust), James B. Ames, Trustee, c/o Ropes & Gray, 225 Franklin Street, Boston, Massachusetts 02110, 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 1976 (File No. 26788).

On August 25, 1981, James B. Ames, Trustee for petitioner, Katharine P. Cole Trust No. 2 (Katharine C. Worden Trust), advised the State Tax Commission, in writing, that he desired to waive a formal hearing and to submit the case to the State Tax Commission upon the entire record contained in the file. After due consideration of said record, the Commission renders the following decision.

ISSUE

Whether petitioner, Katharine P. Cole Trust No. 2 (Katharine C. Worden Trust), is a resident trust and, accordingly, subject to New York State Tax.

FINDINGS OF FACT

1. The trustee of the Katharine P. Cole Trust No. 2 (Katharine C. Worden Trust), (hereinafter, the Trust), timely filed a 1976 New York State Income Tax Fiduciary Return with minimum income tax computation schedule attached. A tax of \$1,970.00 was remitted with the return.

2. On September 18, 1978, the Audit Division issued to the Trust a Statement of Audit Changes which stated:

"Net Long Term Capital Gains are reportable to New York State at 60% rather than 50%. Accordingly, 20% of the long term capital gain deduction should be added to income.

The error in computing minimum tax has been corrected."

Accordingly, on May 3, 1979, the Tax Compliance Bureau issued a Notice of Deficiency against the Trust imposing personal income tax of \$533.43, plus interest of \$92.80 for a balance due of \$626.23.

3. On or about November 1, 1978, the trustee filed a claim for refund of personal income tax (Form IT-113X) for \$1,970.00 on the grounds that since December, 1971 the Trust corpus has been kept in Massachusetts both trustees of the Trust have been Massachusetts residents and all beneficiaries of the Trust have been Massachusetts residents. The Trust's petition protested the Notice of Deficiency on the same grounds. No protest was made on the basis of the explanation in the Statement of Audit Changes. Therefore, the only issue is whether the Trust is a resident trust.

4. On March 26, 1979, the Audit Division sustained the Statement of Audit Changes and informally denied the claim for refund on the basis that the above explanation (Finding of Fact #3, supra) is irrelevant in this case.

5. On September 21, 1925, Philip Gillett Cole created the inter vivos Trust which consisted of intangible property for the benefit of his wife, Katharine Pyle Cole. Mr. and Mrs. Cole were domiciliaries and residents of New York State. The grantor did not retain the power to revest title of the property transferred to the Trust in himself.

6. The Agreement of Trust provided that Katharine Cole (now Katharine C. Worden), daughter of Mr. and Mrs. Cole, would become the beneficiary of the Trust upon the death of Mrs. Cole.

7. Mr. Cole acted as trustee of the Trust. Upon his death, resignation, or incapacitation, William T. Hunter, Frederick Trismen and Earl A. Darr would become trustees. If the number of trustees were reduced to one, the remaining trustee would select and appoint another trustee upon the written approval of the beneficiary.

8. The Agreement of Trust provided that if the beneficiary, Katharine Cole (now Katherine C. Worden), died intestate, then the corpus of the Trust "shall vest in, belong to and be paid... to such persons as shall be her (Katharine C. Worden's) then living heirs at law... as provided by the laws of the State of New York as if she had died intestate and a resident of the State of New York, and as if all said property were real estate...". The Agreement of Trust also specified that "the successor trustee or trustees shall be entitled to receive as compensation for their services hereunder such commissions as are allowed by the laws of the State of New York to testamentary trustees acting under a will." Except for the above provisions, the Agreement of Trust did not specify that the Trust was to be administered or its terms construed under the laws of any particular jurisdiction.

9. On October 30, 1963, Dwight M. Mills, sole trustee of the Trust, appointed Douglas H. Bradley as co-trustee. Mr. Mills died on April 25, 1969 and on June 5, 1969, Mr. Bradley appointed Richard S. Ritzel as co-trustee.

10. On March 19, 1971, Katharine Pyle Mills (Cole) died, and Katharine C. Worden succeeded to the beneficial interest of the Trust. At the time she became the beneficiary of the Trust, she was living in Massachusetts.

11. On June 27, 1971, Mr. Bradley and Mr. Ritzel resigned and appointed Katharine C. Worden's husband, Frederic C. Worden, and James B. Ames, of Cambridge, Massachusetts, as successor co-trustees.

12. On September 21, 1972, Douglas H. Bradley and Mabel V. Bennett transferred securities belonging to the Trust to Mudge, Rose, Guthrie & Alexander, 20 Broad Street, New York, New York. It is not known whether these securities comprised the whole of the Trust corpus. There is no evidence in the file that the Trust corpus was transferred to Massachusetts. The perfected petition alleged that the Trust corpus has been kept in Massachusetts since December, 1971.

CONCLUSIONS OF LAW

A. That section 689(e) of the Tax Law imposes the burden of proof upon the petitioner except under three circumstances not present here. The trustees have failed to sustain the burden of proof to show when the corpus of the Trust was transferred out of New York State. As of September 21, 1972 the Trust corpus was still in New York State. (see Finding of Fact "12", supra.)

B. That the last, unnumbered paragraph in section 605(c) of the Tax Law provides that "a trust or portion of a trust is revocable if it is subject to a power, exercisable immediately or at any future time, to revest title in the person whose property constitutes such trust or portion of a trust, and a trust or portion of a trust becomes irrevocable when the possibility that such power may be exercised has been terminated." Therefore, since Phillip Gillette Cole did not retain such power at the time he created the trust, it is an irrevocable trust.

C. That section 605(c)(3)(A) of the Tax Law defines a resident trust as a trust, or portion of a trust, consisting of the property of "a person domiciled

in this state at the time such property was transferred to the trust, if such trust or portion of a trust was then irrevocable...". Since Phillip Gillett Cole was domiciled in New York State at the time he transferred property to the Trust, the Trust is a resident trust within the meaning and intent of section 605(c)(3)(A) of the Tax Law and is subject to tax under section 601(a)(1) of the Tax Law.

D. That the residence of an irrevocable inter vivos trust may not change. The residence of a trust may change only if prior to the time the trust becomes irrevocable, the domicile of the person whose property constitutes the trust, or portion thereof, is different from the domicile of such person at the time the property was transferred to the trust. This has long been the position held by the State Tax Commission and is now embodied in 20 NYCRR 148.3(b)(1), which was promulgated by the State Tax Commission on March 24, 1981. Even if the Trust was revocable at the time of its creation in 1925, no evidence was submitted to show that Mr. Cole changed his domicile at any time subsequent to the transfer of property to the Trust.

E. That Mercantile-Safe Deposit and Trust Co. v Murphy, (15 N.Y. 2d 579 [1964], affg 19 A.D. 2d 765, 242 N.Y.S. 2d 26 [1963]) is not dispositive of this matter since in that case "the trustee is domiciled in the State of Maryland, ...the trust is administered there and ...the intangibles constituting its corpus have been at all times in its exclusive possession and control in that state." (emphasis added) (15 N.Y. 2d 579, at 580.) In addition, the trust agreement in Mercantile provided that the trust "was to be construed according to, and be subject to, and the trust thereby created was to be administered according to, the laws of Maryland." (15 N.Y. 2d 579, at 580.)

F. That the petition of Katharine P. Cole Trust No. 2 (Katharine C. Worden Trust), James B. Ames, trustee, is denied. The Notice of Deficiency dated May 3, 1979 is sustained, and the claim for refund is denied.

DATED: Albany, New York

STATE TAX COMMISSION

advising Robert W. Barlow
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Doherty
COMMISSIONER