

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Warren W. & Carol S. Clute, Jr. :
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 Years :
1976 & 1977. :
_____ :

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 28th day of September, 1983, she served the within notice of Decision by certified mail upon Warren W. & Carol S. Clute, Jr., the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Warren W. & Carol S. Clute, Jr.
1212 Spyglass Lane
Naples, FL 33940

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, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

September 28, 1983

Warren W. & Carol S. Clute, Jr.
1212 Spyglass Lane
Naples, FL 33940

Dear Mr. & Mrs. Clute:

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 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
Edward B. Hoffman
Sayles, Evans, Brayton, Palmer & Tifft
One W. Church St.
Elmira, NY 14901
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
WARREN W. CLUTE, JR. and CAROL S. CLUTE	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1976 and 1977.	:	

Petitioners, Warren W. Clute, Jr. and Carol S. Clute, 1212 Spyglass Lane, Naples, Florida 33940, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1976 and 1977 (File Nos. 28000 and 28001).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, 164 Hawley Street, Binghamton, New York, on September 13, 1982 at 2:45 P.M., with all briefs to be submitted by January 1, 1983. Petitioners appeared by Sayles, Evans, Brayton, Palmer & Tifft, Esqs. (Edward B. Hoffman, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Barry Bresler, Esq., of counsel).

ISSUE

Whether, during each of the years at issue, petitioners were domiciled in New York and either maintained a permanent place of abode in New York, maintained no permanent place of abode elsewhere, or spent in the aggregate more than thirty days in New York and are thus resident individuals under section 605(a)(1) of the Tax Law.

FINDINGS OF FACT

1. Petitioner Warren W. Clute, Jr. testified that he filed New York State Income Tax resident and nonresident returns for 1976 and a nonresident return for 1977.¹

2. On May 18, 1979, the Audit Division issued two notices of deficiency. The first was issued against petitioner Warren W. Clute, Jr. in the amount of \$26,530.44, plus interest of \$4,699.13, for a total due of \$31,229.57 for the year 1976. The second notice was issued against petitioners, Warren W. Clute, Jr. and Carol S. Clute, in the amount of \$47,319.83, plus interest of \$4,359.20, for a total due of \$51,679.03 for the year 1977. Two statements of audit changes issued on January 31, 1979 explained that, since petitioner Warren W. Clute, Jr. had continued his business activities in New York in 1976 and 1977 and had continued to maintain a permanent place of abode in New York during 1976 and 1977, he was deemed a resident for tax year 1976 and he and his wife were deemed residents for 1977.

3. Prior to 1976, petitioner Warren W. Clute, Jr. had always been a New York resident and domiciliary. Mr. Clute was chairman of the board of the Watkins Salt Company, located in Watkins Glen, New York. Watkins Salt had been owned by the Clute family since 1898. He was also chairman of the board of the Glen National Bank & Trust Company and was a director of Security New York Corporation which merged with Glen National Bank in 1976. Mr. Clute was a director of two corporations located outside New York, Columbia Gas System, headquartered in Wilmington, Delaware, and Columbia Gas of New York, headquartered in Columbus, Ohio.

¹ None of petitioners' tax returns were submitted into evidence either by petitioners or the Audit Division.

4. During the years in issue and prior thereto, petitioner Warren W. Clute, Jr. owned property in Watkins Glen known as Rose Hill Farm, which had been his residence. He also owned a day cottage and boathouse located at Seneca Lake in New York. In 1974, in anticipation of a possible move to Florida, Mr. Clute purchased a condominium in Naples, Florida and began negotiations for sale of the Watkins Salt Company. Throughout 1976, Mr. Clute negotiated with the Cargill Company for the sale of the Watkins Salt Company. The sale was completed on December 28, 1976. Mr. Clute stayed on at Watkins Salt for a short time in an advisory capacity.

5. Mr. Clute married his current wife, Carol, in January, 1976. Mrs. Clute was a Florida resident at the time of the marriage and there is no evidence to indicate that at any time during the years in issue she changed her residence or domicile to New York. After the marriage, petitioners moved into the Naples, Florida condominium. Most of the furnishings in the condominium were Mrs. Clute's, with a few items brought from New York by Mr. Clute. On March 18, 1977, Mr. Clute sold the first condominium and bought another one, also located in Naples, Florida. Petitioners then moved into the second condominium.

6. On December 8, 1976, petitioner Warren W. Clute, Jr. filed a Declaration of Domicile and Citizenship indicating that he had changed his domicile and become a resident of Naples, Collier County, Florida, as of October 14, 1976. On the same date Mr. Clute executed a codicil to his will indicating that he had become a Florida resident on October 14, 1976. Petitioners had two automobiles registered in Florida, one in Mr. Clute's name and one in Mrs. Clute's name. On February 10, 1977, Mr. Clute registered to vote in Collier County, Florida. Prior to said date, he had been registered to vote in New York State.

During 1976, Mr. Clute resigned his membership in several New York social clubs and became a member of several clubs in Florida.

7. Throughout both of the years in issue, Mr. Clute retained ownership of his New York residence at Rose Hill Farm. He also retained his directorships on the boards of Glen National Bank and Security New York Corporation, as well as the boards of the two out-of-state corporations. Mr. Clute's work for the two New York banks involved numerous visits to New York, some of which were of relatively long duration. During 1977, alone, Mr. Clute spent 180 days in New York. During his stays in New York, Mr. Clute lived at Rose Hill Farm. Both petitioners spent summer vacation time at Rose Hill Farm. During 1977, Mr. Clute's son and daughter-in-law lived at Rose Hill Farm. However, no title to the property passed to the son at that time and Mr. Clute paid all property taxes and utility bills. Late in 1977, Mr. Clute's son and his wife moved out of Rose Hill Farm. Subsequent to 1977, Mr. Clute transferred title to the property to all four of his children.

CONCLUSIONS OF LAW

A. That 20 NYCRR 102.2(d)(2) provides 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. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time."

B. That the burden of proof is upon the petitioner to show that the necessary intention to effect a change in domicile existed (Tax Law §689(e); 20 NYCRR 102.2(d)(2)). "The test of intent with respect to a purported new domicile has been stated as 'whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it' (citation omitted). The evidence to establish the required intention

to effect a change in domicile must be clear and convincing" (Bodfish v. Gallman, 50 A.D.2d 457).

C. That "to change one's domicile requires an intent to give up the old and take up the new, coupled with an actual acquisition of a residence in the new locality" (Bodfish, supra). The fact that a person leaves his established domicile with the intention of never returning is important but not necessarily conclusive, and such domicile continues until a new one is clearly established. "In determining an individual's intention in this regard, 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)).

D. That inasmuch as petitioner Carol Clute was a resident of Florida prior to the years in issue and no evidence was produced indicating that she changed this status during the taxable year 1977, she cannot be considered a resident or domiciliary of New York State for said year.

E. That the facts that petitioner Warren W. Clute, Jr. registered to vote, filed a Declaration of Domicile and Citizenship, joined clubs, and changed his will in Florida, while indicative of an intent to change domicile, are not conclusive (see Zinn v. Tully, 54 N.Y.2d 713, rev'g 77 A.D.2d 725). Mr. Clute continued to maintain his house and furniture at Rose Hill Farm long after he bought the Florida condominium. He lived in New York for extensive periods during 1976 and 1977 and worked at the same New York corporations as before the move. While in New York, petitioner lived at Rose Hill Farm as he had prior to 1976 and he did not transfer the residence until after 1977. Such conduct does not clearly demonstrate an intention to give up the old and take up a new domicile and petitioner Warren W. Clute, Jr. has not met his burden of

proof with respect to a change in domicile. He was, therefore, domiciled in New York for the years 1976 and 1977.

F. That section 605(a)(1) of the Tax Law defines a resident individual as one "who is domiciled in this state, unless 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." Since petitioner Warren W. Clute, Jr. was domiciled in New York and maintained a home in Watkins Glen, New York and spent more than thirty days in New York during 1976 and 1977, he was a resident of New York in 1976 and 1977 and subject to tax as such.

G. That the petition of Warren W. Clute, Jr. and Carol S. Clute is granted to the extent indicated in Conclusion of Law "D"; that the Audit Division is directed to modify the Notice of Deficiency issued May 18, 1979; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 28 1983

Roderick W. Clu
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Smith
COMMISSIONER