

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
David H. & Miriam N. Rush :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of New York State Personal Income Tax under Article :
22 of the Tax Law for the Year 1975 and New York :
State and New York City Personal Income Taxes under :
Articles 22 and 30 of the Tax Law for the Year :
1976. :

State of New York
County of Albany

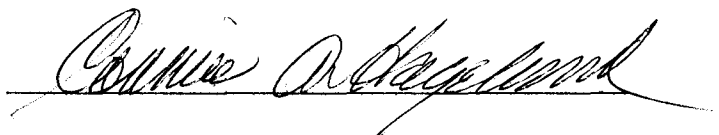
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon David H. & Miriam N. Rush, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David H. & Miriam N. Rush
4804 Banyon Lane
Tamarac, Fl 33319

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

In the Matter of the Petition :
of :
David H. & Miriam N. Rush :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of New York State Personal Income Tax under :
Article 22 of the Tax Law for the Year 1975 and :
New York State and New York City Personal Income :
Taxes under Articles 22 and 30 of the Tax Law for :
the Year 1976. :

State of New York
County of Albany

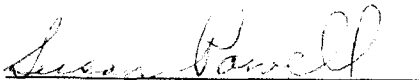
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon Aaron Baer the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Aaron Baer
Baer & Baer
147 S. Franklin Ave.
Valley Stream, L.I., NY 11580

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
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

David H. & Miriam N. Rush
4804 Banyon Lane
Tamarac, Fl 33319

Dear Mr. & Mrs. Rush:

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 & 1312 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
Aaron Baer
Baer & Baer
147 S. Franklin Ave.
Valley Stream, L.I., NY 11580
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
DAVID H. RUSH AND MIRIAM N. RUSH	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law for the Year	:	
1975 and New York State and New York City	:	
Personal Income Taxes under Articles 22 and 30	:	
of the Tax Law for the Year 1976.	:	

Petitioners, David H. Rush and Miriam N. Rush, 4804 Banyon Lane, Tamarac, Florida 33313, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 1975 and New York State and New York City personal income taxes under Articles 22 and 30 of the Tax Law for the year 1976 (File Nos. 27468, 27607, 30534 and 30930).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 10, 1982 at 2:00 P.M. Petitioner appeared by Aaron Baer, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether petitioners were domiciled in and residents of New York State in 1975 and New York State and New York City in 1976.

FINDINGS OF FACT

1. On August 14, 1978, the Audit Division issued a Statement of Audit Changes against petitioners for the year 1975 wherein tax liability was recomputed

based upon the following grounds: "As you filed as a full year resident of New York State, all income received by a resident of New York State is taxable to New York State to the same extent as for Federal tax purposes regardless of its source". Accordingly, on April 13, 1979, notices of deficiency were issued against David H. Rush in the amount of \$1,593.44 plus penalty and/or interest of \$404.84 for a total of \$1,998.28 and against Miriam N. Rush in the amount of \$510.33 plus penalty and/or interest of \$129.65 for a total of \$639.98. The notices allowed no credit for tax previously paid as all tax withheld was refunded prior to the issuance of the notices.

2. On November 16, 1977, the Audit Division issued a Statement of Audit Changes against petitioners for the year 1976, wherein petitioners' tax liability was recomputed, since they were considered to be residents of New York State and New York City and their income from all sources was thus found to be taxable. Accordingly, on January 4, 1980 a Notice of Deficiency was issued against David H. Rush in the amount of \$3,214.23 plus penalty and/or interest of \$743.14 for a total of \$3,957.37 and on April 11, 1980, a Notice of Deficiency was issued against Miriam N. Rush in the amount of \$65.65 plus penalty and/or interest of \$16.71 for a total of \$82.36. The Notice of Deficiency issued to Miriam N. Rush allowed credit for New York State and New York City tax withheld totaling \$705.99.

3. In 1975 and 1976, petitioners filed separate New York State Resident Returns on combined forms. Listed thereon was a New York address, Belle Harbor, New York. Their Federal return likewise listed the same address. Only a part of the income of David H. Rush was included. Petitioners claimed that David H. Rush was a Florida resident. He purchased a home there in March 1973. In 1974 his employer relocated there. His wife remained in their New York home

and would travel to Florida "for family life on a regular but limited basis since her mother aged, ailing, sick with a wasting disease resided with her in her New York home together with her children". Mr. Rush had bank accounts in Florida, had a car registered there, joined the local Chamber of Commerce, was active on the local United Way and Easter Seal campaigns and had been a member of a country club there since 1974. Petitioners sold their New York State home subsequent to the death of Miriam N. Rush's mother in 1976.

4. In filing their 1975 and 1976 New York State income tax returns Mrs. Rush claimed \$10,659.00 and \$15,574.00 in itemized deductions respectively for each year and \$1,950.00 and \$650.00 in exemptions respectively for each year. As a result of these computations Mrs. Rush owed no New York State tax for 1975 and no New York State or City taxes for 1976. In recomputing petitioner's tax liability for each year the Audit Division deducted from Mr. Rush's income all of the New York itemized deductions for each year and all of the exemptions except one, since this produced a less tax liability.

CONCLUSIONS OF LAW

A. That Articles 22 and 30 of the Tax Law impose a tax, inter alia, upon all New York State and New York City resident individuals as defined in sections 605(a) and 1305 of the Tax Law.

B. That any person domiciled in New York State and the City of New York is a resident for income tax purposes for a specific taxable year, unless for that year he satisfies all three of the following requirements: (1) he maintains no permanent place of abode in this State/City during such year, (2) he maintains a permanent place of abode elsewhere during the entire year, and (3) he spends in the aggregate not more than 30 days of the taxable year in this State/City. [Section 1305 of the Tax Law and 20 NYCRR 102.2(b)]

C. That to change one's domicile there must be an intent to make the new location a fixed and permanent home, coupled with an actual acquisition of a residence in the new locality, and the evidence to establish the required intention to effect a change in domicile must be clear and convincing. Klein v. State Tax Comm., 55 A.D.2d 982, 390 N.Y.S. 686 (3rd Dept. 1977), aff'd, 43 N.Y.2d 812, 402 N.Y.S.2d 396 (1977); Bodfish v. Gallman, 50 A.D.2d 457, 378 N.Y.S.2d 138 (3rd Dept. 1976). Domicile, whether of origin or selection, continues in existence until another is acquired and the burden of proof rests upon the party who alleges a change. Bodfish v. Gallman, supra.

D. That petitioner David H. Rush was not a domiciliary of New York State for the year 1975 and New York State and New York City for 1976. Mr. Rush, has shown by clear and convincing proof that he changed domicile to Florida.

E. That a wife's domicile usually follows that of her husband, but if they are separated in fact she may under some circumstances acquire her own separate domicile, even though there be no judgement or decree of separation [20 NYCRR 102.2(d)(5)]. In the case of a person domiciled in New York, the maintenance of a permanent place of abode in this state is alone sufficient to make the person a resident for tax purposes, even though the person remains outside the state for the entire year [20 NYCRR 102.2(e)].

F. That since petitioner Miriam N. Rush has failed to show that she was not a domiciliary of New York State during 1975 and New York State and New York City during 1976 and since she did maintain a permanent abode in the State and City, she was a resident individual in accordance with the meaning and intent of sections 605(a)(1) and 1305(a)(1) of the Tax Law and 20 NYCRR 102.2(b).

G. That the computation as reported by Miriam N. Rush which results in no tax due for 1975 and 1976 is correct as originally computed. Accordingly, the

Audit Division is directed to authorize a refund of the New York State and New York City taxes withheld from her wages for 1976.

H. That the petition of David H. Rush and Miriam N. Rush is granted to the extent provided herein and the notices of deficiency issued April 13, 1979, January 4, 1980 and April 11, 1980 are cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 28 1983

Rodriguez Cln
PRESIDENT

Francis R Koenig
COMMISSIONER

Mark J. Juehl
COMMISSIONER