

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Estate of Meyer J. Butensky :
Gertrude Bender, Co-Executrix & Nancy Butensky : AFFIDAVIT OF MAILING
:
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Years 1971 through 1974. :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 6th day of July, 1984, he served the within notice of Decision by certified mail upon Estate of Meyer J. Butensky, Gertrude Bender, Co-Executrix & Nancy Butensky, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Estate of Meyer J. Butensky
Gertrude Bender, Co-Executrix & Nancy Butensky
19 Rector Street
New York, NY

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
6th day of July, 1984.

David Parchuck

James J. Haggard
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Estate of Meyer J. Butensky :
Gertrude Bender, Co-Executrix & Nancy Butensky : AFFIDAVIT OF MAILING
:
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the :
Tax Law for the Years 1971 through 1974. :

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 6th day of July, 1984, he served the within notice of Decision by certified mail upon James A. Math, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James A. Math
Carlino & Scharf, P.C.
114 Old Country Rd.
Mineola, NY 11501

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
6th day of July, 1984.

David Parchuck

James A. Math
Authorized to administer oaths
pursuant to Tax Law section 174

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

July 6, 1984

Estate of Meyer J. Butensky
Gertrude Bender, Co-Executrix & Nancy Butensky
19 Rector Street
New York, NY

Ms. Bender & Ms. Butensky:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
James A. Math
Carlino & Scharf, P.C.
114 Old Country Rd.
Mineola, NY 11501
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ESTATE OF MEYER BUTENSKY, GERTRUDE	:	DECISION
BENDER, CO-EXECUTRIX AND NANCY BUTENSKY	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1971 through 1974.	:	

Petitioners, Estate of Meyer Butensky, Gertrude Bender, Co-Executrix and Nancy Butensky, 19 Rector Street, New York, New York, 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 1971 through 1974 (File No. 22259).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 28, 1983 at 1:15 P.M. Petitioners appeared by Carlino & Scharf, P.C. (James A. Math, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether Meyer Butensky and Nancy Butensky were domiciled in New York State 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 30 days in New York, and were thus resident individuals under section 605(a)(1) of the Tax Law.

FINDINGS OF FACT

1. Meyer Butensky and Nancy Butensky, his wife, filed joint New York State income tax nonresident returns for the years 1971 through 1974. On the

returns for the years 1971 through 1973, they allocated Mr. Butensky's wage and salary income from Branch Motor Express Co. ("Branch") on the basis of the number of days worked in New York. Mr. and Mrs. Butensky did not report any income as subject to New York State tax during 1974. The wage and tax statements attached to Mr. and Mrs. Butensky's New York income tax returns establish that Branch was located in New York City.

2. On March 27, 1978, the Audit Division issued a Notice of Deficiency, accompanied by an explanatory Statement of Audit Changes, to petitioners, Estate of Meyer J. Butensky, Gertrude Bender as Co-Executrix and Nancy Butensky, asserting a deficiency of personal income tax for the years 1971 through 1974. The total deficiency of tax asserted was \$26,233.22, plus interest of \$8,212.83, for a total of \$34,446.05. The Statement of Audit Changes explained that since petitioners had not replied to previous correspondence, they were considered domiciled in New York State during the years in issue.

3. During the years in issue, Mr. Butensky was the president and chairman of the board of Branch Industries Incorporated. Branch Industries Incorporated was a holding company which owned Branch. From 1971 until Labor Day 1973, Mr. Butensky's activities for Branch were limited to signing some checks, discussing corporate affairs and advising corporate officers. After Labor Day, 1973, Mr. Butensky's activities for Branch were limited to advising and discussing corporate affairs with other officers of the corporation.

4. In 1971, Mr. and Mrs. Butensky lived in a co-operative apartment on Sutton Place in New York City. The apartment was beneficially owned by Branch. However, to avoid the apartment building's prohibition against corporate

ownership, it was held in the name of Mr. and Mrs. Butensky.¹ Branch paid for and owned the furnishings in this apartment. There was a telephone in the apartment which was listed in the name of Mr. and Mrs. Butensky.

5. During 1971 and 1972, Mr. and Mrs. Butensky would leave the apartment in the middle of October to reside in Miami Beach. Depending upon the weather, they would return sometime during May.

6. During the years in issue, Mr. Butensky suffered from emphysema. In 1973, Mr. Butensky was advised by his nephew, who was a physician, as well as another physician in Miami Beach, that because of his poor health he should move permanently to Miami Beach. On or about Labor Day, 1973, Mr. and Mrs. Butensky left New York City for Miami Beach. Mr. Butensky never returned to New York during the remaining years in issue. Mrs. Butensky returned once for a period of two or three days.

7. In December, 1973, the New York apartment in which Mr. and Mrs. Butensky lived was sold.

8. Mr. and Mrs. Butensky leased an attractive three bedroom apartment in Miami Beach during the entire period in issue.

9. Mr. Butensky maintained bank accounts in New York City and Miami Beach. It was Mr. Butensky's practice to transfer funds from the New York City bank to the bank in Miami Beach as funds were needed.

10. Mr. Butensky had a New York driver's license during the years in issue.

11. Mr. and Mrs. Butensky voted in Florida during the years 1971 through 1974.

¹ The details of the arrangement between Branch and Mr. and Mrs. Butensky regarding the use and ownership of the co-operative apartment is not disclosed by the record.

12. Mr. and Mrs. Butensky were not members of any New York social clubs during the years in issue, except for the Jewish Community Center in Brooklyn, New York, which Mr. Butensky had joined in 1923. They were active in social organizations associated with their apartment building in Miami Beach.

13. Mr. Butensky executed a will in 1959 in New York State as a resident of New York. In August, 1973, he executed a new will which listed his address as Miami Beach. Three witnesses listed their addresses in New York State.

14. Mr. Butensky died in late April, 1975 in Miami Beach and was buried in Farmingdale, New York.

15. In a previous decision, the State Tax Commission held that Mr. and Mrs. Butensky were domiciled in New York State and were ineligible to allocate their income as nonresidents during the years 1968 through 1970.

16. At the hearing, petitioners' representative argued that petitioners were taxable as nonresidents for the years 1973 and 1974.

CONCLUSIONS OF LAW

A. That Meyer and Nancy Butensky were domiciliaries of New York State prior to the years 1971 and 1972. Once domicile is established, it will continue "...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)]. The burden of proof is upon the person asserting a change in domicile to establish the presence of the necessary intention [20 NYCRR 102.2(d)(2)]. In view of the fact that Mr. and Mrs. Butensky continued to maintain a fixed and permanent home in New York during 1971 and 1972 and Mr. Butensky remained an officer of a New York corporation during 1971 and 1972, Mr. and Mrs. Butensky remained domiciliaries of New York during these years.

B. That during the periods in issue, section 605(a)(1) of the Tax Law provided:

"§605. Resident and nonresident defined.

(a) Resident individual. A resident individual means an individual:

(1) 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."

C. That in view of the fact that Mr. and Mrs. Butensky maintained a permanent place of abode in New York and the fact that they spent more than thirty days in New York during both 1971 and 1972, they did not satisfy the provisions of section 605(a)(1) of the Tax Law, which would permit them to be taxed as nonresidents of New York State. Accordingly, the Audit Division properly concluded that there was a deficiency of personal income tax for the years 1971 and 1972.

D. That considering the fact that when Mr. Butensky left New York on Labor Day, 1973 (September 3, 1973) he did not intend to return, it is found that Mr. Butensky changed his domicile to Florida on that date. The domicile of Mrs. Butensky also changed to Florida on this date.

E. That section 654(a) of the Tax Law provides that if an individual changes his resident status during the taxable year, he must file one return for the resident period and one return for the nonresident period. Section 654(b) of the Tax Law further provides that New York taxable income for the resident period is determined as if the taxable year for Federal income tax purposes were limited to the resident period. The New York taxable income for the nonresident period is determined as if the taxable year for Federal income tax purposes were limited to the nonresident period.

F. That since Mr. and Mrs. Butensky were domiciliaries of New York and maintained a permanent place of abode in New York from January 1, 1973 until September 3, 1973, they were taxable as residents of New York during that period (Tax Law §§605(a)(1); 654).

G. That during the years at issue Tax Law section 605(a)(2) provided that a resident individual is an individual:

"who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in the armed forces of the United States during an induction period."

H. That Mr. and Mrs. Butensky were not taxable as residents of New York from September 4, 1973 through December 31, 1973, since they did not spend the requisite number of days in New York [Tax Law §605(a)(2)]. Similarly, petitioners were not taxable as residents of New York in 1974 since they neither maintained a permanent place of abode in New York nor spent the requisite number of days in New York during 1974 [Tax Law §605(a)(2)]. Accordingly, petitioners are taxable as nonresidents of New York State from September 4, 1973 to the end of 1974. Petitioners had no New York source income during the nonresident periods and, therefore, no income tax is due during said periods (20 NYCRR 131.2, 131.4(b); see also Matter of Gleason v. State Tax Comm., 76 A.D.2d 1035).

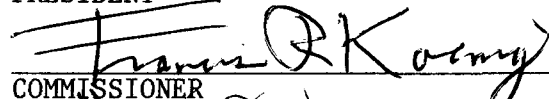
I. That the petition is granted to the extent of Conclusion of Law "H" and the Audit Division is directed to modify the Notice of Deficiency accordingly; the Notice of Deficiency is in all other respects sustained.

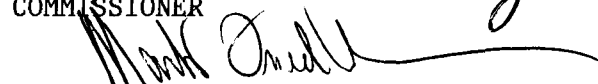
DATED: Albany, New York

JUL 06 1984

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER