

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Harry J. & Barbara A. Clarke :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of New York State and New York City Personal Income :
Tax under Article 22 of the Tax Law and Chapter :
46, Title T of the Administrative Code of the City :
of New York for the Year 1977. :

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 31st day of July, 1984, he served the within notice of Decision by certified mail upon Harry J. & Barbara A. Clarke, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harry J. & Barbara A. Clarke
127 Cedar St.
Cliffside Park, NJ 07010

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
31st day of July, 1984.

David Parchuck

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

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

July 31, 1984

Harry J. & Barbara A. Clarke
127 Cedar St.
Cliffside Park, NJ 07010

Dear Mr. & Mrs. Clarke:

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 and Chapter 46, Title T of the Administrative Code of the City of New York, 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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
HARRY J. CLARKE AND BARBARA A. CLARKE	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Personal Income Tax under Article 22 of the	:	
Tax Law and Chapter 46, Title T of the	:	
Administrative Code of the City of New York	:	
for the Year 1977.	:	

Petitioners, Harry J. Clarke and Barbara A. Clarke, 127 Cedar Street, Cliffside Park, New Jersey 07010, 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 and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the year 1977 (File No. 34377).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 7, 1983 at 9:15 A.M. Petitioner Harry J. Clarke appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether, for the year 1977, petitioner Harry J. Clarke was domiciled in New York State and New York City 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 was thus a resident individual under Tax Law section 605(a)(1) and section T46-105.0(a)(1) of the Administrative Code of the City of New York.

II. Whether petitioners are liable for penalties for failure to file returns on time and failure to pay the taxes when due.

FINDINGS OF FACT

1. Petitioners herein, Harry J. Clarke and Barbara A. Clarke, did not file a New York State or New York City income tax return for the year 1977.

2. The Audit Division received information from the Internal Revenue Service which indicated that petitioners filed a 1977 Federal income tax return reporting Federal adjusted gross income of \$23,492.00. The address shown on petitioners' 1977 Federal income tax return was 2263 East 27th Street, Brooklyn, New York.

3. On December 11, 1980, the Audit Division issued a Notice of Deficiency to petitioners for the year 1977, asserting that \$1,713.56 of New York State and New York City personal income tax was due, together with penalty¹ and interest of \$1,086.28, for a total alleged due of \$2,799.84.

The aforementioned Notice of Deficiency was premised on an explanatory Statement of Audit Changes dated September 2, 1980. On said Statement of Audit Changes, the Audit Division held that petitioners' New York State and New York City total incomes were identical to reported Federal adjusted gross income (\$23,492.00).

4. Sometime in 1976 petitioners separated due to marital difficulties. Petitioner Harry J. Clarke vacated the family abode located at 2263 East 27th Street, Brooklyn, New York, and moved into a house located in Flanders, New Jersey, which was owned and occupied by his brother and his family. For all of 1977 and part of 1978, petitioner Harry J. Clarke resided with his brother and

¹ Penalties were asserted for failure to file a return [Article 22, §685(a)(1) and Chapter 46, Title T §T46-185.0(a)(1)] and for failure to pay the tax required to be shown on the return [Article 22, §685(a)(2) and Chapter 46, Title T §T46-185.0(a)(2)].

his family in Flanders, New Jersey. No rental payments were made by Mr. Clarke to his brother. Sometime in 1978, petitioner Harry J. Clarke leased an apartment in his own name located in Cliffside Park, New Jersey.

5. During the year at issue, petitioners were not separated pursuant to a formal written agreement; however, Mr. Clarke did make regular payments to his wife for her support and for the support of their two children. Subsequent to the year at issue divorce proceedings were instituted and a final decree of divorce is now pending.

6. On November 9, 1977, petitioner Harry J. Clarke purchased a used automobile from a dealer located in the State of New Jersey. The vehicle was registered with the New Jersey Division of Motor Vehicles on November 23, 1977. Mr. Clarke's preceding automobile, sold just prior to the automobile purchased on November 9, 1977, was registered with the State of New York. Mr. Clarke obtained a New Jersey driver's license on November 21, 1977.

7. During the year 1977, petitioner Harry J. Clarke received wage income from Wooster Express, Inc. (hereafter "Wooster") and Hemingway Transport, Inc. (hereafter "Hemingway"). Mr. Clarke was the manager of a terminal located in Jersey City, New Jersey for both of the aforementioned firms and all of his services for said firms were performed in New Jersey. Both Wooster and Hemingway issued wage and tax statements to petitioner Harry J. Clarke listing his address as 2263 East 27th Street, Brooklyn, New York. New Jersey tax was withheld from the wages paid to petitioner by Wooster and Hemingway. Harry J. Clarke did not file an income tax return with the State of New Jersey for the year 1977.

8. For the year 1977, petitioner Barbara A. Clarke received \$1,741.42 in wage income from the City of New York. New York State tax of \$44.43 and New

York City tax of \$20.44 was withheld from said wage income. The Notice of Deficiency issued to petitioners for the year 1977 did not give petitioners credit for the aforementioned New York State and City tax withheld from wages.

9. Petitioner Harry J. Clarke personally prepared the 1977 U.S. Individual Income Tax Return filed with the Internal Revenue Service. Said return was filed on a joint basis and the address shown on the return was 2263 East 27th Street, Brooklyn, New York.

10. At the hearing held herein, it was conceded by petitioners that Barbara A. Clarke was a domiciliary of New York State and New York City for the year 1977 and that she was taxable as a resident individual. Petitioners maintain that Harry J. Clarke was not a domiciliary or resident of New York State and New York City at any time during the year in question. No New York State or New York City income tax returns were filed by petitioners for the year 1977 since they believed that Harry J. Clarke was a nonresident of New York who earned no income from State or City sources and, therefore, no returns were required to be filed. Individually, petitioner Barbara A. Clarke did not earn sufficient income to require the filing of returns unless she desired a refund of the State and City tax withheld from her wages. Petitioners' 1977 Federal income tax return was timely filed and their New York State and City income tax returns for years prior to their separation have been filed in a timely fashion.

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 petitioners to show that the necessary intention to effect a change in domicile existed [Tax Law, §689(e); Title T, §T46-189.0(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 petitioners have not met their burden of proof to show that Harry J. Clarke had changed his domicile to New Jersey prior to the year 1977. The limited evidence submitted by petitioners did not clearly demonstrate that Harry J. Clarke had a bona fide intention of establishing a fixed and permanent home in New Jersey either prior to or during the year 1977. Petitioner Harry J. Clarke was, therefore, domiciled in New York State and New York City for the year 1977.

D. That section 605(a)(1) of the Tax Law and section T46-105.0(a)(1) of the Administrative Code of the City of New York both define a resident individual as one who is domiciled in the State or City unless he satisfies all three of the following conditions:

1. maintains no permanent place of abode in the State or City,
2. maintains a permanent place of abode elsewhere, and,
3. spends not more than 30 days in the State or City during the taxable year.

That there is no evidence in the record to support that petitioner Harry J. Clarke satisfied the three conditions specified in section 605(a)(1) of the Tax Law or section T46-105.0(a)(1) of the Administrative Code of the City of

New York. Accordingly, petitioner Harry J. Clarke is taxable as a resident individual for New York State and New York City income tax purposes for the year 1977.

E. That pursuant to Finding of Fact "8", supra, petitioners are entitled to credit for the New York State and New York City tax withheld from the wages paid to petitioner Barbara A. Clarke. Accordingly, the deficiency in New York State tax is reduced by \$44.43 and the New York City deficiency in tax is reduced by \$20.44.

F. That petitioners have established that reasonable cause existed for their failure to file New York State and New York City income tax returns for the year 1977. Accordingly, the penalties assessed for failure to file returns and failure to pay the taxes when due are cancelled.


G. That the petition of Harry J. Clarke and Barbara A. Clarke is granted to the extent indicated in Conclusions of Law "E" and "F", supra; that the Audit Division is directed to recompute the Notice of Deficiency dated December 11, 1980 consistent with the decision rendered herein; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER