

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ANTHONY LOFRISCO AND ELEANOR LOFRISCO

DECISION

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 Nonresident Earnings Tax under Chapter 46, :
Title U **of** the Administrative Code of the City
of New York for the Year 1980.

Petitioners, Anthony LoFrisco and Eleanor LoFrisco, 34 Indian Hill Road, Wilton, Connecticut 06897, 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 nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the year 1980 (File No. 57680).

A hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 11, 1987 at 9:15 A.M. Petitioner Anthony LoFrisco appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUES

I. Whether petitioner is properly entitled to allocate a portion of his salary income to sources without the State and City of New York.

11. Whether the deficiency at issue was violative of the United States Constitution.

FINDINGS OF FACT

1. On October 20, 1981, Anthony LoFrisco (hereinafter "petitioner") and his wife, Eleanor LoFrisco, filed a joint New York State Income Tax Nonresident Return (with City of New York Nonresident Earnings Tax) for the year 1980 whereon petitioner allocated his salary income of \$156,252.00 to sources within and without New York. Said salary income, which was derived from Lovejoy, Wasson, Lundgren & Ashton Professional, a New York professional service corporation of which petitioner was a shareholder, was allocated to New York State on Schedule A-1 as follows:

$$\begin{array}{rcl} \text{Days worked in New York State} & \frac{155}{237} & \\ \text{Total days worked in year} & & \end{array} \times \$156,252.00 = \$102,189.00$$

allocated to New York

Petitioner used the same allocation on his New York City nonresident earnings tax return. Additionally, petitioner failed to make the necessary modifications pursuant to Tax Law § 612(b)(8), (9) of the Tax Law.

2. On March 19, 1984, the Audit Division issued a Statement of Audit Changes to petitioner and his wife wherein certain adjustments were made which were explained on said statement as follows:

"Since you have not replied to either of our letters dated September 16, 1983 and December 20, 1983 we are disallowing all figures in Schedule A-1.

The modifications required to be made by a shareholder of a professional corporation in determining New York Adjusted Gross Income, pursuant to Section 612(b)(7), (8) and (9) of the New York Tax Law were omitted or incorrect.

Section 612(b)(8) of the New York State Tax Law requires a shareholder of a professional corporation to add to his Federal Adjusted Gross Income the amount of taxes paid by the corporation for old age, survivors and disability insurance on FICA wages for the calendar year of the shareholder. This does not include payment for Hospital (Medicare) Insurance.

Section 612(b)(9) of the New York Tax Law requires a shareholder of a professional corporation to add to his Federal Adjusted Gross Income the amount paid by the corporation on behalf of the shareholder employee for the purchase of life, accident or health insurance, except for amounts attributable to the purchase of insurance to reimburse the shareholder for medical expenses incurred.

The modification pursuant to Section 612(b)(7), (8) and (9) *is* included in the computation of personal service income for maximum tax.

The professional corporation modification under Section 612(b)(7), (8) and (9) of the Tax Law *is* adjusted to conform with information return IT-2102.1 P.C. submitted."

3. The Statement of Audit Changes recomputed total New York income as follows:

	<u>FEDERAL</u>	<u>COLUMN A</u>
"Total Income	\$160,894.00	\$158,291.00
Adjustment	<u>(483.00)</u>	<u>(483.00)</u>
Total New York Income	\$160,411.00	\$157,808.00"

The above subtraction adjustment of \$483.00 was determined by combining petitioner's reported subtraction modification of \$2,039.00, for refunds of state and local income taxes, with the section 612(b)(8), (9) addition modifications totalling \$1,556.00. Said amount was reported on the IT-2101.1 PC filed by the professional service corporation.

4. On October 4, 1984, the Audit Division issued a Notice of Deficiency against petitioner and his wife asserting additional New York State personal income tax and additional New York City nonresident earnings tax totalling \$5,189.96, plus interest of \$2,217.93, for a total due of \$7,407.89.

5. Petitioner conceded the adjustment made with respect to the section 612(b)(8), (9) modifications.

6. Petitioner alleged in his petition that:

"As a non-resident of New York State, it **is** violative of the United States constitution for New York State to impose a tax deficiency against Anthony F. LoFrisco with respect to the 82 days which were working days outside New York State."

7. Petitioner **is** an attorney. During 1980, petitioner's principal duties were as a litigator. He was also responsible for overseeing the work done by the firm for his clients.

8. Petitioner did not keep a record of the days he worked within and without New York during 1980. He estimated that he spent, on the average, a portion of one day per week working at his Connecticut residence. He further estimated that, other than the partial days worked at his residence, he worked a minimum of three days per month working without New York.

CONCLUSIONS OF LAW

A. That 20 NYCRR former 131.16 provides, in pertinent part, that:

"If a nonresident employee...performs services for his employer both within and without the State, his income derived from New York sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within the State bears to the total number of working days employed both within and without the State. The items of gain, loss and deduction...of the employee attributable to his employment, derived from or connected with New York sources, are similarly determined. However, any allowance claimed for days worked outside **of** the State must be based upon the performance **of** services which of necessity -- as distinguished from convenience -- obligate the employee to out-of-state duties in the service of his employer."

B. That petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of the Tax Law and section U46-39.0(e) of the Administrative Code of the City of New York, to show the number of days he worked without New York State, based on the corporation's necessity during 1980.


C. That the constitutionality of the Tax Law **is** presumed at the administrative level of the State Tax Commission.


D. That the petition of Anthony LoFrisco and Eleanor LoFrisco is denied and the Notice of Deficiency issued October 4, 1984 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 25 1987


PRESIDENT


COMMISSIONER


COMMISSIONER