

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

HUGH L. CAREY

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or  
a Revision of a Determination or a Refund  
of Personal Income  
Taxes under Article(s) 22 of the  
Tax Law for the Year(s) or Period(s)  
1975 and 1976

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that  
he is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 8th day of June, 1979, he served the within  
Notice of Decision by (certified) mail upon Hugh L. Carey

~~XXXXXXXXXXXXXXXXXXXX~~ the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

as follows: Hugh L. Carey  
Executive Mansion  
138 Eagle Street  
Albany, New York 12202

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 ~~XXXXXXXXXXXXXXXXXXXX~~  
~~XXXXXX~~ petitioner herein and that the address set forth on said wrapper is the  
last known address of the ~~XXXXXXXXXXXXXXXXXXXX~~ petitioner.

Sworn to before me this

8th day of June, 1979.

Marilyn J. Papaneau

Jay J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

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of

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For a Redetermination of a Deficiency or :  
a Revision of a Determination or a Refund :  
of Personal Income :  
Taxes under Article(s) 22 of the :  
Tax Law for the Year(s) or Period(s) :  
1975 and 1976

State of New York  
County of Albany

Jay Vredenburg , being duly sworn, deposes and says that  
she is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 8th day of June , 1979 , she served the within  
Notice of Decision by (certified) mail upon Harold L.  
Fisher (representative of) the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Harold L. Fisher  
188 Montague St.  
Brooklyn, New York 11201

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

8th day of June , 1979.

Marilyn J. Papineau

Jay J. Vredenburg



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

JAMES H. TULLY JR., PRESIDENT  
MILTON KOERNER  
THOMAS H. LYNCH

June 8, 1979

Hugh L. Carey  
Executive Mansion  
138 Eagle Street  
Albany, New York 12202

Dear Mr. Carey:

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 Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within **four 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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

Michael Alexander  
Supervising Tax  
Hearing Officer

cc: Petitioner's Representative  
**Harold L. Fisher, 188 Montague St., Brooklyn, New York 11201**  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
HUGH L. CAREY : DECISION :  
for Redetermination of a Deficiency or :  
for Refund of Personal Income Tax under :  
Article 22 of the Tax Law for the :  
Years 1975 and 1976. :

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Petitioner, Hugh L. Carey, Executive Mansion, 138 Eagle Street, Albany, New York 12202, executed, under protest, and filed with the New York State Department of Taxation and Finance, a Consent To Findings on June 29, 1978 and reserved, in writing, all of his rights with respect thereto. On or about January 10, 1979, said petitioner was advised that the Consent To Findings, as executed, was accepted as a perfected petition in accordance with Section 601.5 of the Rules of Practice and Procedure of the State Tax Commission.

A formal hearing was commenced before Frank A. Romano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 12, 1979 at 9:30 A.M., and was continued to conclusion at the same location on March 13, 1979. Petitioner appeared by Harold L. Fisher, Esq. and Kenneth K. Fisher, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq. and Irving Atkins, Esq.

#### ISSUE

Whether the use of aircraft owned by the State of New York, in the transport of the children of petitioner, Hugh L. Carey, Governor of the State of New York, resulted in additional New York State taxable income (and, concomitantly, additional New York State income tax) to said petitioner for the calendar years 1975 and 1976.

FINDINGS OF FACT

1. Petitioner, Hugh L. Carey, filed New York State income tax resident returns for the years 1975 and 1976, listing his address in both instances as 9 Prospect Park West, Brooklyn, New York 11215.

2. On January 30, 1978, the Income Tax Bureau issued a Statement of Audit Changes against petitioner, Hugh L. Carey, imposing additional income tax for the years 1975 and 1976 of \$572.33, together with interest thereon of \$45.70, making a total amount of \$618.03. This was done on the grounds that additional taxable income was disclosed which was based on the personal use of aircraft owned by the State of New York, to transport said petitioner's children on three trips in 1975 and seventeen trips in 1976. A Notice of Deficiency which was dated April 4, 1978 was issued in the amount of \$625.90, and was computed as follows:

<u>Year</u>	<u>Deficiency</u>	<u>Interest</u>	<u>Total</u>
1975	\$ 83.02	\$13.80	\$ 96.82
1976	489.31	39.77	529.08
	<u>\$572.33</u>	<u>\$53.57</u>	<u>\$625.90</u>

3. Petitioner, Hugh L. Carey, paid the sum of \$625.90 "under protest" on or about June 29, 1978, and reserved all of his rights with respect thereto.

4. Petitioner, Hugh L. Carey, was and still is the Governor of the State of New York, having initially taken his oath of office in January of 1975. At the time of said inauguration, said petitioner was a widower with twelve children, all of whom (with the exception of two married daughters) lived with him in his private residence at 9 Prospect Park West, Brooklyn, New York. During the years in question, said petitioner, together with his unmarried children, continued to maintain the Brooklyn residence, but also established residence at the Executive Mansion, 138 Eagle Street, Albany, New York. In

addition, said petitioner continued to maintain a residence at Shelter Island, New York, where he and his family had vacationed for approximately twenty years.

5. The State of New York has had an executive transportation program since at least 1968. During the years in question, the operation and scheduling of State aircraft was a function of the Department of Environmental Conservation ("ENCON"). Certain aircraft (the use of which are in question in this proceeding) which are maintained and operated by ENCON are as follows:

<u>Aircraft Number</u>	<u>Passenger Capacity</u>	<u>Crew</u>	<u>Description</u>
N-600	8	2	Bell-Textron 204B, single turbine-engined helicopter
N-604	6	2	Beechcraft B-90 "King Air" twin-engined turbo prop transport
N-606	8	2	Bell-Textron 212, twin turbine engined helicopter
N-22X	9	2	Beechcraft A-100 "King Air" twin-engined turbo prop transport

These aircraft were based at Page Airways, Albany Airport, Albany, New York. Upon the completion of a flight, said aircraft returned to this location.

6. The executive transportation program (utilizing State aircraft) provided passage for 3,853 persons during the fiscal year ended March 31, 1974, 5,259 persons during the fiscal year ended March 31, 1975, 6,400 persons during the fiscal year ended March 31, 1976, and 6,490 persons during the fiscal year ended March 31, 1977.

7. While there were no formal, published rules with respect to the use of State aircraft by State officials (and/or their family and friends), David W. Burke, Secretary to the Governor, circulated a Memorandum dated January 29, 1975

to the Governor and other high-ranking State officials concerning the use of such aircraft. This memorandum purported to set forth the priority of State officials and the procedure to be followed, in the reservation and scheduling of State aircraft for official business. In practice, as it affected the use of State aircraft by petitioner, the Administrative Assistant to the Governor, (Thomas Regan), or one of his staff, would place a telephone call to the offices of ENCON and indicate that the Governor required an aircraft, specifying the date, time, and destination of the trip. A staff employee at ENCON would make an entry on the appropriate day in the log (a calendar or diary-type journal maintained on a daily basis), setting forth the name of the State official for whom the flight was reserved, the scheduled time of the flight, and its destination. This staff employee would then notify the pilots of the scheduled flight. At the time of takeoff or during the flight, the pilot (or someone on his behalf) would prepare a flight manifest which contained the aircraft number, date, destination, and the names of the passengers. The flight manifests were then submitted to and maintained by ENCON.

8. In time, one Karen Mohan assumed greater authority and responsibility at ENCON for the scheduling of such flights, as well as for establishing flying times between specified locations, and for determining suitable landing sites for aircraft transporting petitioner.

9. The examination of the flight manifests by Thomas F. Hogan, Assistant Administrative Director of the New York State Department of Taxation, disclosed the presence of petitioner's children on 234 flights flown by State aircraft during 1975 and 1976. Of this number, the Income Tax Bureau determined that petitioner, incidentally accompanied by his children, made 137 flights for the purpose of conducting official State business. The bureau concluded that

since such flights did not result in any additional expense to the State, no additional income accrued to petitioner. On 52 flights, there was a State official other than petitioner on board for the purpose of conducting official State business. The bureau concluded that since the children's presence was deemed incidental and resulted in no additional expense to the State, no additional taxable income accrued to petitioner. On 25 flights to or from Albany, petitioner or another State official was transported for the purpose of conducting official State business. In such an instance, the flight out of Albany or the flight back to Albany would be a flight without passengers (sometimes referred to as "Deadhead" flights). The bureau concluded that since petitioner's children were incidentally transported at no additional expense to the State on these deadhead flights, no additional taxable income accrued to petitioner.

The Income Tax Bureau determined that the remaining 20 flights consisted of flights where (i) a State aircraft bearing petitioner's children accompanied or followed another aircraft bearing petitioner or another State official (sometimes referred to as "Tailgate" flights), or (ii) the trip was apparently undertaken by the children at petitioner's direction solely for personal reasons. The Income Tax Bureau concluded that these 20 flights resulted in additional expense to the State and conferred an economic benefit upon petitioner. Accordingly, the value of the 20 flights in 1975 and 1976 constituted additional income to petitioner which was computed or measured by the then prevailing first-class commercial airfares for each of petitioner's children, from the point of departure to the place of destination, as follows:



<u>Date</u>	<u>Trip Destination</u>	<u>Number of Passengers</u>	<u>Commercial Air Fare</u>	<u>Cost</u>
1/4/75	Albany - LaGuardia	4	\$32	\$128
*9/26/75	Albany - Saranac Lake	5	32	160
12/22/75	East Hampton - Albany	6	42	252
1/10/76	Albany - East Hampton	3	42	126
2/15/76	Saranac Lake - Albany	2	32	64
2/16/76	Saranac Lake - Albany	6	32	192
2/16/76	Albany - LaGuardia	3	32	96
2/28/76	Albany - LaGuardia	6	32	192
3/7/76	Shelter Island - N.Y.C.	8	18	144
4/15/76	Albany - LaGuardia	5	33	165
6/28/76	Albany - LaGuardia	3	34	102
7/2/76	Albany - East Hampton	7	45	315
7/2/76	New York - East Hampton	7	20	140
8/10/76	Albany - Shelter Island	7	45	315
8/28/76	Albany - Shelter Island	3	45	135
8/28/76	Shelter Island - JFK	5	20	100
9/5/76	Albany - East Hampton	2	45	90
9/5/76	East Hampton - Albany	1	45	45
9/19/76	East Hampton - Albany	5	45	230
9/23/76	LaGuardia - Albany	1	36	36

10. The foregoing twenty flights can be separated into five categories.

\*IT-38 Attachment #1 (Exhibit "E") originally listed this trip as "Albany to Suffolk;" however, the parties stipulated that the entry for that date should read "Albany to Saranac Lake," with no change in the number of passengers or the amount of first class commercial air fare (Tr. 3/13/79, pp. 29-30).

(a) There were flights on which petitioner or another State official was on board for the purpose of conducting official State business, and petitioner's children accompanied him. These consisted of the flights on February 16, 1976 (Saranac Lake to Albany, petitioner on board), June 28, 1976 (William Hennessey, then Deputy Commissioner of the Department of Transportation, on board), July 2, 1976 (Albany to East Hampton, petitioner on board), and August 10, 1976 (Karen Mohan, ENCON, on board).

(b) There were flights on which petitioner or another State official was transported for the purpose of conducting official State business, and the aircraft either departed or returned, or completed another leg of a required flight without petitioner or such other State official, but with petitioner's children on board as incidental passengers. These "Deadhead" flights included those made on February 15, 1976 (aircraft returning to Albany after transporting petitioner to Saranac Lake), February 28, 1976 (aircraft en route to LaGuardia to pick up the then Lt. Governor, Mary Anne Krupsak, for her return flight to Albany), April 15, 1976 (aircraft en route to LaGuardia to pick up petitioner for his flight to East Hampton), and September 23, 1976 (aircraft returning to Albany after transporting the then Budget Director, Peter Goldmark, and others to LaGuardia).

(c) There were flights on which petitioner's children did not accompany petitioner or any other State official in the aircraft; rather, a second State aircraft transported the children to the same destination on the same day and, in most instances, at approximately the same time. (These are sometimes referred to as "Tailgate" flights). These flights included those made on September 26, 1975, March 7, 1976, and September 19, 1976.

(d) There were flights on which petitioner's children were transported without petitioner or any other State official being on board; apparently, these were for purely personal reasons. These flights included those made on December 22, 1975, January 10, 1976, February 16, 1976 (Albany to LaGuardia), July 2, 1976 (LaGuardia to East Hampton), August 28, 1976 (Albany to Shelter Island and a second flight, Shelter Island to JFK Airport), and September 5, 1976 (Albany to East Hampton and a second flight, East Hampton to Albany).

(e) The flight on January 4, 1975, although a "Tailgate" flight, was made to transport petitioner and his children (some of whom were on the second or tailgating plane) from Albany to LaGuardia (for return to their private residence in Brooklyn) after the attendance of petitioner and the children at petitioner's inauguration in Albany.

#### CONCLUSIONS OF LAW

A. That the adjusted gross income of a New York State resident "means his federal adjusted gross income as defined in the laws of the United States for the taxable year ...." Section 612(a) of the New York State Tax Law.

B. That Section 61 of the Internal Revenue Code defines gross income as "all income from whatever source derived."

C. That the United States Congress intended that the term "gross income" be given its broadest interpretation (Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 432 (1935)) and, in determining what constitutes "gross income", one "begins with the basic premise that the purpose of Congress was to use the fullest measure of its taxing power (James v. United States, 366 U.S. 213, 218 (1961)), and intended to include as taxable income, any economic or financial benefit conferred on the taxpayer, whatever the form or mode by which it is effected. Commissioner v. Smith, 324 U.S. 177 (1945). Thus, it "was the

intention to tax all gains except those specifically exempted." James v. United States, 366 U.S. at 219. Accord, Commissioner v. Glenshaw Glass Co., 348 U.S. at 430; Rudolph v. United States, 370 U.S. 269, 273 (1962).

D. That the use of corporate assets or the expenditure of corporate funds for personal or non-business purposes by corporate officers and/or shareholders results in taxable income being realized by said officer or shareholder on the theory of "constructive dividends." See, e.g., United Aniline Co. v. Commissioner, 316 F.2d 701 (1st Cir. 1963) (corporate-owned yacht); Robert R. Walker, Inc. v. Commissioner, 362 F.2d 140 (7th Cir. 1966); Chandler v. Commissioner, 41 B.T.A. 165 (1940), aff'd, 119 F.2d 623 (3rd Cir. 1941) (personal use by taxpayer and family of lodge owned by corporation).

E. That it is not necessary for the individual taxpayer himself to receive the direct benefit of the corporate expenditure in order to be charged with taxable income; rather, it suffices if such expenditure relieves the taxpayer of a financial obligation or a personal expense. United States v. Gotcher, 401 F.2d 118 (5th Cir. 1968); Silverman v. Commissioner, 253 F.2d 849 (8th Cir. 1958); Bauer v. Commissioner, 32 T.C.M. 496 (1973).

F. That by reason of the executive power vested in the Governor of the State of New York, petitioner, Hugh L. Carey, must be available to perform the duties of his office at virtually any time, regardless of his actual physical whereabouts. By reason of the special security risks involved in the use of commercial aircraft, the use of State aircraft by said petitioner is for the convenience and in the best interests of the State of New York. The cost thereof is properly excluded from the taxable income of said petitioner. See, United States v. Gotcher, supra; see also, Kahian v. Hugh L. Carey, No. 8888-78 (Sup. Ct., Albany Co., Oct. 18, 1978) (Pitt, J.).

G. That, with respect to any flight on which petitioner, Hugh L. Carey, was on board or another State official was on board for the purpose of conducting official State business, and petitioner's children were incidental passengers on the same flight, such a flight is deemed to be for the convenience and in the best interests of the State of New York, and did not primarily benefit said petitioner. Accordingly, the value of the flights as computed by the Income Tax Bureau, on February 16, 1976 (Saranac Lake to Albany), June 28, 1976 (Albany to East Hampton), and August 10, 1976 shall be excluded from the computation of the taxable income of petitioner, Hugh L. Carey. The Notice of Deficiency dated April 4, 1978 shall be modified by reducing taxable income by \$924.00, and the tax computed on that amount shall be refunded to said petitioner.

H. That with respect to any flight on which petitioner, Hugh L. Carey, or another State official was transported for the purpose of conducting official State business, and the aircraft either departed or returned to its home base in Albany, or completed another leg of its required flight with said petitioner's children on board as incidental passengers, such a flight is deemed to be for the convenience and in the best interests of the State of New York, and the flight did not primarily benefit said petitioner. Accordingly, the value of the flights, as computed by the Income Tax Bureau, on February 15, 1976, February 28, 1976, April 15, 1976, and September 23, 1976 shall be excluded from the computation of the taxable income of petitioner, Hugh L. Carey. The Notice of Deficiency dated April 4, 1978 shall be modified by reducing taxable income by \$457.00, and the tax computed on that amount shall be refunded to said petitioner.

I. That with respect to any flight on which petitioner, Hugh L. Carey, or any other State official did not accompany said petitioner's children on

board an aircraft but rather, where a second aircraft transported the children to the same destination on the same day, and petitioner's children were not traveling to fulfill a legitimate State function, such a flight was not for the convenience and in the best interests of the State of New York in that it represented a substantial expense to the State and primarily benefited said petitioner by relieving him of a personal expense. See, United States v. Gotcher, supra; Silverman v. Commissioner, supra. Accordingly, the cost of the flights on September 26, 1975, March 7, 1976, and September 19, 1976, in the amount of \$534.00, as asserted in the Notice of Deficiency dated April 4, 1978, is sustained.

J. That with respect to any flight on which the children of petitioner, Hugh L. Carey, were transported without said petitioner or any other State official on board (other than a "Deadhead" flight), and said children were not traveling to fulfill a legitimate State function, such a flight was not for the convenience and in the best interests of the State of New York, in that it represented a substantial expense to the State and primarily benefited said petitioner by relieving him of a personal expense. See, United States v. Gotcher, supra; Silverman v. Commissioner, supra. Accordingly, the costs of the flights on December 22, 1975, January 10, 1976, February 16, 1976 (Albany to LaGuardia), July 2, 1976 (LaGuardia to East Hampton), two flights on August 28, 1976, and two flights on September 5, 1976, in the amount of \$984.00, as asserted in the Notice of Deficiency dated April 4, 1978 is sustained.

K. That the flight on January 4, 1975, which was made to transport petitioner, Hugh L. Carey, and his children in a "Tailgate" flight from Albany to LaGuardia (for their return to their private residence in Brooklyn), after their attendance at said petitioner's inauguration in Albany, was a legitimate

State function at which said petitioner's children were properly present in an official public ceremony. Such a flight is deemed to be for the convenience and in the best interests of the State of New York, and did not primarily benefit said petitioner. Accordingly, the cost of the January 4, 1975 flight shall be excluded from the taxable income of petitioner, Hugh L. Carey, and the Notice of Deficiency dated April 4, 1978 shall be modified by reducing taxable income by \$128.00, and the tax computed on that amount shall be refunded to said petitioner.

L. That the petition of Hugh L. Carey is granted to the extent that the assessment of additional taxable income for 1975 be in the reduced amount of \$412.00; that the assessment of additional taxable income for 1976 be in the reduced amount of \$1,106.00; that the Income Tax Bureau is hereby directed to modify the Notice of Deficiency dated April 4, 1978; and that, except as so granted, the petition is in all other respects denied. Except as so modified, the Notice of Deficiency dated April 4, 1978 is sustained.

Dated: Albany, New York  
June 8, 1979

STATE TAX COMMISSION

\_\_\_\_\_  
PRESIDENT

*Milton Koerner*  
\_\_\_\_\_  
COMMISSIONER

*Thomas H. Spink*  
\_\_\_\_\_  
COMMISSIONER

*Abstained  
James W. Callahan*