

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Carl R. & Margaret H. Frederick :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of  
Personal Income Tax :  
under Article 22 of the Tax Law  
for the Year 1972. :

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 13th day of February, 1980, he served the within notice of Decision by certified mail upon Carl R. & Margaret H. Frederick, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Carl R. & Margaret H. Frederick  
1441 Prospect Ave.  
Plainfield, NJ 07060

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  
13th day of February, 1980.

Joanne Knapp

J. Vredenburg

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

February 13, 1980

Carl R. & Margaret H. Frederick  
1441 Prospect Ave.  
Plainfield, NJ 07060

Dear Mr. & Mrs. Frederick:

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 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  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :

CARL R. FREDERICK and MARGARET H. FREDERICK:

DECISION

for Redetermination of a Deficiency or for :  
Refund of Personal Income Tax under Article :  
22 of the Tax Law for the Year 1972. :

---

Petitioners, Carl R. Frederick and Margaret H. Frederick, 1441 Prospect Avenue, Plainfield, New Jersey 07060, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1972 (File No. 15052).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 6, 1979 at 9:15 A.M. Petitioner Carl R. Frederick appeared pro se and for his wife, petitioner Margaret H. Frederick. The Audit Division appeared by Peter Crotty, Esq. (Samuel Freund, Esq., of counsel).

#### ISSUES

I. Whether petitioner Carl R. Frederick properly allocated his salary income based on the number of days worked within and without New York State.

II. Whether nonresident petitioners are entitled to deduct a net operating loss of a corporation which made an election pursuant to section 1372 of the Internal Revenue Code.

FINDINGS OF FACT

1. Petitioners, Carl R. Frederick and Margaret H. Frederick, timely filed a joint New York State Income Tax Nonresident Return for 1972, on which salary income of \$47,998.00 was allocated based on the number of days worked within and without New York State. Petitioner Carl R. Frederick reported that of a total of 227 days worked during 1972, 170 days were worked within New York, and 57 days were worked without New York, resulting in New York salary income of \$35,946.00. In addition, a loss of \$3,182.00 from a small business corporation (Frederick Airline, Inc.) was included in New York adjusted gross income.

2. On March 29, 1976, the Audit Division issued a Notice of Deficiency holding that of a total of 227 days worked during 1972, 188 days were worked within New York and 39 days were worked without New York, resulting in an allocated salary of \$39,751.65, which was taxable for New York State personal income tax purposes. In addition, the loss of \$3,182.00 from a small business corporation was disallowed as not being derived from or connected with New York State sources and therefore, the loss was not includable in the New York adjusted gross income of a nonresident individual.

3. Petitioner Carl R. Frederick was senior vice president of Riter, Pyne, Kendall and Hollister, Inc. ("Riter") during 1972. His primary function with Riter was as an investment advisor and research analyst, which function required him to render services within and without New York State.

4. Riter was a member of the New York, American and Midwest Stock Exchanges, and had Riter's principal office at 100 Wall Street in New York City with branch offices in the States of Illinois, Florida, New Jersey, Massachusetts and New York.

5. In his capacity as an employee, petitioner Carl R. Frederick rendered services without New York at the New Jersey and Florida offices of Riter, and at Riter's clients place of business in locations such as Ohio, Tennessee, North

Carolina, California, Connecticut, Illinois, Georgia, Louisiana, Pennsylvania, Missouri, South Carolina and Canada. A day-to-day calendar for 1972 was submitted along with a supporting statement from the chairman of the board of Riter which indicated that petitioner Carl R. Frederick worked 57 days without the State of New York during 1972. None of the aforementioned 57 days were worked at petitioner's home in New Jersey.

6. The Audit Division offered no explanation as to its basis for changing the days worked within New York State from 170 days to 188 days.

7. Frederick Air, Inc. was established and organized in accordance with the laws of the State of New Jersey and as a small business corporation pursuant to section 1372 of the Internal Revenue Code. Petitioner Carl R. Frederick contended that said corporation serviced two firms located in New York State and paid taxes to New York State. Accordingly, he reasoned that any losses derived therefrom could be deducted in arriving at New York adjusted gross income.

#### CONCLUSIONS OF LAW

A. That the services rendered by petitioner Carl R. Frederick outside the State of New York for 57 days during 1972, were performed there out of necessity which obligated him to out-of-state duties in the service of his employer and as such, must be counted as days worked without the State of New York in accordance with the meaning and intent of section 632(c) of the Tax Law and 20 NYCRR 131.16.

B. That a loss derived by a nonresident individual from a corporation which is an electing small business corporation under section 1372 of the Internal Revenue Code, does not constitute a loss or deduction derived from or connected with New York sources pursuant to section 632(b) (4) of the Tax Law and 20 NYCRR 131.7.

C. That the petition of Carl R. Frederick and Margaret H. Frederick is granted to the extent that petitioner Carl R. Frederick's salary income of \$47,998.00 was properly allocated for the year 1972. The Audit Division is hereby directed to modify accordingly the Notice of Deficiency issued March 29, 1976; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

FEB 13 1980

STATE TAX COMMISSION

*James A. Tuohy*  
\_\_\_\_\_  
PRESIDENT

*Thomas H. Quinn*  
\_\_\_\_\_  
COMMISSIONER

\_\_\_\_\_  
COMMISSIONER