

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Leonard L. & Deborah Franklin : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of NYS & NYC Income :
Tax under Article 22 & 30 of the Tax Law for the :
Year 1976.

State of New York
County of Albany

Kathy Pfaffenbach, 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 24th day of January, 1983, she served the within notice of Decision by certified mail upon Leonard L. & Deborah Franklin, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leonard L. & Deborah Franklin
42 Jane St.
New York, NY 10014

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
24th day of January, 1983.

Kathy Pfaffenbach

Conce A. Delaney

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

January 24, 1983

Leonard L. & Deborah Franklin
42 Jane St.
New York, NY 10014

Dear Mr. & Mrs. Franklin:

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, 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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

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
LEONARD L. FRANKLIN and DEBORAH FRANKLIN
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Articles 22 :
and 30 of the Tax Law for the Year 1976.

DECISION

Petitioners, Leonard L. Franklin and Deborah Franklin, 42 Jane Street, New York, New York 10014, 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 Article 30 of the Tax Law for the year 1976 (File No. 29072).

A small claims 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 December 17, 1981 at 2:45 P.M. Petitioners appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether petitioner Deborah Franklin's share of capital gain income derived from the sale of an office building situated without New York State is taxable for New York State and New York City personal income tax purposes.

II. Whether penalties asserted pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law should be abated.

FINDINGS OF FACT

1. Petitioners, Leonard L. Franklin and Deborah Franklin, failed to file a New York State personal income tax return (with New York City personal income tax) for the year 1976.

2. On June 19, 1979, the Audit Division issued a Statement of Audit Changes to petitioners whereon their 1976 New York State and New York City personal income tax liabilities were computed from information obtained from the Internal Revenue Service. Accordingly, a Notice of Deficiency was issued against petitioners on September 21, 1979 asserting New York State personal income tax of \$4,096.11 and New York City personal income tax of \$1,230.04, plus penalties and interest of \$3,098.66, for a total due of \$8,424.81. Said penalties were issued pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law for failure to file a 1976 return and failure to pay the tax determined to be due respectively.

3. At the hearing, the Audit Division submitted a revised schedule of additional personal income taxes due in conjunction with underlying workpapers whereon petitioners' total tax liability was reduced to \$471.31 plus applicable penalties and interest. The Audit Division made certain concessions pursuant to said revised schedule, which it deemed correct, as follows:

(a) July 29, 1976 was recognized as the date petitioner Deborah Franklin changed her domicile and residence from Texas to the State of New York,

(b) Salary income of \$7,056.64, earned in Texas by petitioner Deborah Franklin prior to her change of residence, was held nontaxable for New York State and New York City personal income tax purposes,

(c) Credit of \$3,642.86 was allowed for New York State and New York City personal income tax withheld from the salary of petitioner Leonard L. Franklin, and

(d) Itemized deductions were allowed in lieu of the standard deduction.

Additionally, although not computed into the adjusted deficiency, said revised schedule noted a payment by petitioners of \$662.93 applicable to the deficiency at issue herein.

4. On September 18, 1976 petitioners sold a jointly-owned office building which was situated in Austin, Texas. The net long-term capital gain realized by petitioners from said sale was \$26,004.50.

5. Petitioner Leonard L. Franklin was a resident of New York State and New York City for the entire taxable year 1976. Since both petitioners were New York residents at the time of the building sale, the entire taxable gain derived therefrom was held subject to New York State and New York City personal income taxes.

6. Petitioners argued that Deborah Franklin's portion of the capital gain at issue should not be fully taxable since at the time of the sale she was a New York resident for only fifty two (52) days. They maintained that only that portion of her gain should be taxable as computed by multiplying said gain by a fraction of which the numerator represents the period of time she was a New York resident, ending with the date of said sale, and the denominator represents the total period in which the property was held (approximately seven (7) years).

7. A 1976 New York State and New York City personal income tax return was not filed by petitioners since they determined that such filing would be a difficult and complicated task and petitioner Leonard L. Franklin's withholding tax should have covered any liability computed as the result of such filing.

CONCLUSIONS OF LAW

A. That the personal income tax imposed by Article 30 of the Tax Law is by its own terms tied into and contains essentially the same provisions as

Article 22 of the Tax Law. Therefore, in addressing the issues presented herein, unless otherwise specified, all references to particular sections of Article 22 shall be deemed references (though uncited) to the corresponding sections of Article 30.

B. That net capital gains and losses of a taxpayer who changes his resident status during the year are to be computed separately for the resident period and the nonresident period covered by his returns. In each case the computation is to be made in the same manner as the corresponding Federal computations and on the same basis as if his taxable year for Federal income tax purposes were limited to the taxable period covered by the applicable New York return. (20 NYCRR 148.7(a))

Accordingly, since petitioner Deborah Franklin was a New York resident on the date of the capital transaction at issue, the capital gain which she reported for Federal income tax purposes is reportable, in its entirety, for New York State and New York City personal income tax purposes.

C. That petitioners' basic tax deficiency for New York State and New York City personal income taxes for the year 1976 is \$471.31 (Finding of Fact "3", supra).

D. That petitioners have failed to sustain their burden of proof required pursuant to section 689(e) of the Tax Law to show that their failure to file a 1976 return for New York State and New York City, and their failure to pay the taxes determined to be due was the result of reasonable cause and not due to willful neglect. Accordingly, the penalties asserted pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law are hereby sustained to the extent that they apply to the revised tax liability (Finding of Fact "3"; Conclusion of Law "C", supra).

E. That the petition of Leonard L. Franklin and Deborah Franklin is granted to the extent provided in Conclusion of Law "C" supra, and except as so granted, said petition is, in all other respects, denied.

F. That the Audit Division is hereby directed to modify the Notice of Deficiency dated September 21, 1979 to be consistent with the decision rendered herein.

DATED: Albany, New York

JAN 24 1983

STATE TAX COMMISSION

Robert T. Bandel
ACTING PRESIDENT

Frank R. Koenig
COMMISSIONER

Mark *John*
COMMISSIONER