

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Michel & Mary A. Fribourg :  
for Redetermination of a Deficiency or for Refund :  
of 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. :  
\_\_\_\_\_ :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 7th day of October, 1983, she served the within notice of Decision by certified mail upon Michel & Mary A. Fribourg, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michel & Mary A. Fribourg  
277 Park Ave., 50th Fl.  
New York, NY 10172

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  
7th day of October, 1983.

Susan Powell

Connie R. Hagelund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
Michel & Mary A. Fribourg	:	
for Redetermination of a Deficiency or for Refund	:	AFFIDAVIT OF MAILING
of Personal Income Tax under Article 22 of the	:	
Tax Law and Chapter 46, Title T of the Admini-	:	
strative Code of the City of New York for the	:	
Year 1977.	:	

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State of New York  
County of Albany


Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 7th day of October, 1983, she served the within notice of Decision by certified mail upon Gerald Frenchman the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gerald Frenchman  
277 Park Ave., Suite 4800  
New York, NY 10017

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  
7th day of October, 1983.





AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

October 7, 1983

Michel & Mary A. Fribourg  
277 Park Ave., 50th Fl.  
New York, NY 10172

Dear Mr. & Mrs. Fribourg:

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 and Chapter 56, Title T of the Administrative Code of the City of New York, 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 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: Petitioner's Representative  
Gerald Frenchman  
277 Park Ave., Suite 4800  
New York, NY 10017  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
MICHEL and MARY A. FRIBOURG	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of 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.	:	

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Petitioners, Michel and Mary A. Fribourg, 277 Park Avenue, (50th Floor), New York, New York 10172, filed a petition for redetermination of a deficiency or for refund of 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 (File No. 34910).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 18, 1983 at 10:45 A.M. Petitioners appeared by David G. Friedman, Esq., Stanley Belkin, C.P.A. and Gerald Frenchman, C.P.A. The Audit Division appeared by Paul B. Coburn, Esq., (Kevin A. Cahill, Esq., of counsel).

ISSUE

Whether the Audit Division's computation of petitioners' New York items of tax preference and modification for allocable expenses attributable to items of tax preference were proper.

FINDINGS OF FACT

1. On July 17, 1978, petitioners, Michel and Mary A. Fribourg, filed an IT-201/208, New York State Income Tax Resident Return with New York City Personal Income Tax for 1977. Attached thereto was a partially completed New

York State/City Minimum Income Tax Computation Schedule on which petitioners listed only their federal items of tax preference. A statement with respect to said schedule was attached to their return explaining that the items of federal tax preference were eliminated for New York State/City tax purposes because of a conflict with respect to the New York State/City requirement of "Modification for Allocable Expenses Attributable to Items of Tax Preference" and the "Tax Benefit Rule" under I.R.C. §58(h) which made the required computations on the schedule impossible to compute.

2. On March 5, 1981, a Consent Fixing Period of Limitation Upon Assessment of Personal Income and Unincorporated Business Taxes for the year ended December 31, 1977 was validated extending the time for assessment of the deficiency herein until April 15, 1982.

3. On August 28, 1980, a Statement of Audit Changes had been issued against petitioners wherein the Audit Division computed minimum tax and a modification for allocable expenses attributable to items of tax preference based on the federal items of tax preference reported on petitioners' minimum income tax schedule and their personal income tax return as filed. No adjustment was made to petitioners' items of tax preference for state and local income tax included in federal itemized deductions or the modification for allocable expenses as computed by the Audit Division.

4. On April 1, 1981, the Audit Division issued a Notice of Deficiency against petitioners asserting additional state and city income tax due for 1977 in the sum of \$55,891.61, plus interest and/or penalty of \$13,961.66.

5. Petitioners' federal items of tax preference for 1977 included capital gains, adjusted itemized deductions and accelerated depreciation on personal property subject to a lease. Petitioners received a federal tax benefit for

such preference items. Petitioners contend that the "Tax Benefit Rule" (I.R.C. §58(h)) applies to the computation of New York items of tax preference. Therefore, they argue the federal adjusted itemized deductions of \$232,491.64 should be reduced by the amount of New York State income taxes included in federal itemized deductions, since such taxes are not deductible in computing New York taxable income. Petitioners also maintain that the adjusted itemized deductions should be reduced by the "Modification for Allocable Expenses Attributable to Items of Tax Preference" as no New York tax benefit is derived therefrom.<sup>1</sup> If this reasoning is followed and the preference item is changed, it becomes necessary to change the modification, as one computation depends on the amount of the other. Hence, it becomes impossible to compute either amount. Petitioners maintain that they should not suffer any adverse consequences in a case where the law was unclear and created a situation in which the tax could not be properly computed.

#### CONCLUSIONS OF LAW

A. That section 622 of the Tax Law, in pertinent part, provides:

"New York minimum taxable income of resident individual. -- (a) The New York minimum taxable income of a resident individual shall be the sum of items of tax preference, as described in subsection (b) of this section...

\* \* \*

"(b) For purposes of this article, the term 'items of tax preference' shall mean the federal items of tax preference, as defined by the laws of the United States, of a resident individual, ...for the taxable year..."

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<sup>1</sup> During the year at issue herein, section 615(c)(4) of the Tax Law and section T46-115.0(c)(4) of the Administrative Code provided that a resident individual's federal itemized deduction was to be reduced by the modification for allocable expenses attributable to items of tax preference as defined in section 623 and section T46-123.0 when computing his New York State/City itemized deductions.

Section T46-122.0 of the Administrative Code of the City of New York contains essentially the same provision with respect to New York City minimum taxable income and New York City resident individuals.

B. That section 57 of the Internal Revenue Code, in pertinent part, provides:

"Section 57. Items of Tax Preference.

(a) In General. -- For purposes of this part, the items of tax preference are --

(1) Adjusted Itemized Deductions. -- An amount equal to the adjusted itemized deductions for the taxable year (as determined under subsection (b)).

\* \* \*

(b) Adjusted Itemized Deductions. --

(1) In General. -- For purposes of paragraph (1) of subsection (a), the amount of the adjusted itemized deductions for any taxable year is the amount by which the sum of the deductions for the taxable year other than --

- (A) deductions allowable in arriving at adjusted gross income,
- (B) the deduction for personal exemptions provided by section 151,
- (C) the deduction for medical, dental, etc. expenses provided in section 213, and
- (D) the deduction for casualty losses described in section 165(c)(3),  
exceeds 60 percent (but does not exceed 100 percent)  
of the taxpayer's adjusted gross income for the taxable year."

C. That during the year in issue section 58(h) of the Internal Revenue Code provided:

"Regulations to include tax benefit rule. -- The Secretary shall prescribe regulations under which items of tax preference shall be properly adjusted where the tax treatment giving rise to such items will not result in the reduction of the taxpayer's tax under this subtitle for any taxable years."

No regulations have been promulgated under section 58(h).

D. That no adjustment for federal income tax purposes would be allowable under section 58(h) of the Internal Revenue Code with respect to the items of deduction at issue herein, inasmuch as the (federal) tax treatment of those items resulted in a reduction of petitioners' federal taxes (Matter of Jarecki, S.T.C., May 6, 1983).

E. That in 1977 there were no provisions in the Tax Law or the Administrative Code which allowed a portion of New York State or New York City income taxes or the modification for allocable expenses to be deducted from federal items of tax preference in arriving at New York State and New York City items of tax preference. Section 622(b)(5) of the Tax Law and section T46-122.0(5) of the Administrative Code of the City of New York, added by L. 1980, Ch. 669, effective June 30, 1980, and applicable to taxable years beginning after December 31, 1979, provide for the reduction of adjusted itemized deductions by a portion of income taxes includible therein. These amendments are not retroactive to 1977.

F. That accordingly, for the period at issue herein, the Audit Division properly computed petitioners' New York items of tax preference and modification for allocable expenses for New York State and New York City income tax purposes.

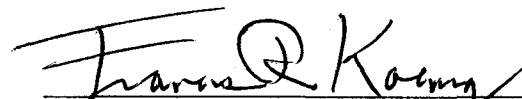
G. That the petition herein is denied and the Notice of Deficiency issued on April 1, 1981 is sustained, together with any additional interest that may be lawfully owing.


DATED: Albany, New York

OCT 07 1983

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER