

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Paul M. & Jean U. Foster :

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 17th day of August, 1979, he served the within notice of Decision by certified mail upon Paul M. & Jean U. Foster, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul M. & Jean U. Foster  
10701 Deneale Pl.  
Fairfax, VA 22030

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  
17th day of August, 1979.

Victoria Gary

Jay Vredenburg



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

STATE TAX COMMISSION

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

JOHN J. SOLLECITO  
DIRECTOR

Telephone: (518) 457-1723

August 17, 1979

Paul M. & Jean U. Foster  
10701 Deneale Pl.  
Fairfax, VA 22030

Dear Mr. & Mrs. Foster:

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 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,

A handwritten signature in cursive script, appearing to read "John J. Sollecito".

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
PAUL M. FOSTER and JEAN U. FOSTER : DECISION  
for Redetermination of a Deficiency or :  
for Refund of Personal Income Tax under :  
Article 22 of the Tax Law for the Year :  
1972. :

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Petitioners, Paul M. Foster and Jean U. Foster, 10701 Deneale Place, Fairfax, Virginia 22030, 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. 12081).

A small claims hearing was held before Harry Huebsch, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 20, 1978 at 10:45 A.M. Petitioner Paul M. Foster appeared pro se and for his wife, petitioner Jean U. Foster. The Income Tax Bureau appeared by Peter Crotty, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUES

- I. Whether petitioner Paul M. Foster properly allocated his wage income on the basis of days worked within and without New York.
- II. Whether petitioner Paul M. Foster properly allocated his business expenses.

FINDINGS OF FACT

1. Petitioners, Paul M. Foster and Jean U. Foster, timely filed a New York State income tax nonresident return for 1972, on which petitioner Paul M. Foster allocated his wage income on the basis of days worked within and without New York State on Schedule A-1, (Allocation of Wage and Salary Income to New York State). He also allocated his business expenses on the same basis.

2. The Income Tax Bureau contended that Paul M. Foster performed services as an employee for the first nine months of 1972, and that he then became a partner in the same firm for the last three months of said year. It recomputed the amount of his wage income on the basis of days worked within and without New York State during the nine-month period and reduced the business expenses which were incurred during the entire year to 9/12 of the amount claimed. It then allocated this remaining amount as it had allocated the wages. It disallowed business expenses incurred by petitioner Paul M. Foster during the last three months of said year. On April 11, 1975, the Income Tax Bureau issued a Notice of Deficiency to petitioners' for \$869.30 in personal income tax, plus \$129.67 in interest, for a total of \$998.97. The Income Tax Bureau made other adjustments to petitioners' tax return which were conceded to and which are not at issue.

3. Paul M. Foster performed services as an employee during the first nine months of 1972. He worked a total of 173 days in the nine-month period, of which 23 were worked outside New York State and 150

were worked in New York State. He was paid wages of \$40,000.45 during the nine-month period.

4. Mr. Foster was made a partner of the firm on October 1, 1972. He performed the same services, held the same title and worked in the same office as he had previously as an employee. As a partner, he was compensated by monthly cash distributions and by a share of the profits which were paid to him quarterly. He correctly excluded from his Federal and New York State tax returns, the partnership income received during the last three months of 1972, since the partnership's fiscal year ended in 1973. Petitioner earned approximately \$56,000.00 from the partnership during its fiscal year which ended in 1973 and of this amount, approximately \$12,000.00 was reportable by him in 1973 as New York source income, based on the source of the partnership income.

5. During 1972 petitioner Paul M. Foster expended \$8,734.21 for business purposes. He expended \$5,902.34 during the first nine months and \$2,831.87 during the last three months of said year.

6. Petitioner contended that he had one period of employment during 1972 and, therefore, his reportable income (\$40,000.45) was allocable over the entire year. Also, since partnership income was not reportable in 1972, the last three months of said year were considered days worked without New York State. Petitioner contended further that, as a cash-basis taxpayer, all business expenses were deductible in 1972 (when they were incurred) and that they should be subject to the same allocation as was his reportable income.

CONCLUSIONS OF LAW

A. That petitioner Paul M. Foster had two separate and distinct periods of employment during 1972 in which he derived income. One period was for nine months when he performed services as an employee, and the other period was for three months when he performed services as a partner. The method of accounting for his income for New York State personal income tax purposes was different for each period. As a result, the Income Tax Bureau correctly determined petitioner's wage income on the basis of days worked within and without New York State during the nine-month period, in accordance with the meaning and intent of section 632(c) of the Tax Law and 20 NYCRR 131.16.

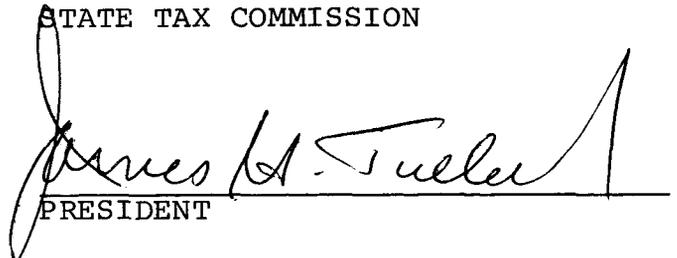
B. That the Income Tax Bureau correctly computed petitioner's business expense for the first nine months of 1972 by allocating said business expense on the same basis as his wages, in accordance with the meaning and intent of section 632(c) of the Tax Law and 20 NYCRR 131.16.

C. That the business expense adjustment for the last three months of 1972 was determinable, in the absence of other indicia, and should be allocated on the same basis as the income to which it pertained. Since the income referred to was partnership income and since the portion derived from New York sources was known, the amount of the expense adjustment allowable to petitioner is  $\$12,000.00 / \$56,000.00 \times \$2,831.87$ , which equals \$606.83. Such a computation is in accordance with the meaning and intent of section 632(c) of the Tax Law and 20 NYCRR 131.10.

D. That the petition of Paul M. Foster and Jean U. Foster is granted to the extent that the expense adjustment for 1972 is increased from \$5,117.54 to \$5,724.37; that the Income Tax Bureau is hereby directed to so modify the Notice of Deficiency issued April 11, 1975; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York  
AUG 17 1979

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER