

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petitions

of

MORTIMER SCHIFF

DECISION

for Redetermination of Deficiencies or for Refunds of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and Chapter 46, Title T of the New York City Administrative Code for the Years 1978 and 1979.

Petitioner, Mortimer Schiff, 30 Charlton Street, #2E, New York, New York 10014, filed petitions for redetermination of deficiencies or for refunds of New York State and New York City personal income tax under Article 22 of the Tax Law and Chapter 46, Title T of the New York City Administrative Code for the years 1978 and 1979 (File Nos. 37572 and 42928).

On October 23, 1985 petitioner waived his right to a hearing and requested that the State Tax Commission render a decision based on the entire record contained in the file, with all briefs to be submitted by October 8, 1986. After due consideration the Tax Commission hereby renders the following decision.

ISSUES

I. Whether the notices of deficiency were issued without any basis and for the sole purpose of extending the period of limitation on assessment.

II. Whether petitioner has substantiated that he was engaged in a trade or business during the years at issue.

III. Whether petitioner has substantiated the character and amount of business expenses claimed as deductions from gross income for the years at issue.

FINDINGS OF FACT

1. Petitioner, Mortimer Schiff, filed New York State and New York City income tax resident returns, and New York State and New York City unincorporated business tax returns for the years 1978 and 1979.

(a) The 1978 income tax return listed petitioner's occupation as "Lect/Writer/Transla" and reported \$23,859.00 in total New York income, consisting of \$23,034.00 in business income, \$687.00 from sale or exchange of capital assets and \$138.00 in New York net additions.

(i) The copy of Federal Schedule C attached to petitioner's return showed total revenues of \$32,943.00, with the following listed expenses:

Allocation of office (\$125 x 12)	\$1,500.00
Telephone (\$90 x 12)	1,080.00
Books & records	535.00
Theater & film	290.00
Secretarial	185.00
Accounting	100.00
Publishing costs	--
Book & promotion expense	--
Automobile travel	
re: book & research (5,000 mi. @ 17¢ = \$850, plus	
tolls & parking)	883.00
Travel for research & documentation	2,108 .00
Dues & subscriptions	296.00
Magazines, newspapers	293.00
Hospitality during research sessions	816.00
Research meeting expense	<u>1,823.00</u>
Total Expenses	\$9,909.00

The \$9,909.00 in expenses subtracted from total revenues of \$32,943.00 resulted in net income of \$23,034.00.

(ii) The Wage and Tax Statement attached to the return for 1978 showed wages, tips and other compensation paid to Mr. Schiff of \$32,583.28 by the City of New York, Board of Higher Education. The statement is stamped with an arrow pointing to the wages, tips and other compensation category on

(iii) The New York State Unincorporated Business Tax Return shows the following: net profit and total income from business before New York modifications was \$23,034.00; from this amount was subtracted \$32,583.00 resulting in a net loss from business of \$9,549.00, and no taxable business income.

(iv) The City of New York unincorporated business tax return showed net profit from business of \$23,034.00 and New York City modifications of \$32,583.00, yielding a loss from business of \$9,549.00. This resulted in no taxable business income and therefore no New York City unincorporated business tax.

(b) The 1979 New York State income tax resident return listed petitioner's occupation as "Lect/Writer/Translator" and reported \$23,768.00 in total income, consisting of \$825.00 in interest income, \$24,443.00 in business income and \$1,500.00 in capital gains.

(i) The Federal Schedule C attached showed "revenues" of \$36,492.00, with the following listed expenses:

Allocation of office - 80% (\$125 x 12)	\$ 1,500.00
Telephone (\$90 x 12)	1,080.00
Books & records	535.00
Theater C film	392.00
Secretarial	325.00
Accounting:	100.00
Publishing costs	--
Book & promotion expense	--
Automobile travel	
re: book & research (7,320 mi. @ 18½¢ = \$850, plus	
tolls & parking)	1,354.00
Travel for research & documentation	2,011.00
Dues & subscriptions	305.00
Magazines newspapers	327.00
Hospitality during research sessions	934.00
Research meeting expense	1,878.00
Accelerator project	1,308.00
Total Expenses	\$12,049.00

The \$12,049.00 in total expenses deducted from revenues of \$36,492.00 resulted in net business income reported of \$24,443.00.

(ii) The Wage and Tax Statement attached to the return showed \$36,192.37 in wages, tips and other compensation paid to Mr. Schiff by the City of New York, Board of Higher Education. Like the 1978 statement, a stamped arrow with the legend "Included in Schedule C" pointed to said compensation.

(iii) The 1979 New York State Unincorporated Business Tax Return showed \$24,443.00 in net profit less \$36,192.00 in subtractions, resulting in a loss from business of \$11,749.00. Said loss yielded no taxable business income and therefore no New York State unincorporated business tax.

(iv) The New York City unincorporated business tax return showed \$24,443.00 in total income from business before New York City modification: New York modifications of \$36,192.00, yielding a business loss of \$11,749.00 and therefore no New York City unincorporated business tax.

(c) For tax years 1978 and 1979, petitioner claimed the standard deduction and did not claim any miscellaneous or other itemized deductions.

2. Petitioner's tax returns were selected for examination along with those of approximately 100 other individuals on the basis that said returns had been prepared by a particular accountant. An investigation had disclosed that said accountant had consistently prepared returns on which an individual with wage or salary income shown on wage and tax statements had reported said income as business receipts on Federal Schedule C. Department of Taxation and Finance auditors were directed to review the returns and to disallow claimed business expense deductions if the taxpayer appeared to be an employee receiving wage or salary income reported on wage and tax statements. Petitioner's claimed Schedule C deductions were disallowed on that basis.

3. (a) On March 26, 1982, the Audit Division issued a Statement of Audit Changes to petitioner for 1978 asserting \$1,814.17 in personal income tax due on the basis that:

"Business expenses are not allowed as not ordinary and necessary in the production of income as an employee. Since household gross income now exceeds \$25,000.00, no household credit of \$35.00 is allowed."

On April 14, 1982, the Audit Division issued a Notice of Deficiency to petitioner for said amount, plus interest.

(b) On February 1, 1983, the Audit Division issued a Statement of Audit Changes to petitioner for 1979 asserting \$1,845.98 in personal income tax due. The explanation offered for said additional tax was as follows:

"As a salaried employee, you are not a business entity and therefore not entitled to claim Schedule C deductions as these expenses are not ordinary and necessary for the production of income as an employee."

On April 8, 1983, the Audit Division issued a Notice of Deficiency to petitioner for said amount, plus interest.

(c) For both years, petitioner was allowed the standard deduction. No penalties were imposed.

4. Petitioner submitted substantial documentary evidence:

(a) For the year 1978, petitioner submitted documentation with regard to translation assignments, cancelled checks with regard to rent and garage rental, checks with regard to telephone payments, receipts and charge card slips with regard to the purchase of books, receipts with regard to admissions to theaters, museums and restaurants, bills for typing services, bills for accounting services and numerous handwritten notes with regard to expenses listed in Finding of Fact "1". Petitioner also submitted an affidavit for the years 1978 and 1979 recanting his

expenses and stating that he has substantiation, at least in part, for the same period.

(b) Petitioner submitted substantial documentation for the year 1979 as well, including: A book which petitioner edited, American Express Card bills, numerous credit card bills, an article on particle accelerators partially written by petitioner, receipts from theaters and films attended by the petitioner, invoices for typing work done, cancelled checks with regard to telephone bills, office allocation expenses, travel receipts and numerous handwritten notes with regard to other expenses incurred.

5. Petitioner contends that the notices of deficiency were issued on an arbitrary and capricious basis just prior to the expiration of the period of limitations on assessment, thus depriving petitioner of the opportunity to present substantiation for the claimed deductions. Petitioner also contends that the deficiencies were arbitrary and capricious because the taxpayer was never audited and that the deficiencies were based upon the erroneous assumption that the expenses claimed were not ordinary and necessary. Petitioner asserts that the expenses were deductible as ordinary and necessary business expenses under section 162 of the Internal Revenue Code and/or deductible for the production or maintenance of income under section 212 of the Internal Revenue Code. Finally, petitioner contends that, regardless of the classifications of the different Internal Revenue Code sections, the taxable income of petitioner is unchanged.

CONCLUSIONS OF LAW

A. That the notices of deficiency were properly issued and were not arbitrary or capricious. The returns were patently erroneous and the Audit Division was justified in disallowing the Schedule C business

expenses. Each Notice **of** Deficiency was preceded by a Statement of Audit Changes and petitioner had an opportunity to file amended returns claiming employee business expenses as adjustments on Federal Form 2106, or as itemized miscellaneous deductions, but he did not do **so**.

B. That the fact that petitioner's returns were selected for examination because **of** certain practices **of his** accountant **is** irrelevant. Petitioner's liability depends solely on the facts adduced herein.

C. That petitioner has not sustained his burden **of** proof under section 689(e) **of** the Tax Law and Administrative Code § T46-189.0(e) **to** show that he was engaged in a trade or business other than as an employee. Thus, expenses claimed on Schedule C may not be deducted under section 62(1) of the Internal Revenue Code.

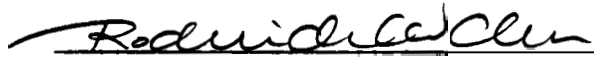
D. That while it would appear that petitioner may have been entitled to deduct certain employee business expenses under section 62(2) or 63(f) of the Internal Revenue Code if he had filed a Form 2106, or had itemized his deductions and claimed such expenses as miscellaneous deductions, petitioner nevertheless failed to sustain his burden **of** proof under the Tax Law and Administrative Code to show the character **or, in** many cases, the amount of the claimed business expenses.

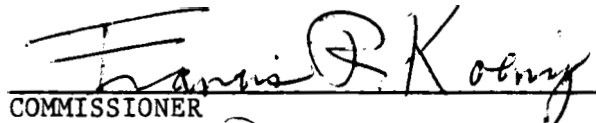
E. That the petitions of Mortimer Schiff are denied and the notices of deficiency issued on April 14, 1982 and April 8, 1983 are sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 29 1987


PRESIDENT


COMMISSIONER


COMMISSIONER