

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions

of

JOHN TIBENSKY

DECISION

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

Petitioner, John Tibensky, 35-20 Leverich Street, Jackson Heights, New York 11372, filed petitions for redetermination of deficiencies or for refunds of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the years 1978 and 1979 (File Nos. 37574 and 42953).

On October 23, 1985, petitioner waived his right to a hearing and requested the State Tax Commission to render a decision based on the entire record contained in his file, with all briefs to be submitted by October 8, 1986. After due consideration, the State 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, John Tibensky, together with his wife, Lodovina Tibensky, timely filed New York State income tax resident returns for 1978 and 1979 wherein they elected a filing status of "Married filing separately on **one** Return". Petitioner also filed unincorporated business tax returns for said years.

2. The 1978 income tax return listed petitioner's occupation as "preparation of printing plates" and reported \$14,563.00 in total income, consisting of \$664.00 in interest income, \$528.00 in dividends, \$13,396.00 in business income and a **loss** of \$25.00 from the sale or exchange **of** capital assets. The copy of Federal Schedule C attached to the return showed "Revenues" of \$27,795.00 with the following listed expenses:

Payments to art assistant (Lodovina Tibensky)	\$ 6,500.00
Photographic supplies	782.00
Art supplies	896.00
Delivery and transportation	2,731.00
Dues and subscriptions	381.00
Magazines, newspapers, etc.	225.00
Parking and tolls	492.00
Solicitation and prospecting	1,418.00
Sports with clients	874.00
Accounting	<u>100.00</u>
Total	\$14,399.00

The \$14,399.00 in expenses deducted from revenues **of** \$27,795.00 resulted **in** the \$13,396.00 net business income reported.

3. The wage and tax statement attached to the return showed \$27,794.77 in "wages, tips, other compensation" from Borne of New York, Inc. The statement

"Included in Schedule C". The \$6,500.00 expense claimed by Mr. Tibensky for payments made to his wife as an art assistant was reported by Mrs. Tibensky as "other income" on her return.

4. The 1978 unincorporated business tax return shows the following: net profit and total income from business before New York modifications was \$13,396.00 from this amount was subtracted \$27,795.00 as a "subtraction", resulting in total (and net) loss from business of \$14,399.00. The \$27,795.00 amount was also noted as "wages subject to FICA tax included in Schedule C".

5. On April 2, 1982, the Audit Division issued a Statement of Audit Changes to petitioner for the year 1978 which contained the following explanation:

"Your 1978 New York State return has been corrected.

Expenses deducted on Federal Schedule C are not necessary and proper for that of an employee.

Since your personal service taxable income exceeds \$21,000.00, you have been allowed a Maximum Tax Benefit.

Itemized Deductions have been deducted from total NY Income in Column A since this results in a lower tax.

Audit of your 1978 return now results in the following:

	<u>HUSBAND</u>	<u>WIFE</u>
Wages	\$27,794.77	\$13,130.00
Interest Income	664.00	556.00
Dividends	528.00	439.00
Sale or Exchange of Capital Assets	<u>(25.00)</u>	<u>(84.00)</u>
Total New York Income	\$28,961.77	\$14,041.00
Itemized Deductions	<u>4,103.00</u>	
Balance	\$24,858.77	<u>\$14,041.00</u>
Exemption	<u>650.00</u>	<u>650.00</u>
New York Taxable-Income	<u>\$24,208.77</u>	<u>\$13,391.00"</u>

6. Based on the aforementioned Statement of Audit Changes, the Audit Division, on April 14, 1982, issued a Notice of Deficiency to petitioner for 1978, asserting additional New York State and City tax due of \$1,220.90, plus

interest of \$383.66, for a total allegedly due of \$1,604.56. The amount allegedly due included a credit due to Mrs. Tibensky for 1978 of \$295.36 (\$1,516.26 - \$295.36 = \$1,220.90).

7. The 1979 return also listed petitioner's occupation as "preparation of printing plates" and reported \$15,354.00 in total income, consisting of \$691.00 in interest income, \$797.00 in dividends, \$12,831.00 in business income and \$1,035.00 in taxable part of capital gain distributions. The copy of Federal Schedule C attached showed "Revenues" of \$27,029.00 with the following listed expenses:

Payments to art assistant (Lodovina Tibensky)	\$ 6,500.00
Photographic supplies	693.00
Art supplies	884.00
Delivery and transportation	2,758.00
Dues and subscriptions	355.00
Magazines, newspapers, etc.	305.00
Parking and tolls	416.00
Solicitation and prospecting	1,213.00
Sports with clients	<u>1,074.00</u>
Total	\$14,198.00

The \$14,198.00 in expenses deducted from revenues of \$27,029.00 resulted in the \$12,831.00 net business income reported.

8. The wage and tax statement attached to the return showed \$27,029.41 in "wages, tips, other compensation" from Bowne of New York, Inc. The statement is stamped with an arrow pointing to the \$27,029.41 figure with the legend "Included in Schedule C". The \$6,500.00 expense claimed by Mr. Tibensky for payments made to his wife as an art assistant was reported by Mrs. Tibensky as "other income" on her return.

9. The 1979 unincorporated business tax return shows the following: net profit and total income from business before New York modifications was \$12,831.00

from this amount was subtracted \$27,209.00¹ as a "subtraction" resulting in total (and net) **loss** from business of \$14,378.00. The \$27,209.00 amount was also noted as "FICA wages, included in Schedule C".

10. On February 7, 1983, the Audit Division issued a Statement of Audit Changes to petitioner and his spouse for the year 1979 which contained the following explanation:

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

Itemized deductions have been allowed in husband's computation as it results in a lower tax liability.

	<u>Husband</u>	Wife
Total New York income corrected	\$29,552.41	\$16,513.00
Less: Itemized deductions	<u>3,334.00</u>	<u></u>
Balance	\$26,218.41	\$16,513.00
Less: Exemptions	<u>700.00</u>	<u>700.00</u>
New York State taxable income corrected	\$25,518.41	\$15,813.00"

11. Based on the aforementioned Statement of Audit Changes, the Audit Division, on April 8, 1983, issued a Notice of Deficiency to petitioner for 1979, asserting additional New York State and City tax due of \$1,227.47, plus interest of \$407.98, for a total allegedly due of \$1,635.45. The amount allegedly due included a credit due to Mrs. Tibensky for 1979 of \$451.27 (\$1,678.74 - \$451.27 = \$1,227.47).

12. Petitioner's tax returns were selected for examination along with those of approximately 100 other individuals on the basis that the returns had been prepared by a particular accountant. An investigation had disclosed that

1 The correct amount should be \$27,029.00 with a net loss from business of

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.

13. Petitioner contends:

(a) That the proposed deficiencies were apparently made to protect against the expiration **of** the statute of limitations for assessments.

(b) That the proposed deficiencies are arbitrary and capricious because petitioner was not informed of the audit and was deprived of his rights to furnish documentation and/or explanations with respect **to** said disallowances.

(c) That the deficiencies are based upon a disallowance of expenses which **is** further based upon an erroneous factual assumption that the expenses were not "ordinary and necessary". The disallowed expenses are 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.

(d) That regardless of the classifications under the different Internal Revenue Code sections, or alternate Internal Revenue Code sections permitting the deductibility **of** the expenses, taxable income **is** unchanged.

14. Petitioner submitted documentary evidence in the form of cancelled checks and worksheets in substantiation **of** a portion of the business expenses

he claimed **on** Federal Schedule C for the years at issue. However, the evidence submitted did not relate to a characterization **of** the expenses as business rather than personal. In addition, except for union dues of \$276.00 per year (1978 and 1979), the documents did not substantiate whether any portion of the claimed expenses were unreimbursed employee business expenses **or** miscellaneous itemized deductions.

CONCLUSIONS OF LAW

A. That the notices of deficiency were properly issued and were not arbitrary and capricious. The returns were patently erroneous and the Audit Division was justified in disallowing the business expenses claimed by petitioner John Tibensky, on each Federal Schedule C filed for 1978 and 1979. The notices of deficiency were preceded **by** statements of audit changes and petitioner had an opportunity to file amended returns claiming employee business expenses as adjustments to income **on** Federal Form 2106, **or** as itemized miscellaneous deductions, but 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, John Tibensky, has failed to sustain his burden **of** proof (Tax Law § 689[e]; Administrative **Code** § T46-189.0[e]) to show (i) that he **was** engaged in a trade **or** business other than as an employee (Internal Revenue Code § 62[1]); (ii) that the expenses in question were trade **or** business expenses of an employee, deductible pursuant to Internal Revenue Code § 62(2); and (iii) that the expenses in question were ordinary and necessary business expenses, deductible under Internal Revenue Code § 162(a). Petitioner, however,


is entitled to the miscellaneous deduction of union dues for 1978 and 1979 of \$276.00 per year.

D. That the petitions of John Tibensky are granted to the extent indicated in Conclusion of Law "C", supra; that the Audit Division **is** directed to recompute the notices of deficiency dated April 14, 1982 and April 8, 1983 to be consistent with the conclusions reached herein; and that, except as **so** modified, the notices of deficiency are in all other respects sustained, together with such additional interest as **may** be lawfully due and owing.

DATED: Albany, New York

STATE TAX COMMISSION

APR 17 1987


PRESIDENT


COMMISSIONER


COMMISSIONER