

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition  
of

GERALD UNTERMAN AND ELAINE UNTERMAN DECISION

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 Nonresident Earnings Tax under Chapter  
**46**, Title U of the Administrative Code of the :  
City of New York for the Years 1978 and 1979.

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Petitioners, Gerald Unterman and Elaine Unterman, 48 Robin Lane, Plainview,  
**New** York 11803, 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 nonresident earnings tax under Chapter 46, Title U of the  
Administrative Code of the City of New Yorkfor the years 1978 and 1979 (File  
**Nos.** 37575, 37800 and 45360).

On October **23**, 1985, petitioner waived a hearing before the State Tax  
Commission and submitted the matter for decision based upon the Audit Division  
file, as well as a brief and additional documents to be submitted by October 8,  
1986. After due consideration of the record, 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 Gerald Unterman has substantiated that he was  
engaged in a trade or business during the years at issue.

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

FINDINGS OF FACT

1. Petitioners, Gerald Unterman and Elaine Unterman, timely filed New York State income tax resident returns (with City of New York nonresident earnings tax) for each of the years 1978 and 1979 under filing status married filing separately on one return. On each return Mr. Unterman reported his occupation to be "Financial Analyst" while Mrs. Unterman reported her occupation to be "School Teacher".

2. For 1978, Mr. Unterman reported \$23,405.00 in business income. A **Schedule C, Federal Form 1040, attached to the return reported the following** income and expenses:

. "Schedule C - Income From Business or Profession - Financial Analyst

Income	27472
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Expenses:

Telephone	120
Travel (3000 mi @ 17¢)	510
Magazines, Newspapers	298
Research, Meetings & Conferences	2146
Professional Development-CFA Exam	125
Supplies	182
Calculator	80
Cassettes, Note-Taking & Speeches	231
FAF Seminar	150
Dues	225
	<u>4067</u>
Net Income	<u>23,405</u>

3. Attached to petitioners' 1978 return was a Wage and **Tax** Statement issued to Mr. Unterman by Standard & Poor's Corp. showing \$27,471.89 in "Wages,

tips, other compensation". The legend "Included in Schedule C" with an arrow pointing to said figure was stamped on the statement.

4. For 1979, Mr. Unterman reported \$25,810.00 in business income. A Schedule C attached to the return reported the following income and expenses:

"Schedule C - Income From Business or Profession: Financial Analyst

Income

Research	32810
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Expenses:

Telephone	180	
Travel (8,450 mi @ 184½¢)	1563	
Magazines, Newspapers	308	
Research, Meetings & Conference	2943	
Professional Development	486	
Supplies	203	
Calculator	81	
Cassettes, Tapes, Note-Taking & Speeches	431	
<b>FAF</b> Seminar	175	
Dues	239	
Accounting	375	
Postage & Mailing	16	7000
Net Income		<u>25810"</u>

5. Attached to petitioners' 1979 return was a Wage and Tax Statement issued to **Mr.** Unterman by Standard & Poor's Corp. showing \$32,809.69 in "Wages, tips, other compensation". The legend "Included in Schedule C" with an arrow pointing to said figure was stamped on the statement.

6. **Mrs.** Unterman's income of \$20,749.21 (1978) and \$16,421.95 (1979), as reported on the wage and tax statements issued to her by the City of New York was properly reported as wage income on each return at issue.

7. Mr. Unterman filed an unincorporated business tax return for each year at issue. For 1978 he reported a net profit of \$23,405.00 and a subtraction of \$27,472.00. A handwritten explanation of the subtraction appears on the return

characterizing it as "FICA wages included in Schedule C". Accordingly, a net **loss** of \$4,067.00 was shown, with **no** tax due. For 1979, Mr. Unterman reported a net profit of \$25,810.00 and a subtraction of \$32,810.00. A stamped arrow with the legend "FICA Wages included in Schedule C" pointed to the latter figure. Accordingly, a net **loss** of \$7,000.00 was shown, with no tax due.

8. Mr. Unterman filed a New York City nonresident earnings tax return for each year at issue. For 1978, he reported net earnings from self-employment of \$23,405.00. For 1979, he reported net earnings from self-employment **of** \$25,552 .00

9. Mrs. Unterman failed to file a New York City nonresident earnings tax return for 1978. However, for 1979, she properly filed such return wherein she reported her salary income **of** \$16,422.00.

10. On petitioners' 1978 and 1979 personal income tax returns they claimed itemized deductions. **The** miscellaneous deductions claimed of \$928.00 (1978) and \$784.00 (1979) appear **to** be related to Mrs. Unterman's income. **No** adjustments to income were reported on either return.

11. Petitioners' 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 Gerald Unterman's claimed Schedule C deductions were disallowed on that basis.

12. On March 26, 1982, the Audit Division issued a Statement of Audit Changes to petitioners for the year 1978, wherein Mr. Unterman's claimed Schedule C expenses were disallowed. Additionally, adjustments were made with respect to New York City nonresident earnings tax. The aforesaid adjustments were explained in said statement as **follows**:

"Deductions shown on Schedule C are disallowed since they are not considered ordinary and necessary in the production of income as an employee.

The New York City non-resident earnings tax return for the husband has been based on wages of \$27,471.89. A New York City non-resident earnings tax return has been computed for the wife based on wages of \$20,749.21."

Accordingly, on April 14, 1982 a separate Notice of Deficiency was issued against each petitioner for 1978. The notice issued against Mr. Unterman asserted additional ~~New~~ New York State personal income tax **of** \$241.51, less a credit of \$27.86 **for** New York City nonresident earnings tax, plus interest of \$61.63, for a total due of \$275.28. The notice issued against Mrs. Unterman asserted additional New York State personal income tax of \$234.18, New York City nonresident earnings tax **of** \$88.87, plus interest of \$93.18, for a total due of \$416.23.

13. On February 8, 1983, the Audit Division issued a Statement of Audit Changes to petitioners for the year 1979, wherein Mr. Unterman's claimed Schedule C expenses were disallowed based on 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."

Accordingly, on April 8, 1983, a separate Notice of Deficiency was issued against each petitioner for 1979. The notice issued against Mr. Unterman asserted additional New York State personal income tax **of** \$316.67, less a

credit of \$12.36 for New York City nonresident earnings tax, plus interest of \$101.15 for a total due of \$405.46. The notice issued against Mrs. Unterman asserted additional New York State personal income tax of \$316.67, plus interest of \$105.26, for a total due of \$421.93. The deficiency computed against Mrs. Unterman was based on a redistribution of petitioners' itemized deductions between husband and wife.

14. Petitioner Gerald Unterman submitted documentary evidence which was insufficient to show that he was engaged in business as a financial analyst.

15. Petitioner Gerald Unterman contends:

(a) That the notices of deficiency were issued on an arbitrary and capricious basis just prior to the expiration of the period of limitation on assessment, thus depriving him of the opportunity to present substantiation for the claimed deductions;

(b) that he *is* part *of* a large group of taxpayers who were selected for special scrutiny because their returns had been prepared by the same tax preparer; and

(c) that where he does not have cancelled checks or other receipts for certain expenses, the Department of Taxation and Finance should allow him a reasonable estimate of such expenses.

#### 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 income and expense. The notices of deficiency for 1978 and 1979 were each preceded by a Statement of Audit Changes; thus petitioner Gerald Unterman had an opportunity *to* file amended returns claiming employee business expenses as adjustments on Federal Form 2106, or as itemized miscellaneous deductions, but did not do *so*.

B. That the fact that petitioners' returns were selected for examination because of certain practices of their accountant *is* irrelevant. Their liability

C. That petitioner Gerald Unterman has not sustained his burden of proof under section 689(e) of the Tax Law and section U46-39.0(e) of the Administrative Code of the City of New York, 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. Furthermore, the expenses purportedly attributable to any such business were not properly substantiated.

D. That even if petitioner Gerald Unterman may have been entitled to deduct certain employee business expenses under sections 62(2) or 63(f) of the Internal Revenue Code if he had filed Form 2106, or had claimed such expenses as miscellaneous deductions, he nevertheless failed to sustain his burden of proof to substantiate the character or, in many cases, the amount of the claimed business expenses.

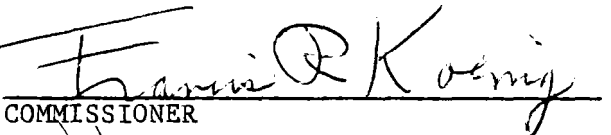
E. That the petition of Gerald Unterman and Elaine Unterman is denied and the notices of deficiency issued April 14, 1982 and April 8, 1983 are sustained together with such additional interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

JUL. 0 11987

PRESIDENT



COMMISSIONER



COMMISSIONER