

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions

of

RICHARD WOLFSON AND BERNICE WOLFSON

DECISION

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

Petitioners, Richard Wolfson and Bernice Wolfson, 42 Simpson Drive, Old Bethpage, New York 11804, filed petitions for redetermination of deficiencies or for refunds of New York State personal income tax under Article 22 of the Tax Law and City of New York nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the years 1978 and 1979 (Pile Nos. 37577, 37801 and 43028).

On October 23, 1985, petitioners advised the State Tax Commission that they desired to waive their right to a hearing and to submit their case for decision based upon the existing record contained in the file, together with the submission of additional evidence 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 petitioners have substantiated that they were engaged in a trade or business during the years at issue.

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

FINDINGS OF FACT

1. For the years 1978 and 1979, petitioners Richard Wolfson and Bernice Wolfson filed New York State income tax resident returns with City of New York nonresident earnings tax under the filing status "married filing separately on one return". For 1978, Richard Wolfson filed an unincorporated business tax return and, for 1979, both petitioners filed unincorporated business tax returns.

(a) The 1978 return listed Richard Wolfson's occupation as a social counsellor and Bernice Wolfson's occupation as an office aide. Richard Wolfson reported total income of \$11,535.00, consisting of \$53.00 interest income and \$13,049.00 business income, with a loss from the sale or exchange of capital assets of \$1,500.00 and an adjustment of \$67.00 representing an interest penalty due to early withdrawal of savings. Bernice Wolfson reported total income of \$14,443.00 consisting of \$9,533.00 in wages, \$110.00 interest income and \$4,800.00 other income.

(i) The COPY of the Federal Schedule C attached to the return indicated income from Richard Wolfson's business or profession as a social counsellor consisting of \$23,385.00 from the City of New York, \$60.00 from David Lerner Associates, Inc. and \$1,050 .00 from referral fees. The Federal Schedule C reported the following expenses:

Payments to Bernice Wolfson (office aide)	\$ 4,800
Travel (7,530 miles at 17¢)	1,280
Meeting and promotion expense	884
Licensing fees	10
Telephone	361
postage	

Magazines, newspapers, periodicals	286
Stationery supplies & attache case	108
Gifts (21 gifts at \$15.00)	315
Hospitality at home (27 weeks at \$25)	675
Office maintenance costs (alloc.)	300
Travel (Fla. 250; Penn. 206)	456
Dues & memberships	215
Depreciation on furnishings & equip. office	240
Messengers (Richard)	1,300
Accounting	<u>100</u>
Total	<u>\$11,392</u>

The \$11,392.00 **in** total **expenses** deducted from revenues of \$24,441.00 resulted **in** the \$13,049.00 net business income reported.

(ii) The wage and tax statements for Richard Wolfson which were attached to the return indicated \$23,385.52 from the City **of** New York and \$1,050.00 from Plainview-Old Bethpage Summer Day Camp Program, Inc. Federal, State and **FICA** taxes were withheld from both sums and New York City tax was withheld from the amounts paid by the City of New York. The wage and tax statement from the City of New York also indicated that Richard Wolfson was provided with pension plan coverage. Each wage and tax statement was stamped with an arrow pointing to the amount contained in the "wages, tips, other compensation" box with the legend "Included in Schedule **C**".

(iii) The unincorporated business tax return shows the following: net profit and total income from business before New York modifications was \$13,049.00; from this amount was subtracted \$24,435.00 (this amount was the amount for which petitioner received wage and tax statements), resulting in total net: **loss** from **business** of \$11,386.00.

(b) The 1979 return listed petitioners' occupations **in** the same manner as on the 1978 return. Bernice Wolfson reported total income of \$12,059.00, consisting of business income of \$11,916.00 and interest income of \$143.00.

business income and \$142.00 interest income with a capital loss of \$1,500.00.

Each petitioner filed a Federal Schedule C for 1979.

(i) The copy of the Federal Schedule C for Richard Wolfson indicated a business or profession in sales which consisted of \$24,298.00 from counselling and \$1,754.00 from a selling venture for a total of \$26,052.00.

The Federal Schedule C reported the following expenses:

Payments to Bernice Wolfson	\$ 4,900
Merchandise	1,658
Rental - RT 110	325
Travel (8,350 mi. @ 18½¢)	1,545
Supplies - selling	437
Repairs & maint.	294
Selling expense	847
Buying expense	272
Licensing fees	40
Telephone	240
Magazines, books, stationery	207
Dues & memberships	285
Accounting	100
Office maint. costs & storage	600
Hospitality	437
Messengers & selling aide	750
Depreciation of F & F	<u>240</u>
Total	<u><u>\$13,077</u></u>

The \$13,077.00 in total expenses deducted from revenues of \$26,052.00 resulted in the \$12,975.00 net business income reported.

(ii) The copy of the Federal Schedule C for Bernice Wolfson indicated a business or profession of secretarial services exchange which consisted of \$5,964.00 from Halbro, \$5,053.00 from Trans Atlantic and \$4,800.00 from R. Wolfson for a total of \$15,817.00. The Federal Schedule C reported the following expenses:

Telephone (\$25 x 12 mos.)	\$ 300
Magazines, newspapers	308
Travel (8,630 mi. @ 18½¢)	1,597
Supplies	118
Messenger - Michael Wolfson (son)	950

Mailings	111
Postage	<u>84</u>
Total	<u><u>\$3,901</u></u>

The \$3,901.00 in total expenses deducted from revenues of \$15,817.00 resulted in the \$11,916.00 net business income reported.

(iii) The wage and tax statements for petitioners which were attached to the return indicated \$24,298.32 from the City of New York to Richard Wolfson and \$5,053.30 from Trans Atlantic Electronics, Inc. and \$5,964.00 from Halbro Control Ind. to Bernice Wolfson. Federal, State and FICA taxes were withheld from each of the amounts paid to petitioners and local tax was withheld from the amount paid to Richard Wolfson by the City of New York. The wage and tax statement from the City of New York also indicated that Richard Wolfson was provided with pension plan coverage. Each wage and tax statement was stamped with an arrow pointing to the amount contained in the "wages, tips, other compensation" box with the legend "Included in Schedule C".

(iv) Richard Wolfson's unincorporated business tax return shows the following: net profit and total income from business before New York modifications was \$12,975.00; from this amount was subtracted \$24,298.00 (this amount was noted as "FICA wages included in Schedule C"), resulting in total net loss from business of \$11,323.00. Bernice Wolfson's unincorporated business tax return shows the following: net profit and total income from business before New York modifications was \$11,916.00; from this amount was subtracted \$11,017.00 (this amount was noted as "FICA wages included in Schedule C"), resulting in total business income of \$899.00. From this amount was subtracted \$180.00 as an allowance for taxpayer's services for a total net income from business of \$719.00.

2. Petitioners' tax returns were selected for examination **along** with those of approximately 100 other taxpayers **on** the basis that their 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. Petitioners' claimed Schedule C deductions were disallowed on that basis.

3. (a) On April 2, 1982, the Audit Division issued a Statement of Audit Changes to petitioners for the year 1978 which asserted additional New **York** State personal income tax due from Richard Wolfson in the amount of \$414.24 and from Bernice Wolfson in the amount of \$404.37 and additional New York City nonresident earnings tax due from Richard Wolfson in the amount **of** \$42.25, plus interest, for a total amount due of \$1,107.88. The **basis** was stated as follows:

"Expenses claimed on your 1978 New **York** State tax return are disallowed as they are not considered as ordinary and necessary in the production of income as an employee. In addition, your New York City nonresident earnings tax is computed based on wages of \$24,435.00."

On April 14, 1982, the Audit Division issued a Notice of Deficiency for 1978 to Richard Wolfson asserting additional tax due of \$456.69, plus interest of \$133.95, for a total amount due **of** \$590.64. On the same date, the Audit Division issued a Notice **of** Deficiency for 1978 to Bernice Wolfson asserting additional tax due of \$404.37, plus interest of \$118.60, for a total amount due of \$522.97. Since the Audit Division disallowed petitioner Richard Wolfson's salary expense of \$4,800.00 paid to Bernice Wolfson, this amount should have

been deducted from petitioner Bernice Wolfson's income for 1978. Accordingly, the amount of additional tax due from petitioner Bernice Wolfson for 1978 should be reduced from \$404.37 to \$52.08, plus interest.

(b) On January 26, 1983, the Audit Division issued a Statement of Audit Changes to petitioners for the year 1979 which asserted additional New York State personal income tax due from Richard Wolfson in the amount of \$899.23 and additional New York City nonresident **earnings** tax due **from** Richard Wolfson **in** the amount of \$33.84. The Statement of Audit Changes indicated that Bernice Wolfson had an overpayment of New York State personal income tax of \$28.47 which **was** deducted from the amount owed by Richard Wolfson. The total amount due was, therefore, \$904.60, plus interest, for a total amount due of \$1,187.03. The basis of these changes was stated as follows:

"**As** a salary employee, you are not a business entity and therefore not entitled to claim Schedule D [sic] deductions as these expenses are not ordinary and necessary for the production of income as an employee. **An** isolated transaction does not constitute the carrying on **of** a business and the income from this transaction equals [sic] to the expenses and therefore, **no** income **is** shown. Your wife's income is decreased by the payment of \$4800.00. Household credit **is** not allowed as your income exceeds \$25,000.00. As a nonresident **of** New York City your total wages are subject to the New York City wage tax on employee [sic]."

On April 8, 1983, the Audit Division issued a Notice of Deficiency for 1979 to Richard Wolfson asserting additional tax due of \$904.60, plus interest of \$300.69, **for** a total amount due of \$1,205.29. A corrected wage and tax statement for Richard Wolfson from the City **of** New York indicates that his wages for 1979 were \$24,463.08 rather than \$24,298.32 as originally reported. However, since no additional Notice of Deficiency was issued to Richard **Wolfson** by the Audit Division to reflect this additional income, issuance of such a notice is now barred by statute of limitations.

(c) For both **of** said years, petitioners itemized their deductions.

4. Upon the submission, petitioners submitted affidavits, bills and, in some cases, cancelled checks pertaining to the amounts claimed as business expenses on the Federal Schedules C filed for the years at issue. Petitioner Richard Wolfson paid the sums of \$195.00 for 1978 and \$210.84 for 1979 as dues **to** the United Federation **of** Teachers Union. **As** to the other expenses, **no** evidence was submitted to substantiate that these expenses were other than personal in nature.

5. Petitioners contend:

(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 petitioners **of** the opportunity to present substantiation for the claimed deductions;

(b) that petitioners are 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 petitioners do not have cancelled checks or other receipts for certain expenses, the Department of Taxation and Finance should **allow** petitioners 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 claimed Schedule **C** business expenses.

B. That the fact that petitioners' returns were selected for examination because **of** certain practices of their accountant is irrelevant. Petitioners' liability depends solely upon the **facts adduced herein**

C. That petitioner Richard **Wolfson** 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 for the years 1978 and 1979. Petitioner Bernice Wolfson has not sustained her burden of proof under section 689(e) of the Tax Law to show that she was engaged in a trade or business other than as an employee for the year 1979. Expenses claimed on Schedules C may not, therefore, be deducted under section 62(1) of the Internal Revenue Code.



D. That, as indicated in Finding of Fact "3(a)", the New York State personal income tax deficiency asserted against petitioner Bernice Wolfson for the year 1978 is reduced from \$404.37 to \$52.08, plus interest. As indicated ~~in~~ Finding of Fact "4", petitioner Richard Wolfson was entitled to a Schedule A itemized deduction for union dues in the amount of \$195.00 for 1978 and \$210.84 for 1979, which amounts were deducted from his wages for payment to the United Federation of Teachers.

E. That the petitions of Richard Wolfson and Bernice Wolfson are granted to the extent indicated in Conclusion of Law "D", supra; that the Audit Division is directed to modify the notices of deficiency issued April 14, 1982 to each petitioner and the Notice of Deficiency issued April 8, 1983 to petitioner Richard Wolfson accordingly; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 18 1987


PRESIDENT

COMMISSIONER