

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions

of

JOSEPH BOVERMAN AND JUDITH BOVERMAN

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.

Petitioners, Joseph Boverman and Judith Boverman, 144-08 Grand Central
Parkway, Briarwood, New York 11435, 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. 37722 and 44356).

On October 23, 1985, petitioners waived their right to a hearing and
requested that the State Tax Commission render a decision based on the entire
record contained in their 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 Joseph Boverman has substantiated that he was
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. On August 6, 1979, petitioners late filed a New York State and City income tax resident return for 1978 wherein they elected a filing status of "Married filing separately on one Return". On his portion of said return, Joseph Boverman reported business income of \$22,598.00, while on her portion of the return Judith Boverman reported a business **loss** totalling \$2,684.00. The following table details the manner in which petitioners computed their reported business income and loss:

<u>JOSEPH BOVERMAN</u>		
<u>Income</u>		
Consulting institutions	\$33,250.00	
Estimating	250.00	
Photography	225.00	
Other	<u>8,032.00</u>	
Total income		\$41,757.00
<u>Expenses</u>		
Telephone	\$ 480.00	
Newspapers	305.00	
Meetings	1,893.00	
Travel	1,122.00	
Payments to office aide Judith Boverman	7,800.00	
Travelling expenses	483.00	
Interviewing	336.00	
Postage	33.00	
Accounting	100.00	
Dues	399.00	
Photographic supplies	1,653.00	
Depreciation on camera	933.00	
Depreciation on darkroom	700.00	
Payment for darkroom help	1,300.00	
Investment expense	806.00	
Professional meeting	<u>816.00</u>	
Total expenses		<u>19,159.00</u>
<u>Net Income</u>		<u>\$22,598.00</u>

JUDITH BOVERMAN

<u>Income</u>		
Sales		\$ 892.00
<u>Expenses</u>		
Purchases	\$2,093.00	
Travel	377.00	
Framing	<u>1,106.00</u>	
Total expenses		3,576.00
<u>Net Loss</u>		<u>(<u>\$2,684.00</u>)</u>

2. Attached to petitioners' 1978 return was a wage and tax statement issued to Mr. Boverman by Standard Mtr. Prod. Inc., reporting wages, tips, other compensation of \$33,250.00. The statement was stamped with an arrow pointing to the \$33,250.00 figure with the legend "Included in Schedule C". The \$7,800.00 expense claimed by Mr. Boverman for payments made to his wife as an office aide was reported by Mrs. Boverman as "other income" on her return.

3. On March 24, 1982, the Audit Division issued a Statement of Audit Changes to petitioners for the year 1978 which contained the following explanation and computation:

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

Your tax liability is recomputed as married filing joint since this gives you your best tax advantage.

Penalty pursuant to section 685(a)(1) is imposed for failure to file a return on or before due date.

		<u>Joint</u>
Wages (Husband)		\$33,250.00
Dividends (Joint)		1,029.00
Business Loss (Wife)		(2,684.00)
Other Income (Husband)		<u>8,507.00</u>
Total		\$40,102.00
Less: Itemized deductions	\$5,262.00	
Exemptions (4 x \$650.00)	<u>2,600.00</u>	7,862.00
Taxable Income		<u><u>\$32,240.00"</u></u>

4. Based on the aforementioned Statement of Audit Changes, the Audit Division, on July 9, 1982, issued a Notice of Deficiency to petitioners for

1978 asserting additional New York State and City tax due of \$2,406.46, plus penalty of \$282.78 and interest of \$770.77, for a total allegedly due of \$3,460.01.

5. Petitioners timely filed a New York State and City income tax resident return for 1979 wherein they elected a filing status of "Marriedfiling separately on one return". On his portion of said return, Mr. Boverman reported business income of \$22,465.00, while on her portion of the return Mrs. Boverman reported business income totalling \$4,142.00. The following table details the manner in which petitioners computed their respective business incomes:

<u>JOSEPH BOVERMAN</u>		
<u>Income</u>		\$35,750.00
<u>Expenses</u>		
Payments to Aide - Judith Boverman	\$7,800.00	
Newspapers	292.00	
Telephone	360.00	
Photography	1,207.00	
Depreciation of photography equipment	933.00	
Depreciation of darkroom	700.00	
Travel	897.00	
Accounting	104.00	
Dues	29.00	
ASQC due	29.00	
Professional meeting	934.00	
Total expenses		<u>13,285.00</u>
<u>Net Income</u>		<u>\$22,465.00</u>

<u>JUDITH BOVERMAN</u>		
<u>Income</u>		
Secretarial	\$7,800.00	
Sales	933.00	
Total income		\$ 8,733.00
<u>Expenses</u>		
Purchases	\$ 372.00	
Travel	1,267.00	
Framing	incl	
Pillow-making materials	461.00	
Telephone	360.00	
Hospitality	983.00	
Magazines	360.00	

Prof. development	369.00	
Postage	15.00	
Sales parties	418.00	
Secretarial travel exp.	<u>986.00</u>	
Total expenses		5,591.00 ¹
<u>Net Income</u>		<u>\$ 4,142.00</u>

6. Attached to petitioners' 1979 return was a wage and tax statement issued to Mr. Boverman by Standard Mtr. Prod. Inc., reporting wages of \$38,800.08. Said statement was also stamped with an arrow pointing to the \$38,800.08 figure with the legend "Included in Schedule C".

7. On January 28, 1983, the Audit Division issued a Statement of Audit Changes to petitioners for 1979 which contained the following explanation and computation:

"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.

Medical expenses have been adjusted, in the amount of \$8.00, to reflect the increase of Federal income. Business income computation error of \$1,000.00 is corrected, by adjustment on wife's return.

Mrs. Boverman has been allowed business expenses of \$461.00 against business income of \$933.00.

	<u>Husband</u>	<u>Wife</u>
N.Y. Taxable Income-reported	\$19,696.00	\$5,066.00
Adjustments (\$13,285.00 + \$8.00)	<u>13,293.00</u>	<u>(3,670.00)</u>
Corrected N.Y. Taxable Income	\$32,989.00	\$1,396 .00"

8. Based on the aforementioned Statement of Audit Changes, the Audit Division, on April 8, 1983, issued a Notice of Deficiency to petitioners for 1979 asserting additional New York State and City tax due of \$2,168.91, plus interest of \$720.95, for a total allegedly due of \$2,889.86.

1 Mrs. Boverman's net income is overstated by \$1,000.00 due to an error in subtraction. Correct net income is \$3,142.00.

9. Petitioners' 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 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.

10. 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 limitations on assessment, thus depriving petitioner of the opportunity to present substantiation for the claimed deductions;

(b) that petitioners are one 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.

11. Petitioners submitted documentary evidence in the form of sales invoices, cancelled checks and worksheets in substantiation of a portion of the business expenses claimed on their respective Federal Schedules C for the years at issue. With respect to petitioner Joseph Boverman, the evidence submitted did not relate to a characterization of the expenses as business rather than

personal. With respect to petitioner Judith Boverman, the evidence submitted establishes that she was engaged in the carrying on of a trade or business (needlecraft) for the year 1979². Said evidence also substantiates that all expenses claimed by Mrs. Boverman for 1979 were ordinary and necessary business deductions with the one exception of travel expenses totalling \$1,513.00. Travel expenses of \$740.00, out of total travel expenses of \$2,253.00, were related to Mrs. Boverman's needlecraft business activities while the balance, \$1,513.00, were personal expenses unrelated to said needlecraft activities.

12. No evidence or argument was adduced by petitioners with respect to the late filing penalty asserted due for 1978.

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 Joseph Boverman on his respective Federal Schedules C. The notices of deficiency were preceded by statements of audit changes and petitioner Joseph Boverman 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 petitioners' returns were selected for examination because of certain practices of their accountant is irrelevant. Petitioners' liability depends solely on the facts adduced herein.

2 Although petitioner Judith Boverman submitted documentary evidence for 1978, it *is* noted that the Audit Division allowed in full the business loss as claimed on her return for said year.

C. That petitioner Joseph Boverman 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 deductions 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).

D. That petitioner Judith Boverman has sustained her burden of proof to show that she was engaged in a trade **or** business during the year 1979. Pursuant to Finding of Fact "11", supra, **Mrs.** Boverman's allowable ordinary and necessary business expenses **for** 1979 are reduced by \$1,513.00, from \$5,591.00 to \$4,078.00. Petitioner Judith Boverman's business loss for 1979 totals \$3,145.00 (\$933.00 of sales less \$4,078.00 of expenses).

E. That petitioners have failed to present any evidence to show that reasonable cause existed for their failure to timely file a 1978 return. Accordingly, the imposition of a penalty pursuant to Tax Law § 685(a)(1) and Administrative Code § T46-185.0(a)(1) is sustained.


F. That the petitions of Joseph Boverman and Judith Boverman are granted to the extent indicated in Conclusion of Law "D", supra; that the Audit Division is directed to recompute the Notice **of** Deficiency dated April 8, 1983 consistent

with the conclusions reached herein; and that, except as so granted, the petitions for redetermination of the notices of deficiency dated July 9, 1982 and April 8, 1983 are in all other respects denied.

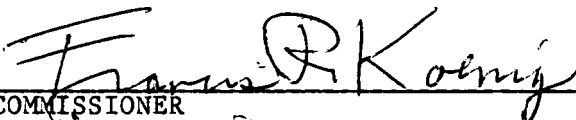
DATED: Albany, New York

STATE TAX COMMISSION


MAY 26 1987



PRESIDENT



COMMISSIONER



COMMISSIONER