

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petitions  
of

NICHOLAS SCHIFANO AND CHARLOTTE SCHIFANO . 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 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, Nicholas Schifano and Charlotte Schifano, 3327 Walters  
Avenue, Wantagh, New York 11793, filed petitions for redetermination of deficien-  
cies or for refunds 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 (File Nos. 37763 and 44364).

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 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. Petitioner Nicholas Schifano, together with his wife, Petitioner Charlotte Schifano, 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". For both years, petitioners claimed itemized deductions but did not claim any miscellaneous itemized deductions. On his portion of said returns, Mr. Schifano reported New York City nonresident earnings tax. Petitioners also filed unincorporated business tax returns for said years.

2. The 1978 income tax return listed Nicholas Schifano's occupation as "truck route" and reported \$13,323.00 in total income, consisting of \$149.00 in interest income and \$13,174.00 in business income. Charlotte Schifano's occupation was listed as "maintenance contracting". On her portion of said return, she reported \$7,141.00 in total income, consisting of \$150.00 interest income and \$6,991.00 in business income. The following table, as shown on Federal Schedule C's, details the manner in which petitioners computed their reported business income:

Nicholas Schifano

Revenues	\$16,786.00
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Expenses:

Travel to truck depot	\$683.00
Gloves	196.00
Outside telephone	381.00
Safety equipment - shoes	136.00
Arctic wear/rainwear	293.00
Personal tools, flares	234.00
Gratuities	495.00

Dues and subscriptions	150.00	
Tax preparation	100 00	
Maps	<u>53.00</u>	
Total expenses		<u>3,612.00</u>
Net income		<u>\$13,174.00</u>

Charlotte Schifano

Revenues	\$11,094.00
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Expenses :		
Travel	\$1,649.00	
Rubber gloves	193.00	
Hand lotions	98.00	
Cleaning/laundry	348.00	
Aqua uniforms	275.00	
White shoes and maintenance	225.00	
Personal tools	92.00	
Cafeteria charges	500.00	
Telephone	240.00	
Interest	18.00	
White support stockings	321.00	
Dues	<u>144.00</u>	
Total expenses		<u>4,103.00</u>
Net income		<u>\$ 6,991.00</u>

3. The wage and tax statements attached to the return showed \$16,786.45 in "Wages, tips, other compensation" paid to Nicholas Schifano from Desk Transportation Co., Inc. and \$11,094.00 in "Wages, tips, other compensation" paid to Charlotte Schifano from Carillon House Nursing Home. The statements were stamped **with** an arrow pointing to the \$16,786.45 and \$11,094.00 figures with the legend "Included in Schedule C".

4. Mr. Schifano's 1978 unincorporated business tax return shows the following: net profit and total income from business before New York modifications was \$13,174.00; from this amount was subtracted \$16,786.00 as a "subtraction resulting in total (and net) loss from business of \$3,612.00. Mrs. Schifano's 1978 unincorporated business tax return shows the following: net profit and total income from business before New York modifications was \$6,991.00; from

this amount was subtracted \$11,094.00 as a "subtraction" resulting in total (and net) loss from business of \$4,103.00.

5. On March 22, 1982, the Audit Division issued a Statement of Audit Changes to petitioners for the year 1978 which contained the following:

"Schedule C expenses are disallowed as they are not ordinary and necessary in the production of income as an employee. Also, credits are disallowed as your total income exceeds \$25,000.00. Your New York City income *is* all wages and as such must be reported under the wage column New York City Form NYC-203. Your taxes are therefore recomputed as follows:

	NY City <u>Husband</u>	NY State <u>Husband</u>	Wife
Total taxable income		\$6,276.00	\$ 6,276.00
Expenses disallowed		<u>3,612.00</u>	<u>4,103.00</u>
Total taxable income		\$9,888.00	\$10,379.00
Gross income	\$16,786.45		
Less exemption	<u>2,000.00</u>		
Taxable balance	\$14,786.45		
Tax per tax rate schedule	\$ 66.54	\$ 442.16	\$ 476.53
Tax previously stated	<u>73.00</u>	<u>206.30</u>	<u>\$ 206.30</u>
Overpayment	\$ 6.46		
Tax due		\$ 235.86	\$ 270.23"

6. Based on the aforementioned Statement of Audit Changes, the Audit Division, on April 6, 1982, issued a Notice of Deficiency to petitioner Nicholas Schifano for 1978 asserting additional New York State personal income tax due of \$229.40, plus interest. On the same date, the Audit Division issued a Notice of Deficiency to petitioner Charlotte Schifano asserting additional New York State personal income tax due of \$270.23, plus interest.

7. The 1979 return also listed Nicholas Schifano's occupation as "truck route" and reported \$13,483.00 in total income, consisting of \$354.00 in interest income and \$13,129.00 in business income. Charlotte Schifano's occupation was also listed as "maintenance contracting". On her portion of said return, she reported \$7,178.00 in total income, consisting of \$355.00 in

interest income and \$6,823.00 in business income. The following table, as shown on Federal Schedule C's, details the manner in which petitioners computed their reported business income:

Nicholas Schifano

Revenues		\$18,040.00
Expenses:		
Travel to truck depot	\$1,283.00	
Gloves	294.00	
Outside telephone	587.00	
Safety equipment - shoes	184.00	
Arctic wear/rainwear	291.00	
Personal tools, flares	238.00	
Gratuities	505.00	
Hospitality for helpers	892.00	
Dues and subscriptions	155.00	
Tax preparation	100.00	
Maps	53.00	
Repair services	<u>329.00</u>	
Total expenses		<u>4,911.00</u>
Net income		<u><u>\$13,129.00</u></u>

Charlotte Schifano

Revenues		\$11,525.00
Expenses:		
Travel	\$2,002.00	
Rubber gloves	204.00	
Hand lotions	98.00	
Cleaning/laundry	358.00	
Aqua uniforms	305.00	
White shoes and maintenance	236.00	
Personal tools	94.00	
Cafeteria charges	500.00	
Telephone	240.00	
Interest	18.00	
White support stockings	321.00	
Dues	144.00	
Magazines, newspapers, etc.	<u>182.00</u>	
Total expenses		<u>4,702.00</u>
Net income		<u><u>\$ 6,823.00</u></u>

8. The wage and tax statements attached to the return showed \$18,039.68

In "Wages, tips, other compensation" paid to Nicholas Schifano from Desk

paid to Charlotte Schifano from Carillon House Nursing Home. The statements were stamped with an arrow pointing to the \$18,039.68 and \$11,525.12 figures with the legend "FICA wages included in Schedule C".

9. Mr. Schifano's 1979 unincorporated business tax return shows the following: net profit and total income from business before New York modifications was \$13,129.00; from this amount was subtracted \$18,040.00 as a "subtraction resulting in total (and net) loss from business of \$4,911.00. Mrs. Schifano's 1979 unincorporated business tax return shows the following: net profit and total income from business before New York modifications was \$6,823.00; from this amount was subtracted \$11,525.00 as a "subtraction" resulting in total (and net) loss from business of \$4,702.00.

10. On February 7, 1983, the Audit Division issued a Statement of Audit Changes to petitioners for the year 1979 with 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.

COMPUTATION:

	<u>HUSBAND</u>	<u>WIFE</u>	
rected New York State Wages Per Withholding	\$18,039.68	\$11,525.12	
tements			
erest Income	354.00	355.00	
al New York Income	\$18,393.68	\$11,880.12	
s: Itemized Deductions	6,038.00	1,133.00	
rected New York State Taxable Balance	\$12,355.68	\$10,747.12	
s: Exemptions	2,100.00	700.00	
rected New York State Taxable Income	\$10,255.68	\$10,047.12	
rected New York State Tax	\$ 467.89	\$ 453.29	
s: Tax Previously Due	159.75	159.75	
itional New York State Personal Income			
Due	\$ 308.14	\$ 293.54	\$601.68

Corrected New York City Nonresident Tax:

ges	<u>HUSBAND</u>	
ss: Exclusion	\$18,039.68	
t Wages	<u>2,000.00</u>	
te .0045	\$16,039.68	
ss: Tax Previously Due	\$ 72.17	
w York City Nonresident Tax Due	<u>\$ 72.17</u>	
		<u>\$ -0-</u>

TOTAL ADDITIONAL NEW YORK STATE PERSONAL INCOME TAX DUE \$601.68

11. Based on the aforementioned Statement of Audit Changes, the Audit Division, on April 8, 1983, issued a Notice of Deficiency to petitioner Nicholas Schifano for 1979, asserting additional New York State personal income tax due of \$308.14, plus interest. On the same date, the Audit Division issued a Notice of Deficiency to petitioner Charlotte Schifano, asserting additional New York State personal income tax due of \$293.54, plus interest.

12. 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.

13. 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 petitioners of the opportunity to present

(b) that petitioners are two 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.

14. Petitioners submitted documentary evidence in the form of cancelled checks and worksheets in substantiation of a portion of the business expenses which they claimed on Federal Schedule C's for the years at issue. However, the evidence submitted did not relate to a characterization of the expenses as business rather than personal. Noreover, except for union dues for petitioner Nicholas Schifano ~~of~~ \$174.00 for each of the years at issue and \$144.00 per year for petitioner Charlotte Schifano, 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 petitioners on their respective Federal Schedule C's. The notices of deficiency were preceded by statements of audit changes and petitioners 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.

C. That petitioners have failed to sustain their burden of proof (Tax Law § 689[e]; Administrative Code § T46-189.0[eJ) to show (i) that they were 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). Petitioners, however, are entitled to the miscellaneous deduction of union dues for 1978 and 1979 of \$174.00 per year for Nicholas Schifano and \$144.00 per year for Charlotte Schifano

D. That the petitions **of** Nicholas Schifano and Charlotte Schifano 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 6, 1982 and April 8, 1983 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 23 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER