

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

SOL LEFKOWITZ AND JUDITH LEFKOWITZ

:

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 Year 1979.

Petitioners, Sol Lefkowitz and Judith Lefkowitz, 103 Laurel Drive, New
Hyde Park, New York 11040, filed a petition for redetermination of a deficiency
or for refund of personal income tax under Article 22 of the Tax Law and New
York City nonresident earnings tax under Chapter 46, Title U of the the
Administrative Code of the City of New York for the year 1979 (File No. 44358).

On October 23, 1985, petitioners waived a hearing before the State Tax
Commission and agreed to submit this matter for decision based on the Audit
Division file, as well as a brief and additional documentation 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 Notice of Deficiency was issued without any basis and for
the sole purpose of extending the period of limitation on assessment.

II. Whether petitioner Sol Lefkowitz has substantiated that he **was** engaged
in a trade or business during the year at issue.

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

FINDINGS OF FACT

1. Petitioners, Sol and Judith Lefkowitz, filed, separately on one return, a New York State Income Tax Resident Return for the year 1979. Sol Lefkowitz listed his occupation as "sales representative". Judith Lefkowitz listed her occupation as "office aide". Sol Lefkowitz also filed a New York City Nonresident Earnings Tax Return for 1979.

2. Sol Lefkowitz filed a Schedule C, Form 1040, for 1979 showing his main business activity as "sales representative". The Schedule C reported as "income from business or profession" \$23,425.00 in "commissions" and \$1,050.00 as "(miscellaneous" income for a total "income" of \$24,475.00. The Schedule C also reported the following expenses:

Payments to Judith Lefkowitz (Office Aide)	7,800.00
Travel (13,565 mi. @18½¢)	2,510.00
Parking & Tolls	354.00
Hospitality	1,766.00
Newspapers, Magazines, Etc.	394.00
Sales Expenses, Meetings	1,492.00
Promotional Expense	937.00
Accounting	150.00
Supplies, Briefcase	184.00
Cassettes, Recording & Supplies (Note Taking)	156.00
Messenger (David Lefkowitz)	2,200.00
	<u>\$17,943.00</u>

This resulted in a net profit of \$6,532.00.

3. The net profit of \$6,532.00 was reported as business income on Schedule A of Sol Lefkowitz's New York Income Tax Resident Return. The sum of

\$7,800.00 deducted on Schedule C as "Payments to Judith Lefkowitz (Office Aide)" was included as income on her New York State income tax return.

4. Attached to petitioners' return was a Wage and Tax Statement issued by Apex Fabricators, Inc., showing "Wages, tips, other compensation" of \$23,425.00 for Sol Lefkowitz. Federal and State taxes and FICA were withheld. The wage and tax statement was stamped with the legend "Included in Schedule C", with an arrow pointing to the "Wages, tips, other compensation" figure.

5. Sol Lefkowitz also filed a New York City Unincorporated Business Tax Return for 1979 showing \$6,532.00 in net profit. From this amount, \$23,425.00 was reported as "modifications" resulting in a reported total income from business of \$0.00. "FICA Wages Included in Schedule C" was written on the return next to the "modifications".

6. Petitioners' tax return was 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. Petitioners' claimed Schedule C deductions were disallowed on that basis.

7. On February 8, 1983, the Audit Division issued a Statement of Audit Changes to petitioners for 1979 stating the following with respect to Mr. Lefkowitz's return:

"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, the \$17,945.00 in Schedule C deductions were disallowed resulting in additional State tax due of \$744.03 and additional City tax due of \$77.95.

8. On April 8, 1983, the Audit Division issued to petitioners a Notice of Deficiency for 1979 in the sum of \$821.98 plus interest.

9. Petitioners contended the following:

(a) that the Notice of Deficiency was 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 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 Notice of Deficiency was properly issued and was not arbitrary or capricious. The return was patently erroneous and the Audit Division was justified in disallowing the Schedule C business income and expenses. The Notice of Deficiency was preceded by a Statement of Audit Changes and petitioners had an opportunity to file an amended return 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' return was selected **for** examination because **of** certain practices **of** his accountant **is** irrelevant. Petitioners' liability depends solely **on** the facts adduced herein.


C. That petitioner Sol Lefkowitz has not sustained his burden **of proof** under section 689(e) of the Tax Law 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.

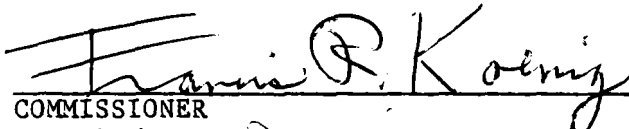
D. That the petition of Sol and Judith Lefkowitz **is in** all respects denied and the Notice **of** Deficiency issued April 8, 1983, **is** sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 29 1987


PRESIDENT


COMMISSIONER


COMMISSIONER