

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

PHILIP E. HOROWITZ AND ROCHELLE HOROWITZ

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 Personal Income Tax under Chapter 46,
Title T of the Administrative Code of the City :
of New York for the Years 1978 and 1979.

DECISION

In the Hatter of the Petition

of

PHILIP E. HOROWITZ, D.D.S., P.C.

for Redetermination of a Deficiency or for
Refund of Corporation Franchise Tax under
Article 9-A of the Tax Law for the Fiscal Year :
Ended June 30, 1978.

Petitioners, Philip E. Horowitz and Rochelle Horowitz, 59 Tamarack Lane, Pomona, New York 10970, 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 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 No. 47405).

Petitioner, Philip E. Horowitz, D.D.S., P.C., 157 North Middletown Road, Pearl River, New York 10965, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal year ended June 30, 1978 (File No. 64529).

A consolidated hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York,

New York, on July 16, 1986 at 1:30 P.M., and continued to conclusion on September 24, 1986, at 1:30 P.M., with all briefs to be submitted by October 24, 1986.

Petitioners appeared by Ira J. Altchek, CPA and David A. Teich, CPA. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether adjustments made as the result of a field audit for New York State and City personal income tax purposes and corporation franchise tax purposes were proper.

FINDINGS OF FACT

1. Petitioners, Philip E. Horowitz and Rochelle Horowitz, filed a 1978 New York State Income Tax Resident Return under filing status "Married filing separately on ~~one~~ Return". On such return Philip E. Horowitz reported salary income of \$26,400.00 derived from his dental practice, Philip E. Horowitz, D.D.S., P.C., 157 North Middletown Road, Pearl River, New York 10965. Although petitioners were New York City residents from January 1, 1978 to May 17, 1978, they failed to compute and pay New York City taxes for said period. For taxable year 1979, petitioners filed a New York State Income Tax Resident Return under the same filing status as that used for 1978. On such return Philip E. Horowitz reported salary income of \$27,500.00 from his dental practice.

2. On October 13, 1982, the Audit Division issued two statements of personal income tax audit changes. One such statement, which was issued solely to Mr. Horowitz, reported adjustments based on a field audit as follows:

	<u>1978</u>	<u>1979</u>
Constructive Dividends from Philip Edward Horowitz, D.D.S., P.C.	\$18,149 .00	\$23,565.00
Interest Income - omitted		44.00
Modifications applicable to petitioner's professional corporation:		

Section 612(b)(8) - Social Security	894.00	1,163.00
Section 612(b)(9) - Insurance	<u>3,687 .00</u>	<u>2,598.00</u>
NET ADJUSTMENT	<u>\$22,730.00</u>	<u>\$27,370.00</u>

The other statement imposed New York City personal income tax against each petitioner for their 1978 New York City resident period.

3. On February 25, 1983, the Audit Division issued two notices of deficiency against petitioners. One notice, which was issued against Philip E. Horowitz, asserted additional New York State personal income tax for 1978 and 1979 of \$6,720.05, New York City personal income tax for 1978 of \$191.60, plus penalty of \$431.80 and interest of \$2,495.57, for a total due of \$9,839.02. The other notice, which was issued against Rochelle Horowitz, asserted New York City personal income tax of \$32.39, plus penalty of \$16.20 and interest of \$13.13, for a total due of \$61.72.

4. On March 14, 1979, Philip E. Horowitz, D.D.S., P.C. (hereinafter "the corporation") filed a Corporation Franchise Tax Report for the fiscal year ended June 30, 1978 whereon taxable income of \$1,879.00 was reported and the minimum tax of \$250.00 was paid.

5. On October 13, 1982, the Audit Division issued a Statement of Franchise Tax Audit Changes to the corporation wherein, as the result of a field audit, the following adjustments were made:

	Fiscal Year Ended <u>June 30, 1978</u>	Fiscal Year Ended <u>June 30, 1979</u>
Additional Income	\$13,879.00	\$17,823.00
Insurance Expense - Personal Use	1,285 .00 ¹	1,768 .00
Auto Expenses - Personal Use	3,985 .00	2,341.00
Depreciation - Auto - Personal Use	<u> </u>	<u>1,633.00</u>

1 The adjustment for Auto Expenses - Personal Use was \$2,985.00 rather than \$3,985.00 as stated. However, the net adjustment as stated of \$18,149.00

NET ADJUSTMENT

\$18,149.00'

\$23,565.00

6. On December 29, 1981, Mr. Horowitz executed a consent form extending the period of limitation on the assessment of corporation franchise tax for the fiscal year ended June 30, 1978 to any time on or before April 15, 1983.

7. On March 4, 1983, the Audit Division issued a Notice of Deficiency against the corporation for the fiscal year ended June 30, 1978, asserting corporation franchise tax of \$1,752.80 plus penalty of \$350.56 and interest of \$897.59, for a total due of \$3,000.95.

8. A Notice of Deficiency was not issued against the corporation for fiscal year ended June 30, 1979 since the period of limitation on assessment had expired.

9. A cash availability audit was conducted with respect to petitioners Philip and Rochelle Horowitz. Such audit revealed undisclosed income of \$27,759.00 for 1978. One half of said amount, or \$13,879.00 was allocated to the corporation as additional income for fiscal year ended June 30, 1978. The balance was allocated to the corporation as additional income for fiscal year ended June 30, 1979. Additionally, one half of the undisclosed income determined on audit for 1979 was allocated to the corporation as additional income for fiscal year ended June 30, 1979. The net adjustments to the corporation for 1978 and 1979 of \$18,149.00 and \$23,565.00 respectively, were held to be additional income to Mr. Horowitz in the nature of constructive dividends from the corporation.

is correct since the aforesaid adjustment in its correct amount was added to the other adjustments in computing the net adjustment as stated.

10. As the result of various concessions made by the Audit Division at a district office conference, a Tax Appeals Bureau conference and the hearing held herein, the amounts of undisclosed income were reduced to \$8,168.00 for 1978 and \$4,234.00 for 1979.

11. The revised field audit workpapers, based on allowances made at the Tax Appeals Bureau conference, contain the following statement with respect to petitioners' New York City tax liability:

"No change from original AU 251 Constructive Dividend effected
Non Resident period only - (no tax)"

12. Mr. Horowitz claimed 100% of his automobile expenses as a business deduction on the returns of the corporation. As the result of the audit only 10% of such expenses were allowed as a business deduction since no records were presented.

13. The 10% allowed by the Audit Division represented 10% of the total of automobile expenses claimed and automobile insurance (which was claimed and subsequently disallowed as an insurance expense).

14. Petitioner's business mileage consisted of 4 round trips per week from his Brooklyn, New York office to his Pearl River, New York office, plus 3 trips per week to Nyack Hospital from his Pearl River office. Based on this mileage, his automobile, a 1975 Volvo, was used 40% for business.

15. Depreciation of the aforestated automobile was also allowed only to the extent of 10% of the amount claimed for fiscal year ended June 30, 1979. For fiscal year ended June 30, 1978, the deduction for depreciation was inadvertently omitted from the corporate return.

16. The cash living expenses incorporated into the cash availability analysis were computed as follows:

	1978	1979
Food (\$ 90 per week for 1978)	\$4,680.00	
(\$100 per week for 1979)		\$5,200.00
Miscellaneous	<u>1,300.00</u>	<u>1,300.00</u>
Total Cash Living Expenses	<u>\$5,980.00</u>	<u>\$6,500.00</u>

The amounts estimated for food expenses were based on field audit manual guidelines and the auditor's personal experience.

17. **Mr.** Horowitz submitted schedules of checks paid to food stores and checks drawn to cash for 1978 and 1979. According to such schedules, his food purchases by check totaled \$612.28 in 1978 and \$887.14 in 1979. Checks drawn to cash per said schedules totaled \$4,480.00 in 1978 and \$3,845.00 in 1979. Credit was previously allowed by the auditor for checks paid to food stores of \$434.10 (1978) and \$816.00 (1979). Credit was also previously allowed for checks drawn to cash of \$2,518.00 (1978) and \$2,000.00 (1979). **No** documentation was submitted to show that petitioners are properly entitled to any credits above what was previously allowed by the Audit Division.

CONCLUSIONS OF LAW

A. That petitioners, Philip and Rochelle Horowitz, have failed to sustain **their burden of proof, imposed pursuant to section 689(e) of the Tax Law, to** show that they are properly entitled to credit for food paid by check or checks drawn to cash over and above the amounts previously allowed by the Audit Division.

B. That based on the evidence adduced at hearing, petitioner has established that 40% of his automobile expenses are deductible on the corporation returns each year as a business deduction computed as follows:

FISCAL YEAR ENDED JUNE 30, 1978

Automobile expenses claimed	\$3,459.00
Insurance	<u>1,285.00</u>
Total	<u>\$4,744.00</u>
40% business use allowed	<u>\$1,898.00</u>
Revised Adjustment (\$3,459.00 - \$1,898.00)	<u><u>\$1,561.00</u></u>

FISCAL, YEAR ENDED JUNE 30, 1979

Automobile expenses claimed	\$2,798.00
Insurance	<u>1,768.00</u>
Total	<u>\$4,566.00</u>
40% business use allowed	<u>\$1,826.00</u>
Revised Adjustment (\$2,798.00 - \$1,826.00)	<u><u>\$ 972.00</u></u>

C. That depreciation on the automobile is also allowed for each fiscal year to the extent of 40% computed as follows:

cost	\$12,700.00
7 Year Life - straight line =	1,814.00 Per Year
40% business use allowed =	726.00

Revised adjustment for fiscal year ended June 30, 1978	<u>\$(726.00)</u>
Revised adjustment for fiscal year ended June 30, 1979	<u><u>\$1,088.00</u></u>

D. That based on all previous concessions made by the Audit Division and the allowances made in Conclusions of Law "B" and "C", supra, the revised net adjustments for both corporation franchise tax and personal income tax purposes are recomputed as follows:

REVISED FRANCHISE TAX AUDIT CHANGES

	<u>Fiscal Year Ended</u> <u>June 30, 1978'</u>	<u>Fiscal Year Ended</u> <u>June 30, 1979</u>
Additional Income (1/2 of \$8,168.00)	\$4,084.00	
Additional Income (\$4,084.00 + 1/2 of \$4,234.00)		6,201.00
Insurance Expense - Personal Use	1,285.00	1,768.00
Auto Expense - Personal Use	1,561.00	972.00
Depreciation - Auto - Personal Use	<u>(726.00)</u>	<u>1,088.00</u>
NET ADJUSTMENT	<u><u>\$6,204.00</u></u>	<u><u>\$10,029.00</u></u>

REVISED NEW YORK STATE PERSONAL INCOME TAX AUDIT CHANGES

	<u>1978</u>	<u>1979</u>
Constructive Dividends from Philip Edward Horowitz, D.D.S., P.C.	\$6,204.00	\$10,029.00
Interest Income - omitted		44.00
Modifications applicable to petitioner's Professional Corporation:		
Section 612(b)(8) - Social Security	894.00	1,163.00
Section 612(b)(9) - Insurance	<u>3,687.00</u>	<u>2,598.00</u>
NET ADJUSTMENT	<u>\$10,785.00</u>	<u>\$13,834.00</u>

E. That the petition of Philip E. Horowitz and Rochelle Horowitz **is** granted to the extent provided in Conclusions of Law "B", "C" and "D", supra; that the Audit Division **is** directed to, modify the Notice of Deficiency issued against petitioner Philip E. Horowitz on February 25, 1983, with respect to New York State and City personal income taxes for 1978 and 1979 accordingly; and except **as so** granted, said petition **is**, in all other respects, denied.

F. That the petition of Philip E. Horowitz, D.D.S., P.C. **is** granted to the extent provided in Conclusions of Law "B", "C", and "D", supra; that the Audit Division **is** directed to modify the Notice of Deficiency issued March 4, 1983 accordingly; and except **as so** granted, said petition is, in all other respects, denied.

DATED: Albany, New York

STATE TAX COMMISSION

APR 23 1987

Rodriguez
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark
COMMISSIONER