

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Harry Scheer :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
& UBT under Article 22 & 23 of the Tax Law for the :
Year 1969. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of November, 1982, he served the within notice of Decision by certified mail upon Harry Scheer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harry Scheer
6 Janet Way #116
Tiburon, CA 94920

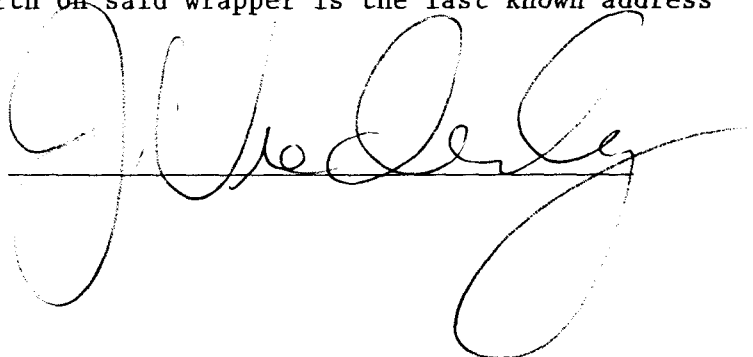
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
9th day of November, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

November 9, 1982

Harry Scheer
6 Janet Way #116
Tiburon, CA 94920

Dear Mr. Scheer:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 & 722 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HARRY SCHEER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income and Unincorporated	:	
Business Taxes under Articles 22 and 23 of	:	
the Tax Law for the Year 1969.	:	

Petitioner, Harry Scheer, 6 Janet Way #116, Tiburon, California 94920, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the year 1969 (File No. 16465).

On May 15, 1981, petitioner advised the State Tax Commission, in writing, that he desired to waive a small claims hearing and submit the case to the State Tax Commission, based on the entire record contained in the file. After due consideration, the State Tax Commission hereby renders the following decision.

ISSUES

- I. Whether petitioner properly substantiated business expenses and business purchases.
- II. Whether petitioner is entitled to carryback to 1969 a net operating loss incurred in 1972.
- III. Whether penalty and interest were properly asserted.

FINDINGS OF FACT

1. Petitioner, Harry Scheer, and his wife Robyn Scheer, filed a separate New York State Combined Income Tax Resident Return for 1969 on Form IT-208. Petitioner indicated his occupation was that of a travelling salesman.

2. On December 29, 1972, the Audit Division issued a Statement of Audit Changes to petitioner for 1969 proposing personal income and unincorporated business taxes of \$1,554.02, penalty, pursuant to section 685(i) of the Tax Law, of \$950.00, and interest of \$266.98 for a total of \$2,771.00. Accordingly, a Notice of Deficiency was issued on February 26, 1973 and a petition timely filed on May 24, 1973.

3. On April 1, 1969, petitioner began business as a sole proprietorship whose principal business activity was wholesale gift products. The business was conducted under the name "Harry's Contemporary Trends" and was located at 18-29 215th Street, Bayside, New York. Petitioner filed Federal Schedule C, Profit (or Loss) From Business or Profession, with the Internal Revenue Service and also filed Form IT-202, New York State Unincorporated Business Tax Return. Petitioner did not show an unincorporated business tax due on his return since his business tax credit was equal to his tax due.

4. Petitioner's case was assigned for field audit on December 3, 1971. Since that time, attempts were made to make an appointment with him but were unsuccessful. Two appointments were cancelled by petitioner's representative and several other attempts elicited no answer. Petitioner did not respond to a request for extending the period of limitation on assessment and, as a result, adjustments were made to business purchases and to business expenses. Petitioner, in arriving at his corrected taxable business income, was allowed a credit for contributions of \$245.00 and additional salary credit of \$2,340.98. The Audit Division also asserted a penalty of \$950.00, pursuant to section 685(i) of the Tax Law, for failure to furnish information previously requested within the time required. On June 12, 1973, the Audit Division received from petitioner and his wife Form IT-113X, "Claim for Credit or Refund of Personal Income Tax

and/or Unincorporated Business Income Tax", for 1969, showing a refund claim of \$194.00 based on a net operating loss carryback ("NOL") from 1972. The NOL was the result of two separate business losses incurred by petitioner.

On November 1, 1974, a preliminary hearing was held with petitioner and his representative, Mr. Morris Radmin, who stated that his client had sustained a NOL in 1972, and that said loss was being applied as carry back to 1969. He also stated that Federal Form 1245 (Quick Claim) was filed with respect to the carry-back and that a refund had been secured for all taxes paid for 1969.

5. Petitioner submitted copies of his monthly bank statements and copies of cancelled checks to support his deductions claimed for purchases and for business expenses; however, he did not submit any documents, vouchers, invoices, etc. to show what the payments were for. The cancelled checks submitted by petitioner were from a checking account under the name Harry Scheer and Robyn Scheer. Several checks, including one for \$5,000.00, showed that payments were made in 1968.

6. Petitioner stated in his Perfected Petition that adjustments made by the Audit Division for purchases and for business deductions were erroneous. He also stated that the Internal Revenue Service notified him that an audit of the 1972 loss year would be made and it was assumed that this audit would probably include the year 1969. On May 14, 1974, petitioner submitted copies of the appropriate Federal documents which showed the carryback loss to 1969 was allowed in full and the amount refunded by the Internal Revenue Service, including interest. The date of the refund document for the year 1969 was May 3, 1974.

CONCLUSIONS OF LAW

A. That petitioner, Harry Scheer, did not meet the substantiation requirements of Treas. Reg. section 1.274-5 and, accordingly, has not sustained his burden of proof imposed by section 689(e) of the Tax Law in establishing that he was entitled to deductions claimed for purchases and business expenses. The Tax Commission is not required to accept as correct any change in Federal taxable income but may conduct an independent audit or investigation in regard thereto (20 NYCRR 153.4).

B. That section 687(f) of the Tax Law reads as follows: "If a notice of deficiency for a taxable year has been mailed...and if the taxpayer files a timely petition..., it may determine that the taxpayer has made an overpayment for such year... . No separate claim for credit or refund for such year shall be filed,...except-... (4) as to any amount claimed as a result of a change or correction described in subsection (c)". (Subsection (c) refers to a change in Federal taxable income.) Since petitioner filed his claim for refund within the time required by section 659 of the Tax Law (within 90 days after the final determination), he is entitled to carryback to 1969 the net operating loss he incurred in 1972. (Petitioner Harry Scheer's claim for refund on Form IT-113X was also timely filed within the meaning and intent of section 687(d) of the Tax Law.) The Audit Division is directed to recompute the amount of the carryback loss due to the disallowance of the deductions shown in Conclusion of Law "A", supra, and to authorize a refund of any overpayment that may result.

C. That the penalty proposed under section 685(i) of the Tax Law is hereby waived, under the discretion granted to the Tax Commission by the aforesaid section.

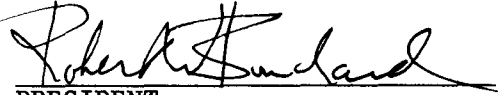
D. That interest asserted, pursuant to section 684 of the Tax Law, is mandatory and cannot be waived.

E. That the petition of Harry Scheer is granted to the extent shown in Conclusions of Law "B" and "C" supra; and that the petition is in all other respects denied.

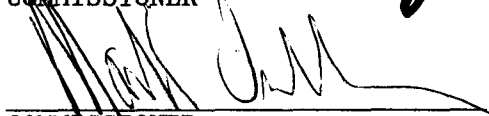
DATED: Albany, New York

NOV 09 1982

STATE TAX COMMISSION

Arthur J. ...

PRESIDENT


COMMISSIONER


COMMISSIONER