

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Barbara Nicholls :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income,
UBT & New York City under Article 22 & 23 & 30 of :
the Tax Law for the Years 1975 & 1976.

State of New York
County of Albany

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Barbara Nicholls, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Barbara Nicholls
162 E. 80th Street
New York, NY 10021

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
6th day of May, 1983.

David Parchuck

James A. Heyburn

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Barbara Nicholls :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
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UBT & New York City under Article 22 & 23 & 30 of :
the Tax Law for the Years 1975 & 1976.

State of New York
County of Albany

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon David Baumgarten the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David Baumgarten
420 Lexington Ave.
New York, NY 10017

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 representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
6th day of May, 1983.

David Parchuck

David C. [Signature]

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 6, 1983

Barbara Nicholls
162 E. 80th Street
New York, NY 10021

Dear Ms. Nicholls:

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, & 1312 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
David Baumgarten
420 Lexington Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
BARBARA NICHOLLS	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income and Unincorporated	:	
Business Taxes under Articles 22, 23 and 30 of	:	
the Tax Law for the Years 1975 and 1976.	:	

Petitioner, Barbara Nicholls, 162 East 80th Street, New York, New York 10021, filed a petition for redetermination of a deficiency or for refund of New York State personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1975 and 1976 and New York City personal income tax under Article 30 of the Tax Law for the year 1976 (File No. 29430).

A small claims 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 April 28, 1982 at 1:15 P.M. Petitioner appeared with David Baumgarten, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether certain adjustments made as the result of a field audit were proper.

FINDINGS OF FACT

1. Barbara Nicholls (hereinafter petitioner) timely filed a New York State Income Tax Resident Return for the year 1975. For 1976, she timely filed a New York State Income Tax Resident Return with New York City Personal Income Tax. On each of said returns, petitioner reported business income from her

activities described as "Art Sales". Petitioner filed a New York State Unincorporated Business Tax Return for 1976, but did not do so for 1975.

2. On June 15, 1979, the Audit Division issued a Statement of Audit Changes to petitioner wherein, pursuant to schedules of audit adjustments attached thereto, the following adjustments were made:

	<u>1975</u>	<u>1976</u>
Utilities (Con Ed & telephone)	\$ 191.00	\$ 232.00
Rent on apartment	1,357.00	2,400.00
Repairs	489.00	160.00
Life insurance	120.00	197.00
Car insurance	204.00	242.00
Travel expense	800.00	633.00
Depreciation on car	200.00	490.00
Additional cash needed for living	10,400.00	10,400.00
Contributions		25.00
Total Adjustments	<u>\$13,761.00</u>	<u>\$14,779.00</u>

All adjustments, with the exception of that made to contributions for 1976, were made for both personal income tax and unincorporated business tax purposes. All adjustments were contested by petitioner except those made for utilities, life insurance and contributions.

3. On March 3, 1980, a Notice of Deficiency was issued against petitioner with respect to said adjustments asserting additional unincorporated business tax of \$1,215.60, additional New York State personal income tax of \$2,400.62, additional New York City personal income tax (for 1976) of \$467.34, plus penalty and interest of \$1,342.09, for a total due of \$5,425.65. Said penalty was imposed pursuant to section 685(c) of the Tax Law for failure to file declarations of estimated tax.

4. A Consent Fixing Period of Limitation Upon Assessment of Personal Income and Unincorporated Business Taxes was executed by petitioner on February 21, 1979. Said Consent extended the period for assessing 1975 taxes to April 15, 1980.

5. During the years at issue herein petitioner operated an art gallery, known as Nicholls Gallery, located at 1014 Madison Avenue, New York City. As such, she was engaged in the buying and selling of original works of art. She specialized in cartoons and various related items such as illustrations and cover designs. She purchased the works of art either outright or on a consignment basis where she would collect the full price from the purchaser, retain 40 percent of such amount as a commission, and forward 60 percent to the artist or artist's representative.

6. Substantiation of adjusted expense items is not at issue herein. Adjustments made to expense items represent those portions of such expenses which were deemed personal and, accordingly, nondeductible.

7. Petitioner resided four blocks from her gallery. Her apartment was comprised of a living room, bedroom, kitchen and bathroom. Since she closed the gallery at 5:00 p.m., some clients visited her, through appointments, at her apartment. One wall in her living room was used exclusively to display works of art which were held for sale. Her apartment was also used for business entertainment purposes.

8. Petitioner deducted 66 2/3 percent of her apartment rent as a business expense based on a computation of square footage. The portion claimed for business was comprised of her entire living room and a small percentage of the balance of her apartment. The adjustments for "rent on apartment" of \$1,357.00 for 1975 and \$2,400.00 for 1976 represented an allowance to petitioner of 25 percent of her apartment rent as a business deduction for 1975 and 22.22 percent for 1976.

9. The adjustments to "travel expense" of \$800.00 for 1975 and \$633.00 for 1976 represents full disallowance of air fare claimed for a trip to Brazil

in 1975, and a trip to Paris, France in 1976. Petitioner did not deduct the cost of meals and lodging on said trips. Both trips were made primarily for business purposes. On each trip she established continuing business relationships with new artists and galleries.

10. The adjustments for "car insurance", "depreciation on car" and "repairs" (car repairs for 1975) were the result of an allowance by the Audit Division of 1/7 of petitioner's claimed automobile-related business expenses.

11. During the years at issue petitioner owned a Volkswagen station wagon which she used to transport works of art to and from various clients, artists and shows, many of which were located outside of New York State.

12. The adjustment to "repairs" for 1976 of \$160.00 represented the disallowance of the major portion of an expense of \$175.00 claimed for costs incurred in painting her gallery.

13. A cash analysis performed by the Audit Division indicated, pursuant to petitioner's cash disbursements journal, that checks drawn to cash, which were used for personal living purposes, totaled \$1,095.59 in 1975 and \$506.06 in 1976. Since it was felt that said amounts were insufficient to cover petitioner's personal living expenses for the years at issue, estimated adjustments were made for "additional cash needed for living" of \$10,400.00 for each year. Said amount was determined based on the following breakdown:

<u>ITEM</u>	<u>AMOUNT</u>
Food	\$75.00 per week
Clothing	\$80.00 per week
Gas for auto	\$20.00 per week
Incidentals	\$25.00 per week

CONCLUSIONS OF LAW

A. That the personal income tax imposed by Article 30 of the Tax Law is by its own terms tied into and contains essentially the same provisions as

Article 22 of the Tax Law. Therefore, in addressing the issues presented herein, unless otherwise specified, all references to particular sections of Article 22 shall be deemed references (though uncited) to the corresponding sections of Article 30.

B. That petitioner has failed to sustain her burden of proof required pursuant to sections 689(e) and 722 of the Tax Law to show that she is properly entitled to a greater business deduction for her apartment rent than that allowed each year at issue by the Audit Division. Accordingly, the adjustments "rent on apartment" of \$1,357.00 for 1975 and \$2,400.00 for 1976 are sustained.

C. That Treasury Regulations §1.162-2(b)(1) provides that:

"If a taxpayer travels to a destination and while at such destination engages in both business and personal activities, traveling expenses to and from such destination are deductible only if the trip is related primarily to the taxpayer's trade or business."

Since the primary purpose of petitioner's trips to Brazil and France was business related, the air fares expended in traveling to and from such destinations are deductible. Accordingly, the adjustments for "travel expense" of \$800.00 for 1975 and \$633.00 for 1976 are cancelled.

D. That the "repairs" adjustment for 1976 of \$160.00 is cancelled, since this is an ordinary and necessary business expense pursuant to section 162 of the Internal Revenue Code.

E. That the adjustments "additional cash needed for living" of \$10,400.00 for each year at issue and the automobile-related expenses are sustained, since petitioner has failed to submit any information which would show that said adjustments are incorrect.

F. That the petition of Barbara Nicholls is granted to the extent provided in Conclusions of Law "C" and "D", supra, and except as so granted, said petition is, in all other respects, denied.


G. That the Audit Division is hereby directed to modify the Notice of Deficiency dated March 3, 1980 to be consistent with the decision rendered herein.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 06 1983


PRESIDENT


COMMISSIONER


COMMISSIONER