

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Duane E. Wilder

:

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Year 1975, under Articles 22 and 30 of :
the Tax Law for the Year 1976, under Article 22 of :
the Tax Law and Chapter 46, Title T of the :
Administrative Code of the City of New York for the :
Year 1977 and for Redetermination of a Deficiency :
or for Refund of Unincorporated Business Tax under :
Article 23 of the Tax Law for the Years 1975, 1976 :
and 1977.

State of New York
County of Albany

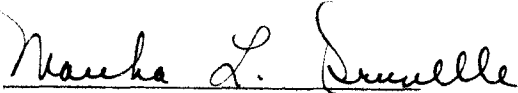
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 22nd day of November, 1983, she served the within notice of Decision by certified mail upon Duane E. Wilder, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Duane E. Wilder
121 Washington Place
New York, NY 10014

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
22nd day of November, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Duane E. Wilder : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax
Law for the Year 1975, under Articles 22 and 30 of :
the Tax Law for the Year 1976, under Article 22 of
the Tax Law and Chapter 46, Title T of the :
Administrative Code of the City of New York for the
Year 1977 and for Redetermination of a Deficiency :
or for Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Years 1975, 1976 :
and 1977.

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 22nd day of November, 1983, she served the within notice of Decision by certified mail upon Morton E. Swetlitz the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

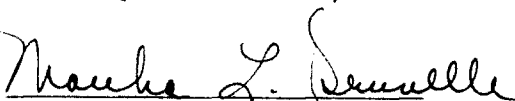
Morton E. Swetlitz
350 5th Ave., Suite 7201
New York, NY 10018

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
22nd day of November, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

November 22, 1983

Duane E. Wilder
121 Washington Place
New York, NY 10014

Dear Mr. Wilder:

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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Morton E. Swetlitz
350 5th Ave., Suite 7201
New York, NY 10018
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
DUANE E. WILDER	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1975, under Articles	:	
22 and 30 of the Tax Law for the Year 1976,	:	
under Article 22 of the Tax Law and Chapter 46,	:	
Title T of the Administrative Code of the City	:	
of New York for the Year 1977 and for Redeter-	:	
mination of a Deficiency or for Refund of	:	
Unincorporated Business Tax under Article 23 of	:	
the Tax Law for the Years 1975, 1976 and 1977.	:	

Petitioner, Duane E. Wilder, 121 Washington Place, New York, New York 10014, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1975, under Articles 22 and 30 of the Tax Law for the year 1976, under Article 22 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the year 1977 and for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1975, 1976 and 1977 (File Nos. 29897 and 29898).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 24, 1982 at 1:30 P.M. Petitioner appeared by Morton E. Swetlitz, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Barry M. Bresler, Esq., of counsel). The hearing was continued until November 29, 1982. However, on November 23, 1982, petitioner advised the Tax Appeals Bureau that he was in

agreement with the Audit Division that there was no need to reconvene the hearing.

ISSUES

I. Whether the Audit Division properly imposed unincorporated business tax on the salary received by petitioner from the Swank Refractories Company.

II. Whether the Audit Division properly disallowed petitioner's deductions for business expenses.

III. Whether petitioner's deduction for a bad debt was substantiated for the 1976 tax year.

IV. Whether petitioner's deduction for legal and professional fees was substantiated for the 1977 tax year.

FINDINGS OF FACT

1. Petitioner, Duane E. Wilder, filed a New York State Income Tax Resident Return for the year 1975 and New York State Income Tax Resident Returns With New York City Personal Income Tax for the years 1976 and 1977. The 1975 return was filed on May 17, 1976, the 1976 return on May 18, 1977 and the 1977 return on July 12, 1978. The timeliness of the filing of these returns is not an issue herein.¹

Petitioner reported the following income on such returns:

	<u>Total Income</u>	<u>New York Taxable Income</u>
1975 tax year	\$41,925	-0-
1976 tax year	\$60,322	\$25,535
1977 tax year	\$ 9,155	-0-

¹ It appears from the record that the 1976 and 1977 returns were timely filed since petitioner had obtained an extension of time to file such returns.

2. Petitioner untimely² filed unincorporated business tax returns for the 1975, 1976 and 1977 tax years on March 26, 1979 showing the following:

	<u>Taxable Business Income</u>	<u>Unincorporated Business Tax Due</u>
1975 tax year	-0-	-0-
1976 tax year	\$ 7,191	\$ 395
1977 tax year	\$12,162	\$ 669
		<u>\$1,064</u>

3. On March 24, 1980, the Audit Division issued a Statement of Personal Income Tax Audit Changes for the 1975, 1976 and 1977 tax years showing the following:

	<u>1975</u>	<u>1976</u>	<u>1977</u>
Net Adjustment	\$4,786.00	\$39,898.00	\$37,525.00
Taxable Income Previously Stated	(14.00)	25,535.00	(5,454.00)
Corrected Taxable Income	<u>4,772.00</u>	<u>65,433.00</u>	<u>32,071.00</u>
Tax on Corrected Taxable Income	150.88	8,124.95	3,120.65
Minimum Income Tax	-0-	-0-	543.34
New York City Tax	-0-	2,413.62	1,034.95
Surcharge 2½%	3.77	203.12	-0-
Less: Credits	<u>-0-</u>	<u>(240.00)</u>	<u>-0-</u>
Corrected Tax Due	154.65	10,501.69	4,698.94
Tax Previously Computed	<u>-0-</u>	<u>2,652.00</u>	<u>1,604.00</u>
Total Additional Tax Due	154.65	7,849.60	3,094.94
Payments Per Albany	-0-	-0-	794.50
Interest	51.79	1,961.48	421.30
Total	<u>\$ 206.44</u>	<u>\$ 9,811.08</u>	<u>\$ 2,721.74</u>

4. On March 24, 1980, the Audit Division issued a Statement of Unincorporated Business Tax Audit Changes for the 1975, 1976 and 1977 tax years showing the following:

² In a letter dated March 22, 1979, Exhibit L herein, petitioner wrote to the Income Tax Bureau that "(t)he returns would have been filed earlier, but I was asked by an Agent of the Bureau to delay filing until we met on February 13, 1979. However, that meeting was cancelled at his request."

	<u>1975</u>	<u>1976</u>	<u>1977</u>
Net Adjustment per audit	\$8,888.80	\$64,643.00	\$74,000.00
Corrected Taxable Income	8,888.80	64,643.00	74,000.00
Tax	444.44	3,232.15	3,700.00
Less: Business Tax Credit	<u>26.39</u>	<u>-0-</u>	<u>-0-</u>
Corrected Unincorporated Business Tax Due	418.05	3,232.15	3,700.00
Unincorporated Business Tax Previously Computed	<u>-0-</u>	<u>336.50</u> ³	<u>669.00</u>
Total Additional Tax Due	418.05	2,895.65	3,031.00
Penalties: 685(a)(1)		88.88	150.53
685(a)(2)		71.11	80.25
685(c)		17.50	30.40
Interest	140.00	723.57	499.75
Total	<u>\$ 558.05</u>	<u>\$ 3,796.71</u>	<u>\$ 3,791.94</u>

5. Both Statements of Audit Changes described in Findings of Fact "3" and "4", supra, contain the following remark: "Since you failed to sign waiver extending audit time, the above adjustments were made".

6. On April 14, 1980,⁴ the Audit Division issued a Notice of Deficiency for the 1975, 1976 and 1977 taxable years against petitioner showing deficiencies in unincorporated business tax as follows:

	<u>Deficiency</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
1975	\$ 418.05	-0-	\$ 140.00	\$ 558.05
1976	2,895.65	\$177.49	723.57	3,796.71
1977	3,031.00	261.19	499.75	3,791.94
	<u>\$6,344.70</u>	<u>\$438.68</u>	<u>\$1,363.32</u>	<u>\$8,146.71</u> ⁵

³ Petitioner on his unincorporated business tax return for 1976 reported tax due of \$395.00 and the record is unclear concerning this discrepancy.

⁴ On December 27, 1978, petitioner executed a Consent Fixing Period of Limitation Upon Assessment of Personal Income and Unincorporated Business Taxes extending the period for assessment for the 1975 tax year until April 15, 1980.

⁵ \$8,146.70 is the correct amount.

7. On April 14, 1980, the Audit Division also issued a Notice of Deficiency for the 1975, 1976 and 1977 taxable years against petitioner showing deficiencies in personal income tax as follows:

<u>Year</u>	<u>Taxing Authority</u>	<u>Deficiency</u>	<u>Interest</u>	<u>Total</u>
1975	New York State	\$ 154.65	\$ 51.79	\$ 206.44
1976	New York State	6,133.98	1,532.78	7,666.76
1976	New York City	1,715.62	428.70	2,144.32
1977	New York State	2,531.99	344.67	2,876.66
1977	New York City	562.95	76.63	639.58
		<u>\$11,109.19⁶</u>	<u>\$2,357.94⁷</u>	<u>\$13,533.76</u>

The Audit Division credited \$794.50⁸ against the \$13,533.76 claimed due, leaving a "(b)alance still due (of) \$12,739.26".

8. The basis for the alleged 1975 personal income tax deficiency was an increase of \$4,786.00 in petitioner's 1975 New York adjusted gross income. The Audit Division had increased petitioner's federal adjusted gross income by the "N.Y.C. Business Tax 1971-73" of \$901.00 and the "N.Y.C. Business Tax 1974" of \$3,885.00 which were taken by petitioner as deductions in Schedule C-2 on his United States Form 1040 for 1975.

The basis for the alleged 1975 unincorporated business tax deficiency was the inclusion of \$12,000.00 in petitioner's unincorporated business taxable income which petitioner contends was an employee salary received from Swank Refractories Company (hereinafter "Swank").

⁶ The proper computation is \$11,099.19.

⁷ The proper computation is \$2,434.57.

⁸ On December 28, 1978, petitioner remitted \$1,800.00 to the Income Tax Bureau for payment of unincorporated business taxes for the years at issue prior to his filing returns for such years on March 26, 1979. According to the Notice of Deficiency, the Audit Division applied \$794.50 of that amount to petitioner's "1977 NYS Personal income tax...".

9. The basis for the alleged personal income tax and unincorporated business tax deficiencies for 1976 was the disallowance of various business expenses, including 2/3 of the petitioner's claimed cleaning expenses, 2/3 of his expenses for utilities, 1/3 of his travel expenses, 1/2 of his expenses for supplies, 2/3 of his claimed depreciation, and all of his bad debt deduction of \$29,193.00. However, the record does not show that the Audit Division conducted an audit or investigation as to the relevant facts and circumstances under which petitioner claimed deductions for such business expenses. The Audit Division also included \$12,000.00 in petitioner's 1976 unincorporated business taxable income which petitioner contends was an employee salary received from Swank.

10. The basis for the alleged personal income tax and unincorporated business tax deficiencies for 1977 was the disallowance of various business expenses including legal and professional fees of \$25,946.00, 2/3 of the petitioner's cleaning expenses, 2/3 of his expenses for utilities, 1/3 of his travel expenses, 1/2 of his expenses for supplies, and 2/3 of his claimed depreciation. However, the record does not show that the Audit Division conducted an audit or investigation as to the relevant facts and circumstances under which petitioner claimed deductions for such business expenses. The Audit Division also included \$12,313.00⁹ in petitioner's 1977 unincorporated business taxable income which he claims was an employee salary received from Swank.

⁹ Petitioner testified that "(t)he \$313, I believe, is the income cost of a life insurance policy over \$50,000...".

11. The record does not show any factual basis at the time of the issuance of the Notices of Deficiency for the inclusion of employee salary as described in Findings of Fact "8", "9" and "10", supra, in petitioner's unincorporated business taxable income.

12. The Audit Division conceded that the portion of each deficiency which was based on the disallowance of cleaning expenses, expenses for utilities, depreciation, travel expenses, and expenses for supplies should be cancelled.

13. Petitioner operated an unincorporated business, Wilder Deem Associates, which provided financial consulting and management services to institutions and businesses. It was formed in 1969 as a partnership between petitioner and Warren Deem, and in 1975 became a proprietorship owned solely by petitioner. Petitioner testified that during the tax years at issue, "the main business of Wilder Deem Associates was to assist a group of investors to purchase some manufacturing companies and to provide consulting and management services to the companies, including Swank Refractories."

14. Petitioner was willing to justify his deductions and the manner in which he calculated his unincorporated business taxable income and to make his records available to the Audit Division. However, the Audit Division did not give petitioner an opportunity to show that his returns were correct prior to the issuance of the Notices of Deficiency, supra, and it appears from the record that the Audit Division issued such Notices of Deficiency solely for the purpose of meeting the period of limitations for assessment of deficiencies.

15. No auditor from the Audit Division testified at the hearing.

CONCLUSIONS OF LAW

A. That the personal income tax imposed by Article 30 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York is by

its own terms tied into and contains essentially the same provisions of 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 and Chapter 46, Title T of the Administrative Code of the City of New York.

B. That as noted in Findings of Fact "9" and "10", supra, the Audit Division failed to conduct an audit or investigation as to the relevant facts and circumstances under which petitioner claimed deductions for business expenses. Consequently, there was no factual basis for the disallowance of such deductions as contained in the Notices of Deficiency issued on April 14, 1980. In addition, as noted in Finding of Fact "14" supra, the Audit Division issued the notices of deficiency for the sole purpose of procuring an extension of time in which to make a different assessment. Therefore, although the burden of proof is upon the petitioner to justify his deductions and the accuracy of his tax returns, since the Audit Division lacked a factual basis for the issuance of the notices of deficiency, it improperly disallowed petitioner's deductions of \$29,193.00 as a bad debt in 1976 and of \$25,946.00 for legal and professional fees in 1977.¹⁰ See Brown v. New York State Tax Commission, 199 Misc. 349, aff'd. 279 A.D. 837, aff'd. 304 N.Y. 651 and Matter of Joseph Friedberg and Jeanette Friedberg, State Tax Commission, January 3, 1983.

C. That as noted in Finding of Fact "11", supra, since the Audit Division lacked a factual basis at the time of the issuance of the Notices of Deficiency

¹⁰ As noted in Finding of Fact "12", herein, the Audit Division conceded the validity of petitioner's other deductions for business expenses.

for the inclusion of employee salary in petitioner's unincorporated business taxable income, the Audit Division also improperly imposed unincorporated business tax on such salary.

D. That the issues concerning whether petitioner can substantiate his deduction for a bad debt and for legal and professional fees are moot.


E. That there was an adequate factual basis for the Audit Division's determination of a 1975 personal income tax deficiency of \$154.65, as noted in Finding of Fact "8", supra.

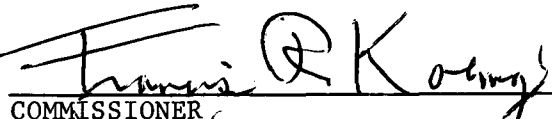
F. That the petition of Duane E. Wilder is granted to the extent described in Finding of Fact "12" and Conclusions of Law "B" and "C", supra; that the Audit Division is directed to refund the balance remaining of the \$1,800.00 payment made by petitioner as described in footnote "8", supra, after subtracting any tax deficiencies plus interest sustained herein; and that, in all other respects, the petition is denied.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 22 1983


PRESIDENT


COMMISSIONER


COMMISSIONER