

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Edward Shepard :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of New York State Personal Income Tax under Article :
22 of the Tax Law, New York City Personal Income :
Tax under Chapter 46, Title T of the Administrative :
Code of the City of New York, and Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Years 1978 and 1979. :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of July, 1984, he served the within notice of Decision by certified mail upon Edward Shepard, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edward Shepard
228-09 114th Terrace
Cambria Heights, NY 11411

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
31st day of July, 1984.

David Parchuck

William A. Haggard
Authorized to administer oaths
pursuant to Tax Law section 174

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

July 31, 1984

Edward Shepard
228-09 114th Terrace
Cambria Heights, NY 11411

Dear Mr. Shepard:

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 and Chapter 46, Title T of the Administrative Code of the City of New York, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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: Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
EDWARD SHEPARD	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law, New York City	:	
Personal Income Tax under Chapter 46, Title T	:	
of the Administrative Code of the City of New	:	
York, and Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1978	:	
and 1979.	:	

Petitioner, Edward Shepard, 228-09 114th Terrace, Cambria Heights, New York 11411, 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, New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York, and unincorporated business tax under Article 23 of the Tax Law for the years 1978 and 1979 (File Nos. 34076 and 34797).

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 January 10, 1984 at 9:00 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether an adjustment attributing additional unreported business income to petitioner during each of the years at issue was proper.

FINDINGS OF FACT

1. Edward Shepard (hereinafter petitioner), timely filed a joint New York State Income Tax Resident Return (with City of New York Personal Income Tax) with his wife, Viola Shepard, for each of the years 1978 and 1979. On such

returns petitioner reported business income of \$7,353.00 (1978) and \$5,938.00 (1979) derived from the operation of his personally owned taxicab. Petitioner did not file an unincorporated business tax return for either year at issue.

2. On June 8, 1981, the Audit Division issued two notices of deficiency against petitioner. One such notice asserted unincorporated business tax for said years of \$862.13, penalty of \$77.53, and interest of \$178.69, for a total due of \$1,118.35. The other notice asserted additional New York State and New York City personal income tax of \$2,142.02, penalty of \$307.12 and interest of \$328.08, for a total due of \$2,777.22. The aforestated penalties were asserted for negligence pursuant to sections 685(b) and 722(a) of the Tax Law and section T46-185.0(b) of the Administrative Code of the City of New York.

3. The aforestated notices of deficiency were premised upon two respective statements of audit changes dated January 12, 1981. Such statements attributed additional unreported income of \$16,743.00 (1978) and \$7,594.50 (1979) to petitioner for both unincorporated business tax and personal income tax purposes based on the following explanation:

"As a result of a field audit, the following adjustments are being made based on taxi gas consumption."

4. Pursuant to the field audit workpapers, the additional unreported income was computed as follows:

	1978	
Gasoline cost \$2,990.00 divided by 75¢ per gallon =	3986	gallons
3986 gallons x 10 miles per gallon =	39860	total miles
Less 25 percent cruising	<u>9965</u>	
Total fare miles		29,895
Average rate per mile	x	\$1.00
Receipts per audit		<u>\$29,895.00</u>
Plus tips @ 10 percent		2,989.00
Total receipts per audit		<u>\$32,884.00</u>
Total receipts per Schedule C		16,141.00
Additional unreported income		<u><u>\$16,743.00</u></u>

Gasoline cost \$3,443.00 ¹ divided by \$1.25 per gallon = 2754 gallons	
2754 gallons x 10 miles per gallon = 27,540 total miles	
Less 25 percent cruising	<u>6,885</u>
Total fare miles	20,655
Average rate per mile	x \$1.00
Receipts per audit	<u>\$20,655.00</u>
Plus tips @ 10 percent	2,065.50
Total receipts per audit	<u>\$22,720.50</u>
Total receipts per Schedule C	15,126.00
Additional unreported income	<u>\$ 7,594.50</u>

5. The gasoline costs used in the above computations were those reported on petitioner's Federal schedules C.¹ Total business expenses claimed per said schedules were \$8,789.00 (1978) and \$9,188.00 (1979).

6. In an annual report filed by petitioner with the New York City Taxi and Limousine Commission, he reported the miles his taxicab was driven during 1978 as 30,000.

7. During the years at issue petitioner's taxicab was a 1973 Dodge.

8. Petitioner's records consisted of a daily log and invoices. He argued that his records should have been used to determine the audit results rather than the indirect "gas purchase formula" method.

9. Petitioner did not contest the mileage determined to be attributable to his use of the taxicab during each of the years at issue pursuant to the gas purchase formula. However, he claimed that a portion of the mileage was for personal purposes and accordingly, such mileage should properly be removed from the "total fare miles" used in said formula.

10. During the years 1978 and 1979 petitioner's wife was hospitalized for approximately six months of each year. Her hospitalization was in two hospitals.

¹ Pursuant to a transcript of petitioner's 1979 Federal Schedule C, gasoline purchases during said year were \$3,473.00, not \$3,443.00. The difference is insignificant and will not be adjusted since an indirect method was used to reconstruct gross receipts.

One hospital was located approximately three miles from petitioner's residence. The other was located approximately five miles from petitioner's residence.

11. During his wife's hospitalizations, petitioner visited her on a daily basis. Most days he visited her twice: in the morning before work and in the evening at the conclusion of his work day. During the periods in which she was not hospitalized, petitioner transported her to and from clinics on several occasions.

12. Although petitioner owned a 1965 Chevrolet, which he used for personal purposes, all of his trips to and from the hospitals and clinics were made in his taxicab. Petitioner's reasons for using the taxicab for this purpose were that it was more convenient and he was able to park it at the taxi stands outside the hospitals.

13. Petitioner kept no record of the mileage the taxicab was driven for the personal purposes as stated.

14. Petitioner's taxicab was operated primarily in Manhattan.

15. Petitioner did not challenge the negligence penalties asserted.

CONCLUSIONS OF LAW

A. That the books and records appear superficially adequate does not preclude use of an indirect audit method. Use of an indirect audit method is not limited to cases in which the taxpayer has no books and records or where his books and records are patently inadequate. Matter of the Petition of J. Beres & Sons Dairy, State Tax Comm., March 21, 1984.

B. That during each of the years at issue, petitioner drove his taxicab 1000 miles for personal nonbusiness purposes (30 miles per week x 26 weeks = 780 miles to visit his wife in the hospitals, plus 220 miles during balance of each year transporting his wife to and from the clinics). Accordingly, the

adjustments each year for additional unreported income are reduced by \$1,000.00 (1,000 miles x \$1.00 average rate per mile).

C. That since a proportion of petitioner's taxicab mileage was personal, an identical proportion of his claimed business expenses related to the taxicab must also be considered personal. Accordingly, for the year 1978, 2.5 percent (1,000 divided by 39,860) of petitioner's claimed business expenses related to the taxicab, which computes to \$219.73, are deemed personal expenses and as such are not deductible. For the year 1979, 3.6 percent (1,000 divided by 27,540) of petitioner's claimed business expenses related to the taxicab, which computes to \$330.77, are deemed personal expenses and as such are not deductible.

D. That the net effect of Conclusions of Law "B" and "C", supra, is to reduce the adjustment for additional unreported income determined for 1978 by \$780.27, and for 1979 by \$669.23.

E. That the petition of Edward Shepard is granted to the extent provided in Conclusions of Law "B" and "D", supra, and except as so granted, said petition is, in all other respects, denied.


F. That the Audit Division is hereby directed to modify the two notices of deficiency dated June 8, 1981 to be consistent with the decision rendered herein.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER