

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of  
John Gebhardt :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of NYS 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 & 1979.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 26th day of May, 1987, he/she served the within notice of Decision by certified mail upon John Gebhardt the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John Gebhardt  
305 East 24th St., Apartment 4C  
New York, NY 10010

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  
26th day of May, 1987.

David Parchuck  
Authorized to administer oaths  
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

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State of New York :  
ss.:  
County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 26th day of May, 1987, he served the within notice of Decision by certified mail upon Louis F. Brush, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Louis F. Brush  
101 Front Street  
Mineola, NY 11501

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 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  
26th day of May, 1987.

David Parchuck  
Authorized to administer oaths  
pursuant to Tax Law section 174

Janet M. Snay

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

May 26, 1987

John Gebhardt  
305 East 24th St., Apartment 4C  
New York, NY 10010

Dear Mr. Gebhardt:

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 & 1312 of the Tax Law, 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  
Audit Evaluation Bureau  
Assessment Review Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:  
Louis F. Brush  
101 Front Street  
Mineola, NY 11501

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
JOHN GEBHARDT	:	DECISION
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.	:	

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Petitioner, John Gebhardt, 305 East 24th Street, Apartment 4C, New York, New York 10010, 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 Nos. 37563 and 42967).

On October 23, 1985, petitioner waived a hearing before the State Tax Commission and agreed to submit the matter for decision based on the Audit Division file, as well as a brief and additional documents to be submitted by October 8, 1986. After due consideration of the record, the State Tax Commission hereby renders the following decision.

ISSUES

I. Whether the notices of deficiency were issued without any basis and for the sole purpose of extending the period of limitation on assessment.

II. Whether petitioner has substantiated that he was engaged in a trade or business during the years at issue.

III. Whether petitioner has substantiated the character and amount of business expenses claimed as deductions from gross income for the years at issue.

FINDINGS OF FACT

1. Petitioner, John Gebhardt, filed New York State income tax resident returns with City of New York personal income tax for 1978 and 1979. His wife, Frances Gebhardt, filed separately on the same returns. On each return, petitioner's occupation was stated to be "Author Educator" while his wife's was stated as "Researcher".

2. The 1978 return.

(a) For 1978, petitioner reported \$14,172.00 in business income and no wage or salary income.

(b) Petitioner filed a Federal Schedule C, Form 1040, showing the following income and expenses:

"INCOME - English Chairmen's Assn.	\$ -0-
English Program - (see W-2)	
Russian Program - (see W-2)	
Board of Examiners (separate pay included in W-2)	
	<u>\$22,909</u>
Travel USSR (American Field Services - Continuation of 1977 teaching program) Easter recess: 10 days	\$2,382
Russian books, magazines, records etc.	600
Union dues & other professional memberships	300
Accounting	115
Study Allocation: Work for Board of Examiners' exam preparations, President of English Chairmen's Assn., Russian library, storage of Russian phonograph records, tapes, slides, photographs & teaching material that is not property of Board of Education 20% alloc. of apt. x \$656 (Rent \$610 + electric \$46) = 130 x 12 = 1,560	1,560
Auto Travel: For Board of Examiners, interview candidates for teaching positions, transport own books and teaching materials, trips to other schools to collect books needed etc. 7300 mi. @ 17¢	1,241

Tolls	85	
Unreimbursed departmental expense - Jan & June		
'78 parties	375	
Cab fares - parking	260	
Professional development - dramatic events plays, films, ballet functions re: USSR & admissions 72nd Street Cinema etc.	1,069	
Hosting Russian Counterparts of AFS program - welcoming committee	750	
Damage to clothes in hotel laundry 4/78		
Total loss - shrank		
		8,737
		<u>\$14,172"</u>

The schedule did not show a "Main business activity".

(c) Attached to the return was a wage and tax statement issued by The City of New York Board of Education, showing that petitioner had "Wages, and other compensation" of \$22,909.29. Federal, State and local income taxes and FICA were withheld.

(d) Petitioner and his wife itemized deductions, claiming \$1,153.00 in miscellaneous deductions, all of which were attributable to and taken by petitioner's wife.

(e) Petitioner filed a New York State Unincorporated Business Tax Return for 1978, on which he reported net profit of \$14,172.00. A note on the return indicated that said sum represented "Wages subject to FICA tax included in Schedule C". An allowance for taxpayer's services of 20% (\$2,834.00) reduced net income from business to \$11,338.00. After the \$5,000.00 exemption, taxable business income was shown as \$6,338.00 and \$258.63 in unincorporated business tax was shown as due.

### 3. The 1979 return.

(a) For 1979, petitioner reported \$14,876.00 in business income and no wage or salary income.

(b) Petitioner filed a Federal Schedule C, Form 1040, showing the following income and expenses:

"INCOME: Classroom Teaching	\$ 9,200	
Program Development	13,307	
Board of Examiners	1,000	
American Field Services	<u>-0-</u>	\$23,507
EXPENSES:		
Subscriptions to Soviet magazines	237	
Russian/English programs: books	392	
Books, records, slides:		
English poets/Scottish plays & playwrights;		
inspection of schools, educational travel	1,492	
Newspapers, magazines	311	
Accounting	125	
Dues & subscriptions	416	
Professional development: drama events, slides films	1,937	
Hosting & meetings with counterparts, curriculum		
development	971	
Local travel	292	
Automobile (7,250 mi. @ 18½¢)	1,341	
Tolls & parking	183	
Postage & mailings		
N.CTE Convention - S.F., Cal.	<u>934</u>	\$ 8,631
NET INCOME		<u>\$14,876.11</u>

The schedule did not show a "Main business activity".

(c) Attached to the return was a wage and tax statement issued to petitioner by The City of New York Board of Education, showing \$23,506.96 in "Wages, tips, other compensation". A stamped arrow with the legend "Included in Schedule C" pointed to said figure. As in 1978, Federal, State and local income taxes and FICA were withheld. Pension plan coverage was also shown.

(d) Petitioner and his wife itemized deductions and claimed \$1,224.00 in miscellaneous deductions, all of which were attributable to and taken by petitioner's wife.

(e) Petitioner filed a New York State Unincorporated Business Tax Return for 1979, showing \$14,876.00 in net profit and subtractions of \$23,507.00.

A stamped arrow with the legend "FICA wages included in Schedule C" pointed to the subtractions. This resulted in a net loss from business of \$8,631.00 and no tax was shown as due.

4. Petitioner's tax returns were selected for examination along with those of approximately 100 other individuals on the basis that said returns had been prepared by a particular accountant. An investigation had disclosed that said accountant had consistently prepared returns on which an individual with wage or salary income shown on wage and tax statements had reported said income as business receipts on Federal Schedule C. Department of Taxation and Finance auditors were directed to review the returns and to disallow claimed business expense deductions if the taxpayer appeared to be an employee receiving wage or salary income reported on wage and tax statements. Petitioner's claimed Schedule C deductions were disallowed on that basis.

5. (a) On March 24, 1982, the Audit Division issued a Statement of Audit Changes to petitioner for 1978 with the following explanation:

"Income shown on wage and tax statements is considered to be wages and reportable as such on page 2, Schedule A, at line 1.

Expenses claimed on Schedule C (Business income) are not considered to be ordinary and necessary in the production of income as an employee.

Unincorporated business tax is recomputed to zero."

A total of \$920.12 in New York State and New York City taxes was asserted.

(b) On April 14, 1982, the Audit Division issued a Notice of Deficiency to petitioner for 1978 asserting \$920.12 in additional tax due, plus interest.

6. (a) On January 17, 1983, the Audit Division issued a Statement of Audit Changes to petitioner for 1979, with the following explanation:

"As a salaried employee, you are not a business entity and therefore are not entitled to claim Schedule C Deductions



as these expenses are not ordinary and necessary for the production of income as an employee."

Since recomputed New York taxable income was over \$21,000.00, petitioner was allowed a maximum tax benefit. Additional New York State and New York City taxes of \$1,251.38 were asserted.

(b) On April 8, 1983, the Audit Division issued a Notice of Deficiency to petitioner for \$1,251.38 in additional tax, plus interest.

7. Petitioner was assistant principal of Fort Hamilton High School in Brooklyn, New York, during the years at issue. He also taught English at the school. It appears that he was involved with Russian studies or Russian language studies at the school, but the exact nature and extent of his involvement is not clear from the record.

8. Petitioner traveled to Russia for 8 days in 1978 and to England and Scotland for 21 days in 1979. The cost of each trip was deducted on the Schedule C filed for each year (Findings of Fact "2[b]" and "3[b]").

9. Petitioner submitted documentary evidence substantiating the following deductions:

- a. For 1978, \$276.00 in union dues, \$72.90 in other dues and \$100.00 in tax preparation fees.
- b. For 1979, \$300.00 in union dues, \$140.50 in other dues and \$100.00 in tax preparation fees.

10. Petitioner contends:

(a) that the notices of deficiency were issued on an arbitrary and capricious basis just prior to the expiration of the period of limitations on assessment, thus depriving petitioner of the opportunity to present substantiation for the claimed deductions;

(b) that petitioner is part of a large group of taxpayers who were selected for special scrutiny because their returns had been prepared by the same tax preparer; and

(c) that where petitioner does not have cancelled checks or other receipts for certain expenses, the Department of Taxation and Finance should allow a reasonable estimate of such expenses.

CONCLUSIONS OF LAW

A. That the notices of deficiency were properly issued and were not arbitrary or capricious. The returns were patently erroneous and the Audit Division was justified in disallowing the Schedule C business income and expenses. Each Notice of Deficiency was preceded by a Statement of Audit Changes and petitioner had an opportunity to file amended returns claiming employee business expenses as adjustments on Federal Form 2106, or as itemized miscellaneous deductions, but did not do so.

B. That the fact that petitioner's returns were selected for examination because of certain practices of his accountant is irrelevant. Petitioner's liability depends solely on the facts adduced herein.

C. That petitioner has not sustained his burden of proof under section 689(e) of the Tax Law and Administrative Code § T46-189.0(e) to show that he was engaged in a trade or business other than as an employee. Thus, expenses claimed on Schedule C may not be deducted under section 62(1) of the Internal Revenue Code.

D. That petitioner may deduct the \$348.90 in dues and \$100.00 in tax preparation fees as miscellaneous deductions for 1978, and \$440.50 in dues and \$100.00 in tax preparation fees as miscellaneous deductions for 1979. While it would appear that petitioner may have been entitled to deduct certain other employee business expenses under sections 62(2) or 63(f) of the Internal Revenue

Code if he had filed form 2106, or if he had claimed such expenses as miscellaneous itemized deductions, petitioner nevertheless failed to sustain his burden of proof under the Tax Law and Administrative Code to show the character or, in many cases, the amount of the claimed business expenses.

E. That the petition of John Gebhardt is granted to the extent provided in Conclusion of Law "D"; that the Audit Division is hereby directed to modify the notices of deficiency issued on April 14, 1982 and April 8, 1983, accordingly; and that except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 26 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER