

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Wilfredo Rivera :

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 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 15th day of April, 1987, he/she served the within notice of Decision by certified mail upon Wilfredo Rivera the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Wilfredo Rivera  
63-09 108th St.  
Forest Hills, NY 11375

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  
15th day of April, 1987.

Janet M. Snay

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

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Wilfredo Rivera : 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 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 :

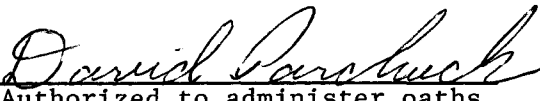
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 15th day of April, 1987, he served the within notice of Decision by certified mail upon Louis F. Brush, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

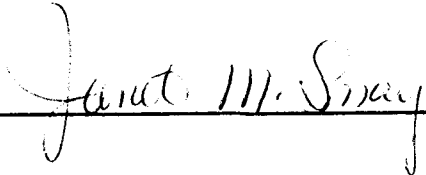
Louis F. Brush  
101 Front Street  
Mineola, NY 11501

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  
15th day of April, 1987.

  
Authorized to administer oaths  
pursuant to Tax Law section 174



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

April 15, 1987

Wilfredo Rivera  
63-09 108th St.  
Forest Hills, NY 11375

Dear Mr. Rivera:

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

---

In the Matter of the Petitions  
of  
WILFREDO RIVERA  
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.

---

:  
:  
:  
:  
:  
:  
:

DECISION

Petitioner, Wilfredo Rivera, 63-09 108th Street, Forest Hills, New York 11375, filed petitions 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. 37734 and 45060).

On October 23, 1985, petitioner waived his right to a hearing and requested the State Tax Commission to render a decision based on the entire record contained in his file, with all briefs to be submitted by October 8, 1986. After due consideration, 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, Wilfredo Rivera, together with his wife, Evelyn Rivera, timely filed a New York State and City income tax resident return for 1978 wherein they elected a filing status of "Married filing separately on one Return". On his portion of said return, petitioner reported business income of \$10,336.00. The following table details the manner in which petitioner computed his business income:

<u>Revenue</u>		
Services - Contract cutting	\$15,870.00	
Other	<u>285.00</u>	
Total income		\$16,155.00
<u>Expenses</u>		
Telephone - inside	\$ 120.00	
Travel	974.00	
Delivery	695.00	
Promotion & packing	932.00	
Safety equipment	197.00	
Newspapers, magazines	284.00	
Messengers	326.00	
Accounting	100.00	
First aid supplies	125.00	
Solicitations	476.00	
Blade sharpening	198.00	
Tools	436.00	
Protective plastic	381.00	
Hospitality to truckers, messengers	493.00	
Outside telephone	<u>82.00</u>	
Total Expenses		<u>\$ 5,819.00</u>
<u>Net Income</u>		\$10,336.00

2. Attached to petitioner's return was a wage and tax statement issued to Mr. Rivera by Acorn Bookbinding Co., Inc., reporting "wages, tips, other compensation" of \$15,870.35. The statement is stamped with an arrow pointing to the

\$15,870.35 figure with the legend "Included in Schedule C". The 1978 return listed petitioner's occupation as "contract cutting" and reported \$10,426.00 in total income consisting of \$90.00 in interest and \$10,336.00 in business income.

3. On March 24, 1982, the Audit Division issued a Statement of Audit Changes to petitioner for the year 1978 which contained the following explanation:

"We have received your 1978 personal income tax return and find the following. The expenses claimed on Federal Schedule C are not ordinary or necessary in the production of income as an employee, therefore, all Schedule C expenses are not allowed.

You are not subject to unincorporated business tax."

4. The Audit Division recomputed petitioner's New York State and City income tax liability for 1978. New York State and City taxable income of \$15,595.35 was computed in the following manner:

Wages	\$15,870.35
Interest income	90.00
Other income	285.00
Total	<u>\$16,245.35</u>
Standard deduction	<u>-0-</u>
Balance	<u>\$16,245.35</u>
Exemption	<u>650.00</u>
Taxable income	<u>\$15,595.35</u>

5. Based on the aforementioned Statement of Audit Changes, the Audit Division, on April 14, 1982, issued a Notice of Deficiency to petitioner for 1978 asserting additional New York State and City tax due of \$646.26, plus interest of \$186.42, for a total allegedly due of \$832.68.

6. Petitioner, Wilfredo Rivera, together with his wife, Evelyn Rivera, timely filed a New York State and City income tax resident return for 1979 wherein they elected a filing status of "Married filing separately on one return". On his portion of said return, petitioner reported business income of

\$5,878.00. The following table details the manner in which petitioner computed his business income:

<u>Revenue</u>		
Services - Contract cutting	\$10,680.00	
Other	1,300.00	
Interest income	<u>137.00</u>	
Total income		\$12,117.00
<u>Expenses</u>		
Telephone - inside	\$ 180.00	
Travel-sales training (8,525 mi. @ 18½¢)	1,577.00	
Delivery	432.00	
Promotion & packing	816.00	
Safety equipment	184.00	
Newspapers, magazines	313.00	
Messengers	219.00	
Accounting	100.00	
First aid supplies	62.00	
Solicitation	319.00	
Blade sharpening	59.00	
Tools	212.00	
Protective plastic	538.00	
Hospitality to truckers, messengers	386.00	
Outside telephone	297.00	
Education	398.00	
Supplies	<u>147.00</u>	
Total Expenses		<u>\$ 6,239.00</u>
<u>Net Income</u>		\$5,878.00

7. Attached to petitioner's return was a wage and tax statement issued to Mr. Rivera by Acorn Bookbinding Co., Inc., reporting "wages, tips, other compensation" of \$10,680.45. The statement is stamped with an arrow pointing to the \$10,680.45 figure with the legend "Included in Schedule C". The 1979 return listed petitioner's occupation as "contract cutting" and reported \$7,778.00 in total income consisting of \$6.00 in interest income, \$5,878.00 in business income and \$1,894.00 in taxable part of unemployment compensation.

8. On February 4, 1983, the Audit Division issued a Statement of Audit Changes to petitioner for the year 1979 which contained the following explanation:

"As a salary 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 per the production of income as an employee. Your other income results from isolated transaction [sic] rather than a regularly carried on business."

9. The Audit Division recomputed petitioner's New York State and City income tax liability for 1979. New York State and City taxable income of \$13,317.45 was computed in the following manner:

Wages	\$10,680.45
Interest income	143.00
Taxable unemployment compensation	1,894.00
Other income	1,300.00
Total income	<u>\$14,017.45</u>
Exemption	700.00
New York taxable income	<u>\$13,317.45</u>

10. Based on the aforementioned Statement of Audit Changes, the Audit Division, on April 8, 1983, issued a Notice of Deficiency to petitioner for 1979 asserting additional New York State and City tax due of \$601.31, plus interest of \$199.87, for a total allegedly due of \$801.18.

11. Petitioner's tax returns were selected for examination along with those of approximately 100 other individuals on the basis that the 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.

12. Petitioner submitted documentary evidence in the form of sales invoices, cancelled checks and worksheets in substantiation of a portion of the business



expenses claimed on his Federal Schedule C's. However, the evidence submitted did not relate to a characterization of the expenses as business rather than personal.

13. 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 one 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 petitioner a reasonable estimate of such expenses.

CONCLUSIONS OF LAW

A. That the notices of deficiency were properly issued and were not arbitrary and capricious. The returns were patently erroneous and the Audit Division was justified in disallowing the business expenses claimed by petitioner on his Federal Schedule C's. The notices of deficiency were preceded by statements of audit changes and petitioner had an opportunity to file amended returns claiming employee business expenses as adjustments to income 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 failed to sustain his burden of proof (Tax Law § 689[e]; Administrative Code § T46-189.0[e]) to show (i) that he was engaged in a trade or business other than as an employee (Internal Revenue Code § 62[1]); (ii) that the expenses in question were trade or business deductions of employees deductible pursuant to Internal Revenue Code § 62(2); and (iii) that the expenses in question were ordinary and necessary business expenses deductible under Internal Revenue Code § 162(a).

D. That the petitions of Wilfredo Rivera are denied and the notices of deficiency dated April 14, 1982 and April 8, 1983 are sustained in full, together with such additional interest as may be lawfully due and owing.

DATED: Albany, New York


STATE TAX COMMISSION

APR 15 1987

Roderichew Chen  
PRESIDENT

Francis R. Kolm  
COMMISSIONER

COMMISSIONER



COMMISSIONER