

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions :
of :
Nicholas & Charlotte Schifano : AFFIDAVIT OF MAILING

for Redetermination of Deficiencies or for :
Refunds of New York State Personal Income Tax :
under Article 22 of the Tax Law and New York :
City Nonresident Earnings Tax under Chapter 46, :
Title U 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 23rd day of April, 1987, he/she served the within notice of Decision by certified mail upon Nicholas & Charlotte Schifano the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nicholas & Charlotte Schifano
3327 Walters Ave.
Wantagh, NY 11793

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
23rd day of April, 1987.

Janet M. Snay

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

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
Nicholas & Charlotte Schifano	:	AFFIDAVIT OF MAILING
for Redetermination of Deficiencies or for	:	
Refunds of New York State Personal Income Tax	:	
under Article 22 of the Tax Law and New York	:	
City Nonresident Earnings Tax under Chapter 46,	:	
Title U of the Administrative Code of the City	:	
of New York for the Years 1978 & 1979.	:	
	:	

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

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 23rd day of April, 1987, he served the within notice of Decision by certified mail upon Louis F. Brush, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Louis F. Brush
101 Front St.
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
23rd day of April, 1987.

Daniel Carabuch
Authorized to administer oaths
pursuant to Tax Law section 174

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

April 23, 1987

Nicholas & Charlotte Schifano
3327 Walters Ave.
Wantagh, NY 11793

Dear Mr. & Mrs. Schifano:

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 and Chapter 46, Title U 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
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 St.
Mineola, NY 11501

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
NICHOLAS SCHIFANO AND CHARLOTTE SCHIFANO	:	DECISION
	:	
for Redetermination of Deficiencies or for	:	
Refunds of New York State Personal Income Tax	:	
under Article 22 of the Tax Law and New York	:	
City Nonresident Earnings Tax under Chapter 46,	:	
Title U of the Administrative Code of the City	:	
of New York for the Years 1978 and 1979.	:	

Petitioners, Nicholas Schifano and Charlotte Schifano, 3327 Walters Avenue, Wantagh, New York 11793, filed petitions for redetermination of deficiencies or for refunds of New York State personal income tax under Article 22 of the Tax Law and New York City nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the years 1978 and 1979 (File Nos. 37763 and 44364).

On October 23, 1985, petitioners waived their right to a hearing and requested that the State Tax Commission render a decision based on the entire record contained in their 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 petitioners have substantiated that they were engaged in a trade or business during the years at issue.

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

FINDINGS OF FACT

1. Petitioner Nicholas Schifano, together with his wife, petitioner Charlotte Schifano, timely filed New York State income tax resident returns for 1978 and 1979 wherein they elected a filing status of "Married filing separately on one Return". For both years, petitioners claimed itemized deductions but did not claim any miscellaneous itemized deductions. On his portion of said returns, Mr. Schifano reported New York City nonresident earnings tax. Petitioners also filed unincorporated business tax returns for said years.

2. The 1978 income tax return listed Nicholas Schifano's occupation as "truck route" and reported \$13,323.00 in total income, consisting of \$149.00 in interest income and \$13,174.00 in business income. Charlotte Schifano's occupation was listed as "maintenance contracting". On her portion of said return, she reported \$7,141.00 in total income, consisting of \$150.00 interest income and \$6,991.00 in business income. The following table, as shown on Federal Schedule C's, details the manner in which petitioners computed their reported business income:

Nicholas Schifano

Revenues	\$16,786.00
Expenses:	
Travel to truck depot	\$683.00
Gloves	196.00
Outside telephone	381.00
Safety equipment - shoes	136.00
Arctic wear/rainwear	293.00
Personal tools, flares	234.00
Gratuities	495.00
Hospitality for helpers	891.00

Dues and subscriptions	150.00	
Tax preparation	100.00	
Maps	<u>53.00</u>	
Total expenses		3,612.00
Net income		<u>\$13,174.00</u>

Charlotte Schifano

Revenues	\$11,094.00
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Expenses:

Travel	\$1,649.00	
Rubber gloves	193.00	
Hand lotions	98.00	
Cleaning/laundry	348.00	
Aqua uniforms	275.00	
White shoes and maintenance	225.00	
Personal tools	92.00	
Cafeteria charges	500.00	
Telephone	240.00	
Interest	18.00	
White support stockings	321.00	
Dues	<u>144.00</u>	
Total expenses		4,103.00
Net income		<u>\$ 6,991.00</u>

3. The wage and tax statements attached to the return showed \$16,786.45 in "Wages, tips, other compensation" paid to Nicholas Schifano from Desk Transportation Co., Inc. and \$11,094.00 in "Wages, tips, other compensation" paid to Charlotte Schifano from Carillon House Nursing Home. The statements were stamped with an arrow pointing to the \$16,786.45 and \$11,094.00 figures with the legend "Included in Schedule C".

4. Mr. Schifano's 1978 unincorporated business tax return shows the following: net profit and total income from business before New York modifications was \$13,174.00; from this amount was subtracted \$16,786.00 as a "subtraction" resulting in total (and net) loss from business of \$3,612.00. Mrs. Schifano's 1978 unincorporated business tax return shows the following: net profit and total income from business before New York modifications was \$6,991.00; from

this amount was subtracted \$11,094.00 as a "subtraction" resulting in total (and net) loss from business of \$4,103.00.

5. On March 22, 1982, the Audit Division issued a Statement of Audit Changes to petitioners for the year 1978 which contained the following:

"Schedule C expenses are disallowed as they are not ordinary and necessary in the production of income as an employee. Also, credits are disallowed as your total income exceeds \$25,000.00. Your New York City income is all wages and as such must be reported under the wage column New York City Form NYC-203. Your taxes are therefore recomputed as follows:

	NY City <u>Husband</u>	NY State	
		Husband	Wife
Total taxable income		\$6,276.00	\$ 6,276.00
Expenses disallowed		<u>3,612.00</u>	<u>4,103.00</u>
Total taxable income		\$9,888.00	\$10,379.00
Gross income	\$16,786.45		
Less exemption	<u>2,000.00</u>		
Taxable balance	\$14,786.45		
Tax per tax rate schedule	\$ 66.54	\$ 442.16	\$ 476.53
Tax previously stated	<u>73.00</u>	<u>206.30</u>	<u>\$ 206.30</u>
Overpayment	\$ 6.46		
Tax due		\$ 235.86	\$ 270.23"

6. Based on the aforementioned Statement of Audit Changes, the Audit Division, on April 6, 1982, issued a Notice of Deficiency to petitioner Nicholas Schifano for 1978 asserting additional New York State personal income tax due of \$229.40, plus interest. On the same date, the Audit Division issued a Notice of Deficiency to petitioner Charlotte Schifano asserting additional New York State personal income tax due of \$270.23, plus interest.

7. The 1979 return also listed Nicholas Schifano's occupation as "truck route" and reported \$13,483.00 in total income, consisting of \$354.00 in interest income and \$13,129.00 in business income. Charlotte Schifano's occupation was also listed as "maintenance contracting". On her portion of said return, she reported \$7,178.00 in total income, consisting of \$355.00 in

interest income and \$6,823.00 in business income. The following table, as shown on Federal Schedule C's, details the manner in which petitioners computed their reported business income:

Nicholas Schifano

Revenues		\$18,040.00
Expenses:		
Travel to truck depot	\$1,283.00	
Gloves	294.00	
Outside telephone	587.00	
Safety equipment - shoes	184.00	
Arctic wear/rainwear	291.00	
Personal tools, flares	238.00	
Gratuities	505.00	
Hospitality for helpers	892.00	
Dues and subscriptions	155.00	
Tax preparation	100.00	
Maps	53.00	
Repair services	329.00	
Total expenses		<u>4,911.00</u>
Net income		<u>\$13,129.00</u>

Charlotte Schifano

Revenues		\$11,525.00
Expenses:		
Travel	\$2,002.00	
Rubber gloves	204.00	
Hand lotions	98.00	
Cleaning/laundry	358.00	
Aqua uniforms	305.00	
White shoes and maintenance	236.00	
Personal tools	94.00	
Cafeteria charges	500.00	
Telephone	240.00	
Interest	18.00	
White support stockings	321.00	
Dues	144.00	
Magazines, newspapers, etc.	182.00	
Total expenses		<u>4,702.00</u>
Net income		<u>\$ 6,823.00</u>

8. The wage and tax statements attached to the return showed \$18,039.68 in "Wages, tips, other compensation" paid to Nicholas Schifano from Desk Transportation Co., Inc. and \$11,525.12 in "Wages, tips, other compensation"

paid to Charlotte Schifano from Carillon House Nursing Home. The statements were stamped with an arrow pointing to the \$18,039.68 and \$11,525.12 figures with the legend "FICA wages included in Schedule C".

9. Mr. Schifano's 1979 unincorporated business tax return shows the following: net profit and total income from business before New York modifications was \$13,129.00; from this amount was subtracted \$18,040.00 as a "subtraction" resulting in total (and net) loss from business of \$4,911.00. Mrs. Schifano's 1979 unincorporated business tax return shows the following: net profit and total income from business before New York modifications was \$6,823.00; from this amount was subtracted \$11,525.00 as a "subtraction" resulting in total (and net) loss from business of \$4,702.00.

10. On February 7, 1983, the Audit Division issued a Statement of Audit Changes to petitioners for the year 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.

RECOMPUTATION:

	<u>HUSBAND</u>	<u>WIFE</u>
Corrected New York State Wages Per Withholding Statements	\$18,039.68	\$11,525.12
Interest Income	354.00	355.00
Total New York Income	\$18,393.68	\$11,880.12
Less: Itemized Deductions	6,038.00	1,133.00
Corrected New York State Taxable Balance	\$12,355.68	\$10,747.12
Less: Exemptions	2,100.00	700.00
Corrected New York State Taxable Income	\$10,255.68	\$10,047.12
Corrected New York State Tax	\$ 467.89	\$ 453.29
Less: Tax Previously Due	159.75	159.75
Additional New York State Personal Income Tax Due	\$ 308.14	\$ 293.54
		\$601.68

Corrected New York City Nonresident Tax:

	HUSBAND	
Wages	\$18,039.68	
Less: Exclusion	2,000.00	
Net Wages	\$16,039.68	
Rate .0045	\$ 72.17	
Less: Tax Previously Due	\$ 72.17	
New York City Nonresident Tax Due		\$ -0-

TOTAL ADDITIONAL NEW YORK STATE PERSONAL INCOME TAX DUE \$601.68"

11. Based on the aforementioned Statement of Audit Changes, the Audit Division, on April 8, 1983, issued a Notice of Deficiency to petitioner Nicholas Schifano for 1979, asserting additional New York State personal income tax due of \$308.14, plus interest. On the same date, the Audit Division issued a Notice of Deficiency to petitioner Charlotte Schifano, asserting additional New York State personal income tax due of \$293.54, plus interest.

12. Petitioners' 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. Petitioners' claimed Schedule C deductions were disallowed on that basis.

13. Petitioners contend:

(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 petitioners of the opportunity to present substantiation for the claimed deductions;

(b) that petitioners are two 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 petitioners do not have cancelled checks or other receipts for certain expenses, the Department of Taxation and Finance should allow petitioners a reasonable estimate of such expenses.

14. Petitioners submitted documentary evidence in the form of cancelled checks and worksheets in substantiation of a portion of the business expenses which they claimed on Federal Schedule C's for the years at issue. However, the evidence submitted did not relate to a characterization of the expenses as business rather than personal. Moreover, except for union dues for petitioner Nicholas Schifano of \$174.00 for each of the years at issue and \$144.00 per year for petitioner Charlotte Schifano, the documents did not substantiate whether any portion of the claimed expenses were unreimbursed employee business expenses or miscellaneous itemized deductions.

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 petitioners on their respective Federal Schedule C's. The notices of deficiency were preceded by statements of audit changes and petitioners 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 petitioners' returns were selected for examination because of certain practices of their accountant is irrelevant. Petitioners' liability depends solely on the facts adduced herein.


C. That petitioners have failed to sustain their burden of proof (Tax Law § 689[e]; Administrative Code § T46-189.0[e]) to show (i) that they were 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 an employee 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). Petitioners, however, are entitled to the miscellaneous deduction of union dues for 1978 and 1979 of \$174.00 per year for Nicholas Schifano and \$144.00 per year for Charlotte Schifano.

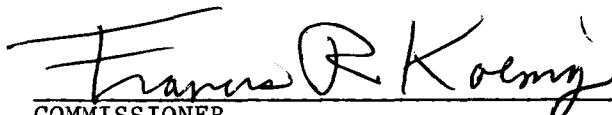
D. That the petitions of Nicholas Schifano and Charlotte Schifano are granted to the extent indicated in Conclusion of Law "C", supra; that the Audit Division is directed to recompute the notices of deficiency dated April 6, 1982 and April 8, 1983 consistent with the conclusions reached herein; and that, except as so modified, the notices of deficiency are in all other respects sustained, together with such additional interest as may be lawfully due and owing.


DATED: Albany, New York

STATE TAX COMMISSION

APR 23 1987


PRESIDENT


COMMISSIONER


COMMISSIONER