

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Gerald & Elaine Unterman : 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 Nonresident Earnings Tax under Chapter 46, :
Title U of the Administrative Code of the City :
of New York for the Years 1978 and 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 20th day of July, 1987, he/she served the within notice of Decision by certified mail upon Gerald & Elaine Unterman the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gerald & Elaine Unterman
152 Yukon Drive
Woodbury, NY 11797

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
20th day of July, 1987.

David Parchuck

Janet M. Snay
Authorized to administer oaths
pursuant to Tax Law section 174

TA-26 (7/85)
STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
W. A. Harriman Campus
ALBANY, N.Y. 12227

X

Fold at line over top of envelope to the right
of the return address.

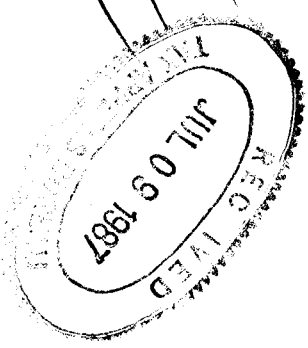
CERTIFIED

P-602 466 094

MAIL

Gerald & Elaine Unterman
48 Robin Lane
Plainville, NY 11803

MMF



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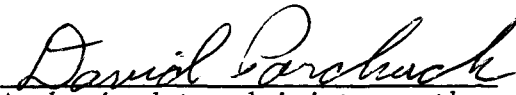
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 1st day of July, 1987, he/she served the within notice of Decision by certified mail upon Gerald & Elaine Unterman the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

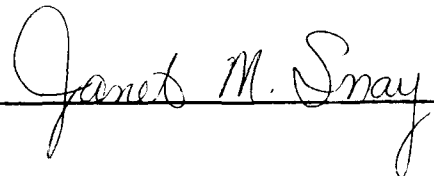
Gerald & Elaine Unterman
48 Robin Lane
Plainview, NY 11803

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
1st day of July, 1987.


Authorized to administer oaths
pursuant to Tax Law section 1/4



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Gerald & Elaine Unterman : AFFIDAVIT OF MAILING
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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 Nonresident Earnings Tax under Chapter 46, :
Title U of the Administrative Code of the City :
of New York for the Years 1978 and 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 1st day of July, 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
1st day of July, 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

July 1, 1987

Gerald & Elaine Unterman
48 Robin Lane
Plainview, NY 11803

Dear Mr. & Mrs. Unterman:

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 TAX COMMISSION

On October 23, 1985, petitioner waived a hearing before the State Tax Commission and submitted the matter for decision based upon 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 Gerald Unterman has substantiated that he was engaged in a trade or business during the years at issue.

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

FINDINGS OF FACT

1. Petitioners, Gerald Unterman and Elaine Unterman, timely filed New York State income tax resident returns (with City of New York nonresident earnings tax) for each of the years 1978 and 1979 under filing status married filing separately on one return. On each return Mr. Unterman reported his occupation to be "Financial Analyst" while Mrs. Unterman reported her occupation to be "School Teacher".

2. For 1978, Mr. Unterman reported \$23,405.00 in business income. A Schedule C, Federal Form 1040, attached to the return reported the following income and expenses:

"Schedule C - Income From Business or Profession - Financial Analyst

Income	27472
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Expenses:

Telephone	120
Travel (3000 mi @ 17¢)	510
Magazines, Newspapers	298
Research, Meetings & Conferences	2146
Professional Development-CFA Exam	125
Supplies	182
Calculator	80
Cassettes, Note-Taking & Speeches	231
FAF Seminar	150
Dues	225

	4067
Net Income	<u>23,405</u>

3. Attached to petitioners' 1978 return was a Wage and Tax Statement issued to Mr. Unterman by Standard & Poor's Corp. showing \$27,471.89 in "Wages,

tips, other compensation". The legend "Included in Schedule C" with an arrow pointing to said figure was stamped on the statement.

4. For 1979, Mr. Unterman reported \$25,810.00 in business income. A Schedule C attached to the return reported the following income and expenses:

"Schedule C - Income From Business or Profession: Financial Analyst

Income

Research	32810
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Expenses:

Telephone	180	
Travel (8,450 mi @ 18½¢)	1563	
Magazines, Newspapers	308	
Research, Meetings & Conference	2943	
Professional Development	486	
Supplies	203	
Calculator	81	
Cassettes, Tapes, Note-Taking & Speeches	431	
FAF Seminar	175	
Dues	239	
Accounting	375	
Postage & Mailing	16	7000
Net Income		<u>25810"</u>

5. Attached to petitioners' 1979 return was a Wage and Tax Statement issued to Mr. Unterman by Standard & Poor's Corp. showing \$32,809.69 in "Wages, tips, other compensation". The legend "Included in Schedule C" with an arrow pointing to said figure was stamped on the statement.

6. Mrs. Unterman's income of \$20,749.21 (1978) and \$16,421.95 (1979), as reported on the wage and tax statements issued to her by the City of New York was properly reported as wage income on each return at issue.

7. Mr. Unterman filed an unincorporated business tax return for each year at issue. For 1978 he reported a net profit of \$23,405.00 and a subtraction of \$27,472.00. A handwritten explanation of the subtraction appears on the return

characterizing it as "FICA wages included in Schedule C". Accordingly, a net loss of \$4,067.00 was shown, with no tax due. For 1979, Mr. Unterman reported a net profit of \$25,810.00 and a subtraction of \$32,810.00. A stamped arrow with the legend "FICA Wages included in Schedule C" pointed to the latter figure. Accordingly, a net loss of \$7,000.00 was shown, with no tax due.

8. Mr. Unterman filed a New York City nonresident earnings tax return for each year at issue. For 1978, he reported net earnings from self-employment of \$23,405.00. For 1979, he reported net earnings from self-employment of \$25,552.00.

9. Mrs. Unterman failed to file a New York City nonresident earnings tax return for 1978. However, for 1979, she properly filed such return wherein she reported her salary income of \$16,422.00.

10. On petitioners' 1978 and 1979 personal income tax returns they claimed itemized deductions. The miscellaneous deductions claimed of \$928.00 (1978) and \$784.00 (1979) appear to be related to Mrs. Unterman's income. No adjustments to income were reported on either return.

11. Petitioners' 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 Gerald Unterman's claimed Schedule C deductions were disallowed on that basis.

12. On March 26, 1982, the Audit Division issued a Statement of Audit Changes to petitioners for the year 1978, wherein Mr. Unterman's claimed Schedule C expenses were disallowed. Additionally, adjustments were made with respect to New York City nonresident earnings tax. The aforestated adjustments were explained in said statement as follows:

"Deductions shown on Schedule C are disallowed since they are not considered ordinary and necessary in the production of income as an employee.

The New York City non-resident earnings tax return for the husband has been based on wages of \$27,471.89. A New York City non-resident earnings tax return has been computed for the wife based on wages of \$20,749.21."

Accordingly, on April 14, 1982 a separate Notice of Deficiency was issued against each petitioner for 1978. The notice issued against Mr. Unterman asserted additional New York State personal income tax of \$241.51, less a credit of \$27.86 for New York City nonresident earnings tax, plus interest of \$61.63, for a total due of \$275.28. The notice issued against Mrs. Unterman asserted additional New York State personal income tax of \$234.18, New York City nonresident earnings tax of \$88.87, plus interest of \$93.18, for a total due of \$416.23.

13. On February 8, 1983, the Audit Division issued a Statement of Audit Changes to petitioners for the year 1979, wherein Mr. Unterman's claimed Schedule C expenses were disallowed based on 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."

Accordingly, on April 8, 1983, a separate Notice of Deficiency was issued against each petitioner for 1979. The notice issued against Mr. Unterman asserted additional New York State personal income tax of \$316.67, less a

credit of \$12.36 for New York City nonresident earnings tax, plus interest of \$101.15 for a total due of \$405.46. The notice issued against Mrs. Unterman asserted additional New York State personal income tax of \$316.67, plus interest of \$105.26, for a total due of \$421.93. The deficiency computed against Mrs. Unterman was based on a redistribution of petitioners' itemized deductions between husband and wife.

14. Petitioner Gerald Unterman submitted documentary evidence which was insufficient to show that he was engaged in business as a financial analyst.

15. Petitioner Gerald Unterman contends:

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

(b) that he 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 he does not have cancelled checks or other receipts for certain expenses, the Department of Taxation and Finance should allow him 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 expense. The notices of deficiency for 1978 and 1979 were each preceded by a Statement of Audit Changes; thus petitioner Gerald Unterman 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 petitioners' returns were selected for examination because of certain practices of their accountant is irrelevant. Their liability depends solely on the facts adduced herein.

C. That petitioner Gerald Unterman has not sustained his burden of proof under section 689(e) of the Tax Law and section U46-39.0(e) of the Administrative Code of the City of New York, 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. Furthermore, the expenses purportedly attributable to any such business were not properly substantiated.


D. That even if petitioner Gerald Unterman may have been entitled to deduct certain employee business expenses under sections 62(2) or 63(f) of the Internal Revenue Code if he had filed Form 2106, or had claimed such expenses as miscellaneous deductions, he nevertheless failed to sustain his burden of proof to substantiate the character or, in many cases, the amount of the claimed business expenses.

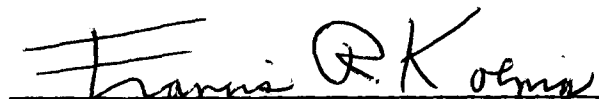
E. That the petition of Gerald Unterman and Elaine Unterman is denied and the notices of deficiency issued April 14, 1982 and April 8, 1983 are sustained together with such additional interest as may be lawfully owing.

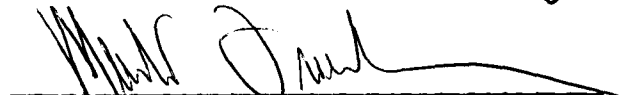
DATED: Albany, New York

STATE TAX COMMISSION

JUL 01 1987


PRESIDENT


COMMISSIONER


COMMISSIONER