

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Philip E. & Rochelle Horowitz : 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 :

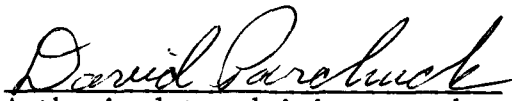
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 23rd day of April, 1987, he/she served the within notice of Decision by certified mail upon Philip E. & Rochelle Horowitz the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

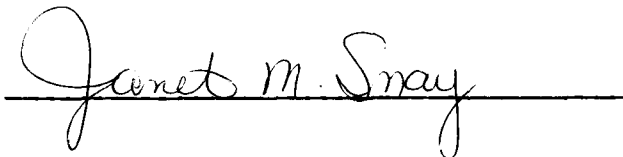
Philip E. & Rochelle Horowitz
59 Tamarack Lane
Pomona, NY 10970

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.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Philip E. Horowitz, D.D.S., P.C. : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for :
Refund of Corporation Franchise Tax under :
Article 9-A of the Tax Law for the Fiscal Year :
Ended June 30, 1978. :
:

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 Philip E. Horowitz, D.D.S., P.C. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

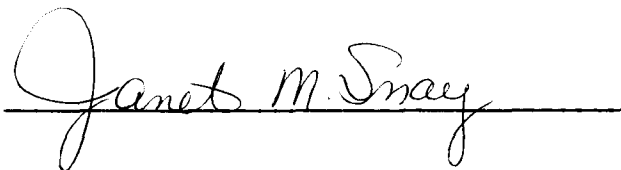
Philip E. Horowitz, D.D.S., P.C.
157 N. Middletown Road
Pearl River, NY 10965

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.

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:

State of New York :

ss.:

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

David A. Teich
Altchek, Teich & Co.
65 South Route 303
Blauvelt, NY 10913

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.

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 :
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:

State of New York :

ss.:

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

Ira J. Altchek
Altchek, Teich & Co.
65 South Route 303
Blauvelt, NY 10913

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.

Janet M. Snay

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

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

April 23, 1987

Philip E. & Rochelle Horowitz
59 Tamarack Lane
Pomona, NY 10970

Dear Mr. & Mrs. Horowitz:

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 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
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:
Ira J. Altchek
Altchek, Teich & Co.
65 South Route 303
Blauvelt, NY 10913

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

April 23, 1987

Philip E. Horowitz, D.D.S., P.C.
157 N. Middletown Road
Pearl River, NY 10965

Gentlemen:

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) 1090 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
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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:
David A. Teich
Altchek, Teich & Co.
65 South Route 303
Blauvelt, NY 10913

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
PHILIP E. HOROWITZ AND ROCHELLE HOROWITZ :
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

In the Matter of the Petition :
of :
PHILIP E. HOROWITZ, D.D.S., P.C. :
for Redetermination of a Deficiency or for :
Refund of Corporation Franchise Tax under :
Article 9-A of the Tax Law for the Fiscal Year :
Ended June 30, 1978.

Petitioners, Philip E. Horowitz and Rochelle Horowitz, 59 Tamarack Lane, Pomona, New York 10970, 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 No. 47405).

Petitioner, Philip E. Horowitz, D.D.S., P.C., 157 North Middletown Road, Pearl River, New York 10965, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal year ended June 30, 1978 (File No. 64529).

A consolidated 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 July 16, 1986 at 1:30 P.M., and continued to conclusion on September 24, 1986, at 1:30 P.M., with all briefs to be submitted by October 24, 1986.

Petitioners appeared by Ira J. Altchek, CPA and David A. Teich, CPA. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether adjustments made as the result of a field audit for New York State and City personal income tax purposes and corporation franchise tax purposes were proper.

FINDINGS OF FACT

1. Petitioners, Philip E. Horowitz and Rochelle Horowitz, filed a 1978 New York State Income Tax Resident Return under filing status "Married filing separately on one Return". On such return Philip E. Horowitz reported salary income of \$26,400.00 derived from his dental practice, Philip E. Horowitz, D.D.S., P.C., 157 North Middletown Road, Pearl River, New York 10965. Although petitioners were New York City residents from January 1, 1978 to May 17, 1978, they failed to compute and pay New York City taxes for said period. For taxable year 1979, petitioners filed a New York State Income Tax Resident Return under the same filing status as that used for 1978. On such return Philip E. Horowitz reported salary income of \$27,500.00 from his dental practice.

2. On October 13, 1982, the Audit Division issued two statements of personal income tax audit changes. One such statement, which was issued solely to Mr. Horowitz, reported adjustments based on a field audit as follows:

	<u>1978</u>	<u>1979</u>
Constructive Dividends from Philip Edward Horowitz, D.D.S., P.C.	\$18,149.00	\$23,565.00
Interest Income - omitted		44.00
Modifications applicable to petitioner's professional corporation:		

Section 612(b)(8) - Social Security	894.00	1,163.00
Section 612(b)(9) - Insurance	3,687.00	2,598.00
NET ADJUSTMENT	<u>\$22,730.00</u>	<u>\$27,370.00</u>

The other statement imposed New York City personal income tax against each petitioner for their 1978 New York City resident period.

3. On February 25, 1983, the Audit Division issued two notices of deficiency against petitioners. One notice, which was issued against Philip E. Horowitz, asserted additional New York State personal income tax for 1978 and 1979 of \$6,720.05, New York City personal income tax for 1978 of \$191.60, plus penalty of \$431.80 and interest of \$2,495.57, for a total due of \$9,839.02. The other notice, which was issued against Rochelle Horowitz, asserted New York City personal income tax of \$32.39, plus penalty of \$16.20 and interest of \$13.13, for a total due of \$61.72.

4. On March 14, 1979, Philip E. Horowitz, D.D.S., P.C. (hereinafter "the corporation") filed a Corporation Franchise Tax Report for the fiscal year ended June 30, 1978 whereon taxable income of \$1,879.00 was reported and the minimum tax of \$250.00 was paid.

5. On October 13, 1982, the Audit Division issued a Statement of Franchise Tax Audit Changes to the corporation wherein, as the result of a field audit, the following adjustments were made:

	<u>Fiscal Year Ended June 30, 1978</u>	<u>Fiscal Year Ended June 30, 1979</u>
Additional Income	\$13,879.00	\$17,823.00
Insurance Expense - Personal Use	1,285.00	1,768.00
Auto Expenses - Personal Use	3,985.00 ¹	2,341.00
Depreciation - Auto - Personal Use	<u> </u>	<u>1,633.00</u>

1 The adjustment for Auto Expenses - Personal Use was \$2,985.00 rather than \$3,985.00 as stated. However, the net adjustment as stated of \$18,149.00

NET ADJUSTMENT

\$18,149.00¹

\$23,565.00

6. On December 29, 1981, Mr. Horowitz executed a consent form extending the period of limitation on the assessment of corporation franchise tax for the fiscal year ended June 30, 1978 to any time on or before April 15, 1983.

7. On March 4, 1983, the Audit Division issued a Notice of Deficiency against the corporation for the fiscal year ended June 30, 1978, asserting corporation franchise tax of \$1,752.80 plus penalty of \$350.56 and interest of \$897.59, for a total due of \$3,000.95.

8. A Notice of Deficiency was not issued against the corporation for fiscal year ended June 30, 1979 since the period of limitation on assessment had expired.

9. A cash availability audit was conducted with respect to petitioners Philip and Rochelle Horowitz. Such audit revealed undisclosed income of \$27,759.00 for 1978. One half of said amount, or \$13,879.00 was allocated to the corporation as additional income for fiscal year ended June 30, 1978. The balance was allocated to the corporation as additional income for fiscal year ended June 30, 1979. Additionally, one half of the undisclosed income determined on audit for 1979 was allocated to the corporation as additional income for fiscal year ended June 30, 1979. The net adjustments to the corporation for 1978 and 1979 of \$18,149.00 and \$23,565.00 respectively, were held to be additional income to Mr. Horowitz in the nature of constructive dividends from the corporation.

is correct since the aforesaid adjustment in its correct amount was added to the other adjustments in computing the net adjustment as stated.

10. As the result of various concessions made by the Audit Division at a district office conference, a Tax Appeals Bureau conference and the hearing held herein, the amounts of undisclosed income were reduced to \$8,168.00 for 1978 and \$4,234.00 for 1979.

11. The revised field audit workpapers, based on allowances made at the Tax Appeals Bureau conference, contain the following statement with respect to petitioners' New York City tax liability:

"No change from original AU 251 Constructive Dividend effected
Non Resident period only - (no tax)"

12. Mr. Horowitz claimed 100% of his automobile expenses as a business deduction on the returns of the corporation. As the result of the audit only 10% of such expenses were allowed as a business deduction since no records were presented.

13. The 10% allowed by the Audit Division represented 10% of the total of automobile expenses claimed and automobile insurance (which was claimed and subsequently disallowed as an insurance expense).

14. Petitioner's business mileage consisted of 4 round trips per week from his Brooklyn, New York office to his Pearl River, New York office, plus 3 trips per week to Nyack Hospital from his Pearl River office. Based on this mileage, his automobile, a 1975 Volvo, was used 40% for business.

15. Depreciation of the aforesaid automobile was also allowed only to the extent of 10% of the amount claimed for fiscal year ended June 30, 1979. For fiscal year ended June 30, 1978, the deduction for depreciation was inadvertently omitted from the corporate return.

16. The cash living expenses incorporated into the cash availability analysis were computed as follows:

	<u>1978</u>	<u>1979</u>
Food (\$ 90 per week for 1978)	\$4,680.00	
(\$100 per week for 1979)		\$5,200.00
Miscellaneous	<u>1,300.00</u>	<u>1,300.00</u>
Total Cash Living Expenses	<u>\$5,980.00</u>	<u>\$6,500.00</u>

The amounts estimated for food expenses were based on field audit manual guidelines and the auditor's personal experience.

17. Mr. Horowitz submitted schedules of checks paid to food stores and checks drawn to cash for 1978 and 1979. According to such schedules, his food purchases by check totaled \$612.28 in 1978 and \$887.14 in 1979. Checks drawn to cash per said schedules totaled \$4,480.00 in 1978 and \$3,845.00 in 1979. Credit was previously allowed by the auditor for checks paid to food stores of \$434.10 (1978) and \$816.00 (1979). Credit was also previously allowed for checks drawn to cash of \$2,518.00 (1978) and \$2,000.00 (1979). No documentation was submitted to show that petitioners are properly entitled to any credits above what was previously allowed by the Audit Division.

CONCLUSIONS OF LAW

A. That petitioners, Philip and Rochelle Horowitz, have failed to sustain their burden of proof, imposed pursuant to section 689(e) of the Tax Law, to show that they are properly entitled to credit for food paid by check or checks drawn to cash over and above the amounts previously allowed by the Audit Division.

B. That based on the evidence adduced at hearing, petitioner has established that 40% of his automobile expenses are deductible on the corporation returns each year as a business deduction computed as follows:

FISCAL YEAR ENDED JUNE 30, 1978

Automobile expenses claimed	\$3,459.00
Insurance	1,285.00
Total	<u>\$4,744.00</u>
40% business use allowed	<u>\$1,898.00</u>
Revised Adjustment (\$3,459.00 - \$1,898.00)	<u>\$1,561.00</u>

FISCAL YEAR ENDED JUNE 30, 1979

Automobile expenses claimed	\$2,798.00
Insurance	1,768.00
Total	<u>\$4,566.00</u>
40% business use allowed	<u>\$1,826.00</u>
Revised Adjustment (\$2,798.00 - \$1,826.00)	<u>\$ 972.00</u>

C. That depreciation on the automobile is also allowed for each fiscal year to the extent of 40% computed as follows:

Cost	\$12,700.00
7 Year Life - straight line =	1,814.00 Per Year
40% business use allowed =	726.00

Revised adjustment for fiscal year ended June 30, 1978	<u>\$(726.00)</u>
Revised adjustment for fiscal year ended June 30, 1979	<u>\$1,088.00</u>

D. That based on all previous concessions made by the Audit Division and the allowances made in Conclusions of Law "B" and "C", supra, the revised net adjustments for both corporation franchise tax and personal income tax purposes are recomputed as follows:

REVISED FRANCHISE TAX AUDIT CHANGES

	<u>Fiscal Year Ended June 30, 1978</u>	<u>Fiscal Year Ended June 30, 1979</u>
Additional Income ($\frac{1}{2}$ of \$8,168.00)	\$4,084.00	
Additional Income (\$4,084.00 + $\frac{1}{2}$ of \$4,234.00)		6,201.00
Insurance Expense - Personal Use	1,285.00	1,768.00
Auto Expense - Personal Use	1,561.00	972.00
Depreciation - Auto - Personal Use	(726.00)	1,088.00
NET ADJUSTMENT	<u>\$6,204.00</u>	<u>\$10,029.00</u>

REVISED NEW YORK STATE PERSONAL INCOME TAX AUDIT CHANGES

	<u>1978</u>	<u>1979</u>
Constructive Dividends from Philip Edward Horowitz, D.D.S., P.C.	\$6,204.00	\$10,029.00
Interest Income - omitted		44.00
Modifications applicable to petitioner's Professional Corporation:		
Section 612(b)(8) - Social Security	894.00	1,163.00
Section 612(b)(9) - Insurance	<u>3,687.00</u>	<u>2,598.00</u>
NET ADJUSTMENT	<u>\$10,785.00</u>	<u>\$13,834.00</u>

E. That the petition of Philip E. Horowitz and Rochelle Horowitz is granted to the extent provided in Conclusions of Law "B", "C" and "D", supra; that the Audit Division is directed to modify the Notice of Deficiency issued against petitioner Philip E. Horowitz on February 25, 1983, with respect to New York State and City personal income taxes for 1978 and 1979 accordingly; and except as so granted, said petition is, in all other respects, denied.

F. That the petition of Philip E. Horowitz, D.D.S., P.C. is granted to the extent provided in Conclusions of Law "B", "C", and "D", supra; that the Audit Division is directed to modify the Notice of Deficiency issued March 4, 1983 accordingly; and except as so granted, said petition is, in all other respects, denied.

DATED: Albany, New York

STATE TAX COMMISSION

R. de la Cruz Allen
PRESIDENT

Francis P. Koenig
COMMISSIONER

[Signature]
COMMISSIONER