

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Dragutin & Elena Nikolic :

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

Dragutin & Elena Nikolic
81 Hylan Blvd.
Staten Island, NY 10305

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.

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 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.

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

April 15, 1987

Dragutin & Elena Nikolic
81 Hylan Blvd.
Staten Island, NY 10305

Dear Mr. & Mrs. Nikolic:

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 Petition	:	
of	:	
DRAGUTIN NIKOLIC and ELENA NIKOLIC	:	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 Year 1978.	:	

Petitioners, Dragutin Nikolic and Elena Nikolic, 81 Hylan Boulevard, Staten Island, New York 10305, 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 Year 1978 (File Nos. 37759 and 38102).

On October 23, 1985, petitioners waived their right to a hearing and requested the State Tax Commission to 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 petitioner Dragutin Nikolic has substantiated that he was engaged in a trade or business during the year at issue.

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

FINDINGS OF FACT

1. Petitioners, Dragutin Nikolic and Elena Nikolic, 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, Mr. Nikolic reported business income of \$13,742.00, while on her portion of the return Mrs. Nikolic reported wages and interest income totalling \$8,052.00. The following table details the manner in which Mr. Nikolic computed his business income:

<u>Income</u>	
Narrows Tanker	\$14,800.00
Amway Distributors	-0-
Delivery Charges	-0-
Emergency Service	<u>3,831.00</u>
Total Income	\$18,631.00

<u>Expenses</u>	
Purchases	\$ 639.00
Delivery & Travel	841.00
Telephone	180.00
Samples	193.00
Postage	51.00
Mailings	52.00
Work Clothes:	
Rain Wear	120.00
Arctic Wear	62.00
Gloves	245.00
Safety Shoes	158.00
Recruiting Costs	198.00
Tools	233.00
Northwestern Rain Hats	15.00
Travel - Delivery of Amway Products ordered & paid in 1977:	
2200 miles @ .17	374.00
Long Distance Telephone	292.00
Meals on Board: 16 weeks @ 7 days = 112 days @ 10.00 = \$1,120.00	
Reimbursed 112 days @ \$6.00 = \$672.00	448.00
Travel to Boat - 16 Roundtrips @ \$15.00	240.00
Dues	250.00
Magazines & Newspapers	198.00
Accounting	<u>100.00</u>

Total Expenses	\$ 4,889.00
<u>Net Income</u>	\$13,742.00

2. Attached to petitioners' 1978 return was a wage and tax statement issued to Mr. Nikolic by Narrows Tanker Corp. reporting "wages, tips, other compensation" of \$18,630.54. The statement is stamped with an arrow pointing to the \$18,630.54 figure with the legend "Included in Schedule C".

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

"We have reviewed your 1978 income tax return and have disallowed business expenses as shown on Schedule C. The expenses claimed are not necessary and ordinary in the production of income as an employee.

Since your total household gross income is over \$25,000.00, the household credit is not allowed."

4. The Audit Division recomputed petitioners' New York State and City income tax liability for 1978 as follows:

	<u>Husband</u>	<u>Wife</u>
New York taxable income per return	\$ 9,928.00	\$7,402.00
Expenses disallowed	4,889.00	-0-
New York taxable income corrected	<u>\$14,817.00</u>	<u>\$7,402.00</u>

	<u>State</u>	<u>City</u>
	<u>Husband</u>	<u>Wife</u>
Tax on above	\$843.53	\$284.12
Tax per original return	427.46	266.62
	<u>\$416.07</u>	<u>\$ 17.50</u>

	<u>Husband</u>	<u>Wife</u>
	\$315.69	\$122.25
	182.20	122.25
	<u>\$153.49</u>	<u>-0-</u>

5. Based on the aforementioned Statement of Audit Changes, the Audit Division, on April 6, 1982, issued notices of deficiency to petitioners for 1978 asserting additional New York State and City tax due as indicated above, plus interest.

6. Petitioners' tax return was 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 Dragutin Nikolic's claimed Schedule C deductions were disallowed on that basis.

7. Petitioner Dragutin Nikolic submitted documentary evidence in the form of receipts, cancelled checks and worksheets in substantiation of a portion of the business expenses claimed on his Federal Schedule C. However, the evidence submitted did not relate to a characterization of the expenses as business rather than personal.

8. 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 petitioners were 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 petitioners did 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.

CONCLUSIONS OF LAW

A. That the notices of deficiency were properly issued and were not arbitrary and capricious. The return was patently erroneous and the Audit

Division was justified in disallowing the business expenses claimed by Dragutin Nikolic on his Federal Schedule C. The notices of deficiency were preceded by a Statement of Audit Changes and Mr. Nikolic had an opportunity to file an amended return 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' return was selected for examination because of certain practices of their accountant is irrelevant. Petitioners' liability depends solely on the facts adduced herein.

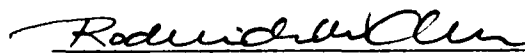
C. That petitioners have failed to sustain their burden of proof (Tax Law § 689[e]; Administrative Code § T46-189.0[e]) to show (i) that Dragutin Nikolic was engaged in a trade or business other than as an employee (Internal Revenue Code § 62[1]); (ii) that the expenses in question were trade or business deductions of 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).

D. That the petition of Dragutin Nikolic and Elena Nikolic is denied and the notices of deficiency dated April 6, 1982 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


PRESIDENT


COMMISSIONER


COMMISSIONER