

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ROBERT GREENE AND DOLORES GREENE

DECISION

for Redetermination of a Deficiency or for
Refund of New York State and New York City
Personal Income Tax under Article 22 of the
Tax Law and Chapter 46, Title T of the
Administrative Code of the City of New York
for the Years 1978 and 1979.

Petitioners, Robert Greene and Dolores Greene, 2821 Wynsum Avenue, Merrick, New York 11566, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the years 1978 and 1979 (File Nos. 37545 and 44357).

A hearing was commenced before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 21, 1985 at 3:15 P.M. Petitioners appeared by Louis F. Brush, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

On October 23, 1985, petitioners waived their right to proceed with the 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 Notice of Deficiency was issued without any basis and for the sole purpose of extending the period of limitation on assessment.

II. Whether petitioners have substantiated that Mr. Greene was 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. For the years 1978 and 1979, petitioners, Robert Greene and Dolores Greene, filed New York State income tax returns under filing status "married filing separately on one return". Mr. Greene filed New York City nonresident earnings tax returns and State unincorporated business tax returns for 1978 and 1979.

2. The 1978 State income tax return listed Mr. Greene's occupation as "Writer/Lecturer" and Mrs. Greene's occupation as "Office Aide". Mr. Greene reported total income of \$8,294.00 consisting of business income of \$8,163.00 and interest income of \$131.00. Mrs. Greene reported total income of \$7,950.00 consisting of "other income" of \$7,800.00 and interest income of \$150.00.

(a) On an attached worksheet labeled "Schedule C", Mr. Greene reported the following "Revenues":

	<u>Total</u>	<u>Outside NYC</u>	<u>Inside NYC</u>
Lecturing/Teaching	\$21,907.00	--	\$21,907.00
Writing Courses	1,628.00	\$1,628.00	--
Review Courses	<u>1,990.00</u>	<u>1,990.00</u>	<u>--</u>
Totals	\$25,525.00	\$3,618 .00	\$21,907.00

(b) The Schedule C shows the following Expenses:

<u>Expenses:</u>	<u>Total</u>	<u>Outside NYC</u>	<u>Inside NYC</u>
Payments to Dolores Greene	\$ 7,800	\$ --	\$ 7,800
Books, literary publications	328	28	300
Drama	306	--	306
Cassette players for speech improvement	97	--	97
Career development & counseling	481	55	426
Telephone - inside	300	100	200
Office maint.	1,200	600	600
Accounting	125	--	125
Dues & subscriptions	225	--	225
Telephone - outside	628 ¹	128	510
Professional development	550	--	550
Recordings used in teaching English	173	--	173
Newspapers magazines	292	--	292
Meetings & promotion exp.	1,136	292	844
Tolls, parking	103	--	103
Travel (8,000 mi. @ 17¢)	1,360	560	800
Licenses	20	--	20
Transcripts & resumes	38		38
Postage & mailings	68	34	34
Advertising	500	250	250
Outside services - teachers	838	838	--
Outside services - conference rooms	794	794	
	<u>\$17,362</u>	<u>\$3,679</u>	<u>\$13,693</u>

The \$17,362.00 in total expenses deducted from total revenues of \$25,525.00 resulted in the business income reported.

(c) Two wage and tax statements attached to the return showed "wages, tips, other compensation" to Mr. Greene of \$1,628.00 from Bellmore-Merrick CHSD of Merrick, New York and \$21,907.25 from Board of Education of the City of New York. Both statements are stamped with an arrow pointing to the compensation figures and bearing the legend "Included in Schedule C".

(d) Mr. Greene claimed total New York itemized deductions of \$3,882.00, and Mrs. Greene claimed total New York itemized deductions of \$3,538.00.

1 The correct total is \$638.00.

(e) The unincorporated business tax return shows total business income of \$8,163.00 less subtractions of \$21,907.00, resulting in a net loss of \$13,744.00. Accordingly, no unincorporated business tax was shown as due.

(f) Mr. Greene's New York City Nonresident Earnings Tax Return for 1978 shows net earnings from self-employment of \$8,163.00.

3. The 1979 income tax return lists Mr. Greene's occupation as "Writer/Lecturer" and Mrs. Greene's occupation as "Office Aide". Mr. Greene reported total income of \$6,270.00 consisting of business income of \$6,178.00 and interest income of \$92.00. Mrs. Greene reported total income of \$7,912.00 consisting of "other income" of \$7,800.00 and interest income of \$112.00.

(a) On the attached Schedule C, Mr. Greene reported the following "Revenues":

	<u>Total</u>	<u>Outside NYC</u>	<u>Inside NYC</u>
Lecturing/Teaching	\$23,364.00	--	\$23,364.00
Review Courses	<u>6,650.00</u>	<u>\$6,650.00</u>	<u>--</u>
	\$30,014.00	\$6,650.00	\$23,364.00

(b) The Schedule C shows the following expenses:

<u>Expenses:</u>	<u>Total</u>	<u>Outside NYC</u>	<u>Inside NYC</u>
Payments to Dolores Greene (Adm. Asst.)	\$ 7,800	--	\$ 7,800
Books , literary publications	498	52	446
Drama/Theatre	421	73	348
Rent	2,609	2,609	--
Telephone - inside	360	360	--
Office maintenance	1,800	900	900
Answering Service	300	300	--
Accounting	125	--	125
Dues & Subscriptions	225	--	225
Outside telephone	743	--	743
Recordings (used in teaching English)	158	--	158
Newspapers, magazines	372	79	293
Meetings, Organization Recruitment Expense	1,307	1,307	--

Promotion Expense/Professional Development	1,067	384	683
Tolls, parking	109	--	109
Travel (15,000 mi. @ 18½¢)			
(3,470 mi. @ 10¢)	3,122	1,850	1,272
Postage & mailings	473	341	132
Advertising	175	175	--
Outside services - teachers	2,172	2,172	--
	<u>\$23,836</u>	<u>\$10,602</u>	<u>\$13,234</u>

The \$23,836.00 in total expenses was subtracted from total revenues of \$30,014.00, and the result was shown as the \$6,178.00 net business income reported.

(c) A wage and tax statement attached to the return shows income to Mr. Greene from "wages, tips, other compensation" in the amount of \$23,363.80 from the City of New York. The statement is stamped with arrow pointing to the compensation figure and bearing the Legend "Included in Schedule C".

(d) Mr. Greene claimed New York itemized deductions of \$4,363.00, and Mrs. Greene claimed New York itemized deductions of \$4,605.00.

(e) Mr. Greene's New York City Nonresident Earnings Tax Return shows net earnings from self-employment of \$10,130.00.

(f) The unincorporated business tax return shows total business income of \$6,178.00, less subtractions of \$23,364.00, resulting in a net loss of \$17,186.00. Accordingly, no unincorporated business tax was shown as due.

4. Petitioners' tax returns were selected for examination along with those of approximately 100 other individuals because their returns had been prepared by a particular accountant. An investigation had disclosed that this accountant had consistently prepared returns on which an individual with wage or salary income shown on wage and tax statements had reported this 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.

5. On March 24, 1982, the Audit Division issued a Statement of Audit Changes to petitioners for 1978, asserting additional personal income tax due of \$864.72. The statement explained that the following adjustments were made:

(a) All of Mr. Greene's reported income was deemed to be wage income, rather than income from a business or profession.

(b) Expenses of \$17,362.00 were disallowed, because they were not deemed to be ordinary and necessary expenses incurred as an employee.

(c) Since the wages paid to Mrs. Greene were not allowed as an expense, they were not treated as income to Mrs. Greene. Petitioners' filing status was changed to "married filing joint return", and the computation of tax due was made accordingly.

(d) The household credit was disallowed.

(e) Mr. Greene's New York City income reported as wages was changed to \$21,907.00, less an exclusion of \$1,000.00, and New York City nonresident earnings tax was computed accordingly.

6. On April 14, 1982, the Audit Division issued to petitioners a Notice of Deficiency for the year 1978 asserting personal income tax due of \$864.72 plus interest. No penalties were imposed.

7. In response to a letter from the Audit Division, dated December 27, 1982, Mr. Greene provided the following explanation of the 1979 Schedule C expenses:

"Expense Apportionment are [sic] all documentable. Please refer to Schedule C filed with return. Look in column [sic] 'outside NYC' for Review Course Business and in column [sic] 'inside NYC' for joint expenses pertaining to 'Teaching'. For example - How much of the \$0.75 paid for the Sunday Times is apportioned to maintaining literary and current event skills for teaching and how much is allocated for

administration skills in operating the Review Course Business? Estimated apportionment [sic] were used whenever the item was not specific."

Information regarding Mrs. Greene's employment was also provided.

8. On February 17, 1983, the Audit Division issued a Statement of Audit Changes to petitioners for 1979 asserting total New York State and New York City personal income tax due of \$579.19 on total income of \$23,567.80. The statement contained this 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."

Petitioners' tax liability was recomputed under filing status "married filing jointly". On April 8, 1983, the Audit Division issued to petitioners a Notice of Deficiency for 1979 asserting personal income tax due of \$579.19 plus interest. No penalties were imposed.

9. The Audit Division did not include Mr. Greene's reported income from review courses of \$6,650.00 in its computation of petitioners' taxable income. At hearing, the Audit Division asserted additional tax due on this income; however, it had not recalculated petitioners' total tax liability on this basis.

10. Petitioners submitted a substantial amount of documentation to substantiate-claimed business expenses:

(a) In 1978 and 1979, Mr. Greene operated a part-time unincorporated business known as "Robert Greene Academic Services", which tutored students in preparation for college board examinations. Mr. Greene's income from this business was \$1,990.00 in 1978 and \$6,650.00 in 1979.

(b) Based on Mr. Greene's statement to the Audit Division (Finding of Fact "7", supra), it is concluded that expenses listed on both the 1978 and

1979 Federal Schedules C under the heading "inside NYC" were not attributable to Mr. Greene's review course business.

(c) In 1978, expenses listed under the heading "outside NYC" apparently included those attributable to Mr. Greene's performance of services as an employee of Bellmore-Merrick CHSD, **as well** as expenses attributable to his business. Petitioners established that they made the following expenditures, attributable only to Mr. Greene's business: (1) advertising expense of \$409.34; (2) salary expense ("outside services teachers") of \$838.00; and (3) conference room rental expense of \$790.00. The remainder of the evidence submitted was insufficient to establish that the expenses constituted ordinary and necessary business expenses and not personal expenditures.

(d) Petitioners established that in 1979 they made the following expenditures attributable to Mr. Greene's business: (1) advertising expense of \$175.00 and (2) salary expense ("outside services teachers") of \$2,247.00. There was insufficient proof to establish that the remainder of the claimed expenses were ordinary and necessary business expenses and not personal expenditures.

10. 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 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 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.

CONCLUSIONS OF LAW

A. That the notices of deficiency were properly issued and were not arbitrary or capricious. Mr. Greene submitted wage and tax statements showing income as an employee, yet he reported **no** income from wages, salaries, tips and other compensation. **In** addition, he submitted Federal Schedules **C** reporting his employee income as business income. These returns were patently erroneous, and the Audit Division was justified in making a determination of tax due based **on** adjustments to correct inconsistencies apparent on the face of the returns. Each Notice of Deficiency was preceded by a Statement of Audit Changes fully informing petitioners of the basis for the assessment and affording petitioners the opportunity to file amended returns.

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 established that Mr. Greene was engaged **in** a business other than as an employee, and Mr. Greene had gross receipts from this business of \$1,990.00 in 1978.

D. That the **Tax Commission** has the power to determine a greater deficiency than asserted **in** the Notice of Deficiency where, as here, a claim for such **is** asserted at hearing (Tax Law § 689[d][1]). The Audit Division has established, through petitioners' 1979 tax returns, that Mr. Greene had gross receipts from business in 1979 of **\$6,650.00**.

E. That petitioners have established that, in connection with Mr. Greene's business, he incurred expenses totalling \$2,037.34 in 1978 and \$2,422.00 in 1979 which were ordinary and necessary business expenses deductible under Internal Revenue Code §§ 62(1) and 162(a). Petitioners' tax liability will be recomputed by the Audit Division in accordance with this Conclusion and Conclusions of Law "C" and "D".

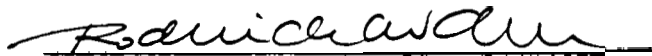
F. That while Mr. Greene may have been entitled to deduct certain employee business expenses under Internal Revenue Code § 62(2), petitioners asserted the deductibility of all disputed expenses as expenses of a trade or business. Except as indicated in Conclusion of Law "E", petitioners have failed to sustain their burden of proof under section 689(e) of the Tax Law to show that the expenses were so deductible. Furthermore, petitioners had ample opportunity to file amended returns claiming employee business expenses as adjustments on Federal form 2106, or as itemized miscellaneous deductions, but have not done so.

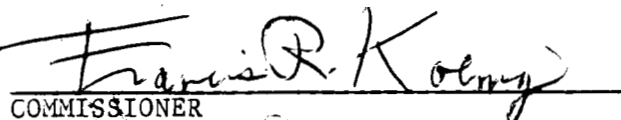
G. That the petition of Robert Greene and Dolores Greene is granted to the extent indicated in Conclusions of Law "C" and "E"; that the notices of deficiency issued respectively on April 14, 1982 and April 8, 1983 will be modified accordingly; and that, except as so granted, the petition is denied.


DATED: Albany, New York

STATE TAX COMMISSION

MAR 11 1987


PRESIDENT


COMMISSIONER


COMMISSIONER