

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

DOMINICK AMENDOLARE AND SONDRAMENDOLARE

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 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, Dominick Amendolare and Sondra Amendolare, 234 West 15th Street, Deer Park, New York 11729, 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 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. 37560 and 44359).

On October 23, 1985, petitioners waived a hearing before the State Tax Commission and agreed to submit the matter for a decision based on the Audit Division file, as well as a brief and additional documentation 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 petitioners have substantiated that Dominick Amendolare 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. Petitioners, Dominick and Sondra Amendolare, filed joint New York State income tax resident returns for 1978 and 1979. On the returns, petitioner Dominick Amendolare listed his occupation as "Security Investigator" while petitioner Sondra Amendolare listed her occupation as "Housewife".

2. For 1978:

(a) Petitioners reported \$18,264.00 in business income on their New York State return. Attached to the return was a Schedule C, Federal Form 1040, filed by petitioner Dominick Amendolare, showing the business activity of "Security Investigations" with the business name "Dom Amendolare". The address listed was petitioners' home address. An attachment to Schedule C reported the following income and expenses:

"Schedule C - Income from Business or Profession Security/Investigations

Revenues	\$23,517.00
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Expenses :

Travel (8,560 @ \$.17 mi)	\$1,455.00
Tolls Parking	92.00
Disguises	493.00
Outside Services - Car Rental	265.00
Professional Development	
-St. Francis College	
Books & Supplies -	385.00
-Travel to College -	<u>90.00</u>
Newspapers - Magazines, Sunday Papers	475.00
Dues & Subscriptions	248.00
Ammunition, Target Practice	275.00
Telephone (Alloc)	166.00
Hospitality for informers	220.00
	849.00

Accounting	200.00	
Payments for Information	<u>515.00</u>	<u>5,253.00</u>
Net Income		<u><u>\$18,264.00"</u></u>

(b) Attached to the return was a Wage and Tax Statement issued to "D.R. Amendolare" by the City of New York, showing \$23,517.12 in "Wages, and other compensation". A stamped arrow with the legend "Included in Schedule C" pointed to said amount. Federal, State and New York City income taxes and FICA tax were shown as withheld.

(c) Petitioners itemized their deductions but claimed no miscellaneous deductions.

(d) Petitioner Dominick Amendolare filed a New York State Unincorporated Business Tax Return for 1978 reporting \$18,264.00 in net profit and total income. The words "FICA wages included in Schedule C" were written next to said amount. Petitioner then deducted \$23,517.00 in subtractions resulting in a net **loss** of \$5,253.00, with no tax due.

(e) Petitioner Dominick Amendolare filed a City of New York Nonresident Earnings Tax Return for 1978 showing \$16,438.00 in net earnings from self employment.

3. For 1979:

(a) Petitioners reported \$19,544.00 in business income on their New York State return. Attached to the return was a Schedule C, Federal Form 1040, similar to that filed by petitioner Dominick Amendolare for 1978, reporting \$19,544.00 in net profit. An attachment to the Schedule C reported the following income and expenses:

"Schedule C - Income from Business or Profession: Security & Investigations

Income - Institutional	\$19,500.00	
Emergency Services	6,021.00	
Interest	<u>502.00</u>	\$26,023.00
Expenses:		
Newspapers, Magazines, Etc.	396.00	
Dues & Subscriptions	307.00	
Ammunition, Target Practice	278.00	
Payments for Information	638.00	
Accounting	200.00	
Telephone - Inside: Alloc	120.00	
Travel (9,220 mi @ 18 1/2	1,706.00	
Tolls, Parking	103.00	
Disguises, Supplies	348.00	
Outside Services, Car Rentals	309.00	
Meeting, Conferences: New Business	784.00	
Hospitality to Informants	912.00	
Telephone - Outside	<u>378.00</u>	
		<u>6,479.00</u>
NET INCOME		<u><u>\$19,544.00"</u></u>

(b) Attached to the New York State return was a Wage and Tax Statement issued to "D.R. Amendolare" by the City of New York showing \$25,520.83 in "Wages, tips, other compensation". A stamped arrow with the legend "Included in Schedule C" pointed to said amount. Federal, State and local income taxes and FICA tax were **shown** as withheld. The Statement also showed that Mr. Amendolare was covered by a pension plan.

(c) Petitioners itemized their deductions and claimed **no** miscellaneous deductions.

(d) Petitioner Dominick Amendolare filed a New York State Unincorporated Business Tax Return for 1979 showing \$19,544.00 in net profit and total income, with subtractions of \$25,521.00. A stamped arrow with the legend "FICA wages

included in Schedule C" pointed to said amount of subtractions. A net loss of \$5,977.00 was shown, with no tax due.

(e) Petitioner Dominick Amendolare filed a City of New York Nonresident Earnings Tax Return for 1979 showing \$19,544.00 in net earnings from self employment.

4. 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 Dominick Amendolare's claimed Schedule C deductions were disallowed on that basis.

5. (a) On April 2, 1982, the Audit Division issued a Statement of Audit Changes to petitioners for 1978, asserting additional New York State tax due of \$473.29 and additional New York City tax due of \$7.33. The explanation given was that "(t)he expenses claimed against 1978 wages are not considered ordinary and necessary expenses of production of income as an employee." On April 14, 1982, the Audit Division issued a Notice of Deficiency to petitioners for 1978, showing \$480.62 in additional tax due, plus interest.

(b) On February 2, 1983, the Audit Division issued a Statement of Audit Changes to petitioners for 1979, asserting \$699.84 in additional New York State tax due, with a credit of \$3.67 for an overpayment of New York City tax, for a total tax due of \$696.17. The explanation was as follows:

"As a salary [sic] employee you are not a business entity and therefore not entitled to claim Schedule D [sic] deductions as these expenses are not ordinary and necessary for the production of income as an employee.

Your New York City tax is based on total wages as shown on your withholding statement.

The household credit is disallowed as your income exceeds \$25,000.00."

On April 8, 1983, the Audit Division issued a Notice of Deficiency to petitioners for 1979, showing \$696.17 in additional tax, plus interest.

6. During the years at issue, petitioner Dominick Amendolare was a member of the New York City Police Department and his "business income" actually consisted of wage or salary income from the City of New York.

7. A letter dated January 1981 from the Commanding Officer of the 104th Precinct Detective Unit to the Director of Internal Revenue, which letter was submitted by petitioners, stated as follows:

"This is to certify that Detective Dominick R. Amendolare Shield #1712, New York City Police Department, is a member of the 104th Precinct Detective Unit, and as such necessarily uses his private auto in the performance of official police duties, which include criminal investigations and surveillances. He has received no reimbursement from the City of New York.

Authorization for deduction of auto expenses, not otherwise reimbursed by the City of New York, was contained in a letter dated February 1, 1951, signed by E.I. McLarney, Deputy Commissioner, U.S. Treasury Department, Washington, D.C."

It is not clear whether petitioner Dominick Amendolare used his automobile in his official duties during the years at issue. Moreover, the claimed mileage and expenses were not substantiated by the evidence in the record.

8. Petitioners paid \$200.00 for tax return preparation in 1978 and again in 1979.

9. During 1978 and 1979, petitioner Dominick Amendolare attended St. Francis College, Brooklyn, New York. On June 9, 1979 he was awarded an associate's degree in criminal justice. He apparently claims that the cost of books and other materials related to his studies are deductible; however, he did not prove the amounts paid for such items, or their deductibility.

10. Petitioners submitted copies of telephone bills, auto repair bills, Knights of Columbus dues, documents referring to a Small Business Administration loan and several receipts, which are insufficient to establish that petitioner Dominick Amendolare was anything but a City of New York police officer during the years at issue.

11. 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 limitation on assessment, thus depriving petitioners of the opportunity to present substantiation for the claimed deductions;

(b) that petitioners are 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 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. The returns were patently erroneous and the Audit Division was justified in disallowing the Schedule C business income and expenses. Each Notice of Deficiency was preceded by a Statement of Audit

Changes and petitioners 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. Petitioners' liability depends solely on the facts adduced herein.

C. That petitioners have not sustained their burden of proof under Tax Law § 689(e) and Administrative Code § U46-39.0(e) to show that petitioner Dominick Amendolare 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.

D. That petitioners have substantiated that they paid \$200.00 for tax preparation fees during each of the years 1978 and 1979. Said amounts may be claimed as miscellaneous deductions.


E. That while it would appear that petitioners may have been entitled to deduct certain other expenses as employee business expenses under sections 62(2) or 63(f) of the Internal Revenue Code if they had filed Form 2106, or had claimed such expenses as miscellaneous deductions, petitioners nevertheless failed to sustain their burden of proof under Tax Law § 689(e) and Administrative Code § U46-39.0(e) to show the character or, in many cases, the amount of the claimed business expenses.

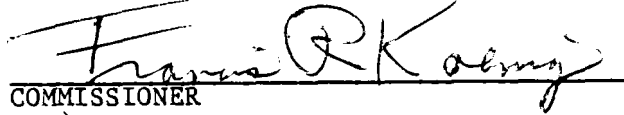
F. That except as granted in Conclusion of Law "D", the petition of Dominick Amendolare and Sondra Amendolare is denied and the notices of deficiency issued on April 14, 1982 and April 8, 1983, as modified, are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 25 1987


PRESIDENT


COMMISSIONER


COMMISSIONER