

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

PASQUALE S. GIORDANO AND ROSEANN C. GIORDANO

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, Pasquale S. Giordano and Roseann C. Giordano, 109 10-103 Avenue, Richmond Hill, New York 11419, 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. 37564 and 44363).

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 the existing 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 for the sole purpose of extending the period of limitation on assessment.

11. Whether petitioners have substantiated that Mr. Giordano was engaged in a trade or business during the years at issue.

111. 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, Pasquale S. Giordano and Roseann C. Giordano, filed New York State income tax returns under filing status "married filing separately on one return". Mr. Giordano also filed State unincorporated business tax returns for 1978 and 1979.

2. 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.

3. The 1978 State income tax return shows Mr. Giordano's occupation as "Bond Trader" and Mrs. Giordano's occupation as "Research Aide". Mr. Giordano reported total taxable income of \$24,535.00, consisting of business income of \$23,769.00 and interest income of \$766.00. Mrs. Giordano reported total income of \$8,183.00, consisting of "other income" of \$7,800.00 and interest income of \$383.00.

(a) A wage and tax statement attached to the return showed "wages, tips, other compensation" to Mr. Giordano of \$38,384.71 from Dean Witter Reynolds, Inc. of San Francisco, California. The statement *is* stamped with an arrow pointing to the compensation figure and bearing the legend "Included in Schedule C".

(b) On Federal Schedule C, Mr. Giordano reported total income from business or profession of \$38,385.00. The Schedule C shows the following expenses:

Newspapers, magazines, etc.	\$ 398.00
Desk lunches for buyers	921.00
Telephone alloc.	240.00
Research meetings, contacts	2,386.00
Mailings	120.00
Photostats	113.00
Briefcase, pens and personal supplies	229.00
Travel: cabs, fares after late meetings	684.00
Gifts (not exceeding \$25.00 per person)	305.00
Sports events with traders	275.00
Parking, tolls	482.00
Refreshments, coffee at deskside	367.00
Cigars, cigarettes: deskside	155.00
Outside telephone calls while at meetings	41.00
Accounting	100.00
Research aide-Roseann Giordano	<u>7,800.00</u>
Total	<u>\$14,616.00</u>

The \$14,616.00 in total expenses was subtracted from total income of \$38,385.00, and the result was shown as net business income on the State income tax return. The research aide expense of \$7,800.00 was reported by Mrs. Giordano as "other income".

(c) Mr. Giordano claimed New York itemized deductions of \$5,386.00.

(d) The unincorporated business tax return shows total income to Mr. Giordano of \$23,769.00, less subtractions of \$38,385.00, resulting in a net loss of \$14,616.00. Accordingly, no unincorporated business tax was shown as due.

4. On March 26, 1982, the Audit Division issued to petitioners a Statement of Audit Changes for 1978 which explained, "[t]he expenses claimed on Federal Schedule C are not ordinary or necessary in the production of income as an employee; therefore, all Schedule C expenses are disallowed." Petitioners' tax liability was recomputed as if a joint return had been filed, and additional state and city personal income tax of \$1,894.69 plus interest was asserted on petitioners' New York taxable income, computed as follows:

Wages per wage and tax statements	\$38,384.71
Interest income	<u>1,149.00</u>
Balance	\$39,533.71
Less: Itemized deductions	5,386.00
Less: Exemptions	<u>1,950.00</u>
Corrected New York taxable income	\$32,197.71

5. On April 14, 1982, the Audit Division issued against petitioners a Notice of Deficiency for 1978, asserting additional tax due of \$1,894.69 plus interest. No penalties were imposed.

6. The 1979 income tax return lists Mr. Giordano's occupation as "Bond Trader" and Mrs. Giordano's occupation as "Research Aide". Mr. Giordano reported total income of \$25,889.00, consisting of business income of \$23,812.00 and interest income of \$2,077.00. Mrs. Giordano reported total income of \$7,827.00, consisting of interest income of \$27.00 and "other income" of \$7,800.00.

(a) A wage and tax statement attached to the return shows income to Mr. Giordano of \$39,692.32 from Dean Witter Reynolds, Inc. of San Francisco, California. The statement *is* stamped with an arrow pointing *to* the compensation figure and bearing the legend "Included In Schedule C",

(b) On an attached Federal Schedule C, Mr. Giordano reported income from business or profession of \$39,692.00, and he reported the following expenses:

Newspapers, magazines, etc.	\$ 439.00
Desk lunches for buyers	928.00
Telephone allocation	240.00
Research meetings, contacts	2,933.00
Mailings	130.00
Photostats	119.00
Briefcase & personal supplies	248.00
Travel - cabs, fares after late meetings	684.00
Gifts (not exceeding \$25 per person)	820.00
Sports events with traders	325.00
Hospitality - desk side	639.00
Cigars - desk side	182.00
Outside telephone calls	293.00
Accounting	100.00
Research aide - Roseann Giordano	<u>7,800.00</u>
Total	\$15,880.00

The \$15,880.00 in total expenses was subtracted from total income, and the result was shown as net business income on the State income tax return. The research aide expense was reported by Mrs. Giordano as "other income".

(c) Mr. Giordano claimed New York itemized deductions of \$6,131.00.

(d) Mr. Giordano's unincorporated business tax return shows total income from business of \$23,812.00, less subtractions of \$39,692.00, resulting in a loss of \$15,880.00. The return is stamped with an arrow pointing to the subtractions and bearing the legend "FICA wages included in Schedule C". As no taxable income was reported, no tax was shown as due.

7. On January 17, 1983, the Audit Division issued to petitioners a Statement of Audit Changes for 1979, asserting additional tax due of \$2,090.72 plus interest on a New York taxable income of \$33,565.32. All expenses claimed on Mr. Giordano's Federal Schedule C were disallowed; income shown on the wage and tax statement was treated as income from wages; and taxes were recomputed as if petitioners had filed a joint return.

8. On April 8, 1983, the Audit Division issued to petitioners a Notice of Deficiency for 1979, asserting additional tax due of \$2,090.72 plus interest. No penalties were imposed.

9. To substantiate the claimed expenses for 1978 and 1979, petitioners submitted affidavits and certain documents:

(a) Receipts from a number of restaurants were submitted, totalling \$2,225.15 for 1978 and \$3,759.70 for 1979. For 1979, Mr. Giordano also submitted several ticket stubs from sporting events.

(b) Daily diaries were submitted for 1978 and 1979, showing expenses for such things as "coffee for desk", lunches, dinners, meetings and cabs.

10. Petitioners base their protest of the tax deficiencies under consideration on the following grounds:

(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 scrutiny because their returns had been prepared by the same preparer;

(c) that all claimed expenses are deductible as ordinary and necessary business expenses under IRC § 162 or as expenses for the production or maintenance of income under IRC § 212;

(d) 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. Giordano 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 deficiency 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 Mr. Giordano has not sustained his burden of proof (Tax Law § 689[e] Administrative Code § T46-189.0[e]) to show that he was engaged in a trade or business other than as an employee.

D. That no proof was submitted that showed that Mrs. Giordano actually performed services for Mr. Giordano as an employee.

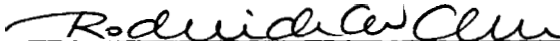
E. That Mr. Giordano may have been entitled to deduct certain expenses under IRC § 62(2), as expenses incurred in connection with the performance of his duties as an employee; however, he provided almost no information to show the business character of those expenses. The receipts from restaurants, which were the only expenditures documented, did not even correlate in any direct way with the expenses claimed on the Federal Schedules C. Accordingly, Mr. Giordano has not established that any of the expenses in question were ordinary and necessary business expenses (IRC § 162). Similarly, there is no evidence in the record to establish that the claimed expenses were ordinary and necessary expenses incurred for the production or maintenance of income (IRC § 212).

F. That the petition of Pasquale S. Giordano and Roseann C. Giordano is denied, and the notices of deficiency issued on April 14, 1982 and April 8, 1983 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 25 1987


PRESIDENT


COMMISSIONER


COMMISSIONER