

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

MALCOLM M. PARKER

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1978 and 1979.

Petitioner, Malcolm M. Parker, 20 Richlee Court #3S, Mineola, New York 11501, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1978 and 1979 (File Nos. 37566 and 42902).

A hearing was held 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 23, 1985 at 10:00 A.M., with all briefs to be submitted by October 8, 1986. Petitioner appeared by Louis F. Brush, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

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 the petitioner has substantiated that he was engaged in a trade or business during the years at issue.

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

FINDINGS OF FACT

1. Petitioner, Malcolm M. Parker, filed New York State income tax resident

(a) The 1978 income tax return listed petitioner's occupation as "Repair Service" and reported \$11,459 .00 in total income, consisting of \$11,301.00 in business income and \$158.00 in interest income.

(i) The copy of Federal Schedule C attached showed "Revenues" of \$16,015.00 with the following listed expenses:

Travel	\$ 400.00
Telephone	144.00
Newspapers, Magazines, Etc.	283.00
Personal Tools/Gauges and Devices	271.00
Hand Cleaners and Lotions	120.00
Driving Sunglasses	68.00
Chronometers to Set Clocks	75.00
Insulated Wear	
(re: installations during winter)	184.00
Writing Supplies	24.00
Safety Shoes	85.00
Communications	192.00
Accidental Destruction of Apparel	358.00
Dry Cleaning	182.00
Books	63.00
Hospitality:	
Electricians	326.00
Accounting	150.00
Meeting Expenses	
(re: development of "Parker Machine Repair")	954.00
Car Rental	312.00
Rain Wear	173.00
Car Wash	350.00
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TOTAL	\$4,714.00

The \$4,714.00 in expenses deducted from revenues of \$16,015.00 resulted in the \$11,301.00 net business income reported.

(ii) The wage and tax statement attached to the return showed \$16,014.60 In "Wages, tips, other compensation" from Simplex Time Recorder Co. of Gardner Massachusetts. The statement is stamped with an arrow pointing to the \$16,014.60 figure with the legend "Included in Schedule C".

(iii) The unincorporated business tax return shows the following: net profit

(this amount was also noted as "Wages subject to FICA tax included in Schedule C"); from this amount was subtracted \$16,015.00 as a "subtraction" resulting in total (and net) loss from business of \$4,714.00.

(b) The 1979 return listed petitioner's occupation as "Sales Representative" and reported \$10,924.00 in total income consisting of \$10,794.00 in business income and \$130.00 in interest income.

(i) The Federal Schedule C attached showed "Revenues" of \$17,456.00 consisting of \$16,651.00 in commissions and \$805.00 in reimbursements, with the following listed expenses:

Travel: Cab Fares, Buses	\$ 613.00
Telephone	144.00
Newspapers, Magazines	376.00
Personal, Tools, Gauges, Etc.	273.00
Hand Cleaners and Lotions	62.00
Driving Sunglasses	74.00
Chronometer to Set Clocks	75.00
Insulated Wear (re: winter installations) and Gloves	248.00
Writing Supplies	37.00
Safety Shoes	130.00
Dry Cleaning	370.00
Selling and Prospecting Expense	1,742.00
Accounting	150.00
"Parker Machine Repair Service" Development	776.00
Car Rental	242.00
Rain Gear	194.00
Car Wash	178.00
Meetings with Fire Department Personnel	286.00
Survey of Buildings for System Installation	<u>492.00</u>
TOTAL	\$6,662.00 ¹

The \$6,662.00 in total expenses deducted from revenues of \$17,456.00 resulted in the \$10,794.00 net business income reported.

(ii) The wage and tax statement attached to the return showed \$16,651.15 in "Wages, tips, other compensation" from Simplex Time Recorder Co. Like the 1978 statement, a stamped arrow with the legend "Included in Schedule C" pointed to said compensation.

(iii) The unincorporated business tax return showed \$10,794.00 in net profit less \$1,665.00 in subtractions resulting in business income of \$9,129.00. Petitioner then subtracted \$1,826.00 as an allowance for taxpayer's services resulting in net income from business of \$7,303.00. Tax of \$103.64 was computed which was equal to the business tax credit; accordingly, no unincorporated business tax was shown as due.

(c) For each of the years at issue petitioner claimed the standard deduction and did not claim any miscellaneous or other itemized deductions.

2. Petitioner's 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's claimed Schedule C deductions were disallowed on that basis.

3. (a) On March 24, 1982 the Audit Division issued a Statement of Audit Changes to petitioner for 1978 asserting \$312.47 in personal income tax due on

the basis that "Schedule C business expenses are not allowed because they are not ordinary and necessary expense [sic] for the production of wage income."

On April 14, 1982 the Audit Division issued a Notice of Deficiency to petitioner for said amount, plus interest.

(b) On February 1, 1983, the Audit Division issued a Statement of Audit Changes to petitioner for 1979 asserting \$392.74 in personal income tax due. The basis was stated as follows: "As a salaried employee, you are not a business entity and therefore not entitled to claim Schedule C deductions as these expenses are not ordinary and necessary for the production of income as an employee." On April 8, 1983, the Audit Division issued a Notice of Deficiency to petitioner for said amount, plus interest.

(c) For both years, petitioner was allowed the standard deduction and household credit. No penalties were imposed..

4. Petitioner did not personally attend the hearing and testify. However, he submitted substantial documentary evidence:

(a) Petitioner's paycheck stubs from Simplex Time Recorder Co. show income broken down by various categories such as regular pay, holiday pay, on call pay, excused absence pay, overtime pay, sick pay, vacation pay and, starting in 1979, commissions and selling expenses. Payroll deductions for federal, state and local taxes and FICA were made, as well as Blue Cross and other insurance deductions.

(b) Petitioner submitted other documentation applying to automobile expenses, telephone expenses, clothing, etc., but there is no evidence that these expenses were other than personal in nature.

5. 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 petitioner is 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 petitioner does not have cancelled checks or other receipts for certain expenses, the Department of Taxation and Finance should allow petitioner 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. Each Notice of Deficiency was preceded by a Statement of Audit Changes and petitioner 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 petitioner's returns were selected for examination because of certain practices of his accountant is irrelevant. Petitioner's liability depends solely on the facts adduced herein.

C. That petitioner has not sustained his burden of proof under section 689(e) of the Tax Law to show that he was engaged in a trade or business other than as an employee. Thus, expenses claimed on Schedule C may not be deducted

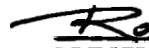
D. That while it would appear that petitioner may have been entitled to deduct certain employee business expenses under sections 62(2) or 63(f) of the Internal Revenue Code if he had filed form 2106, or had itemized his deductions and claimed such expenses as miscellaneous deductions, petitioner nevertheless failed to sustain his burden of proof under section 689(e) of the Tax Law to show the character or, in many cases, the amount of the claimed business expenses.

E. That the petition of Malcolm M. Parker 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

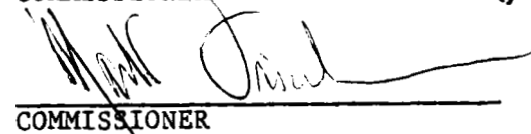
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PRESIDENT



COMMISSIONER



COMMISSIONER