

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

MICHAEL VACCARINO AND ANDREA VACCARINO

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, Michael Vaccarino and Andrea Vaccarino, **766** Wooley Avenue, Staten Island, New York **10314**, 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 No. 37576).

On October 23, 1985, petitioners, by their representative, Louis F. Brush, Esq., waived a hearing before the State Tax Commission and requested the Commission to render its decision based on the existing file, plus additional documentary evidence and briefs to be submitted by October 8, 1986. After due consideration, the State Tax Commission 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 substantiated that they were each engaged in a trade or business during the year at issue.

III. Whether petitioners have substantiated the character and amount of business expenses claimed as deductions from gross income for the year at issue.

FINDINGS OF FACT

1. Petitioners, Michael Vaccarino and Andrea Vaccarino, filed a joint New York State Income Tax Resident Return and separate unincorporated business tax returns for the year 1978.

2. Petitioners' 1978 income tax return listed Mr. Vaccarino's occupation as "Financial Consultant" and Mrs. Vaccarino's occupation as "Sales" and reported \$13,210.00 in business income and \$47.00 in interest income, for a total income of \$13,257.00.

Michael Vaccarino

3. The attached copy of Federal Schedule C pertaining to petitioner Michael Vaccarino showed his 1978 income to be \$21,280.00, minus a deduction for a net loss on rental income from an apartment in his two family house of \$3,566.00, for a total income of \$17,714.00, with the following listed expenses:

Travel	\$ 983.00
Meeting Expenses	1,042.00
Telephone - outside	180.00
Magazines, Newspapers	296.00
Hospitality	684.00
Supplies, etc.	147.00
Calculators	60.00
Recording supplies for meetings	113.00
	<u>\$3,506.00</u> ¹

¹ The correct claimed amount is \$3,505.00.

The \$3,506.00 in expenses deducted from income of \$17,714.00 resulted in the \$14,208.00 net business income reported.

4. The wage and tax statement attached to the return showed \$21,280.00 in 'wages, tips, other compensation' from Laidlow, Adams and Peck of New York City. The statement is stamped with an arrow pointing to the \$21,280.00 figure with the legend "Included in Schedule C".

5. Mr. Vaccarino's unincorporated business tax return shows that net profit and total income from business before New York modifications was \$14,208.00 (this amount was also noted as "FICA wages included in Schedule C"); from this amount was subtracted \$21,280.00 as a "subtraction" resulting in a total (and net) loss from business of \$7,072.00.

Andrea Vaccarino

6. The attached copy of Federal Schedule C pertaining to petitioner Andrea Vaccarino showed her income to be \$1,863.00 with the following listed expenses:

Merchandise costs	\$1,216.00
Hospitality	841.00
Travel (4,000 miles @ 17¢)	680.00
Out-of-town travel	
Washington D.C. Grooming	125.00
	<u>\$2,862.00</u>

The \$2,862.00 in expenses deducted from income of \$1,863.00 resulted in the \$998.00² net business loss reported.

7. There was no wage and tax statement attached to the return reflecting Mrs. Vaccarino's income.

8. Mrs. Vaccarino's unincorporated business tax return shows a net **loss** from business before New York modifications **of** \$998.00 (this amount was also noted as "FICA wages included in Schedule C"). No other "subtractions" were reported, resulting in a total (and net) **loss** of \$998.00.

9. Petitioners claimed itemized deductions **of** \$6,591.00 on their 1978 income tax return.

10. On March 24, 1982, the Audit Division issued a Statement of Audit Changes to petitioners for the year 1978 which contained the following explanation

"The 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 not allowed.

You are not subject to unincorporated business tax."

11. The Audit Division recomputed petitioners' New York State and City income tax liability for 1978 in the following manner:

Wages	\$21,280.00
Interest income	47.00
Other income	<u>1,863.00</u>
Total	\$23,190.00
Itemized deductions	<u>6,591.00</u>
Balance	\$16,599.00
Exemption	<u>2,600.00</u>
Taxable income	\$13,999.00

Petitioners were also allowed the household credit. No penalties were imposed.

12. Based on the aforementioned Statement of Audit Changes, the Audit Division, **on** April 14, 1982, issued a Notice of Deficiency to petitioners for 1978 asserting additional New York State and City tax due of \$883.05, plus interest of \$254.74, for a total allegedly due of \$1,137.79.

13. Petitioners' tax returns were selected for examination along with those of approximately 100 other individuals **on** the basis that their 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 expense deductions if the taxpayer appeared to be an employee receiving wage or salary income reported on wage and tax statements. Petitioner Michael Vaccarino's claimed Schedule C deductions were disallowed on that basis. The Audit Division disallowed the entire \$998.00 loss claimed by Mrs. Vaccarino on the Schedule C on the basis that she had not substantiated the income as business income or business expenses as ordinary or necessary to the production of income.

14. Petitioners submitted documentary evidence in the form of sales invoices, cancelled checks and worksheets in substantiation of a portion of the business expenses claimed on their Federal Schedule C. However, the evidence submitted **is** insufficient to establish (i) that the petitioners were each engaged in the carrying on **of** a trade or business (other than as an employee); (ii) that the expenses constituted employee trade or business deductions pursuant to Internal Revenue Code § 62(2); and (iii) that the expenses constituted ordinary and necessary business expenses and not personal expenditures.

15. Petitioners contend:

(a) That the Notice of Deficiency was 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 Notice of Deficiency was properly issued and was not arbitrary and capricious. The return was patently erroneous and the Audit Division was justified in disallowing the business expenses claimed by petitioners on their respective Federal Schedules C. The Notice of Deficiency **was** preceded by a Statement of Audit Changes and petitioners 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 they were each engaged in a trade or business other than as employees (Internal Revenue Code § 62[1]); (ii) that the expenses in question were trade or business deductions of employees 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 petitioner Michael Vaccarino failed to provide sufficient evidence that he derived rental income and incurred rental expenses from his two family home. Therefore said petitioner's claim for a net rental loss is denied.

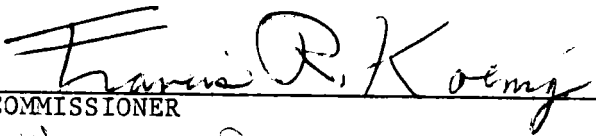
E. That the petition of Michael Vaccarino and Andrea Vaccarino is denied and the Notice of Deficiency dated April 14, 1982 is sustained in **full**, together with such additional interest as may be lawfully due and owing.

DATED: Albany, New **York**

STATE TAX COMMISSION

APR 17 1987

PRESIDENT

Handwritten signature of Francis R. Koenig in cursive script.

COMMISSIONER

Handwritten signature of Mark J. Dineen in cursive script.

COMMISSIONER