

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions

of

GANDOLFO ~~GIORDANO~~ AND MARY GIORDANO

DECISION

for Redetermination of Deficiencies or for Refunds of New York State and New York City Personal Income Taxes 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, Gandolfo Giordano and Mary Giordano, 515 West Market Street, Long Beach, New York 11561, filed petitions for redetermination of deficiencies or for refunds 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. 37727 and 43681).

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 documents 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 petitioner Mary Giordano has substantiated that she 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, Gandolfo and Mary Giordano, timely filed New York State income tax resident returns (including City of New York Personal Income Tax) for 1978 and 1979. For each year, petitioners' filing status was "Married filing joint return".

(a)(i) On the 1978 return, petitioner Mary Giordano stated her occupation to be "Special Education" and reported \$92.00 in business income. Her Federal Schedule C, Form 1040, showed the following income and expenses:

"SCHEDULE C INCOME FROM BUSINESS OR PROFESSION - SPECIAL EDUCATION CONSULTANT"

Income: \$3,821 -

Expenses:

Travel (60 mi. RT x 5 days = 300 x 40 wks. = 12,000 mi.)	\$2,040	
Supplies	--	
Professional Development -	--	
Adelphi U.	1,040	
Travel (30 mi. x 40 wks. = 1,200 x 17; =)	<u>204</u>	1,244
Telephone		120
Filing Supplies	--	
Shelves/Storage		83
Hospitality	--	
Desk & Chairs	--	
Newspapers, Magazines, etc.	--	
Postage		26
Textbooks		106
Transcripts & Resumes		63
Special Tutoring Expenses		37
Teaching Lic.	<u>10</u>	<u>3,729</u>
Net Income		<u>\$ 92 "</u>

The Schedule C reported Mrs. Giordano's main business activity to be "Special Education Consultant".

(ii) A Wage and Tax Statement issued to petitioner Mary Giordano by St. Boniface Martyr R. C. Church, which was attached to the return, showed "Wages, tips, other compensation" of \$3,821.19. A stamped arrow with the legend "Included in Schedule C" pointed to this amount, which amount was also reflected as total FICA wages.

(iii) A 1978 unincorporated business tax return filed by Mary Giordano reported \$92.00 in net profit, with no tax due after the allowance and exemption available on such return, at Schedule U-A, line 12 and Schedule U-C, line 2, respectively.

(iv) Petitioners itemized their deductions, claiming therein miscellaneous deductions of \$585.00.

(b)(i) On the 1979 return, petitioner Mary Giordano again stated her occupation to be "Special Education", and reported \$123.00 in business income. Her Federal Schedule C showed the following income and expenses:

"SCHEDULE C INCOME FROM BUSINESS OR PROFESSION - SPECIAL EDUCATION CONSULTANT"

Income:	\$4,263
---------	---------

Expenses:

Travel 60 mi. RT x 3 days = 180 x 40 wks. = 7,200 mi. @ 18½¢	\$1,332
Supplies	--
Professional Development	--
Adelphi U.	2,149
Travel (30 mi. x 40 wks. = 1,200 x 18½¢ =)	222
Telephone	120
Filing Supplies	--
Shelves/Storage	83
Hospitality	--
Desk & Chairs	--
Newspapers, Magazines, etc.	--

Postage	26	
Textbooks	106	
Transcripts & Resumes	63	
Special Tutoring Exp.	37	
Teaching Lic.	10	4,140 ¹
Net Income		<u>\$ 123"</u>

The main business activity was once again reported as "Special Education Consultant" on the Schedule C.

(ii) A Wage and Tax Statement issued to petitioner Mary Giordano by St. Boniface Martyr R. C. Church, which was attached to the return, showed "Wages, tips, other compensation" of \$4,263.90. A stamped arrow with the legend "Included in Schedule C" pointed to said amount, which amount was also reflected as total FICA wages.

(iii) A 1979 unincorporated business tax return filed by Mary Giordano reported \$123.00 in net profit, and a stamped arrow and legend "FICA Wages Included in Schedule C" pointed to such figure. The return reported no tax due, as a result of the Schedule U-C, line 2 \$5,000.00 exemption.

(iv) Petitioners itemized their deductions, claiming \$937.00 as miscellaneous deductions.

2. The record on submission does not include copies of petitioners' Federal Schedule A (itemized deductions) for either 1978 or 1979. Hence, the individual items comprising petitioners' miscellaneous deduction for each year are not known.

3. Petitioners' tax returns were selected for examination along with those of approximately 100 other individuals on the basis that said returns had

¹ The correct total of expenses as reported is \$4,148.00.

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 Mary Giordano's claimed Schedule C deductions were disallowed on that basis.

4. (a) On March 26, 1982, the Audit Division issued a Statement of Audit Changes to petitioners for 1978 with the following explanation:

"The wages of \$3,821.19 earned by the wife are taxable for New York State purposes."

Additional New York State personal income tax due was computed at \$321.40. On April 14, 1982, the Audit Division issued a Notice of Deficiency to petitioners for \$321.40 in additional tax due for 1978, plus interest.

(b) On January 17, 1983, the Audit Division issued a Statement of Audit Changes to petitioners for 1979 with the following 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."

Additional New York State tax due was computed as \$329.60. On April 8, 1983, the Audit Division issued a Notice of Deficiency to petitioners in the amount of \$329.60 in additional tax due for 1979, plus interest.

5. During the years at issue, petitioner Mary Giordano was a part-time teacher for St. Boniface Martyr R. C. Church parochial elementary school. She is a 1977 graduate of Brooklyn College with a Bachelor of Arts degree in Early Childhood Education. During the years in question, Mrs. Giordano also was

taking graduate courses at Adelphi University with the intent of earning a Masters Degree in reading and learning disabilities.

6. Petitioners submitted cancelled checks for some of the claimed business expenses and also some information as to the mathematics involved in calculating the claimed business expenses. None of the cancelled checks bore any memo or legend on their faces indicating the purpose for which written (for instance, the titles of the courses taken at Adelphi were not shown on the checks, or else where). The additional information submitted gave scant detail of the nature and purpose for the "business" expenditures claimed. Finally, there **is** no evidence that Mrs. Giordano's earnings were derived other than from employment as a part-time teacher.

7. Petitioners maintain:

(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; and

(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.

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 section 689(e) of the Tax Law to show that petitioner Mary Giordano was engaged in a trade or business other than as an employee, and thus have not proven entitlement to deduct "business expenses" reflected per her Schedule C.

D. That while it is possible that petitioner Nary Giordano may have been entitled to deduct certain of the claimed expenses either as employee business expenses (if unreimbursed) under sections 62(2) or 63(f) of the Internal Revenue Code if she had filed Form 2106, or as additional miscellaneous itemized deductions, petitioners have nevertheless failed, based on the evidence submitted, to prove entitlement to any of the items or amounts shown.

E. That the petitions of Gandolfo Giordano and Mary Giordano are denied and the notices of deficiency issued on April 14, 1982 and April 8, 1983 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 29 1987

PRESIDENT



COMMISSIONER



COMMISSIONER