

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
MARTIN J. McNAMARA	:	DECISION

for Redetermination of Deficiencies or for
Refunds 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 Years 1978 and 1979.

Petitioner, Martin J. McNamara, 795 Lexington Avenue, Apt. 4-R, New York, New York 10021, filed petitions for redetermination of deficiencies or for refunds 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 years 1978 and 1979 (File Nos. 37731 and 44517).

On October 23, 1985, petitioner waived his right to a formal hearing and requested the State Tax Commission to render a decision based on the entire record contained in the 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 and or the sole purpose of extending the period of limitation on assessment.

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

III Whether 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, Martin J. McNamara, timely filed New York State income tax resident returns for 1978 and 1979, wherein he elected a filing status of "single". Petitioner also filed unincorporated business tax returns for said years.

2. The 1978 income tax return listed petitioner's occupation as marketing consultant and engineer and reported \$34,847.00 in total income, consisting of \$1,157.00 in interest income and \$33,690.00 in business income. The COPY of the Federal Schedule C attached showed "Income" of \$38,746.00, of which \$38,596.00 was reported as arising from activities as a marketing consultant and \$150.00 from lecturing. The Federal Schedule C reported the following expenses:

Newspapers, magazines	\$ 301
Telephone	240
Accounting	125
Sports with clients	631
Socializing with clients	897
Dry cleaning	363
Briefcase and supplies	108
Hospitality	686
Cost of "Brainstorm Sessions"	734
Interview applicants for clients	493
Cassettes, tapes for taking notes	311
Attendance at drama events	<u>167</u>
Total	\$5,056

The \$5,056.00 in expenses deducted from revenues of \$38,746.00 resulted in the \$33,690.00 net business income reported.

3. The wage and tax statement attached to the return showed \$38,596.05 in

statement is stamped with an arrow pointing to the \$38,596.05 figure, with the legend "Included in Schedule C".

4. The 1978 unincorporated business tax return shows the following: net profit and total income from business before New York modifications was \$33,690.00 from this amount was subtracted \$38,596.00 as a "subtraction", resulting in total (and net) **loss** from business of \$4,906.00. The \$38,596.00 amount was **also** noted as "wages subject to FICA tax included in Schedule C".

5. On March 26, 1982, the Audit Division issued a Statement of Audit Changes to petitioner for the year 1978 which contained the following explanation:

"Expenses claimed **on** your 1978 personal income tax return are not ordinary and necessary in the production of income as an employee.

According to the information submitted, your 1978 tax liability has been recomputed as follows:

Wages	\$38,569.00
Other	150.00
Total wages	<u>\$38,719.00</u>
Interest	1,157.00
Total income	<u>\$39,876.00</u>
Itemized deductions	3,048.00
Balance	<u>\$36,828.00</u>
Exemption	650.00
New York taxable income	<u>\$36,178.00</u>

Your maximum tax benefit **is** computed to be \$283.87.

	<u>NYS</u>	<u>NYC</u>
Tax on New York taxable income	\$3,402. 83	\$1,155.65
Tax paid on original return	<u>2,768.90</u>	<u>939.41</u>
Balance due	\$ 633.93	\$ 216.24

ADDITIONAL TAX DUE \$850.17"

6. Based **on** the aforementioned Statement of Audit Changes, the Audit Division **on** April 14, 1982, issued a Notice of Deficiency to petitioner for 1978, asserting additional New York State and City **tax due of** \$8511.17. **plus**

7. The 1979 return also listed petitioner's occupation as marketing consultant and engineer, and reported \$33,967.00 in total income, consisting of \$33,949.00 in business income and \$18.00 in other income. The COPY of the federal Schedule C attached showed "Income" of \$40,256.00, of which \$38,683.00 was reported as arising from activities as a marketing consultant, \$225.00 from engineering consulting, \$150.00 from lecturing and \$1,198.00 as interest income. The Federal Schedule C reported the following expenses:

Newspapers, magazines, etc.	\$ 313
Telephone	300
Accounting	125
Sports with clients	921
Campaign promotion expenses	984
Dry cleaning	406
Briefcase and supplies	124
Hospitality	832
Research assistant cost	806
Dues and memberships	31
Hosting "Brainstorm Sessions"	627
Interviewing applicants	388
Cassettes, tapes for note taking	291
Attendance at drama events for public speaking	<u>159</u>
Total	\$6,307

The \$6,307.00 in expenses deducted from revenues of \$40,256.00 resulted in the \$33,949.00 net business income reported.

8. The wage and tax statement attached to the return showed \$38,682.63 in 'wages, tips, other compensation' from Sudler & Hennessey, Inc. The statement is stamped with an arrow pointing to the \$38,682.63 figure, with the legend 'Included in Schedule C'.

9. The 1979 unincorporated business tax return shows the following: net profit and total income from business before New York modifications was \$33,949.00; from this amount was subtracted \$38,683.00 as a "subtraction", resulting in total (and net) loss from business of \$4,734.00. The \$38,683.00 amount was

10. On February 1, 1983, the Audit Division issued a Statement of Audit Changes to petitioner for the year 1979 which contained 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.

Taxable income per return	\$30,301.00
Adjustment	<u>6,307.00</u>
Corrected taxable income	\$36,608.00

	<u>NEW YORK STATE</u>	<u>NEW YORK CITY</u>	
Maximum tax/Tax on above	\$3,414.70	\$1,174.14	
Tax previously stated	<u>2,636.42</u>	<u>902.94</u>	
BALANCE DUE	\$ 778.28	\$ 271.20	\$1,049.48"

II. Based on the aforementioned Statement of Audit Changes, the Audit Division, on April 8, 1983, issued a Notice of Deficiency to petitioner for 1979 asserting additional New York State and City tax due of \$1,049.48, Plus interest of \$348.84, for a total allegedly due of \$1,398.32.

12. Petitioner's tax returns were selected for examination along with those of approximately 100 other individuals on the basis that the 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.

13. Petitioner contends:

(a) That the proposed deficiencies were apparently made to protect against the expiration of the statute of limitations for assessments.

(b) That the proposed deficiencies are arbitrary and capricious because the taxpayer was not informed of the audit and was deprived of his rights to furnish documentation and/or explanations with respect to said disallowances.

(c) That the deficiencies are based upon a disallowance of expenses which is further based upon an erroneous factual assumption that the expenses were not "ordinary and necessary". The disallowed expenses are deductible as "ordinary and necessary" business expenses under section 162 of the Internal Revenue Code and/or deductible for the production or maintenance of income under section 212 of the Internal Revenue Code.

(d) That regardless of the classifications under the different Internal Revenue Service code sections, or alternative Internal Revenue code sections permitting the deductibility of the expenses, taxable income is unchanged.

14. Petitioner submitted documentary evidence in the form of cancelled checks and worksheets in substantiation of a portion of the business expenses he claimed on Federal Schedule C for the years at issue. However, the evidence submitted did not relate to a characterization of the expenses as business rather than personal. In addition, the documents did not substantiate whether any portion of the claimed expenses were unreimbursed employee business expenses or miscellaneous itemized deductions.

Division was justified in disallowing the business expenses claimed by petitioner, Martin J. McNamara, on Federal Schedules C filed for 1978 and 1979. The notices of deficiency were preceded by statements of audit changes and petitioner had an opportunity to file amended returns 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 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.

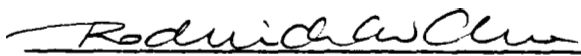
C. That petitioner, Martin J. McNamara, has failed to sustain his burden of proof (Tax Law § 689[e]; Administrative Code § T46-189.0[e]) to show (i) that he was engaged in a trade or business other than as an employee (Internal Revenue Code § 62[1]); (ii) that the expenses in question were trade or business deductions of an employee 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).

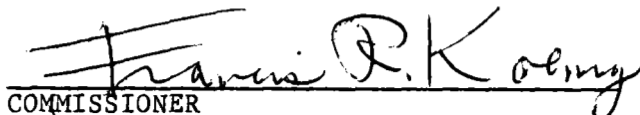
D. That the petitions of Martin J. McNamara are denied and the notices of deficiency dated April 14, 1982 and April 8, 1983 are sustained.

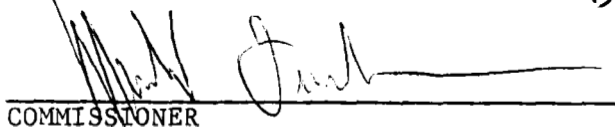
DATED: Albany, New York

STATE TAX COMMISSION

JUN 09 1987


PRESIDENT


COMMISSIONER


COMMISSIONER