

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

JOSEPH **AND** THERESA CAROBENE

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 the Administrative Code of the
City of New York for the Years 1975 and 1979.

Petitioners, Joseph and Theresa Carobene, 216 Manor Road, Douglaston, New York 11363, 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 the Administrative Code of the City of New York for the years 1978 and 1979 (File Nos. 37748 and 42883).

On October 23, 1985, petitioners waived a hearing before the State Tax Commission and agreed to submit the matter for 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 Joseph Carobene has substantiated that he was engaged in a trade or business during the years at issue.

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

FINDINGS OF FACT

1. Petitioners, Joseph and Theresa Carobene, filed New York State income tax resident returns with City of New York personal income tax for the years 1978 and 1979. In each case, the filing status was "Married filing separately on one return".

(a) 1978

On his 1978 return, petitioner Joseph Carobene stated his occupation to be "Marketing". He reported \$30,579.00 in business income. Attached to the return was a copy of Schedule C, Federal Form 1040, under the firm name JGC Associates, reporting income and expenses as follows:

Income - Institutions		43,602	
- Calthone Lithographers		600	
- Teaching		--	
		<u>44,202</u>	
Expenses			
Office Asst. Theresa Carobene	7,800**		
Automobile: 7,225 mi. @ 17¢	1,228		
Parking	376		
Tolls	101		
Telephone	240		
Office Maint.	360		
Meeting & Promotion Exp.	1,374		
Publications	93		
Prof. Developmt./Continuing Education	--		
Newspapers, Magazines, etc.	294		
Travelling Exp.			
Dry Cleaning	220		
Personal Hygiene			
Brief Case & Supplies	<u>105</u>	325	
Xmas Mailings		125	
Postage		65	
Dues & Subscriptions		12	
Faculty Expenses & Thesis Consultant		684	
Licenses		55	
Office Hospitality		<u>491</u>	
			<u>13,623</u>
	Net Income		<u>30,579</u>

** Reported as 'Misc. Income' on Form 1040, Page 1, Line 20"

Attached to the return was a Wage and Tax Statement, showing "Wages, tips, other compensation" of \$43,602.20 from Robert A. Becker, Inc.

The Wage and Tau Statement was stamped with the legend "Included in Schedule C", with an arrow pointed to the aforesaid figure.

Petitioner Theresa Carobene stated her occupation to be "Office Asst." and reported \$7,800.00 in "Other income".

Petitioners itemized their deductions. Said itemized deductions included \$719.00 in contributions and \$463.00 in miscellaneous deductions.

(b) 1979

On his 1979 return, petitioner Joseph Carobene again stated his occupation to be "Marketing"; He reported \$32,274.00 in business income. Attached to the return was a Schedule C, Form 1040, under the business name JGC Associates, reporting income and expenses as follows:

Income - R. A. Becker	\$34,210	
Druid Assoc.	12,500	
Sails & Consult.	565	
Misc.	290	
Teaching	--	47,565
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Expenses:		
Research Asst. - Theresa Carobene	7,800**	
Automobile: (7,220 mi. @ \$.185)	1,336	
Parking	403	
Tolls	102	
Telephone	240	
Office Maint.	600	
Meeting & Promotion Exp.	1,584	
Publications	192	
Prof. Developmt. - Cont. Ed.	75	
Newspapers, Magazines	328	
Travel Exp.:		
Dry Cleaning	220	
Personal Expenses	342	
Xmas Mailings	136	
Postage	111	
Dues & Subscriptions	98	
Faculty Expenses & Thesis Consultant	443	
Office Hospitality	593	
Samples	288	
		<hr/>
		15,291
	Net Income	<u>\$32,274</u>

** Reported as 'Other Income' Form 1040, Page 1, Line 21"

Two wage and tax statements were attached to the return:

<u>Employer</u>	<u>Wages, Tips, Other Compensation</u>
Robert A. Becker, Inc.	\$34,209.87
J. R. Druid Associates, Inc.	12,499.98

The wage and tax statements were stamped with the legend "Included in Schedule C", with an arrow pointed to the amounts of "Wages, tips, other compensation".

Mr. Carobene also filed a New York State unincorporated business tax return for 1979. It showed net profit of \$32,274.00 with \$45,710.00 in subtractions. The return was stamped with the legend "FICA Wages Included in Schedule C" with an arrow pointed to the \$46,710.00 in subtractions. The return showed a net **loss** from business of \$14,436.00.

Petitioner Theresa Carobene again stated her occupation as "Office Asst." and reported \$7,800.00 in "Other income".

Petitioners' again itemized their deductions. Said deductions included \$895.00 in contributions and \$392.00 in miscellaneous deductions.

2. Petitioners' 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. Petitioners' 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 petitioners for the year 1978. The statement explained as follows:

"The expenses claimed are not ordinary and necessary for the production of income for an employee.

Since the income in Column B is less than the allowable exemption, your return is recomputed on a joint basis."

The statement asserted that petitioners owed \$1,307.81 in additional New York State tax and \$430.83 in additional New York City tax.

(b) On April 14, 1982, the Audit Division issued a Notice of Deficiency to petitioners for the year 1978 in the amount of \$1,738.64 in additional New York State and New York City taxes, plus interest.

4.(a) On February 1, 1983, the Audit Division issued a Statement of Audit Changes to petitioners for 1979. The statement explained:

"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.

Since other income of \$7,800.00 to Theresa Carobene is disallowed, it is no longer advantageous to file separately for New York State. Therefore, your tax has been recomputed as married filing jointly since it is to your benefit."

Additional New York State and New York City taxes were computed at \$2,000.15.

(b) On April 8, 1983, the Audit Division issued a Notice of Deficiency to petitioners for 1979 in the amount of \$2,000.15 in additional New York State and New York City tax due, plus interest.

5. Petitioners submitted a large quantity of documents to the State Tax Commission in support of their claim. This material indicates that petitioner Joseph Carobene was very active as president of the Douglaston Civic Association; that Mr. Carobene had been offered the position of Assistant Professor of Pharmacy Administration at Long Island University, which position, however, apparently

never materialized; and that Mr. Carobene was involved in selling sails for sailboats. Neither the documentation related to those activities nor the cancelled checks, guest checks, or other material show that said petitioner was engaged in a trade or business other than as an employee.

6. Petitioners contend:

(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 part 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 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 petitioner Joseph Carobene 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 under section 62(1) of the Internal Revenue Code.

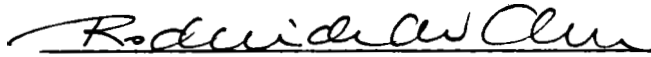
D. That while it would appear that petitioner Joseph Carobene may have been entitled to deduct certain employee business expenses under sections 62(2) or 63(f) of the Internal Revenue Code if he had filed Form 2106, or if he had claimed such expenses as miscellaneous itemized deductions, said petitioner 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. (It is noted that some of the claimed expenses may have been included in itemized deductions taken by petitioners.)

E. That the petition of Joseph and Theresa Carobene is denied and the notices of deficiency issued April 14, 1982 and April 8, 1983 are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAR 20 1987


PRESIDENT


COMMISSIONER


COMMISSIONER