

STATE **OF** NEW YORK

STATE **TAX** COMMISSION

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In the Matter **of** the Petition

**of**

DENNIS J. TIERNEY AND MADELINE B. TIERNEY

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 Years 1978 and 1979.

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Petitioners, Dennis J. Tierney and Madeline B. Tierney, 206 Ada Drive,  
Granitville, 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 incometax under Chapter 46, Title T of the  
Administrative Code of the City of New York for the years 1978 and 1979 (File  
**Nos.** 37765 and 44748).

On October 23, 1985, petitioners waived a hearing before the State Tax  
Commission and submitted the matter for decision based upon 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 Dennis J. Tierney has substantiated that he was  
engaged in a trade or business during the years at issue.

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

FINDINGS OF FACT

1. Petitioners, Dennis J. Tierney and Madeline B. Tierney, timely filed a New York State Income Tax Resident Return (with City of New York Personal Income Tax) for each of the years 1978 and 1979 whereon they reported their filing status as married filing separately on one return. On each return Dennis J. Tierney reported his occupation as "Carpentry Contract" and Madeline B. Tierney reported her occupation as "Office Asst."

2. For 1978, petitioner Dennis J. Tierney reported business income of \$13,005.00. A Federal Schedule C attached to the return reported the following income and deductions:

"Schedule C - Income From Business or Profession - Carpentry Contractor"	
Revenues --	\$20,731
Expenses --	
Payments to Madeline Tierney (Office Asst.)	\$3,600
Tools, Blades, etc.	401
Artic [sic] Gear	237
Accounting	100
Safety Shoes & Gloves	210
Lumber, Supplies	431
Transportation & Deliveries	1,128
Outside Helpers	225
Telephone Allocation (12 x \$15 mo.)	180
Hand Lotions, etc.	73
Newspapers, Magazines	155
Meeting & Promotion Exp.	736
Dues & Subscriptions	<u>250</u>
	7,726
NET INCOME	<u>\$13,005</u>

3. For 1979, petitioner Dennis J. Tierney reported business income of \$12,353.00. A Federal Schedule C attached to the return reported the following

"Schedule C - Income **From** Business or Profession - Carpentry Contractor

Revenues --		\$21,965
Expenses --		
Payments to Madeline Tierney (Office Asst.)	\$ 4,800*	
Tools, Blades, etc.	417	
Cold Weather Gear	258	
Accounting	100	
Safety Shoes & Gloves	233	
Lumber, Supplies	474	
Transportation & Deliveries (7800 mi @ 18½¢)	1,443	
Outside Help	250	
Telephone Allocation (\$17 mo. x 12 mos.)	204	
Hand Lotions etc.	86	
Newspapers, Magazines	162	
Meeting & Promotion Expenses	817	
Dues & Subscriptions	268	
Dept. of Consumer Affairs License	<u>100</u>	
		\$ 9,612
NET INCOME		<u>\$12,353</u>

4. The amounts deducted for "payments to Madeline Tierney (Office Asst.)" for each year at issue were reported by Mrs. Tierney as "other income".

5. Attached to each of petitioners' returns for the years at issue was a Wage and Tax Statement issued to petitioner Dennis J. Tierney by Allied Building & Airport Services, Inc. showing \$20,731.26 for 1978 and \$21,965.93 for 1979 in "Wages, tips, other compensation". The legend "Included in Schedule C", with an arrow pointing to said figure, was stamped on each statement.

6. Petitioner Dennis J. Tierney filed an unincorporated business tax return for each of the years 1978 and 1979. For 1978 he reported a net profit of \$13,005.00 and a subtraction of \$20,731.00, which yielded a net loss and accordingly, no tax liability. A schedule attached to Mr. Tierney's 1978 return characterized the subtraction of \$20,731.00 (which was the amount of his

1978 wages) as "Nontaxable Pensions". For 1979 he reported a net profit of \$12,353.00 and a subtraction of \$21,965.00, (the amount of his wages) which yielded a negative net loss and accordingly, no tax liability. A stamped legend "FICA wages included in Schedule C", with an arrow pointing to the subtraction, appears on Mr. Tierney's 1979 unincorporated business tax return.

7. On petitioners' 1978 and 1979 personal income tax returns they reported itemized deductions. However, no miscellaneous deductions were claimed.

8. 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 a 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.

9. On March 24, 1982, the Audit Division issued a Statement of Audit Changes to petitioners for the year 1978 whereon adjustments were made which were explained as follows:

"The expenses claimed in Schedule C are not ordinary and necessary in the production of income as an employee. Therefore, they have been disallowed.

Since calculation on a joint basis results in a lower tax, we have recomputed your liability as if a joint return had been filed.--

Based on the aforesaid statement, a Notice of Deficiency was issued

New York State and City personal income taxes **of** \$587.90, plus interest of \$169.59, for a total due of \$757.49.

10. On February 7, 1983, the Audit Division issued a Statement of Audit Changes to petitioners for the year 1979 whereon, as was the case in 1978, the Federal Schedule C deductions were disallowed on the basis that "these expenses are not ordinary and necessary for the production of income **as** an employee." Accordingly, a Notice of Deficiency was issued against petitioners for the year 1979 on April 8, 1983, asserting additional New York State and City personal income taxes **of** \$694.71, plus interest of \$230.93, for a total due of \$925.64.

11. 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, rhus 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.

12. The documentation submitted by petitioner Dennis J. Tierney was insufficient to show that he was engaged in business as a carpentry contractor. Furthermore, no documentation, other than affidavits of Mr. Tierney, was submitted to substantiate the amounts **of** the deductions claimed on his 1978 and .979 Federal schedules C.

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 deductions claimed. The notices of deficiency issued for 1978 and 1979 were each preceded by a Statement of Audit Changes; thus 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 Dennis J. Tierney has failed **to** sustain his burden of proof, imposed pursuant to section 689(e) of the Tax Law and section T46-189.0(e) **of** the Administrative Code **of** the City of New York, 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 even **if** petitioner Dennis J. Tierney 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 claimed such expenses as miscellaneous deductions, he nevertheless failed to sustain his burden of proof to show that the amounts of the business deductions claimed were accurate.

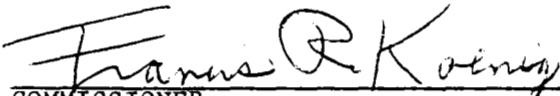
E. That the petition of Dennis J. Tierney and Madeline Tierney *is* denied and the notices of deficiency issued on April 14, 1982 and April 8, 1983 are sustained together with such additional interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

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PRESIDENT

  
COMMISSIONER

  
COMMISSIONER