

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

JAMES AND MAUREEN TOMMASULO

DECISION

for Redetermination of aDeficiency 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 Year1978.

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Petitioners, James and MaureenTomasulo, 6 Maple Lane, MassapequaPark,  
New York 11762, 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 Nos. 37923  
and 38108).

On October 23, 1985, petitioners, by their duly authorized representative,  
Louis F. Brush, Esq., waived a hearing and submitted their case for decision  
based upon the entire record contained in the file, together with documents to  
be submitted by October 8, 1986. After due consideration, the State Tax  
Commission 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 petitioners have substantiated that one or both of them was  
engaged in atrade 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, James and Maureen Tommasulo, timely filed a New York State income tax resident return and petitioner James Tommasulo also filed a timely unincorporated business tax return for 1978. On their income tax return, petitioners selected filing status "4" (married filing separately on one return) .

(a) The 1978 income tax return listed petitioner James Tommasulo's occupation as "Computer Consulting" and reported \$11,577.00 in total income, consisting of \$11,296.00 in business income and \$281.00 in interest income.

(i) The copy of Federal Schedule C attached to the return showed "Revenues" of \$17,260.00 with the following listed expenses:

Office maintenance	\$ 380.00
Supplies	214.00
Tolls	18.00
Parking	98.00
Travel expenses 4,650 mi. at 17¢/mi.	791.00
Messengers and delivery	685.00
Hospitality	831.00
Meeting expenses	962.00
Newspapers and magazines	237.00
Professional development	900.00
Tuition - NYU	
Books/computer time	200.00
Supplies	8.00
Travel and parking	50.00
Telephone expense	120.00
Tax preparation fee	100.00
Calculator and tapes	73.00
Photographic supplies	202.00
Storage	95.00
Total	<u>\$5,964.00</u>

(ii) The wage and tax statements (Forms W-2) of petitioner James F. Tommasulo attached to the return showed "Wages, tips, other compensation" of \$12,436.92 from C.I.T. Financial Corporation of New York, New York, and \$4,823.13 from Republic National Bank of New York. Each of such statements is stamped with an arrow pointing to the noted amounts with the legend "Included in Schedule C".

(iii) The unincorporated business tax return showed the following: net profit and total income from business (before New York modification) was \$11,296.00; this amount was reduced by \$17,260.00 as a "subtraction", resulting in a total (and net) **loss** from business in the amount of \$5,964.00 (which amount matches the amount of alleged business expenses per Schedule C).

(iv) For the year at issue, petitioner claimed the standard deduction and did not claim any miscellaneous or other itemized deductions.

2. 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 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 such basis.

3. On March 24, 1982, the Audit Division issued a Statement of Audit Changes to petitioners for 1978 asserting \$680.24 in personal income tax due on the basis that "expenses claimed are not ordinary and necessary in the production

resulted in a household gross income in excess of \$25,000.00, petitioners " claimed household credit was disallowed. On April 14, 1982, the Audit Division issued two notices of deficiency, one to Maureen Tommasulo in the amount of \$228.56, plus interest, and one to James Tommasulo in the amount of \$451.68, plus interest.

4. Petitioner James Tommasulo submitted a one page affidavit attesting to his assertion that the expenses reflected on Schedule C, which expense amounts were restated on the affidavit, should be allowed as deductible expenses incurred in his "revenue producing activity" of computer programming. Also submitted with the affidavit were additional copies of petitioners' returns for 1978. No other documentation was provided with regard to the claimed expenses, nor any evidence that such expenses were other than personal in nature. Each of petitioner James Tommasulo's Forms W-2 reflect payroll deductions for Federal, State and local taxes and for FICA.

5. 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;

(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 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 claimed Schedule C "business expenses." Each Notice of Deficiency was preceded by a Statement of Audit Changes and petitioners had an opportunity to file amended returns claiming the disallowed expenses as either unreimbursed employee business expenses (adjustments to income on Federal Form 2106), or as miscellaneous itemized 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 James Tommasulo 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 and thus has not proven entitlement to deduct those "business expenses" reflected per his Schedule C.


D. That petitioner James Tommasulo 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 he had filed Form 2106, or as miscellaneous itemized deductions if he had itemized his deductions. However, in this regard, petitioner James Tommasulo did not itemize deductions for the year in question and further has failed herein to sustain his burden of proof under section 689(e) of the Tax Law to show the character and circumstances by and under which the claimed business expenses would otherwise be deductible.

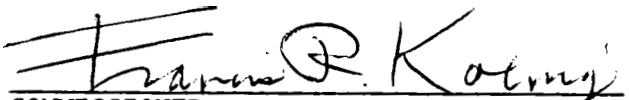
E. That the petition of James and Maureen Tommasulo is denied and the notices of deficiency issued on April 14, 1982 are sustained.

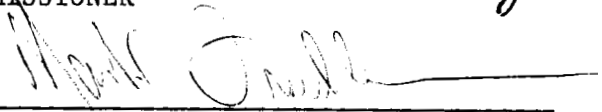
DATED: Albany, New York

STATE TAX COMMISSION

MAR 20 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER