

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ANTHONY CESARE

DECISION

for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and City of New York Nonresident Earnings Tax under Chapter 46, Title U of the Administrative Code of the City of New York for the Year 1979.

Petitioner, Anthony Cesare, 23 Hooper Court, East Northport, New York 11731, 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 City of New York nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the year 1979 (File No. 44361).

On October 23, 1985, petitioner advised the State Tax Commission that he desired to waive his right to a hearing and to submit his case for decision based upon the existing record contained in the file, together with the submission of additional evidence by October 8, 1986. After due consideration, the State Tax Commission hereby renders the following decision.

ISSUES

I. Whether the Notice of Deficiency issued to petitioner by the Audit Division was issued without any basis and for the sole purpose of extending the period of limitation on assessment.

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

111. Whether petitioner has substantiated the character and amount of business expenses claimed as deductions from gross income for the year at issue.

FINDINGS OF FACT

1. Anthony Cesare (hereinafter "petitioner") and his wife, Jaqueline Cesare, filed a New York State Income Tax Resident Return with City of New York Nonresident Earnings Tax for the year 1979 under the filing status "Married filing separately on one return". On his return, petitioner listed his occupation as "sales representative", while Jaqueline Cesare listed her occupation as "sales assistant". Petitioner reported total income of \$16,388.00, consisting of \$3,344.00 interest income, \$569.00 dividends, \$12,932.00 business income and capital losses of \$457.00.

(a) A copy of the Federal Schedule C attached to the return showed income to petitioner in the amount of \$26,372.00 consisting of "commissions earned". The Federal Schedule C reported the following expenses:

Travel	\$ 2,007
Demonstrator Expenses	1,741
Promotion of anti corrosion process and body paint process	852
Refreshments in Showroom	693
Cigars, Cigarettes	467
Telephone Allocation	360
Office Maintenance	600
Solicitations, Leasing and Meeting Expenses	966
Sports Events Tickets	315
Newspapers, Magazines	293
Promotional Expenses	496
Accounting	150
Hospitality	407
Mailings	493
Payments to Jaqueline Cesare - Sales Asst.	<u>3,600</u>
Total	\$13,440

The \$13,440.00 in expenses deducted from revenues of \$26,372.00 resulted in the \$12,932.00 net business income reported.

(b) Wage and tax statements attached to the return indicated that petitioner received "wages, tips, other compensation" from Circle Pontiac, Inc. in the amount of \$11,390.00 and from **Rex** Pontiac Corporation in the amount of \$14,981.70. Each statement was stamped with an arrow pointing to the amount contained in the "wages, tips, other compensation" box with the legend "Included in Schedule C". Federal, State, local and FICA taxes were withheld from the amounts paid to petitioner by each employer.

(c) Petitioner filed a New York State Unincorporated Business Tax Return for 1979 which set forth the following: net profit and total income from business before New York modifications was \$12,932.00; from this amount was subtracted \$26,372.00 (the amount reported on the Federal Schedule C as "**commissions** earned" and the amount for which wage and tax statements were issued) resulting in total (and net) **loss** from business of \$13,440.00.

(d) For the year 1979, petitioner claimed itemized deductions totalling \$9,724.00 (petitioner's wife claimed itemized deductions of \$2,231.00) but did not include any miscellaneous deductions.

2. Petitioner's 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 this 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 of \$13,440.00.

wage or salary income reported on wage and tax statements. Petitioner's claimed Schedule C deductions were disallowed on that basis.

3. On February 1, 1983, the Audit Division issued a Statement of Audit Changes to Anthony Cesare and Jaqueline Cesare asserting additional tax due in the amount of \$810.68, plus interest. The basis was stated as follows:

"As a salaried employee, you are not a business entity and therefore not entitled to claim Schedule C deductions as these expenses are not ordinary and necessary for the production of income as an employee."

As a result of the increase in petitioner's adjusted gross income, his statutory medical expense adjustment was increased. The statement of Audit Changes asserted additional State personal income tax due from petitioner in the amount of \$799.71 and City of New York nonresident earnings tax due of \$43.17, with an overpayment of State personal income tax from Jaqueline Cesare of \$32.20.

On April 8, 1983, the Audit Division issued a Notice of Deficiency to petitioner in the amount of \$810.68, plus interest of \$269.47, for a total amount due of \$1,080.15.

4. Petitioner submitted a 1979 engagement diary which contained receipts for certain of his expenses for the year. In addition, he submitted an affidavit, cancelled checks and a copy of an undated letter from the general manager of Rex Pontiac Corporation which states that petitioner was paid a base salary of \$100.00 per week plus commissions, and that expenses incurred by petitioner were not paid by the company. No evidence was submitted to show the extent to which the expenses claimed were ordinary and necessary business expenses.

5. Petitioner contends:

(a) That the Notice of Deficiency was issued on an arbitrary and capricious basis just prior to the expiration of the period of limitations on

assessments, thus depriving petitioner of the opportunity to present substantiation for the claimed deductions;

(b) that petitioner is 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 petitioner does not have cancelled checks or other receipts for certain expenses, the Department of Taxation and Finance should allow petitioner a reasonable estimate of such expenses.

CONCLUSIONS OF LAW

A. That the Notice of Deficiency was properly issued and was not arbitrary or capricious. The return was patently erroneous and the Audit Division was justified in disallowing the Schedule C business income and expenses. The Notice of Deficiency was preceded by a Statement of Audit Changes and petitioner had an opportunity to file an amended return 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 petitioner's return was 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 has not sustained his burden of proof under section 689(e) of the Tax Law and section U 46-39,0(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.

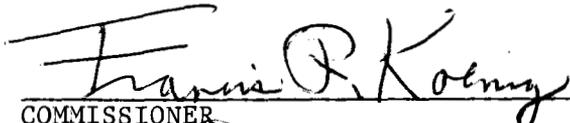
D. That the petition of Anthony Cesare is denied and the Notice of Deficiency issued April 8, 1983 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 26 1987


PRESIDENT


COMMISSIONER


COMMISSIONER