

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

JOSEPH ALAGNA

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Year 1979.

Petitioner, Joseph Alagna, 239 Spruce Street, West Hempstead, New York 11552, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1979 (File No. 44367).

On October 23, 1985, petitioner waived a hearing before the State Tax Commission and agreed to submit this matter for decision based on the Audit Division file, as well as a brief and additional documentation 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 Notice of Deficiency was issued without any basis and for 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 year at issue.

III. 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. Petitioner, Joseph Alagna, filed a New York State Personal Income Tax Resident Return for the year 1979. His wife, Janet Alagna, filed separately on the same return. Petitioner listed his occupation as "Heating/Cooling Tec".

2. Petitioner filed a Schedule C, form 1040, for 1979 showing his main business activity as "Heating & Cooling Contract". The Schedule C reported \$37,492.00 in "Revenues" and the following expenses:

• "Travel 14,580 @ 18/2 =	2,697
Prospecting	942
Telephone - inside	180
Postage, Blue Print, Fees	162
Materials	248
Safety Equip., Gloves, Insulated Garments	507
Tools	603
Dues, Memberships	850
Tax Prep. Fees	100
Magazines, Newspapers	388
Metal Cutting Accessories	316
Cleaning Compounds	253
Telephone - outside	340
Rainwear	237
Arctic Wear	191
Payments to Janet Alagna - Assistant	3,600
Testing Solar Heating Devices	1,247
	<hr/>
	12,861"

This resulted in a net profit of \$24,631.00.

3. The net profit of \$24,631.00 was reported as business income on Schedule A of petitioner's New York personal income tax return. The sum of \$3,600.00 deducted on Schedule C as "Payments to Janet Alagna - Assistant" was included as "Other income" on her New York State personal income tax return.

4. Attached to petitioner's return was a Wage and Tax Statement issued by Courter and Company, Incorporated, showing "Wages, tips, other compensation" of \$34,992.36. Federal and State taxes and FICA were withheld. Also attached was a Wage and Tax Statement issued by the Steamfitters Industry Security Benefit Fund in the amount of \$2,500.00. Federal, State and local taxes were shown

as withheld. Both wage and tax statements were stamped with the legend "Included in Schedule C", with an arrow pointing to the "Wages, tips, other compensation".

5. Petitioner also filed a New York State Unincorporated Business Tax Return for 1979 showing \$24,631.00 in net profit. From this amount, \$37,492.00 was reported as "subtractions" resulting in a net loss of \$12,861.00. The legend "FICA Wages Included in Schedule C" was stamped on the return with an arrow pointed between the two amounts. No tax was shown as due.

6. Petitioner's tax return was 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. Petitioner's claimed Schedule C deductions were disallowed on that basis.

7. On February 1, 1983, the Audit Division issued a Statement of Audit Changes to petitioner and his wife for 1979 stating the following:

"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 to the production of income as an employee."

Accordingly, the \$12,861.00 in Schedule C deductions were disallowed resulting in additional tax due of \$1,558.90. Janet Alagna's income was reduced by the \$3,600.00 purportedly paid to her by petitioner and her tax was reduced by \$301.98. Net additional tax stated as due was \$1,256.92.

8. On April 8, 1983, the Audit Division issued to petitioner a Notice of Deficiency for 1979 in the sum of \$1,256.92 plus interest.

9. Petitioner worked on the construction of the Shoreham Nuclear Power Plant at Shoreham, Long Island, six days per week for fifty weeks during 1979. The travel expenses claimed (Finding of Fact "2") are for travel to Shoreham from petitioner's home in Hempstead and return.

10. Petitioner submitted cancelled checks substantiating union dues of \$850.00 and tax preparation fees of \$100.00.

11. 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 assessment, 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 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.

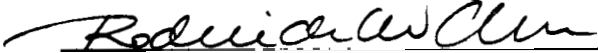
D. That petitioner has substantiated \$950.00 in employee business expenses which are deductible under sections 62(2) or 63(f) of the Internal Revenue Code. The other expenses claimed have not been substantiated, as petitioner failed to sustain his burden of proof under section 689(e) of the Tax Law to show either the character or the amount of the claimed expenses?

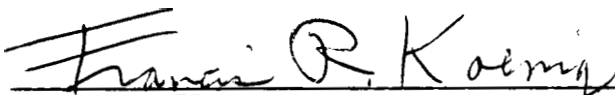
E. That except as provided in Conclusion of Law "D", the petition of Joseph Alagna is denied and the Notice of Deficiency issued April 8, 1983, as modified, is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAR 11 1987


PRESIDENT


COMMISSIONER


COMMISSIONER