

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

GIRIACO M. SERINO

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law **for** the Years 1981 and 1982.

Petitioner, Giriaco M. Serino, 1 Ivy Terrace, Poughkeepsie, New York 12601, filed a petition for redetermination **of** a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1981 and 1982 (File No. 59840).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices **of** the State Tax Commission, Building #9 W. A. Harriman Office Campus, Albany, New York, on April 7, 1987 at 1:15 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, **Esq.** (Thomas Sacca, **Esq.**, **of** counsel).

ISSUE

Whether petitioner has substantiated entitlement to a greater deduction for travel and entertainment expenses than the amounts allowed by the Audit Division.

FINDINGS OF FACT

1. Giriaco M. Serino (hereinafter "petitioner") and his wife, Claire M. Serino, filed New York State resident income tax returns for the years 1981 and 1982. On the returns, the filing status checked was "Married filing joint return". It should be noted that the actual filing status was "Marriedfiling separately on one return for both of the years at issue

2. On January 22, 1985, the Audit Division issued to petitioner and Claire M. Serino a Statement of Personal Income Tax Audit Changes asserting additional personal income tax due from petitioner in the amount of \$887.12 for 1981, \$798.52 for 1982 and \$39.63 for 1983. Pursuant to the Audit Division's adjustments set forth thereon, Claire M. Serino was determined to be entitled to a credit of \$62.75 for 1982 and \$20.00 for 1983, thereby reducing tax due from petitioner to \$735.77 for 1982 and \$19.63 for 1983. The total tax asserted to be due for the years 1981, 1982 and 1983 was, therefore, \$1,642.52. These adjustments, proposed as a result of an audit, were as follows:

"Travel & entertainment: The amounts are disallowed as estimated & excessive.
Office expense: The amounts disallowed are personal insurance (B/C) personal rents, corporation tax payments & visa payments.. Also a correction is made for a math error in totaling the expense.
Dividend Income: N.Y.S. does not allow income splitting, therefore, a correction is made.
Modification-Subtraction: Your modification for U.S. saving bonds exceeds the amount claimed, therefore a correction is made.
Itemized & Exemption: Are adjusted to give you the maximum tax benefit.

	Husband 1981	Husband 1982	Wife 1982	Husband 1983
Travel & Ent.	2,356.16	4,462.31	--	5,840.60
Office Expense	6,508.20	3,357.41	--	1,443.83
Dividend Income	--	2,980.34	(2,980.34)	--
.Modification-NY Subtraction	--	4,929.20	(4,929.20)	--
Itemized Deductions		(6,193.12)	6,193.12	
Exemption		(800.00)	800.00	
Total Adjustments	8,864.36	8,736.14	(916.42)	7,284.43

Note: Also you have been allowed a household credit on 1983."

3. On April 8, 1985, the Audit Division issued to petitioner a Notice of Deficiency for the years 1981 and 1982 asserting additional tax due in the amount of \$1,642.52, plus interest, for a total amount due of \$2,134.45. Since

the Notice of Deficiency did not assert tax due for the year 1983, the Audit Division, at the hearing held herein, agreed to waive the \$19.63 asserted in the Statement of Personal Income Tax Audit Changes to be due from petitioner for 1983, thereby reducing total tax due from \$1,642.52 to \$1,622.89, plus applicable interest. Therefore, the only years remaining at issue are 1981 and 1982.

4. (a) On his Federal Schedule C, Profit or (Loss) From Business or Profession for 1981, petitioner claimed travel and entertainment expenses of \$2,771.95 and an office expense of \$21,107.53. The Audit Division initially disallowed \$2,356.16 of the travel and entertainment expenses and \$6,508.20 of the office expense. At a pre-hearing conference, the Audit Division agreed to allow 50 percent of the travel and entertainment expenses claimed, or \$1,385.98. The Audit Division made no adjustment with respect to the amount of office expense disallowed. Petitioner agreed at the hearing to the Audit Division's disallowance of \$6,508.20 of the office expense, but did not agree to the disallowance by the Audit Division of \$1,385.98 (50 percent) of his travel and entertainment expenses.

(b) On his Federal Schedule C for 1982, petitioner claimed travel and entertainment expenses of \$5,249.75 and an office expense of \$7,950.32. The Audit Division initially disallowed \$4,462.31 of the travel and entertainment expenses and \$3,357.41 of the office expense. At a pre-hearing conference, the Audit Division agreed to allow 50 percent of the travel and entertainment expenses claimed, or \$2,624.89. In addition, certain purchases for the office were allowed as business expenses, thereby resulting in a disallowance of \$3,040.00 of the office expense claimed, rather than the \$3,357.41 originally disallowed. Petitioner agreed at the hearing to the disallowance of \$3,040.00

of his claimed office expense, but did not agree to the disallowance by the Audit Division of \$2,624.89 (50 percent) of his travel and entertainment expenses.

(c) The sole issue remaining herein *is* whether or not petitioner *is* entitled to a greater deduction for travel and entertainment expenses than the amounts allowed by the Audit Division (50 percent of the amount claimed on each Federal Schedule C) for the years 1981 and 1982.

5. Petitioner is an attorney licensed to practice in the State of New York. For the years at issue, petitioner was also a director and officer of three construction corporations, owned a wholesale antique business and invested in real estate. In 1978, he purchased a 1978 Cadillac which he contends was used solely for business purposes. No logs or records were kept regarding the purpose or mileage of trips taken in this vehicle. During the years at issue, petitioner owned three or four vehicles. Petitioner purchased nearly all of the gasoline and repairs for the 1978 Cadillac at Texaco or at Lloyd's of Poughkeepsie. The Texaco purchases were charged on a Texaco credit card and the purchases from Lloyd's of Poughkeepsie were charged on petitioner's Visa card. Petitioner produced Texaco and Visa statements for 1982, but offered no evidence to substantiate that these purchases were for his 1978 Cadillac. Moreover, no evidence was introduced which would show that these purchases were solely for business purposes. Petitioner also claimed, as business expenses, membership fees at a social tennis club and liquor expenses for home entertainment. No evidence was offered at the hearing which would substantiate amounts claimed or that such expenses were, in fact, for business purposes.

CONCLUSIONS OF LAW

A. That section 689(e) of the Tax Law imposes upon petitioner the burden of refuting the Audit Division's disallowance and establishing that he **is** properly entitled to the travel and entertainment expenses claimed as deductible business expenses for the years at issue.

B. That, under certain circumstances, **if** a taxpayer had no records to prove the amount of a business expense deduction but can establish that some expense was incurred, an allowance may be based on an estimate. However, the absence of supporting records will "'bear heavily' against the taxpayer 'whose inexactitude **is** of his own making'" (Jack R. Olken v. Commissioner, 41 TCM 1255, 1257 [1981]). Furthermore, where the Audit Division has allowed part of a deduction, the Audit Division's determination will not be altered "unless facts appear from which a different approximation can be made" (Robert L. Nowland v. Commissioner, 15 TCM 368, 375 [1956]). See also, (Masters v. Commissioner, 243 F2d 335 [3d Cir 1957].)

C. That petitioner produced neither usage logs nor records **of** any kind nor did he produce complete statements and/or cancelled checks for amounts claimed to have been expended for such travel and entertainment expenses for the years at issue. Petitioner has not, therefore, sustained his burden of proving entitlement, in full, to the travel and entertainment expenses claimed nor has he produced such evidence from which an approximation patently more reliable than that of the Audit Division can be made.


D. That the petition of Giriaco M. Serino **is** granted to the extent contained in Findings of Fact "3" and "4"; the Audit Division **is** directed to

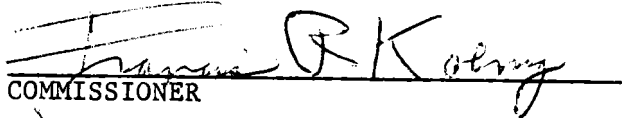
modify the Notice of Deficiency issued April 8, 1985 accordingly; and that, except as so granted, the petition is in all other respects denied.

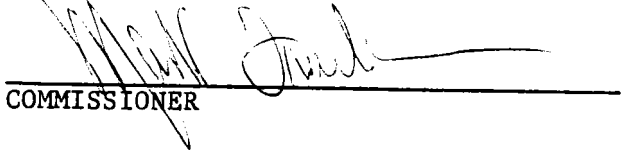
DATED: Albany, New York

STATE TAX COMMISSION

AUG 14 1981


PRESIDENT


COMMISSIONER


COMMISSIONER