

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of : DECISION  
JOSEPH COSTA and GERALDINE COSTA :  
for Redetermination of a Deficiency or :  
for Refund of Personal Income and Unincorporated :  
Business Taxes under Articles 22 and 23 of the :  
Tax Law for the years 1969, and 1970 :  
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Petitioners, Joseph Costa and Geraldine Costa, residing at 500 Weaver Street, Larchmont, New York 10538, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1969, and 1970. (File No. 00385).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 9, 1976 at 1:15 P.M. The petitioners appeared by Eugene C. Greenwald, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

#### ISSUE

Whether the activities of petitioner, Joseph Costa, in the operation of an H & R Block, Inc. tax return preparation service

during 1969 and 1970, constituted the practice of a profession, therefore, exempting him from the imposition of New York State unincorporated business tax.

II. Whether the gain on the sale of a franchise in 1970 can be attributed to petitioners, Joseph Costa and Geraldine Costa, in proportion to their alleged respective ownership interest.

#### FINDINGS OF FACT

1. Petitioners, Joseph Costa and Geraldine Costa, timely filed New York State income tax returns for the years 1969 and 1970. In 1969, they filed New York State form IT-201, a joint return. In 1970 they filed New York State form IT-208, a combined tax return in which they split a gain realized on the sale of a franchise. In 1969 and 1970, Joseph Costa did not file a New York State unincorporated business tax return.

2. On December 28, 1973, the Income Tax Bureau issued a Statement of Audit Changes against petitioner, Joseph Costa, imposing unincorporated business tax upon his income received as a tax consultant during the years 1969 and 1970. Accordingly, the Income Tax Bureau issued a Notice of Deficiency in the sum of \$7,419.05, plus interest of \$1,234.84, for a total of \$8,653.89.

3. On December 28, 1973, the Income Tax Bureau issued a Statement of Audit Changes against petitioners, Joseph Costa and Geraldine Costa, stating that the gain on the sale of the

H & R Block, Inc. franchise was attributable to Joseph Costa only. In addition, personal income tax was recomputed due to unreported Federal audit changes. Accordingly, the Income Tax Bureau issued a Notice of Deficiency in the amount of \$2,628.24, plus interest of \$426.17, for a total of \$3,054.41.

4. In 1950, petitioner, Joseph Costa, a graduate of Manhattan College, received a B. B. A. degree with a major in accounting. He also completed courses in taxation, business and law. Thereafter, he continued his training and education as finance officer in the U. S. Air Force. In May 8, 1954, he became associated with the Tax Research Institute of America and did research in the field of Federal, state and corporate taxation. In 1962, he obtained franchise from H & R Block, Inc. in Westchester County. He also had his own operation in the preparation of Federal, state, city, personal, business and fiduciary returns. He employed tax consultants and gave them special training courses in tax matters. He has attended tax seminars and educational programs. He is neither a licensed public accountant, registered public accountant nor a certified public accountant.

5. On May 2, 1966, petitioner, Joseph Costa, filed a Certificate of Discontinuance of Business under H & R Block, at 6 East Second St., Mt. Vernon, County of Westchester, New York, for the reason that the business was transferred and a new certificate was filed.

6. On May 2, 1966, petitioner, Geraldine Costa, filed a Business Certificate of conducting business of H & R Block, at 6 East Second St., Mt. Vernon, County of Westchester as successor to Joseph Costa.

7. On June 25, 1969, petitioner, Joseph Costa filed a Business Certificate of conducting business of H & R Block, at 207 North Avenue New Rochelle, County of Westchester, New York.

8. On September 3, 1970, petitioner, Joseph Costa, entered into an agreement to sell, convey, assign and transfer all the properties and assets of every kind and description and wherever located to H & R Block, Inc. Under an agreement dated November 27, 1962 and amended September 8, 1964 (the franchise agreement), the seller (petitioner - Joseph Costa) was granted the right to engage in the business of preparation of tax returns under the name of H & R Block in Westchester County. This tax return preparation business conducted pursuant to the franchise agreement was the subject of this sale. Petitioner, Joseph Costa, provided the first three pages of said agreement and to date has failed to submit the remaining pages as promised upon the record of the hearing.

9. Petitioner, Geraldine Costa, failed to state her occupation on the 1969 New York State Income Tax Return. In 1970, she listed her occupation as housewife on both State and Federal returns.

10. Petitioners, Joseph Costa and Geraldine Costa, have failed to submit documentary or other substantial evidence that they were "tenants in common" in the franchise business of H & R Block, or that the franchise permitted any transfer of interest, between them.

11. Eighty percent or more of petitioner, Joseph Costa's income from the H & R Block, Inc. franchise business was derived from personal services rendered. Capital was not a material income producing factor.

CONCLUSIONS OF LAW

A. That the activities of petitioner, Joseph Costa, in the operation of an H & R Block, Inc. tax return preparation service during the years 1969 and 1970, although requiring special knowledge and experience, did not constitute the practice of a profession exempt from the imposition of the unincorporated business tax in accordance with the meaning and intent of section 703 (c) of the Tax Law.

B. That the activities of petitioner, Joseph Costa, during 1969 and 1970, constituted the carrying on of an unincorporated business and his income derived therefrom was subject to the unincorporated business tax in accordance with the meaning and intent of section 703 of the Tax Law.

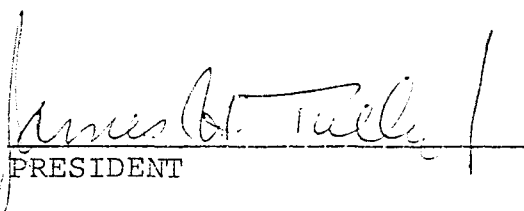
C. That the sale of the H & R Block, Inc. franchise by petitioner, Joseph Costa, was the gain on his capital investment.

Where a husband and wife determine their Federal income tax (as petitioners did in 1970) on a joint return, but determine their New York income taxes separately as if their Federal adjusted gross income had been determined separately, this gain must be reported separately, also, according to the meaning and intent of the section 612 (f) of the Tax Law and 20 NYCRR 116.6.

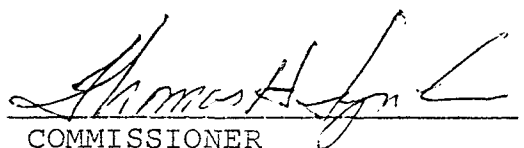
D. That the petition of Joseph Costa, individually, and Joseph Costa and Geraldine Costa is denied and the notices of deficiency issued December 28, 1973 against Joseph Costa individually, and Joseph Costa and Geraldine Costa are sustained.

DATED: Albany, New York  
August 16, 1977

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER