

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Philip & Louise Zichello :

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the Year 1974. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of April, 1981, he served the within notice of Decision by certified mail upon Philip & Louise Zichello, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Philip & Louise Zichello
1214 Stadium Ave.
Bronx, NY 10265

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
17th day of April, 1981.

Gerrit P. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Philip & Louise Zichello :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the Year 1974. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of April, 1981, he served the within notice of Decision by certified mail upon Eugene O'Neil the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Eugene O'Neil
6 Nottingham Gate
Rock Hill, NY 12775

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
17th day of April, 1981.

Carmie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

April 17, 1981

Philip & Louise Zichello
1214 Stadium Ave.
Bronx, NY 10265

Dear Mr. & Mrs. Zichello:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Eugene O'Neil
6 Nottingham Gate
Rock Hill, NY 12775
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
PHILIP ZICHELLO and LOUISE ZICHELLO	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Year	:	
1974.	:	

Petitioners, Philip Zichello (deceased) and Louise Zichello, 1214 Stadium Avenue, Bronx, New York 10465, 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 1974 (File No. 16149).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 26, 1979 at 2:45 P.M. Petitioners appeared by Eugene O'Neill, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether legal fees expended by petitioner Philip Zichello, a Civil Court Judge, with respect to a court action instituted for the purpose of challenging the validity of a section of the State Constitution that mandates retirement from the bench at the age of 70, are deductible.

FINDINGS OF FACT

1. Petitioners, Philip Zichello (now deceased) and Louise Zichello, filed a joint New York State Income Tax Resident Return for the year 1974.

2. As a result of an audit, the Income Tax Bureau issued a Statement of Audit Changes on December 2, 1975, wherein it disallowed contributions claimed

to the extent of \$418.00, and miscellaneous deductions to the extent of \$3,384.00. Accordingly, on May 24, 1976 the Audit Division issued a Notice of Deficiency against the petitioners, asserting additional personal income tax of \$570.30, plus interest of \$53.65, for a total due of \$623.95.

3. Petitioners are contesting the disallowance of a legal fee claimed in the amount of \$3,302.00, which comprised the bulk of the adjustment to miscellaneous deductions. The balance of the adjustments to miscellaneous deductions and contributions were not contested.

4. Petitioner Philip Zichello contended that the legal fees at issue were paid to defend his right to serve out his full term as a Civil Court Judge and that said fees were deductible under section 212 of the Internal Revenue Code.

5. Judge Zichello, who was elected to a ten year term in 1969, filed suit in Federal District Court in October of 1974, wherein he claimed that the statutory retirement age of 70 was discriminatory and, therefore, unconstitutional. Judge Zichello, who was then on the verge of reaching said age, filed the suit jointly with a man described as having voted for him.

6. In instituting said suit, which was ultimately lost, petitioner incurred legal expenses of \$3,302.00 for which a deduction was claimed during the year at issue. During the initial audit, the legal fees were fully substantiated. Accordingly, the only issue at hand were whether by nature the expenditure qualified as a deduction.

7. During the course of the hearing, the Audit Division maintained that the legal fees at issue were not a proper deduction within the meaning and intent of section 212 of the Internal Revenue Code. Its reasoning appeared to be that since the issue was a constitutional one, and the petitioner ultimately lost, such expenses were not deductible.

CONCLUSIONS OF LAW

A. That section 212 of the Internal Revenue Code reads in pertinent part:

"In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year ---

(1) for the production or collection of income; ..."

As observed in Morgan's Estate v. C.I.R., 332 F.2d 144,150 (5th Cir. 1964) "the exact line of demarcation" between deductible and non-deductible expenses incurred in litigation is not always, a perceptible one. In an attempt to ascertain these often elusive boundaries, the following guidelines are laid down by the Fifth Circuit:

"[the court] must look to the issues involved, the nature of the objectives of the suit in which the expenditures were made, the defenses asserted, the purpose for which the claimed deductions were expended, the background of the litigation, and all the facts pertaining to the entire controversy out of which the disputed expenses arose."

Since the facts adduced in the instant case show that the sole purpose of the litigation was for the continued production of income and maintenance of employment, the legal expenses of \$3,302.00 arising from such litigation are deemed to be a proper deduction within the meaning and intent of section 212 of the Internal Revenue Code, and Article 22 of the Tax Law.

B. That the adjustment to contributions of \$418.00 and the adjustment for the balance of miscellaneous deductions disallowed of \$82.00 are hereby sustained.

C. That the petition of Philip Zichello and Louise Zichello is granted to the extent provided in Conclusion of Law "A" supra, and that, said petition

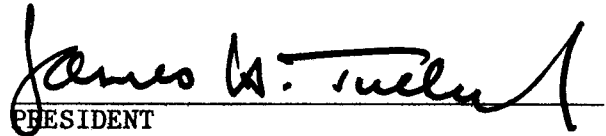
is in all other respects denied.

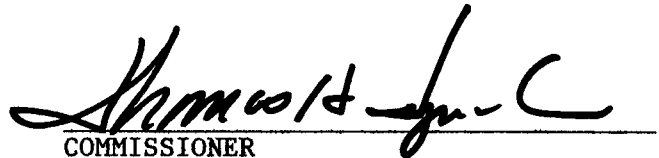
D. That the Audit Division is hereby directed to modify the Notice of Deficiency dated May 24, 1976 to be consistent with the determination rendered herein.


DATED: Albany, New York

STATE TAX COMMISSION

APR 17 1981


PRESIDENT


COMMISSIONER


COMMISSIONER