

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Anthony Cesare :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of NYS Personal
Income Tax under Article(s) 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.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 26th day of May, 1987, he/she served the within notice of Decision by certified mail upon Anthony Cesare the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Anthony Cesare
23 Hooper Court
East Northport, NY 11731

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
26th day of May, 1987.

Janet M. Snay

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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State of New York :
ss.:
County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 26th day of May, 1987, he served the within notice of Decision by certified mail upon Louis F. Brush, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Louis F. Brush
101 Front Street
Mineola, NY 11501

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
26th day of May, 1987.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

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

May 26, 1987

Anthony Cesare
23 Hooper Court
East Northport, NY 11731

Dear Mr. Cesare:

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 & 1312 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Louis F. Brush
101 Front Street
Mineola, NY 11501

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
ANTHONY CESARE
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.

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DECISION

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.

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. 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 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.

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.

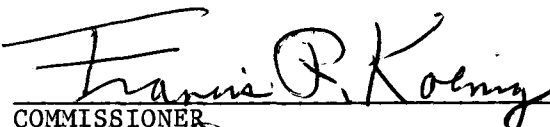
D. That the petition of Anthony Cesare is denied and the Notice of Deficiency issued April 8, 1983 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 26 1987


PRESIDENT


COMMISSIONER


COMMISSIONER