

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Charles Messina : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for :
Refund of New York State Personal Income Tax :
under Article 22 of the Tax Law and New York :
City Personal Income Tax under Chapter 46, Title :
T of the Administrative Code of the City of :
New York for the Year 1978. :

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 29th day of May, 1987, he/she served the within notice of decision by certified mail upon Charles Messina the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

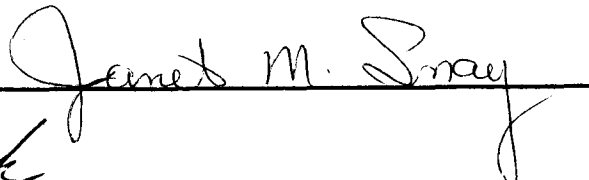
Charles Messina
82 Piedmont Avenue
Staten Island, NY 11530

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
29th day of May, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Charles Messina :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for :
Refund of New York State Personal Income Tax
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T of the Administrative Code of the City of :
New York for the Year 1978.

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 29th 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:

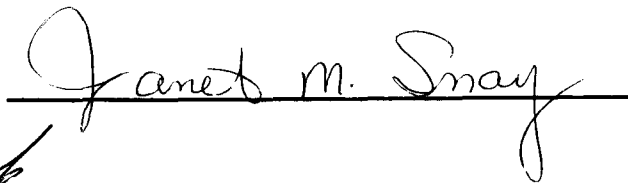
Louis F. Brush
101 Front Street
Mineola, NY 11501

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
29th day of May, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



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

May 29, 1987

Charles Messina
82 Piedmont Avenue
Staten Island, NY 11530

Dear Mr. Messina:

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

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In the Matter of the Petition	:	
of	:	
CHARLES MESSINA	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law and New York	:	
City Personal Income Tax under Chapter 46,	:	
Title T of the Administrative Code of the City	:	
of New York for the Year 1978.	:	

Petitioner, Charles Messina, 82 Piedmont Avenue, Staten Island, New York 11530, 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 New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the Year 1978 (File No. 37732).

On October 23, 1985, petitioner waived his right to a hearing and requested the State Tax Commission to render a decision based on the entire record contained in the file, with all briefs to be submitted by October 8, 1986. After due consideration, 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, Charles Messina, together with his wife, Anne Messina, timely filed a New York State and City income tax resident return for 1978, wherein they elected a filing status of "Married filing separately on one Return". On his portion of said return, Mr. Messina reported business income of \$9,416.00, while on her portion of the return Mrs. Messina reported wages and interest income totalling \$15,385.00. The following table details the manner in which Mr. Messina computed his business income:

<u>Income</u>		
Produce Buying Service	<u>\$11,684.00</u>	
Total Income		\$11,684.00
 <u>Expenses</u>		
Courtesies, Coffee, Etc. to Deliverers	\$ 164.00	
Car fares	293.00	
Safety Shoes	180.00	
Gloves	84.00	
Delivery Expenses Absorbed	187.00	
Over shipments	236.00	
Hospitality	841.00	
Dues	100.00	
Container Deposits Forfeited	<u>183.00</u>	
Total Expenses		<u>2,268.00</u>
Net Income		\$ 9,416.00

2. Attached to petitioner's 1978 return was a wage and tax statement issued to Mr. Messina by Food Fair, Inc. D.I.P., reporting wages, tips and other compensation of \$11,683.73. The statement is stamped with an arrow pointing to the \$11,683.73 figure with the legend "Included in Schedule C".

3. On March 24, 1982, the Audit Division issued a Statement of Audit Changes to petitioner Charles Messina and his spouse for the year 1978 which contained the following explanation:

"Deductions shown on Schedule C are disallowed since they are not considered ordinary and necessary in the production of income as an employee.

Your tax liability is recomputed to your best tax advantage.
Household credit disallowed since your total New York income is more than \$25,000.00."

4. The Audit Division recomputed petitioner's New York State and City income tax liability for 1978 as follows:

	Husband		Wife	
Wages	\$11,683.73		\$14,900.56	
Interest income	-0-		484.00	
Total Income	\$11,683.73		\$15,384.56	
Adjustments	-0-		352.00	
Total New York Income	\$11,683.73		\$15,032.56	
Less: Itemized deductions	-0-		3,849.00	
Exemptions	1,300.00		650.00	
Taxable Income	\$10,383.73		\$10,533.56	

	Husband		Wife		
	State	City	State	City	
Tax on Above	\$476.86	\$193.59	\$487.35	\$197.35	
Resident tax credit	-0-	-0-	482.51	-0-	
Balance	\$476.86	\$193.59	\$ 4.84	\$197.35	
Tax previously stated	309.46	138.67	-0-	197.35	
ADDITIONAL TAX DUE	\$167.40	\$ 54.92	\$ 4.84	\$ -0-	\$227.16

5. Based on the aforementioned Statement of Audit Changes, the Audit Division, on April 14, 1982, issued a Notice of Deficiency to petitioner for 1978, asserting additional New York State and City tax due of \$222.32 as indicated above, plus interest.

6. Petitioner's tax return was selected for examination along with those of approximately 100 other individuals on the basis that the 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 Charles Messina's claimed Schedule C deductions were disallowed on that basis.

7. Petitioner submitted documentary evidence in the form of an affidavit and worksheets in substantiation of the business expenses claimed on his Federal Schedule C. However, the evidence submitted did not relate to a characterization of the expenses as business rather than personal.

8. 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 was 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 did 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 and capricious. The return was patently erroneous and the Audit Division was justified in disallowing the business expenses claimed by petitioner on his Federal Schedule C. 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 to income 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 failed to sustain his burden of proof (Tax Law § 689[e]; Administrative Code § T46-189.0[e]) to show (i) that Charles Messina was engaged in a trade or business other than as an employee (Internal Revenue Code § 62[1]); (ii) that the expenses in question were trade or business deductions of an employee, deductible pursuant to Internal Revenue Code § 62(2); and (iii) that the expenses in question were ordinary and necessary business expenses, deductible under Internal Revenue Code § 162(a).


D. That the petition of Charles Messina is denied and the Notice of Deficiency dated April 14, 1982 is sustained in full, together with such additional interest as may be lawfully due and owing.

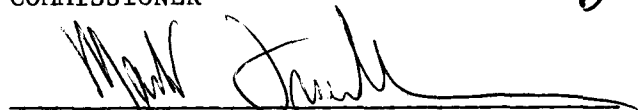
DATED: Albany, New York

STATE TAX COMMISSION

MAY 29 1987


PRESIDENT


COMMISSIONER


COMMISSIONER