

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of
John R. Buzzerio :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income :
Tax under Article(s) 22 of the Tax Law :
for the Years 1978 & 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 6th day of April, 1987, he/she served the within notice of decision by certified mail upon John R. Buzzerio the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John R. Buzzerio
581 Pauley Drive
West Hempstead, NY 11552

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
6th day of April, 1987.



Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

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of

John R. Buzzerio

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ss.:

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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 6th day of April, 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
6th day of April, 1987.

Janet M. Snay

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

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

April 6, 1987

John R. Buzzerio
581 Pauley Drive
West Hempstead, NY 11552

Dear Mr. Buzzerio:

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, 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

JOHN R. BUZZERIO

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1978 and 1979.

DECISION

Petitioner, John R. Buzzerio, 581 Pauley Drive, West Hempstead, New York 11552, 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 1978 and 1979 (File Nos. 37725 and 42516).

On October 23, 1985, petitioner waived a hearing before the State Tax Commission and submitted the matter for decision based on the Audit Division file, as well as a brief and additional documents to be submitted by October 8, 1986. After due consideration of the record, the State Tax Commission hereby renders the following decision.

ISSUES

I. Whether the notices of deficiency were 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 years at issue.

III. Whether petitioner has substantiated the character and amount of business expenses claimed as deductions from gross income for the years at issue.

FINDINGS OF FACT

1. (a) Petitioner, John R. Buzzerio, filed a New York State Income Tax Resident Return for 1978, on which he stated his occupation to be "Design Engineer".

(b) Petitioner reported \$19,576.00 in business income, \$1,058.00 as a 50 percent capital gain distribution, \$514.00 in interest income and \$3,402.00 in "other income" for a total of \$24,550.00.

(c) Petitioner filed a Schedule C, Form 1040, for 1978 stating his main business activity to be "Linkage & Cam Engineer". The schedule showed the following revenues and expenses:

"Schedule C - Income From Business Or Profession - Engineering: Cams

Revenues		\$27328
Expenses		
Materials - Purch. Exp. (6800 @ 17¢)	\$1156	
Metal, Motors	892	
Tools, Bits	483	
Telephone Alloc.	240	
Prospecting: Contractors	2681	
Tolls	48	
Parking	125	
Accounting	100	
Blue Prints, Messengers, Etc.	844	
Newspapers, Magazines, Etc.	392	
Postage	63	
Office Supplies	134	
Hospitality	94	
Finders Fees	500	7752
Net Income		<u>\$19576"</u>

(d) Petitioner filed a New York State Unincorporated Business Tax Return for 1978, reporting a net profit of \$19,576.00 with \$27,328.00 in subtractions, resulting in a net loss of \$7,752.00.

(e) Two wage and tax statements issued to petitioner were attached to his income tax return. One was issued by Owens-Illinois, Inc. in the amount of \$18,822.80 and stated that petitioner was covered by a pension plan. The other

was issued by the Photo Circuits Division of Kollmorgen Corporation in the amount of \$8,505.00 and stated that petitioner was not covered by a pension plan. Federal and state income taxes and FICA were withheld by each firm. Each statement was stamped with the legend "Included in Schedule C" with an arrow pointing to the amount of income shown.

A Form W-2P issued by Wachovia Bank & Trust Co., N.A., as "Trustee O-I Salary Trust", in the amount of \$1,425.88 was also attached to the return.

(f) Petitioner itemized deductions and deducted \$458.00 in miscellaneous deductions for 1978.

2. (a) Petitioner filed a New York State Income Tax Resident Return for 1979 on which he again stated his occupation to be "Design Engineer".

(b) Petitioner reported \$14,131.00 in business income, \$4,278.00 as a taxable pension or annuity, \$706.00 in interest and \$62.00 as a state tax refund.

(c) Petitioner filed a Schedule C, Form 1040, for 1979, again stating his main business activity as "Linkage & Cam Engineer". The schedule showed the following revenues and expenses:

"Schedule C - Income From Business Or Profession - Engineering: Cams

Revenues		\$21883
Expenses		
Materials - Purch. Exp. (6820 @ 18½¢)	\$1252	
Metal, Motors	796	
Tools, Bits	511	
Telephone Alloc.	240	
Prospecting: Contractors	2714	
Tolls	44	
Parking	139	
Accounting	100	
Blue Prints, Messengers, Etc.	802	
Newspapers, Magazines, Etc.	305	
Postage	67	
Office Supplies	138	
Hospitality	194	
Finders Fees	450	7752
Net Income		<u>\$14131"</u>

(d) Petitioner filed a New York State Unincorporated Business Tax Return for 1979, reporting a net profit of \$14,131.00 with \$21,883.00 in subtractions, resulting in a net loss of \$7,752.00. The legend "FICA Wages Included in Schedule C" was stamped on the return, with an arrow pointing to the subtractions.

(e) Three wage and tax statements issued to petitioner were attached to petitioner's income tax return. One was issued by PMI Motors Division, Kollmorgen Corporation, in the amount of \$5,821.92. A second was issued by Bulova Systems & Instruments Corp. in the amount of \$5,091.91. The third was issued by Esselte Pendaflex Corp. in the amount of \$10,969.29. Each statement was stamped with the legend "FICA Wages Included in Schedule C" with an arrow pointing to the amount of income stated. Each statement also indicated that petitioner was not covered by a pension plan.

A Form W-2P issued by Wachovia Bank & Trust Co., N.A., as "Trustee O-I Salary Trust", in the amount of \$4,277.64 was also attached to the return.

(f) Petitioner itemized deductions and deducted \$468.00 in miscellaneous deductions for 1979.

3. Petitioner's tax returns were selected for examination along with those of approximately 100 other individuals on the basis that said 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's claimed Schedule C deductions were disallowed on that basis.

4. (a) On March 24, 1982, the Audit Division issued a Statement of Audit Changes to petitioner for 1978, stating as follows:

"The expenses claimed are not ordinary and necessary for the production of income for an employee.

The trust income from Wachovia Bank & Trust Company is included in New York income at line 11(c), Schedule A.

You are allowed a tax benefit as computed on Form IT-250, based on personal service income."

Additional tax due was computed at \$1,171.68. On April 14, 1982, the Audit Division issued a Notice of Deficiency for 1978 to petitioner in the amount of \$1,171.68, plus interest.

(b) On February 1, 1983, the Audit Division issued a Statement of Audit Changes to petitioner for 1979, stating as follows:

"As a salaried employee, you are not a business entity and therefore are not entitled to claim Schedule C Deductions as these expenses are not ordinary and necessary for the production of income as an employee."

Additional tax due was computed at \$788.88. On April 8, 1983, the Audit Division issued a Notice of Deficiency for 1979 to petitioner in the amount of \$788.88, plus interest.

5. From materials submitted by petitioner, it appears that petitioner worked for Owens-Illinois, Inc. from 1965 until July 1978, when the firm's business operations moved to Toledo, Ohio. He then took the Kollmorgen Corporation job on an interim basis and started with Bulova in March 1979, as project engineer for industrial timers. The status of petitioner's relationship with Esselte Pendaflex Corporation is unclear. Cancelled checks and other documents submitted by petitioner failed to show that he was engaged in business as a design engineer during the years at issue.

6. Petitioner contends:

(a) that the notices of deficiency were 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 is part 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.

7. The adjustment for the income from Wachovia Bank & Trust Co., N.A. for 1978, does not appear to be in issue.

CONCLUSIONS OF LAW

A. That the notices of deficiency were properly issued and were not arbitrary or capricious. The returns were patently erroneous and the Audit Division was justified in disallowing the Schedule C business income and expenses. The notices of deficiency for each year were preceded by statements of audit changes; thus, petitioner had an opportunity to file amended returns 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 returns were 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 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 even if petitioner may have been entitled to deduct certain employee business expenses under sections 62(2) or 63(f) of the Internal Revenue Code if he had filed Form 2106, or had claimed such expenses as miscellaneous deductions, petitioner nevertheless failed to sustain his burden of proof under section 689(e) of the Tax Law to show the character or, in many cases, the amount of the claimed business expenses.

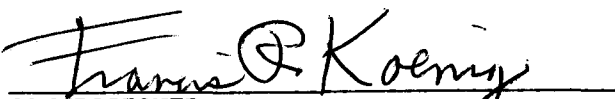
E. That the petition of John R. Buzzerio is denied and the notices of deficiency issued on April 14, 1982 and April 8, 1983, are sustained.

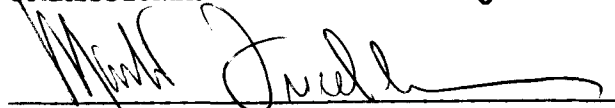
DATED: Albany, New York

STATE TAX COMMISSION

APR 06 1987


PRESIDENT


COMMISSIONER


COMMISSIONER