

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
George C. Trovato : 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 17th day of April, 1987, he/she served the within notice of Decision by certified mail upon George C. Trovato the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

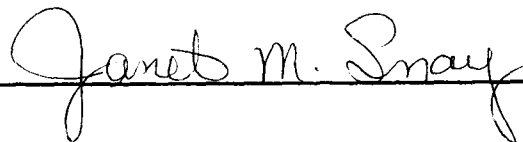
George C. Trovato
68 Massapequa Ave.
Massapequa, NY 11758

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
17th day of April, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

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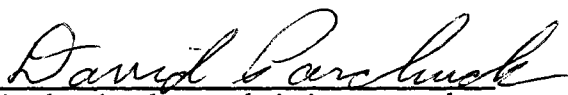
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 17th day of April, 1987, he served the within notice of Decision by certified mail upon Louis F. Brush, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

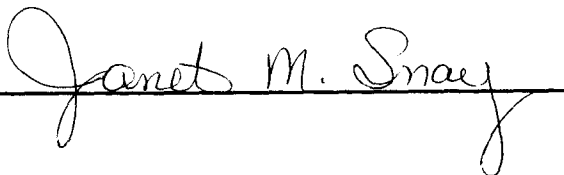
Louis F. Brush
101 Front St.
Mineola, NY 11501

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
17th day of April, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



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

April 17, 1987

George C. Trovato
68 Massapequa Ave.
Massapequa, NY 11758

Dear Mr. Trovato:

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 St.
Mineola, NY 11501

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions

of

GEORGE C. TROVATO

DECISION

for Redetermination of Deficiencies or for
Refunds of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1978 and 1979.

Petitioner, George C. Trovato, 68 Massapequa Avenue, Massapequa, New York 11758, filed petitions for redetermination of deficiencies or for refunds of personal income tax under Article 22 of the Tax Law for the years 1978 and 1979 (File Nos. 37558 and 45355).

A hearing was commenced before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 22, 1985 at 9:30 A.M., and continued sine die. Petitioner appeared by Louis F. Brush, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel). Subsequently petitioner waived his right to a hearing and requested the State Tax Commission to render a decision based upon the entire record contained in his file, with all briefs submitted by October 8, 1986.

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 the petitioner has substantiated that he was engaged in a trade or business during the years at issue.

III. Whether the 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. Petitioner, George C. Trovato, filed New York State income tax resident returns for the years 1978 and 1979, and an unincorporated business tax return for the year 1979. The return filed by petitioner for 1978 was filed late on May 8, 1979.

(a) The 1978 income tax return listed petitioner's occupation as "court reporting service" and his wife's occupation as "office aide", and reported total income of \$18,846.00, consisting of \$9,183.00 in business income, \$1,863.00 in interest income and \$7,800.00 in "other" income.

(i) The copy of Federal Schedule C attached to the return showed "income" of \$27,336.00 from teaching, Nassau County Family Court and the State of New York. The following expenses were listed beneath said income:

Payments to office aide, Mary Trovato (reported as "other income" on form 1040, page 1, line 20)	\$ 7,800.00
Telephone	600.00
Maintenance	600.00
Messengers	520.00
Postage	120.00
Office supplies	845.00
Photocopies	209.00
Travel	2,361.00
Meeting & promotion	974.00
Hospitality in office	842.00
Dues & memberships	265.00
Depreciation on office equipment	392.00
Tolls, parking	380.00
Professional development	175.00
Accounting	125.00
Insurance	169.00
Equipment maintenance	520.00

Outside services	273.00
Newspapers, magazines, etc.	292.00
Qualifying tests	60.00
Advertising	<u>631.00</u>
Total Expenses	\$18,153.00

The \$18,153.00 in expenses was deducted from income of \$27,336.00 and resulted in \$9,183.00 net business income reported.

(ii) Wage and tax statements attached to the return showed \$1,450.00 in "wages, tips, other compensation" from Adelphi Business School of Mineola, New York, "wages, tips, other compensation" of \$1,140.00 from Verbatim, Inc. of Hicksville, New York and "wages, tips, other compensation" in the sum of \$23,999.47 from the State of New York. Each statement is stamped with an arrow pointing to the amount in the box entitled "wages, tips, other compensation" with the legend "Included in Schedule C".

(b) The 1979 return listed petitioner's occupation as "court reporting service" and petitioner's wife's occupation as "office aide" and reported \$19,694.00 in total income, consisting of \$10,709.00 in business income, \$1,185.00 in interest income and \$7,800.00 in "other" income.

(i) The Federal Schedule C attached to said return showed income of \$30,299.00, consisting of teaching income of \$1,320.00, Nassau County Family Court income of \$24,019.00, County of Nassau income of \$3,297.00 and other income of \$1,663.00. The following expenses were listed beneath said income:

Payments to office aide: Mary Trovato	\$ 7,800.00*
Telephone	840.00
Maintenance	600.00
Messengers	535.00
Postage	182.00
Office supplies	947.00
Photocopies	213.00
Travel	3,671.00
Solicitation expense	497.00

Office hospitality	731.00
Dues & memberships	354.00
Depreciation on office equipment	392.00
Tolls & parking	394.00
Typing	477.00
Accounting	125.00
Insurance	169.00
Outside services & repairs	380.00
Newspapers, magazines, etc.	338.00
Professional development & test expense	225.00
Advertising & promotion	236.00
Telephone (outside)	<u>484.00</u>
Total Expenses	\$21,590.00

* Reported as "other income" on Form 1040, page 1, line 21

The \$21,590.00 in total expenses was deducted from income of \$30,299.00 and resulted in \$10,709.00 net business income reported.

(ii) The wage and tax statements attached to the return showed "wages, tips, other compensation" from the County of Nassau of \$3,297.23, "wages, tips, other compensation" of \$1,320.00 from SILI Schools, Ltd., "wages, tips, other compensation" of \$1,450.00 from Verbatim, Inc., and "wages, tips, other compensation" of \$24,018.57 from the State of New York. On each of the wage and tax statements, a stamped arrow with the legend "Included in Schedule C" pointed to the compensation listed under "wages, tips, other compensation".

(iii) The unincorporated business tax return for 1979 showed \$10,709.00 in net profit, less \$28,636.00 in subtractions, resulting in a loss from business of \$17,927.00. Accordingly, no unincorporated business tax was shown as due.

(c) For each of the years at issue, petitioner itemized his deductions as follows:

1978

Medical & dental expense	\$ 242.00
Taxes	4,041.00
Interest	3,538.00
Contributions	408.00
Total Federal Itemized Deductions	<u>\$8,229.00</u>
Less: Income taxes included in total	414.00
New York Itemized Deductions	<u>\$7,815.00</u>

1979

Medical & dental expense	\$ 2,376.00
Taxes	3,951.00
Interest	3,514.00
Contributions	467.00
Total Federal Itemized Deductions	<u>\$10,308.00</u>
Less: Income taxes included in total	346.00
New York Itemized Deductions	<u>\$ 9,962.00</u>

2. 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.

3. (a) On March 22, 1982, the Audit Division issued a Statement of Audit Changes to petitioner for the year 1978, asserting additional personal income tax due of \$1,021.72. The following explanation was given for said additional tax:

"Amount deducted as Schedule C expenses is not considered ordinary and necessary expense in production of income earned as an employee.

No household credit is allowable, since household gross income exceeds \$25,000.00.

Child care credit is applied only to tax of the spouse having the smaller New York taxable income."

On April 6, 1982, the Audit Division issued a Notice of Deficiency to petitioner for additional tax due of \$1,021.72, plus penalty of \$51.09 for late filing, and interest of \$291.72, for a total amount due of \$1,364.53.

(b) On January 20, 1983, the Audit Division issued a Statement of Audit Changes to petitioner for tax year 1979, asserting additional tax due of \$1,038.14. The following explanation was given for said additional tax:

"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.

Your New York State liability has been recomputed on a joint basis, since this results in a lower tax.

Since household gross income now exceeds \$25,000.00, no household credit is allowed."

On April 8, 1983, the Audit Division issued a Notice of Deficiency to petitioner stating additional tax due of \$1,038.14 and interest of \$345.08 for a total amount due of \$1,383.22.

4. Petitioner attended and testified at the hearing on October 22, 1985 and also submitted substantial documentary evidence, to wit:

(a) Numerous receipts and invoices for courier services, postal charges, photocopy charges, automobile repair bills, equipment repairs, advertising expenses, dues and professional fees and Department of Motor Vehicle charges.

(b) Petitioner also submitted a complete copy of his Federal Form 1040 and attached schedules, additional copies of his wage and tax statements,

his 1978 desk calendar showing appointments, New York telephone bills, electric company bills, printing bills, and other substantiation of home office expenses. Petitioner also submitted his desk calendar for 1979, a complete copy of his Federal Form 1040, his pay stubs from the State of New York for the year 1979, and further substantiation of the expenses listed on his Schedule C for the year 1979.

5. Petitioner contends 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. Petitioner also contends that the deficiencies were arbitrary and capricious because an audit was never conducted and that the deficiencies were based upon the erroneous assumption that the expenses claimed were not ordinary and necessary. Petitioner asserts that the expenses were deductible as ordinary and necessary business expenses under section 162 of the Internal Revenue Code and/or deductible for the production or maintenance of income under section 212 of the Internal Revenue Code. Finally, petitioner contends that, regardless of the classifications of the different Internal Revenue Service code sections, the taxable income of petitioner is unchanged.

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. Each Notice of Deficiency was preceded by a Statement of Audit Changes and petitioner had an opportunity to file amended returns claiming

employee business expenses as adjustments on Federal Form 2106, or as itemized miscellaneous deductions, but he 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 while it would appear that 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 a Form 2106, or had itemized his deductions and 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 petitions of George C. Trovato are denied and the notices of deficiency issued on April 6, 1982 and April 8, 1983 are sustained, together with such additional penalty and interest as may be lawfully owing.

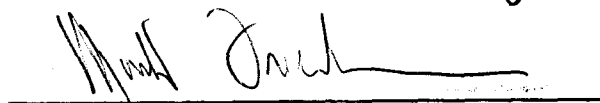
DATED: Albany, New York

STATE TAX COMMISSION

APR 17 1987


PRESIDENT


COMMISSIONER


COMMISSIONER