

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Charles E. McCarthy

:

:

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 Year 1968.

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 16th day of January, 1987, he/she served the within notice of Decision by certified mail upon Charles E. McCarthy the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Charles E. McCarthy
8 Deerhill Road
Demarest, NJ 07627

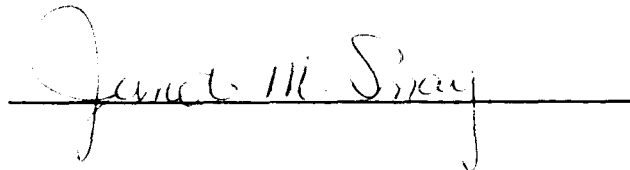
and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

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
16th day of January, 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 E. McCarthy :

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 Year 1968.

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 16th day of January, 1987, he served the within notice of Decision by certified mail upon Angelo Amato, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

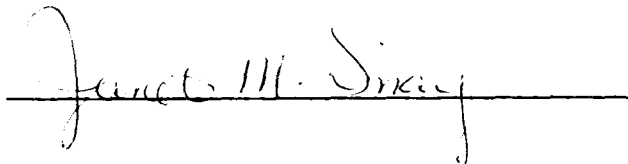
Angelo Amato
45 Legion Dr.
Cresskill, NJ 07626

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
16th day of January, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



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

January 16, 1987

Charles E. McCarthy
8 Deerhill Road
Demarest, NJ 07627

Dear Mr. McCarthy:

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:
Angelo Amato
45 Legion Dr.
Cresskill, NJ 07626

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
CHARLES E. McCARTHY
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Year 1968.

DECISION

Petitioner, Charles E. McCarthy, 8 Deerhill Road, Demarest, New Jersey 07627, 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 1968 (File No. 01229).

A hearing was commenced before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 25, 1986 at 9:45 A.M. and continued to conclusion on May 13, 1986 at 1:15 P.M., with additional evidence to be submitted by August 5, 1986. Petitioner appeared by Harry Cohen, Esq. and Angelo Amato, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Lawrence Newman, Esq., of counsel).

ISSUES

- I. Whether petitioner may allocate a portion of his income to non-New York sources based on days worked outside of New York.
- II. Whether the Audit Division properly disallowed petitioner's deductions for employee business, travel and entertainment expenses.

FINDINGS OF FACT

1. Petitioner, Charles E. McCarthy, a New Jersey resident during the period under consideration, timely filed a New York State Nonresident Income Tax Return for 1968. Mr. McCarthy was the president and national sales officer

of Leath, McCarthy and Maynard, Inc. ("Leath"), a manufacturer of hosiery and other items with principal offices and facilities in North Carolina.

2. In 1968 Mr. McCarthy reported New York State income from wages of \$90,000.00, plus income of \$360.95 received from insurance premiums. He adjusted this income by deducting \$18,459.37 which he claimed to be employee business expenses.¹ He allocated the resulting income to sources within and without New York State, using a percentage arrived at by dividing 132, representing the number of days worked within the State, by 221, representing the total number of days worked.

3. On July 26, 1971, the Income Tax Bureau issued to Mr. McCarthy a Statement of Audit Changes for the year 1968, explaining that both the allocation of income to sources outside of New York State and the claimed business expenses were being disallowed in full because of Mr. McCarthy's failure to reply to two letters which had requested substantiating information. Based on the Statement of Audit Changes, the Audit Division, on the same date, issued against Mr. McCarthy a Notice of Deficiency in the amount of \$6,015.04 for the year 1968, plus interest.²

4. As his employer's sales representative, Mr. McCarthy was required to travel to various states to meet with store managers, buyers and other customers and to visit stores where his company's products were displayed. He was also

1 The individual expenses listed on an attached schedule total \$18,240.87, rather than the amount claimed.

2 Mr. McCarthy timely protested this Notice. Following a hearing, the State Tax Commission issued a decision (Matter of Charles E. McCarthy, State Tax Commission, October 2, 1981). Upon Mr. McCarthy's request, the Commission vacated its decision on or about December 5, 1983 and granted a rehearing.

extremely active in the United Cerebral Palsy Foundation ("the Foundation"), and each year he helped to organize a pro-amateur golf tournament in New Jersey for the benefit of the Foundation. He enlisted the aid of his business customers and associates to help with this activity. Mr. McCarthy considered his work with the Foundation to be primarily motivated by business concerns. Consequently, he included days he worked in New Jersey on behalf of the Foundation in his New York State wage allocation formula. He also included certain entertainment expenses incurred in planning and organizing the golf tournament in his employee business expenses.

5. Mr. McCarthy's personal datebook for 1968 and a series of cancelled checks were submitted to show the number of days worked outside New York and to substantiate his business expenditures. Entries in the datebook were very sparse and often illegible. From these and from his personal knowledge and memory, Mr. McCarthy prepared three schedules as follows:

Schedule 1 consisted of a day-by-day listing of Mr. McCarthy's business meals and other activities. It was essentially an expanded version of his datebook.

Schedule 2 was a list of 114 days which Mr. McCarthy spent outside of New York. It provided dates, locations and a very brief explanation of the activity engaged in. In many cases, the explanation consisted of no more than the name of a company and an individual associated with that company.

Schedule 3 was a listing of total monthly expenditures for entertainment and travel. These charges were segregated by business establishment where the expense was incurred, and within each establishment were listed

dates, the person(s) entertained and each person's business affiliation.

6. On his 1968 tax return, Mr. McCarthy claimed to have worked outside of New York State on 89 days out of a total of 221 work days. Schedule "2" listed 114 days spent outside of New York State by Mr. McCarthy. In order to determine the number of days he spent outside of New York State for work, the documents described in Finding of Fact "5" were cross-referenced and reconciled. In some cases, days claimed to have been worked outside of New York on Schedule "2" were not supported or were contradicted by the datebook or by Schedules "1" and "3". Days spent outside of New York, as shown on Schedule "2", included days on which Mr. McCarthy engaged in such social activities as golf and duck hunting. These were included based on the general proposition that such activities were engaged in with business associates and necessary to maintain business contacts. Also included were 28 days spent in New Jersey on activities associated with the Foundation golf tournament. The documents confirmed that Mr. McCarthy spent 41 days outside of New York visiting stores, meeting with customers and attending meetings at Leath's headquarters in North Carolina.

7. Employee business expenses listed on Mr. McCarthy's 1968 tax return were compared with the cancelled checks and the three schedules to determine whether payment of the expense had been substantiated and whether the expenditure was a deductible business expense.

8. There were no cancelled checks or other evidence to substantiate payment of the following deductions claimed on Mr. McCarthy's 1968 return:

<u>Expense</u>	<u>Deduction Claimed</u>
Tenafly Wines	\$ 131.13
Bryant's	51.38
The Ledges	182.50
Liberty Music	31.45

Charles & Co.	13.60
Diners Club	14.00
Avis Rent A Car	108.51
Howard Johnson	518.00
Ivy Lane Auto Service	49.15
Total	<u>\$1,099.72</u>

9. With minor discrepancies, cancelled checks substantiated payment of the following expenditures, but no evidence or explanation was offered to show that the expense was related to a business purpose:

<u>Expense</u>	<u>Deduction Claimed</u>	<u>Cancelled Check(s)</u>
Warren Hotel	\$ 108.73	\$ 108.73
La Comedie	10.95	10.95
Martin's Ticket Agency	204.90	152.40
E. F. Bronfam	199.50	199.50
Upper Montclair Country Club	18.80	18.80
Frank J. McCormac	60.75	175.40
Windam Mtn Club	391.50	391.50
Chalet Ski Club	15.00	15.00
Amwell Shooting Reserve	496.22	496.22
Statewide Leasing	3,063.81	2,985.58
Gulf Oil	343.61	343.61
Humble Oil Co.	489.08	489.08
Sun Oil	108.86	108.86
Mobil Oil	98.55	103.70
Insurance	<u>386.20</u>	<u>196.00</u>
Totals	\$5,996.46	\$5,795.33

10. Cancelled checks substantiated payment of the expenditures listed below. In addition, Schedule "3" showed that Mr. McCarthy entertained business associates or engaged in business meals at the various establishments shown. However, there was a significant discrepancy between the total amounts claimed by Mr. McCarthy on his 1968 tax return and the amounts shown to have been expended on business meals per Schedule "3". Furthermore, the deduction for American Express included not only business meals, but also entertainment expenses related to Foundation fundraising activities.

<u>Expense</u>	<u>Deduction Claimed</u>	<u>Cancelled Check(s)</u>	<u>Expense Per Log 3</u>
La Potinere	\$ 1,151.85	\$ 1,151.85	\$1,006.85
La Cote Basque	275.40	275.40	275.40

Clinton Inn	451.49	447.50	419.71
The Opera Club	540.81	540.81	410.64
Twenty One Club	320.41	320.41	278.28
La Toque Blanche	128.07	128.07	128.07
Vesuvio	251.30	168.25	168.35
Essex House	184.32	184.32	184.32
Toots Shor	79.35	79.35	79.35
American Express	2,655.50	2,873.50	2,767.35
Carte Blanche	394.36	394.36	387.36
New York Athletic Club	1,268.45	1,268.45	898.91 (meals) 183.75 (dues)
Knickerbocker Country Club	2,194.83	2,194.35	717.87
Air Travel	<u>1,248.58</u>	<u>1,202.48</u>	<u>849.33</u> ³
Totals	\$11,144.72	\$11,229.10	\$8,755.54

CONCLUSIONS OF LAW

A. That nonresident employees and corporate officers rendering services for an employer both within and without New York are entitled to apportion earned income in the same proportion that the number of days worked within New York compares to total work days for the period (Tax Law §632[c]; 20 NYCRR 131.18[a]).

B. That any deduction for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer (Kitman v. State Tax Commn., 92 AD2d 1018, lv denied 59 NY2d 603). The documents presented support Mr. McCarthy's claim that certain days were worked outside of New York. However, there were inconsistencies among the various documents and a significant lack of detail in the explanations provided. Furthermore, many work days claimed were spent in activities having, at best, dual social and business purposes. In view of Mr. McCarthy's failure to provide

3 The source of this figure is a series of billing invoices from Leath to Mr. McCarthy. Leath paid for Mr. McCarthy's air travel and was later reimbursed by him.

anything more than a general claim that all such activities were motivated by a business purpose, all such ambiguities and inconsistencies must be construed against his claim (Matter of Hunter and Gertrude Yager, State Tax Commission, April 25, 1984). In accordance with Finding of Fact "6", the number of days worked outside of New York by Mr. McCarthy is reduced to 41. The resultant allocation fraction by which Mr. McCarthy's income may be allocated to New York sources is 180 divided by 221.

C. That, generally speaking, the New York adjusted gross income of a nonresident includes all items of income, gain, loss and deduction which enter into Federal adjusted gross income to the extent that those items are connected with New York State sources (Tax Law §632[a]; 20 NYCRR 131.1). Accordingly, employee expenses for business, travel and entertainment incurred in connection with employment are deductible items. However, when an expense deduction is disallowed by the Audit Division, the taxpayer bears the burden of proving that he or she is entitled to the deduction (Tax Law §689[e]).

D. That Mr. McCarthy failed to substantiate payment of the expenses listed in Finding of Fact "8", and, while he provided proof of payment of the expenses listed in Finding of Fact "9", he failed to show the business purpose of any of those items. Accordingly, he is not entitled to the deductions claimed for these expenses.

E. That Mr. McCarthy substantiated certain business meals and entertainment expenses by providing cancelled checks and schedules containing information regarding the time, place and business purpose of the expenses and the business relationship of the person or persons entertained. However, the American Express charges included both business expenses and expenses related to his activities with the Foundation. Petitioner's claim that his association with

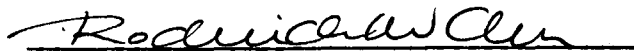
the Foundation served primarily a business rather than a charitable purpose is not credible. Because the American Express charges were stated as a total monthly expense, making it impossible to differentiate between business meals and other expenses, the entire claim is disallowed. Furthermore, as shown in Finding of Fact "10", there are discrepancies between the deductions claimed by Mr. McCarthy and the amounts shown to have been expended for business purposes. Inasmuch as Mr. McCarthy offered no explanation for the discrepancies, deductible business expenses are reduced to expenses shown on Schedule "3" minus the American Express charges or a total of \$5,988.19.


F. That the petition of Charles E. McCarthy is granted to the extent indicated in Conclusions of Law "B" and "E"; that the Notice of Deficiency issued on July 26, 1971 shall be modified accordingly; and that, in all other respects, the petition is denied.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 16 1987


PRESIDENT


COMMISSIONER


COMMISSIONER