

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of  
ROLAND & MARGARET E. PASSERO : AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :  
a Revision of a Determination or a Refund  
of Personal Income & Unincorporated Business  
Taxes under Article(s) 22 & 23 of the  
Tax Law for the Year(s) ~~xxx Period(s)~~ 1966, :  
1967 & 1968

State of New York  
County of Albany

Denise Burke , being duly sworn, deposes and says that  
she is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 28th day of September , 19 76, she served the within  
Notice of Decision by (certified) mail upon Roland & Margaret E.  
Passero ~~(representative of)~~ the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Roland & Margaret E. Passero  
1840 Linwood Avenue  
Niagara Falls, N.Y. 14305  
and by depositing same enclosed in a postpaid properly addressed wrapper in a  
(post office or official depository) 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~~  
~~xxx 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

28th day of September , 1976

Denise Burke

Janet Mac



STATE OF NEW YORK  
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION

TAX APPEALS BUREAU  
STATE CAMPUS  
ALBANY, N.Y. 12227

ADDRESS YOUR REPLY TO

TELEPHONE: (518) **457-3850**

**September 28, 1976**

**Roland & Margaret E. Passero**  
**1840 Linwood Avenue**  
**Niagara Falls, N.Y. 14305**

**Dear Mr. & Mrs. Passero:**

Please take notice of the **DECISION**  
of the State Tax Commission enclosed herewith.

Please take further notice that pursuant to  
Section(s) **690 & 722** of the Tax Law, any  
proceeding in court to review an adverse deci-  
sion must be commenced within **4 months**  
from the date of this notice.

Inquiries concerning the computation of tax  
due or refund allowed in accordance with this  
decision or concerning any other matter relative  
hereto may be addressed to the undersigned. They  
will be referred to the proper party for reply.

Very truly yours,

**Paul B. Coburn**  
**Supervising Tax**  
**Hearing Officer**

Enc.

cc: ~~Petitioner's Representative:~~

Taxing Bureau's Representative:

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
ROLAND PASSERO and MARGARET E. PASSERO	:	DECISION
for a Redetermination of a Deficiency or	:	
for Refund of Personal Income and	:	
Unincorporated Business Taxes under	:	
Articles 22 and 23 of the Tax Law for the	:	
Years 1966, 1967 and 1968.	:	

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Petitioners, Roland Passero and Margaret E. Passero, residing at 1840 Linwood Avenue, Niagara Falls, New York 14305, have filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1966, 1967 and 1968. (File No. 01801).

A formal hearing was held before L. Robert Leisner, Hearing Officer, at the offices of the State Tax Commission, State Office Building, Buffalo, New York, on September 11, 1974, at 9:30 A.M. Petitioner appeared in person and for his wife, Margaret E. Passero. The Income Tax Bureau appeared by Saul Heckelman, Esq., (James Scott, Esq., of counsel).

ISSUES

I. Whether petitioner, Roland Passero, correctly computed and deducted his 1969 net operating loss from his 1966 unincorporated business income.

II. Whether petitioners, Roland Passero and Margaret E. Passero, may properly apply income averaging and the investment tax credit provided for in the Internal Revenue Code, in the computation of their New York State personal income tax for the year 1968.

FINDINGS OF FACT

1. Petitioners, Roland Passero and Margaret E. Passero, filed joint New York State resident income tax returns for the years 1966, 1967 and 1968. Petitioner, Roland Passero, filed New York State unincorporated business tax returns for said years.

2. On October 26, 1970, the Income Tax Bureau issued a Statement of Audit Changes against petitioners, Roland Passero and Margaret E. Passero, for personal income and unincorporated business taxes due in the year 1968. In accordance with the aforesaid Statement of Audit Changes, it issued a Notice of Deficiency against petitioners for \$3,253.76 plus interest of \$298.70.

3. On November 2, 1971, petitioners, Roland Passero and Margaret E. Passero, filed claims for refunds of personal income tax of \$101.69 for the year 1966 and \$124.44 for the year 1968. On the aforesaid date, petitioner, Roland Passero, also filed a claim for refund of unincorporated business tax of \$902.94 for the year 1968. The Income Tax Bureau allowed petitioners a refund of \$96.30 in personal income tax for the year 1966 but disallowed the remaining claims for refunds.

4. Petitioner, Roland Passero, incurred a net operating loss in the year 1969 of \$7,272.77. Petitioners, Roland Passero and Margaret E. Passero, "carried back" said operating loss in computing personal income and unincorporated business taxes for the year 1966. With the inclusion of the aforesaid net operating loss, petitioners computed a personal income tax refund of \$101.69 for the year 1966.

5. Petitioner, Roland Passero, used the 1969 net operating loss incorrectly to offset his unincorporated business income for the year 1966. Petitioners incorrectly added the 20% allowance for taxpayers services and the \$5,000.00 exemption provided for in Article 23 of the Tax Law to the \$7,272.77 net operating loss for 1969. Thus, petitioner computed a \$13,727.33 net operating loss for unincorporated business tax purposes. He used the aforesaid amount as a "loss carryback" to offset his 1966, 1967 and 1968 adjusted gross unincorporated business incomes, after initially subtracting from said incomes the 20% allowance for taxpayer services and the \$5,000.00 exemption. Subsequently, he incorrectly computed an unincorporated business tax refund of \$902.94 for the year 1968.

6. The Income Tax Bureau computed petitioner, Roland Passero's net operating loss in 1969 for unincorporated business tax purposes at \$7,272.77. It "carried back" said amount to 1966 to offset petitioner's adjusted gross unincorporated business income of \$7,554.66. Thus, petitioner's adjusted gross income for said year totally absorbed his net operating loss. Since petitioner paid no

unincorporated business tax in 1966, no refund was due for said year. With no net operating loss remaining to be "carried forward" to future years, the Income Tax Bureau disallowed petitioner's request for a refund in the year 1968.

7. Petitioners, Roland Passero and Margaret E. Passero, used income averaging and the Federal investment tax credit in the computation of their New York State personal income tax for the year 1968. Subsequently, petitioners filed a claim for a refund for said year. The Income Tax Bureau disallowed the investment tax credit and the use of income averaging. Petitioner's refund was denied and a deficiency for unpaid personal income and unincorporated business taxes for the year 1968 was issued.

#### CONCLUSIONS OF LAW

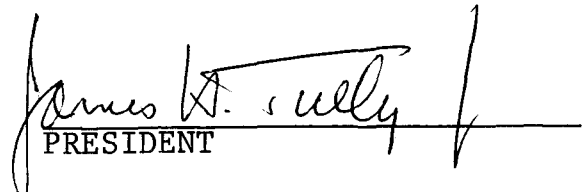
A. That petitioner, Roland Passero, had the same net operating loss for both personal income and unincorporated business tax purposes. The net operating loss for unincorporated business tax purposes is computed without reference to the personal service credit or the \$5,000.00 exemption. The \$7,272.77 net operating loss for 1969 had to initially offset petitioner's unincorporated business income of \$7,554.66 for the year 1966 in the computation of petitioner's adjusted gross income. With the net operating loss totally absorbed, no refund of unincorporated business tax was forthcoming for the years 1966, 1967 or 1968. The Income Tax Bureau properly disallowed petitioner's claim for a refund of unincorporated business tax in 1968, and properly issued a deficiency for unpaid unincorporated business tax for said year.

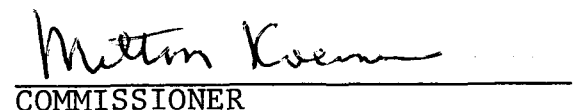
B. That income averaging is not permitted under Article 22 of the Tax Law in the computation of New York State personal income tax. Federal income averaging deals with the computation of the Federal tax itself rather than the amount of Federal adjusted gross income reportable for the taxable year. Thus, it is disregarded in the computation of a taxpayer's New York State adjusted gross income and personal income tax (20NYCRR 116.1(c); Alaimo V. State Tax Commission, 330N.Y.S. 2d 231, 69 Misc. 2d 484). The Federal investment tax credit also deals with the computation of Federal tax rather than the amount of Federal adjusted gross income. It is to be similarly disregarded in the computation of New York State personal income tax.

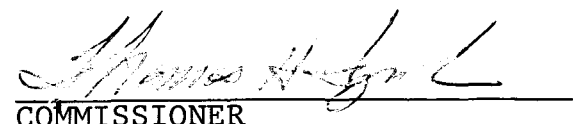
C. That the petition of Roland Passero and Margaret E. Passero is granted to the extent of permitting a refund of \$96.30 for the year 1966, together with such interest as may be lawfully owing; that the Income Tax Bureau is hereby directed to accordingly modify the Notice of Deficiency issued October 26, 1970; and, that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York  
September 28, 1976

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER