



## Tax Reduction Letter

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### **Sherman v. Commissioner**

16 T.C. 332 (T.C. 1951)

The respondent determined a deficiency in income tax for the calendar year 1945 in the amount of \$ 1,129.68, which was based in effect upon disallowance of one-half of the total deduction of \$ 5,129.73 claimed on the return, in computing income from a business operated by petitioner Joseph H. Sherman, Jr., as "Traveling -- (Worcester to New York 4 days each week)." The Commissioner's action was predicated upon the theory that, although petitioner and his family resided in Worcester, Massachusetts, where he was employed, the greater part of his time was spent in New York where he conducted a part time business and New York was therefore his "home" for income tax purposes; [\*\*3] accordingly, the Commissioner disallowed the \$ 5,129.73 deduction claimed as travel expense in New York, but he allowed \$ 2,564.86 as travel expense for 2 days a week said to be spent in Massachusetts.

By amended petition, the total amount claimed by petitioner was reduced to \$ 5,063.32 and broken down into the following components:

(1) Transportation	\$ 806.40
(2) Room and meals	1,631.65
(3) Postage, telephone and telegraph	207.61
(4) Entertainment	1,517.85
(5) Other -- Tips for entertainment, travel, and hotel and other hotel charges	749.81
(6) Gifts	150.00
Total	5,063.32

By answer to the amended petition, the Commissioner now asserts an increased deficiency, based upon the disallowance of all these amounts except the \$ 806.40 for transportation. In a reply to the answer to the amended petition it is contended that even if petitioner's home were New York, he would be entitled not only to the \$ 806.40 allowance for transportation, but also living expenses in Worcester, alleged to be in excess of the "room and meals" item in New York, and that the remaining four items (postage, etc.) would be deductible as ordinary [\*334] and necessary expenses [\*\*4] under section 23 (a), irrespective of whether petitioner's home be regarded as Worcester or New York.

#### FINDINGS OF FACT.

Petitioners are husband and wife. In their joint income tax return for the year 1945 filed with the collector of internal revenue for the district of Massachusetts, they gave their address as 31 Orne Street, Worcester, Massachusetts. Joseph H. Sherman, Jr., is referred to herein as the petitioner.

Petitioner has lived in Worcester all of his life. In 1945 he and members of his family lived in a house owned by him at 31 Orne Street. He paid real estate taxes and poll taxes to the City of

Worcester, where he was a registered voter from 1932 to 1949, inclusive. One of his two children attended school in Worcester, and he and his family were parishioners of St. John's Church located in that city. He estimated that his household expenses for the maintenance of his family at Worcester were between \$ 3,500 and \$ 4,000 per year.

During the calendar year 1945, and for several years prior and subsequent thereto, petitioner was employed by the Haskins Manufacturing Company, which manufactured plastic products. Its offices and factory were situated near Worcester. He [\*\*5] had no proprietary interest in the enterprise; he served in the capacity of "production manager and purchasing agent." His duties were to see that production was maintained and that the machines produced at their fastest rate. He also handled the purchase of machines for the factory, and did some real estate work for the company. He received \$ 4,066.40 as compensation for services rendered to it during the year 1945. It employed between 75 and 125 people, depending upon the season. A subforeman and a foreman in the machine department assisted petitioner in the maintenance of production. The position of production manager and purchasing agent did not require petitioner's full time and attention, and production was maintained when he was absent from the plant.

Prior to 1945, the petitioner had never engaged in the business of selling plastic products. Early in that year he formed the Metropolitan Sales Company in New York City, which he operated as a sole proprietorship. The company's principal business during 1945 consisted of selling plastic combs and plastic toys to the jobbing trade. Sales made through it represented about 80 per cent of the entire production of the Haskins [\*\*6] Manufacturing Company. Petitioner maintained a mailing address in New York City at 799 Broadway where he picked up mail pertaining to this business. He had no employees at this address and customers did not come there to transact business. It was his practice to call on those who sent letters, and [\*335] the sales of the Metropolitan Sales Company were due entirely to his personal efforts. In his income tax return for the year 1945, he reported the results of the Sales Company's operations, as follows:

Gross receipts	\$ 141,850.60	
Merchandise bought for sale	126,471.23	
Gross profit		\$ 15,379.37
Depreciation	17.89	
Expenses	7,020.54	7,038.43
Net profit		\$ 8,340.94

In Schedule C, attached to his 1945 return, petitioner itemized the expenses totaling \$ 7,020.54, as follows:

Commissions	\$ 813.26
Freight	55.31
Office supplies	98.30
Rent	660.00
Advertising	10.50
Telephone	190.14
Miscellaneous expenses	19.22
Postage	44.08

Traveling -- (Worcester to New York 4 days each week) --	5,129.73
Total	\$ 7,020.54

In lieu of the \$ 5,129.73 figure in the foregoing tabulation, petitioner now claims \$ 5,063.32 as a deduction, which consists of the [\*\*7] following items:

(1) Transportation	\$ 806.40
(2) Room and meals	1,631.65
(3) Postage, telephone and telegraph	207.61
(4) Entertainment	1,517.85
(5) Other -- Tips for entertainment, travel, and hotel and other hotel charges	749.81
(6) Gifts	150.00
Total	5,063.35

All of these items, except item (5), reflect expenditures actually made by petitioner on trips to New York in connection with the business of the Metropolitan Sales Company during the year 1945.

Although Schedule C attached to the return indicates that petitioner spent 4 days each week in New York City and in traveling between Worcester and New York City, 4 days represented in fact the maximum time spent by him in that city and in traveling in any one week. During 1945, the total time actually spent by him in New York City was 102 days; he spent 216 days in Worcester and 43 1/2 days in traveling to and from New York City. There were some weeks during 1945 when petitioner did not travel to New York City. [\*336] The number of days he spent in New York City in any week depended upon the length of time it took him to sell his allotment of plastic goods produced by the Haskins Manufacturing [\*\*8] Company. The machines of that company were running 7 days and nights each week and petitioner worked regularly at the factory on Saturdays and approximately thirty Sundays. Either he or "Mr. Haskins" had to be there on Sunday to give technical assistance in the event a machine broke down, and on that day they scheduled production for the coming week.

In traveling to and from New York City in connection with the business of the Metropolitan Sales Company the petitioner utilized the ordinary modes of travel, and his total transportation expense of \$ 806.40 represented the cost of train and plane tickets.

The postage, telephone and telegraph expenses of \$ 207.61 included in petitioner's travel expense record were incurred while in New York City, and were necessary to communicate with customers, some of whom were not in New York City, and to advise the factory of sales.

The entertainment expense of \$ 1,517.85 was incurred by petitioner in entertaining his customers. Such entertainment was customary in his business, was reasonable in amount, and was necessary to get business.

The item of gifts in the amount of \$ 150 represents the total amount of Christmas gifts to customers of the Metropolitan [\*\*9] Sales Company. It was a common procedure for similar business concerns to give their customers Christmas gifts, and petitioner limited such gifts to those which in his judgment were necessary.

During the year 1945, the petitioner's home for tax purposes was in Worcester, Massachusetts.

#### OPINION.

Petitioner claims a deduction in the amount of \$ 5,063.32 under section 23 (a) (1) (A) of the Internal Revenue Code for expenditures made in connection with his business trips to New York. In seeking to disallow all of that amount above \$ 806.40 (for transportation), respondent argues that petitioner's "home" was in New York within the meaning of section 23 (a) (1) (A), and that his New York expenses cannot be regarded as having been incurred while "away from home." We think that respondent's position cannot be sustained by the record in this case.

Although the return indicates that petitioner spent 4 days a week in New York, there is convincing evidence that 4 days was merely the maximum time that he spent in New York in any one week; that in some weeks he spent all of his time in Worcester; that he was actually in New York an aggregate of 102 days during 1945 as against an aggregate of [\*\*10] 216 days in Worcester; and that he spent more time in [\*337] Worcester during 1945 in connection with his employment with the Haskins Manufacturing Company than he did in New York and in traveling to and from New York on the business of the Metropolitan Sales Company.

This is not the case of a taxpayer who keeps his place of residence at a point where he is not engaged in carrying on a trade or business and claims deductions for living expenses and cost of traveling to and from his residence. Cf. *Commissioner v. Flowers*, 326 U.S. 465; *Mort L. Bixler*, 5 B. T. A. 1181, 1184. The petitioner owned and maintained a home for his family in Worcester and was employed by the Haskins Manufacturing Company in a factory located not far from his residence at the beginning of the year 1945. This was his principal place of business and his home at that time. During 1945 he continued his employment with Haskins and it continued to be an important source of livelihood to him. In 1945 he undertook a business venture in New York City under the name of the Metropolitan Sales Company. In order to carry on both of these activities, [\*\*11] he had to make expenditures for transportation to and from New York City, meals and lodging while there, and for telephone, telegraph and other items. He maintained no house or apartment in New York; he merely stayed at a hotel on each trip. This Court has heretofore recognized that a taxpayer may have more than one occupation or business, and has held that where it is shown that the taxpayer has two occupations which require him to spend a substantial amount of time in each of two cities, he is entitled to the deduction of traveling and other ordinary and necessary business expenses incurred in connection with attendance upon the one removed from his residence. *Walter F. Brown*, 13 B. T. A. 832; *Joseph W. Powell*, 34 B. T. A. 655, affd., 94 Fed. (2d) 483 (CA-1).

This case is unlike *S. M. R. O'Hara*, 6 T. C. 841, in which the taxpayer, a lawyer, was held to have her "home" at her principal place of employment where she was required to spend full time over a period of years, notwithstanding that she visited her apartment or family residence on weekends in another [\*\*12] city where she handled some legal matters for clients at such times. The Court stressed the comparatively inconsequential degree of activity on such occasions and the relatively meager returns therefrom. Here, on the other hand, petitioner's Worcester employment was a significant source of income to him; it was of a permanent character, and his roots were in Worcester where he spent the greater part of his time during the tax year. He had no office or place of business in New York, other than a mailing address. On his New York trips he would stay at a hotel, at most only a few days at a time. While it is true that his rewards from the New York venture in 1945 exceeded his Worcester earnings for that year, that fact alone cannot shift his "home" from Worcester to New York.

[\*338] We hold that petitioner's "home" was Worcester and that his New York "traveling expenses (including the entire amount expended for meals and lodging)" are deductible. These include at least the item of \$ 806.40 identified as "Transportation", the item of \$ 1,631.65 identified as "Room and Meals", and possibly also the item of \$ 207.61, <sup>1</sup> identified as "postage, Telephone and Telegraph." However, it [\*13] is unnecessary to determine whether the latter item is strictly classifiable as "traveling expenses," for it is in any event deductible as an "ordinary and necessary" business expense under section 23 (a) (1) (A). <sup>2</sup> Similarly, we are satisfied that the items of \$ 1,517.85 for entertainment expenses and \$ 150 for gifts to customers are deductible as "ordinary and necessary" business expenses under section 23 (a) (1) (A). But we do not approve the deduction of the item of \$ 749.81 alleged to represent "Tips for entertainment, travel, and hotel and other hotel charges." The proof of expenditures for these purposes was vague and unsatisfactory. Moreover, even if some portion of this amount did represent deductible expenditures actually made, we are not satisfied as to whether some or all of them may not have been included in one or more of the other items.

1 Respondent suggests in his brief that this item may be a duplication of telephone and postage expenses already allowed in the amounts of \$ 190.14 and \$ 44.08, respectively. However, this issue was not raised at the trial or prior thereto, and we are satisfied that the \$ 207.61 item relates only to such expenditures made while petitioner was in New York and does not duplicate the other similar expenditures which were presumably made while he was in or about Worcester.

[\*\*14]

2 Respondent urges that petitioner has limited himself to claiming deductions herein only as "traveling expenses." We do not agree that the issue is thus limited. While it is true that the amended petition is inartistically drawn in this respect, we think that, read as a whole, it puts in issue the deductibility under section 23 (a) (1) (A) of the contested expenditures as traveling expenses and as ordinary and necessary business expenses. The ordinary and necessary expenses here involved were incurred in connection with petitioner's traveling and a fair reading of the amended petition discloses the intention to raise the issue in both aspects.

We hold that petitioner is entitled to deductions under section 23 (a) (1) (A) for items (1), (2), (3), (4), and (6), but is not entitled to any deduction for item (5).

*Decision will be entered under Rule 50.*