

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOSEPH E. AND CYNTHIA E. JORDAN : SMALL CLAIMS
 : DETERMINATION
 : DTA NO. 820280
for Redetermination of a Deficiency or for Refund of :
New York State Personal Income Tax under Article 22 :
of the Tax Law for the Years 1998 through 2001. :

Petitioners, Joseph E. and Cynthia E. Jordan, 16 Mecca Drive, Salisbury Mills, New York 12577, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1998 through 2001.

A small claims hearing was held before Brian L. Friedman, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 6, 2005 at 9:15 A.M., with additional evidence to be submitted by November 7, 2005, which date began the 90-day period for the issuance of this determination. Petitioners appeared by W. Warren Kolb, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Matthew Roberts).

ISSUES

I. Whether, for the years at issue, petitioners properly substantiated Schedule E partnership losses which, if substantiated, would entitle petitioners to a refund of New York State personal income tax.

II. Whether, for each of the years at issue, petitioners substantiated claimed itemized deductions which, if substantiated, would entitle petitioners to a refund of New York State personal income tax.

FINDINGS OF FACT

1. On January 2, 2001, the Division of Taxation (“Division”) issued a Notice of Deficiency (Notice No. L-018701994) to Joseph E. and Cynthia E. Jordan asserting additional New York State personal income tax due in the amount of \$1,047.92, plus penalty and interest, for a total amount due of \$1,314.56 for the year 1998.¹

2. On December 31, 2001, the Division issued a Statement of Proposed Audit Changes to petitioners which asserted additional New York State personal income tax due in the amount of \$2,497.11, plus penalty and interest, for a total amount due of \$3,427.53 for the year 1998. The Statement of Proposed Audit Changes informed petitioners that based upon their failure to substantiate certain of their claimed itemized deductions, the amount thereof was decreased to an amount less than the standard deduction; therefore, their New York deduction was adjusted to the allowable standard deduction. In addition, their claimed Schedule E rental real estate partnership loss in the amount of \$20,718.00 was also disallowed as unsubstantiated which, together with the disallowed itemized deductions, resulted in the deficiency asserted.

On October 21, 2003, the Division issued another Notice of Deficiency (Notice No. L-020416975) for the year 1998 to petitioners asserting additional tax due in the amount of \$2,497.11, plus penalty and interest.²

¹ Based upon the answer of the Division and various consolidated statements of tax liabilities attached to the petition in this matter, it appears that an audit adjustment by the Division closed this deficiency and that there is, therefore, no balance due.

² While this Notice of Deficiency was not introduced into evidence at the hearing, the information pertaining to this deficiency was obtained from the answer of the Division and from various consolidated statements of tax liabilities attached to the petition.

3. On petitioners' original 1999 New York State resident income tax return, they claimed a New York itemized deduction in the amount of \$37,399.00 as well as a Schedule E loss (from rental real estate, partnership) in the amount of \$12,269.00. On the return, petitioners computed total New York State personal income tax due of \$6,896.00 (no tax had previously been withheld).

On February 10, 2003, the Division issued a Statement of Proposed Audit Changes which advised petitioners that based upon their failure to provide copies of canceled checks, receipts and other documentation to support claimed itemized deductions, such itemized deductions were disallowed and the full standard deduction was, therefore, allowed. In addition, the Statement of Proposed Audit Changes further stated that their claimed rental real estate partnership loss was also disallowed. Accordingly, tax in the amount of \$2,639.75, plus penalty and interest, for a total amount due of \$3,605.62 was asserted to be due for the year 1999. On or about April 7, 2003, the Division issued a Notice of Deficiency (Notice No. L-022016842) to petitioners asserting a tax deficiency in the amount of \$2,639.75, plus penalty and interest, for the year 1999.³

4. Subsequent to the issuance by the Division of the notices of deficiency for the years 1998 and 1999, Jordan Associates ("the partnership") issued amended Schedules K-1 (Partner's Share of Income, Credits, Deductions, etc.) to each petitioner for each of the tax years 1998 and 1999. The partnership listed its address as 32 Mecca Drive, Salisbury Mills, New York 12577 which was the residential address of petitioners. The Schedules K-1 indicated that each

³ As was the case for 1998, the Notice of Deficiency for 1999 was not introduced into evidence at the hearing; however, the information was again obtained from the answer of the Division, a Conciliation Order Dismissing Request (CMS No. 197796) and from various consolidated statements of tax liabilities attached to the petition.

petitioner was a general partner, each owned 50 percent of capital and each shared 50 percent of the partnership's profits and losses which were derived from rental real estate activities.

5. As previously noted, on their original 1998 return, petitioners claimed Schedule E losses (from the rental real estate activities of the partnership) in the amount of \$20,718.00. After receiving the amended Schedule K-1 for 1998, petitioners filed amended State and Federal returns for 1998. On their amended New York State return for 1998, petitioners claimed a Schedule E loss in the amount of \$46,347.00. In addition, petitioners' claimed itemized deductions were increased on the amended return to \$31,751.00 from the amount of \$28,321.00 which had been claimed on the original return. A review of the schedules of itemized deductions on the returns reveals that the amounts claimed in each category vary from the original return to the amended return. As a result of the filing of the amended return for 1998, petitioners claimed a refund due of \$1,789.00.

6. On their original return filed for 1999, petitioners claimed Schedule E losses (from the rental real estate activities of the partnership) in the amount of \$12,269.00. After receiving the amended Schedule K-1 for 1999, petitioners filed amended State and Federal returns for 1999. On their amended New York State return for 1999, petitioners claimed a Schedule E loss in the amount of \$32,925.00. In addition, petitioners also claimed a loss on the sale of business property in the amount of \$177,488.00 (each petitioner's loss pursuant to the Schedules K-1 issued by the partnership was \$88,744.00).

On their amended return filed for 1999, petitioners claimed a lesser amount of itemized deductions. On their original return, petitioners had claimed total itemized deductions of \$37,399.00 which amount included gifts to charity of \$23,395.00. On the amended return, total itemized deductions in the amount of \$17,489.00 were claimed; no gifts to charity were included.

As was the case for 1998, the amount claimed in each category varied from the original to the amended return. As a result of the filing of the amended return, petitioners claimed a refund due of \$6,896.00.

7. On their 1999 amended Federal return, petitioners elected to waive their net operating loss (“NOL”) carryback incurred for the 1999 tax year. On their amended Federal return, petitioners computed their Federal adjusted gross income to be a loss of \$77,941.00. They then determined their 1999 NOL to be \$92,017.00.

8. On their 2000 New York State resident income tax return, petitioners claimed a NOL in the amount of \$92,017.00 (carried forward from 1999) which resulted in New York adjusted gross income of \$25,685.00, thereby leading to no State tax liability for the year. Since \$6,730.00 had been withheld during the year, they claimed a refund of \$6,730.00 for the 2000 tax year.

9. On April 5, 2004, the Division issued a Statement of Proposed Audit Changes to petitioners for the year 2000 which stated that because petitioners did not reply to the Division’s letter asking for copies of canceled checks, receipts and other documentation to support the itemized deductions claimed on their return (petitioners claimed a New York itemized deduction of \$24,649.00), their itemized deductions were disallowed and petitioners were allowed the full standard deduction. The Statement of Proposed Audit Changes further stated that because petitioners had failed to provide documentation to verify the NOL claimed on the return, the NOL was also disallowed. As a result of the aforesaid disallowances, the Division asserted a New York State personal income tax deficiency of \$6,589.67, plus penalty and interest, for a total amount due of \$8,873.49 for the year 2000. On the same date (April 5, 2004), a Notice of Deficiency was issued to petitioners which asserted a deficiency in the identical amounts.

10. For the year 2001, petitioners filed a New York State resident income tax return on which they listed, on line 4 thereof, taxable refunds, credits or offsets of State and local income taxes of \$16,137.00.⁴ On their 2001 New York State return, petitioners claimed a New York State itemized deduction of \$62,331.00. Total New York State tax was computed to be \$599.00. Since tax had been withheld in the amount of \$6,561.00, petitioners claimed a refund of \$5,962.00.

11. On December 11, 2003, the Division issued a Statement of Proposed Audit Changes to petitioners for the year 2001 which stated that because they had failed to reply to the Division's letter asking for copies of canceled checks, receipts and other documentation to support their claimed itemized deductions, the itemized deductions were disallowed and the full standard deduction was allowed. Accordingly, a deficiency in the amount of \$2,957.00, plus penalty and interest, was asserted.

On February 5, 2004, a Notice of Deficiency was issued to petitioners in the amount of \$2,957.00, plus penalty and interest, for a total amount due of \$3,613.90.

12. The answer of the Division filed on March 16, 2005 indicates that on October 28, 2004, petitioners made a payment in the amount of \$14,397.00 which was applied to the 1999, 2000 and 2001 assessments which are now paid in full. In addition, as previously noted, the Notice of Deficiency (Assessment No. L-018701994) issued on January 2, 2001 for the year 1998 in the amount of \$1,047.92, plus penalty and interest, was closed by the Division by means of an audit adjustment. The other assessment for 1998 (Notice No. L-020416975) in the amount of \$2,497.11, plus penalty and interest, has also been paid in full pursuant to payments made by

⁴ Although petitioners later filed amended New York State and Federal returns for 2001 on which the amounts of taxable credits, refunds or offsets of State and local taxes and exemptions claimed was changed, the Division has not contested these amounts.

petitioners in November 2003, June 2004 and July 2004. Accordingly, petitioners owe no additional amounts to the Division for the years at issue, and pursuant to the amended returns filed, petitioners are seeking refunds of tax, penalty and interest paid for the years at issue.

13. With respect to the deficiency for the year 1999 (Notice No. L-022016842), petitioners apparently filed a request for a conciliation conference on July 14, 2003 in response to a Notice of Deficiency which was issued on April 7, 2003. Since the request was filed more than 90 days after the issuance of the Notice of Deficiency, the Division's Bureau of Conciliation and Mediation Services issued a Conciliation Order Dismissing Request (CMS No. 197796). However, as previously noted, since petitioners paid the full amount of the deficiency and thereafter filed a claim for refund (by means of their filing an amended return for 1999), timeliness is not at issue and, accordingly, the Division of Tax Appeals has jurisdiction over the 1999 tax year.

14. At the hearing, petitioner's representative submitted documentation for the purpose of substantiating petitioners' claimed itemized deductions for the years 2000 and 2001. No documentation was submitted for the years 1998 or 1999. No substantiation was offered to support claimed partnership losses for any of the years at issue.

15. For the year 2000, petitioners claimed total itemized deductions in the amount of \$31,379.00. After subtraction of state and local income taxes (\$6,730.00), petitioners' New York itemized deductions were \$24,649.00. The itemized deductions consisted of the following: medical and dental expenses of \$360.00; taxes paid of \$11,281.00; interest paid of \$6,895.00 and gifts to charity of \$12,843.00.

The Division, at the hearing, indicated that it does not dispute the amounts claimed by petitioners for taxes and interest paid which when added together total \$18,176.00. It is the

balance claimed (primarily for charitable contributions) which the Division contends has not been substantiated.

Petitioners claimed an itemized deduction of \$360.00 for medical and dental expenses. A deduction is allowed for those expenses which exceed 7.5 percent of a taxpayer's Federal adjusted gross income. On their Federal return, petitioners claimed total medical expenses of \$2,286.00. The amount by which these expenses exceeded 7.5 percent of petitioners' Federal adjusted gross income (\$25,685.00) is the \$360.00 claimed. No canceled checks or invoices were submitted by petitioners to verify the total medical expenses of \$2,286.00.

Petitioners claimed a deduction on their State return for gifts to charity in the amount of \$12,843.00. This amount was derived from Schedule A of their Federal return. On the Federal return, petitioners listed gifts by cash or check in the amount of \$23,547.00, gifts other than by cash or check of \$500.00, carryover from the prior year of \$23,772.00 and then subtracted unexplained disallowed contributions in the amount of \$34,976.00 to reach the total deduction claimed of \$12,843.00. In support of their claimed deduction, petitioners submitted a letter written on the letterhead of the Penuel Pentecostal Tabernacle, 12 Winona Avenue, P.O. Box 7181, Newburgh, New York 12550-0058. The letter, dated February 3, 2001 and signed by two individuals as Pastor and Treasurer, states that petitioners' total contribution of tithes and offerings for the year 2000 was \$23,826.00. It must be noted that the letter is typewritten with the exception of the amount which was handwritten. No checks or other documentation were offered to substantiate the amount claimed. Since petitioners did not appear at the hearing, no testimony was offered to explain the amount of the alleged contribution or the reason why no checks were submitted to substantiate the amount claimed. Petitioners' representative was unable to explain why petitioners claimed only \$12,843.00 if, in fact, they contributed

\$23,826.00 to the Penuel Pentecostal Tabernacle. If the deduction for gifts to charity and medical and dental expenses was properly disallowed by the Division, the balance ($\$24,649.00 - \$360.00 - \$12,843.00 = \$11,446.00$) of the claimed itemized deductions is less than the amount of the standard deduction ($\$13,000.00$) for the year 2000.

16. For the year 2001, petitioners claimed total itemized deductions in the amount of \$71,389.00. After subtraction of State and local income taxes (\$9,058.00), petitioners' New York itemized deductions were \$62,331.00. The itemized deductions consisted of the following: taxes paid of \$14,794.00, interest paid of \$5,767.00, gifts to charity of \$46,722.00 and job expenses and other miscellaneous deductions of \$4,106.00.

Petitioners claimed a deduction on their State return for gifts to charity in the amount of \$46,722.00. This amount was derived from Schedule A of their Federal return. On the Federal return, petitioners listed gifts by cash or check in the amount of \$19,991.00, gifts other than by cash or check of \$2,045.00, carryover from the prior year of \$34,976.00 and then subtracted disallowed contributions in the amount \$10,290.00 to reach the total deduction claimed of \$46,722.00.

In support of their claimed deduction, petitioners submitted two packets of documentation; both packets contained many of the same documents. One of the documents submitted by petitioners was a letter dated October 29, 2001, written on the letterhead of Sears which thanks them, on behalf of the American Red Cross, for their contributions to the relief efforts resulting from the events of September 11, 2001. While the letter indicates that the receipt will provide the proper documentation, no receipt was submitted to substantiate the amount of this contribution.

In addition, petitioners submitted a letter from the Penuel Pentecostal Tabernacle, dated February 28, 2002 which purported to set forth contributions from January 1, 2001 through January 1, 2002. The letter states that petitioners' total contributions were \$11,715.00. While the letter indicates that the contribution was made by check, no check or copy thereof was submitted by petitioners. Also submitted, in one of the packets of documentation was a letter to petitioner Joseph Jordan from the Penuel Pentecostal Tabernacle, dated February 6, 2002, which thanks Mr. Jordan for his donation in memory of Susan Zaretsky. While the letter is typewritten and signed by Shelia Johnson, Secretary, the amount of the donation, \$8,500.00, is handwritten. No other documentation was provided to substantiate this donation. The other packet contains another letter to petitioner Joseph Jordan from the Penuel Pentecostal Tabernacle, also dated February 6, 2002, which thanks Mr. Jordan for his donation in memory of Susan Zaretsky. As was the case with the first letter, this letter is typewritten and signed by Shelia Johnson, Secretary. However, unlike the first letter, this letter sets forth the amount of the donation as \$400.00 and the amount, too, is typewritten.

At the hearing, the Division's representative indicated that the only portion of the claimed itemized deductions which he could accept is a real estate tax payment in the amount of \$1,750.78 which is set forth in a tax payment receipt from the Town of Windsor, County of Orange, New York.

CONCLUSIONS OF LAW

A. When the Division issues a Notice of Deficiency to a taxpayer, a presumption of correctness attaches to the notice, and the burden of proof is on the taxpayer to demonstrate that the deficiency assessment is erroneous by clear and convincing evidence (*Matter of O'Reilly*, Tax Appeals Tribunal, May 17, 2004).

B. Under Tax Law § 612(a), the adjusted gross income of a New York resident is Federal adjusted gross income, with certain modifications not applicable in this case. Section 62(a)(1) of the Internal Revenue Code (“IRC”) defines the adjusted gross income as an individual’s gross income minus certain deductions. Among the deductions permitted are deductions for expenses which are “ordinary and necessary” for the production or collection of income (IRC § 212[1]). The taxpayer has the double burden of (1) demonstrating entitlement to the deduction and (2) substantiating the amount of the deduction (*see*, Tax Law § 658[a]; § 689(e); 20 NYCRR 158.1; *Matter of Macaluso*, Tax Appeals Tribunal, September 22, 1997, *confirmed* 259 AD2d 795, 686 NYS2d 193). Furthermore, petitioners were required to maintain adequate records of their items of income, loss and deduction for the years in issue (Tax Law § 658[a]; 20 NYCRR 158.1[a]).

C. With respect to the claimed Schedule E rental real estate partnership losses, petitioners contend that the losses claimed on each year’s return and those which result in a NOL need not be substantiated since they are a flow-through from the partnership, i.e., petitioners merely relied on the Schedules K-1 (and amended Schedules K-1) which were provided to them by the partnership which was not audited by the Division. Petitioners assert that they cannot be expected to provide substantiation of the partnership’s losses. This argument is wholly without merit.

First, it must be noted that each of these petitioners is a 50 percent partner in Jordan Associates, each owns 50 percent of the partnership capital and each shares 50 percent of its profits and losses. Clearly, under these circumstances, partnership records are available to petitioners to substantiate the losses claimed. The Tax Appeals Tribunal, in *Matter of Greenwald* (Tax Appeals Tribunal, November 24, 1993) held that the mere production by a

taxpayer of the partnership's return and the Schedule K-1 issued to the taxpayer were not sufficient to prove the amount of the loss. Therefore, since petitioners provided no substantiation of partnership losses for any of the years at issue, the Division properly disallowed such losses for each year as well as any claimed NOL for any of the years at issue resulting from the business activities of the partnership.

D. For the years 1998 and 1999, petitioners submitted no evidence to substantiate their claimed itemized deductions for these years, and accordingly, based upon the determination that their Schedule E losses (and NOLs) have also not been substantiated (*see*, Conclusion of Law "C"), petitioners' claims for refund for 1998 and 1999 were properly denied.

E. For the year 2000, petitioners failed to substantiate their claimed itemized deduction of \$360.00 for medical and dental expenses since no canceled checks or invoices have been provided. Petitioners' only evidence pertaining to their claimed gifts to charity is a letter from the Penuel Pentecostal Tabernacle which alleges that petitioners made a total contribution of tithes and offerings for the year in the amount of \$23,826.00. As previously noted, neither petitioner appeared at the hearing to offer testimony concerning these alleged contributions. No canceled checks payable to the Penuel Pentecostal Tabernacle were produced to corroborate the alleged amount of contributions. At the hearing, petitioners' representative asserted that the contributions were made by means of a "passing of the hat." However, it is beyond credibility that such a large annual contribution (\$23,826.00) could have been made in cash and it is equally beyond credibility that if the contribution was, in fact, made by a passing of the hat, that the recipient thereof could keep an accurate account of the amount of the contributions.

Therefore, it is hereby determined that the Division properly disallowed petitioners' claimed medical and dental expenses and gifts to charity, and as previously noted (*see*, Finding

of Fact “15”), since the balance claimed as itemized deductions is less than the amount of the standard deduction for 2000, i.e., \$13,000.00, the Division properly allowed the standard deduction in lieu of the itemized deductions claimed by petitioners.

F. For the year 2001, petitioners claimed total itemized deductions in the amount of \$71,389.00, and after subtraction of State and local income taxes of \$9,058.00, they claimed New York itemized deductions of \$62,331.00 consisting of \$14,794.00 taxes paid, \$5,767.00 interest paid, \$46,722.00 gifts to charity and \$4,106.00 job expenses and other miscellaneous deductions.

Petitioners offered no evidence to substantiate the \$5,767.00 in interest paid or the \$4,106.00 in job expenses and other miscellaneous deductions and these deductions were, therefore, properly disallowed by the Division.

Petitioners claimed on their 2001 return that they made gifts to charity totaling \$46,722.00 for the year consisting of \$19,991.00 made by cash or checks, \$2,045.00 made other than by cash or check, \$34,976.00 carryover from the prior year with an unexplained subtraction of \$10,290.00 for disallowed contributions. As to a carryover from 2000, it has been previously determined herein that petitioners failed to substantiate their entitlement to this itemized deduction for gifts to charity for 2000; therefore, petitioners are not entitled to any carryover therefrom.

To substantiate their alleged gifts to charity for 2001, petitioners introduced a letter from Sears pertaining to a donation to the relief efforts resulting from the events of September 11, 2001; however, there is no indication as to the amount of the contribution.

As was the case for the 2000 tax year, petitioners again produced a letter from the Penuel Pentecostal Tabernacle which states that petitioners’ total contributions for the year were in the

sum of \$11,715.00. Again, no canceled checks were provided and no testimony was offered by petitioners to explain the manner in which these contributions were allegedly made. Also submitted by petitioners were two letters, bearing the same date (February 6, 2002), from the Peneul Pentecostal Tabernacle to petitioner Joseph Jordan which thanked him for a donation in memory of Susan Zaretsky. One letter indicates that the contribution was in the amount of \$8,500.00; the other letter states that Mr. Jordan contributed \$400.00. No canceled checks or other corroboration were provided.

In addition, with the exception of a real estate tax bill in the amount of \$1,750.78, petitioners produced no documentation to substantiate any amounts claimed as itemized deductions. While they claimed to have paid interest in the amount of \$5,76.00, no substantiation was provided. Their job expenses and other miscellaneous deductions of \$4,106.00 were also unsubstantiated. Accordingly, it is hereby determined that the Division properly disallowed petitioners' claimed itemized deductions and allowed them the standard deduction of \$13,400.00 for 2001.

G. As indicated in Finding of Fact "12", all of the deficiencies for the years at issue have been paid in full by petitioners. Based upon the determination that petitioners failed to substantiate their claimed Schedule E losses (and resulting NOLs) and their claimed itemized deductions for the years at issue, the claims for refund arising out of the filing of the amended returns are also denied.

H. The petition of Joseph E. and Cynthia E. Jordan is hereby denied.

DATED: Troy, New York
January 12, 2006

/s/ Brian L. Friedman
PRESIDING OFFICER