

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

RABBI MILTON BALKANY AND :
SARA BALKANY :

DECISION
DTA NO. 823424

for Redetermination of a Deficiency or for Refund of New
York State Personal Income Tax under Article 22 of the :
Tax Law and New York City Personal Income Tax under :
the Administrative Code of the City of New York for the :
Year 2005.

Petitioners Rabbi Milton Balkany and Sara Balkany filed an exception to the determination of the Administrative Law Judge issued on November 13, 2014. Petitioner appeared by Greenwald Weiss, LLC (Brian Y. Greenwald, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a letter brief in reply. Oral argument was not requested. The six-month period for the issuance of this decision began on April 28, 2015, the date petitioners' reply letter brief was received.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation properly determined that petitioners failed to present sufficient evidence to establish that they made charitable deductions of \$500,000.00 in tax year 2005.

II. If it is determined that the charitable deductions for 2005 should be disallowed, whether petitioners' 2005 gross income should include certain compensation attributed to petitioner Rabbi Balkany by a form 1099 miscellaneous income statement and a form W-2.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for findings of fact 2, 4, and 10, which we have modified to more accurately reflect the record. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. Petitioners, Rabbi Milton Balkany and Sara Balkany, jointly filed their 2005 federal and New York State and City resident personal income tax returns on or about November 13, 2007. They reported wages in the amount of \$180,000.00 and business income on federal schedule C in the amount of \$420,804.00, without any payment for taxes, interest and penalties due.

2. The source of the \$180,000.00 in wages reported paid to Rabbi Balkany was Bais Yaakov of Brooklyn, known, after it moved, as Bais Yaakov of Midwood (Bais Yaakov), a Hebrew school for girls, of which Rabbi Balkany was Dean, and which school appeared to be in financial difficulty. Petitioners' 2005 New York return includes a summary of federal form W-2 statements that lists a W-2 issued to Rabbi Balkany from Bais Yaakov with reported wages of \$180,000.00. The status of Bais Yaakov as an Internal Revenue Code (IRC) (26 USCA) § 501 (c) (3) organization has not been questioned by the Division.

3. The amount of \$420,804.00, shown as gross receipts on federal schedule C for Rabbi Balkany, was reported to him on a 2005 miscellaneous income form (1099-MISC) by Rite Surgical Supplies, Inc. (Rite Care), a company 50% owned by petitioners' son, Levi Balkany.

Petitioners reported the principal business activity of Rabbi Balkany on schedule C for 2005 as “rabbinical teacher.”

4. Rabbi Balkany did not have a written compensation agreement with Rite Care, but he did have an oral understanding with his son that he would be compensated for business that he brought to Rite Care.

5. On the same personal income tax returns for 2005, petitioners claimed itemized deductions on each of the respective returns, as follows:

Itemized Deduction	Federal Return	New York Return
Taxes	\$13,349.00	\$13,349.00
Gifts to Charity	\$500,000.00	\$500,000.00
Subtotal, Itemized Deductions	\$502,670.00¹	\$502,670.00
State, local and foreign income taxes subtracted		(\$2,670.00)
Other subtraction adjustments		(\$250,000.00)
Total Itemized Deduction	\$502,670.00	\$250,000.00

6. The Division of Taxation’s (Division) inquiry into this matter commenced with the late-filing of New York state personal income tax returns for 2004 and 2005.² The Division was able to verify that income items reported in petitioners’ names for 2005 were, in fact, reported on their return. Upon further review of the tax return for 2005, the Division noticed a charitable deduction in the amount of \$500,000.00 and followed up with petitioners by requesting an explanation and substantiation of that deduction. According to the Division’s audit report, despite repeated requests for documentation, petitioners failed to provide any supporting

¹ Itemized deductions were limited in accordance with IRC (26 USCA) § 68.

² The return for 2004 was later accepted as submitted and is not in issue.

documents for the contributions claimed. Thereafter, the charitable deduction was disallowed and replaced by the standard deduction, a statement of audit changes was issued, and upon petitioners' failure to respond to the statement of audit changes, the matter was closed by the Division as disagreed.

7. The Division issued a notice of deficiency to petitioners, dated May 1, 2008, assessing tax in the amount of \$55,780.00, plus interest and penalties, for 2005.

8. A conciliation conference before the Bureau of Conciliation and Mediation Services was held on May 6, 2009. On September 25, 2009, the conferee issued a conciliation order (CMS No. 225246) and sustained the statutory notice.

9. Petitioners submitted into evidence a listing of checks that were paid by Rite Care to Levi Balkany during 2005, totaling \$449,945.00. Levi identified the listing as representing amounts paid by Rite Care to Levi on behalf of Rabbi Balkany. Levi believed that some of these payments were reported as paid to him, which accounts for the difference between the \$449,945.00 and the \$420,804.00 reported on the 1099 issued to Rabbi Balkany. When asked why Rite Care issued the checks to Levi instead of Rabbi Balkany, Levi indicated that since the Bais Yaakov was so financially dysfunctional, this method allowed him to have some control over the funds, making sure the money was directed in the manner prescribed by Rabbi Balkany, who at times did not have a personal bank account.

10. Documentation submitted by petitioners at the hearing included a listing of checks written on the account of Levi Balkany during 2005, prepared by an attorney formerly representing petitioners, some of which were described as payments made by Levi Balkany to the creditors of Bais Yaakov. The checks were essentially presented in numerical order, but bore

dates that were not close in time or in a sequence that corresponded to the numerical check sequence. According to the listing, the payees on many checks were illegible. Levi Balkany identified some of the legible checks as payments to teachers, lawyers for the school, and mortgage payments. Some of the checks were submitted into evidence.

The total of the checks written from Levi Balkany's account in 2005 was \$1,424,144.62. Two columns that were the subject of some discussion during the hearing are entitled "BYM/Teachers and other Payments" and "BYM Debt Service/Hilgar."³ The amounts expended under these columns totaled \$284,567.10 and \$393,908.84, respectively, and were identified as amounts paid to people or companies to whom Bais Yaakov owed money. Testimony was offered that Hilgar held the mortgage on the school.

11. Petitioners also submitted into evidence documentation indicating that the Internal Revenue Service (IRS) reviewed petitioners' federal income tax return for tax year 2005. In correspondence dated February 11, 2008, the IRS stated that it was corresponding with petitioners because there was an error on their 2005 federal income tax return and that a change to that return was being made by the IRS. The notice stated the following: "We changed the amount claimed as total gifts to charity on your Schedule A, Itemized Deductions, because it was figured incorrectly or the amount was not limited to one-half of your adjusted gross income." Page 2 of the IRS correspondence was missing, and page 3, appearing incomplete, discussed penalties that were being imposed.

12. Petitioners had prepared their 2005 federal personal income tax return utilizing the Katrina Emergency Tax Relief Act of 2005 as it concerned charitable contribution limitations.

³ "BYM" was identified as Bais Yaakov of Midwood.

13. Additional correspondence from the IRS dated August 19, 2010, sent to petitioners' former representative, addressing the 2005 tax year, stated the following:

“We finished reviewing the liability issue you raised for Form 1040 tax period 12/31/2005. We found that the Philadelphia Service Center has abated the additional tax assessment based on the information you provided to the campus.

Therefore, the remaining tax liability for this period was based on the Form 1040 that you filed and your request have [sic] been completed.

You have indicated on your Collection Due Process request that you are interested on [sic] an installment agreement”

14. The Administrative Law Judge allowed petitioners additional time post-hearing to submit: 1) documentation to support their position as it related to the IRS review of the same issues in this matter; and 2) documentation that would provide proof that Bais Yaakov authorized and directed payments be made to third parties for debts owed by the school. Petitioners made no such submission.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that petitioners failed to prove that they made charitable deductions of \$500,000.00 in the tax year in issue, as claimed. Specifically, the Administrative Law Judge found that petitioners did not prove the deductibility of the checks written by Levi Balkany, purportedly on behalf of petitioners and purportedly for the benefit of Bais Yaakov, because of the absence of receipts from Bais Yaakov. The Administrative Law Judge found that the checks alone were not sufficient. The Administrative Law Judge also disallowed the \$80,000.00 deduction claimed by petitioners as foregone salary as unsubstantiated. In making her determination, the Administrative Law judge questioned the credibility of Rabbi Balkany's testimony. Finally, the Administrative Law Judge found that there

was an insufficient basis in the record to ignore the 1099-MISC income statement issued to Rabbi Balkany from Rite Care, and that, accordingly, such income was properly reported on petitioners' return.

ARGUMENTS ON EXCEPTION

Petitioners argue that their position reflects the realities of the situation and that the evidence presented demonstrates that the amounts in question were used to pay creditors of Bais Yaakov, the 501 (c) (3) organization operated by Rabbi Balkany.

Specifically, petitioners continue to argue on exception that the amounts reported on the Rite Care 1099-MISC issued to petitioner Rabbi Balkany were paid into the account of petitioners' son, Levi Balkany, who disbursed them at the direction of Rabbi Balkany to satisfy obligations of Bais Yaakov. Petitioners also continue to contend that Rabbi Balkany did not receive \$80,000.00 of his \$180,000.00 salary, but instead directed that such funds be used to pay the school's expenses. Petitioners claim that they should not be required to include these two amounts, \$420,804.00 and \$80,000.00, in their gross income because they never received such funds. If such amounts are required to be included in income, petitioners assert that the claimed charitable deduction should be allowed. Petitioners contend that, if the Division's position is adopted, they would be taxed on moneys they never received.

The Division, citing IRC (26 USCA) § 170, argues that petitioners failed to provide adequate substantiation for the amounts they claim to have contributed. The Division also argues that, with respect to the checks drawn on the account of Levi Balkany, petitioners may not claim a deduction because they did not make a charitable contribution. The Division notes that such checks show payments by Levi Balkany (i.e. not petitioners) to third parties (i.e. not Bais

Yaakov). The Division thus contends that petitioners have failed to meet their burden of proof and that the notice of deficiency should be sustained.

OPINION

As a general principle, where, as here, a notice of deficiency is properly issued under the Tax Law, a presumption of correctness attaches and the taxpayer bears the burden of proving error (*see Matter of Panuccio*, Tax Appeals Tribunal, August 16, 2007; Tax Law § 689 [e]). As applied to the present matter, this means that petitioners have the burden of refuting the Division's disallowance of their deductions and of establishing their entitlement to the claimed charitable contributions (*Matter of Goode*, Tax Appeals Tribunal, October 17, 2013). Petitioners were required to maintain adequate records of their items of deduction for the year in issue (Tax Law § 658 [a]; 20 NYCRR 158.1 [a]).

Tax Law § 615 (a) provides that taxpayers who itemize deductions on their federal return may elect to itemize deductions on their New York return. That section defines the New York itemized deduction as the federal itemized deduction with modifications not relevant to the present matter. Accordingly, it is appropriate to look to the provisions of the Internal Revenue Code and regulations promulgated thereunder to determine the deductibility of the claimed charitable contributions.

IRC (26 USCA) § 170 (a) allows a deduction for charitable contributions made by a taxpayer. A taxpayer claiming a charitable contribution of money is generally required to maintain for each contribution a canceled check or a receipt from the donee charitable organization showing the name of the donee and the date and amount of the contribution, or other reliable written records showing the same information (*see* Treas Reg [26 CFR] § 1.170A-

13 [a] [1]). In addition, and more significant to the instant matter, IRC (26 USCA) § 170 (f) (8) (A) provides that no deduction is allowed under IRC (26 USCA) § 170 (a) for any contribution of \$250.00 or more unless the taxpayer substantiates the contribution by a contemporaneous written acknowledgment by the donee organization.

Here, with one exception, all of the payments in the “BYM/Teachers and other Payments” and “BYM Debt Service/Hilgar” categories discussed at the hearing (*see* finding of fact 10) equal or exceed \$250.00. Additionally, the vast majority of payments in the other categories of the check listing also exceed \$250.00. The record, however, contains no contemporaneous written acknowledgment from Bais Yaakov that any of the purported payments so listed were contributions to that organization. Furthermore, there is no documentation whatsoever in the record to support Rabbi Balkany’s claim that he contributed \$80,000.00 of his salary to the school to pay its debts. Absent any written acknowledgment from Bais Yaakov as required pursuant to IRC (26 USCA) § 170 (f) (8) (A), all of the claimed charitable contributions herein that equal or exceed \$250.00 must be denied as a matter of law.

Even under the less stringent record keeping requirements under Treas Reg (26 CFR) § 1.170A-13 (a) (1), petitioners have failed to establish entitlement to the claimed contributions. As the Administrative Law Judge aptly noted, the records provided by petitioners to substantiate their charitable deduction are “grossly incomplete.” The checks offered to substantiate such deductions are payable to third parties. Such checks are not, therefore, *prima facie* evidence of contributions to Bais Yaakov, let alone payments made by petitioners. Additional evidence is clearly required. The Administrative Law Judge gave petitioners the opportunity to submit evidence post-hearing to prove that the checks to third parties paid debts owed by the school, but

petitioners provided no such evidence. We note that Rabbi Balkany's testimony is insufficient to overcome petitioners' inadequate documentation, given the Administrative Law Judge's finding that the Rabbi's credibility was "completely unreliable," a finding to which we defer (*see Matter of Spallina*, Tax Appeals Tribunal, February 27, 1992).

Next we address petitioners' alternative assertion that the \$420,804.00 from Rite Care and \$80,000.00 of salary were not properly included in their gross income for the year in issue. Petitioners' assertion is premised on Rabbi Balkany's testimony that he did not receive \$80,000.00 of his salary and was not the owner of the \$420,804.00 in Rite Care funds that were deposited in Levi Balkany's account.

Rabbi Balkany received a W-2 reporting \$180,000.00 as his salary in connection with his employment at Bais Yaakov. He reported that salary on his 2005 income tax return. Rabbi Balkany also received a form 1099-MISC indicating \$420,804.00 in compensation from Rite Care and reported that amount on his return. Additionally, the record shows that Rabbi Balkany and his son, a 50% owner of Rite Care, had an understanding that Rabbi Balkany would be compensated for the business that he brought to Rite Care (*see* finding of fact 4). Considering these facts, as well as the Administrative Law Judge's credibility finding with respect to Rabbi Balkany's testimony, we reject petitioners' assertion that their gross income should not include the income from Rite Care and a portion of Rabbi Balkany's reported salary.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Rabbi Milton Balkany and Sara Balkany is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Rabbi Milton Balkany and Sara Balkany is denied; and

4. The notice of deficiency dated May 1, 2008 is sustained.

DATED: Albany, New York
October 28, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner