STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RICHARD A. AND CHRISTINE L. SPERL	:	DECISION DTA NO. 824369
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2005.	:	

Petitioners, Richard A. and Christine L. Sperl, filed an exception to the determination of the Administrative Law Judge issued on July 25, 2013. Petitioners appeared *pro se*. The Division of Taxation appeared by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument was not requested.

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

ISSUE

Whether petitioners have substantiated their claimed itemized deductions for 2005.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for findings of fact 3, 6, 7, 9, and 10, which have been modified to more accurately reflect the record. We also make additional findings of fact, numbered 12, 13, and 14 herein. The Administrative Law Judges's findings of fact, the modified findings of fact, and the additional findings of fact are set forth below.

1. During the year in issue, 2005, petitioners were New York State residents and filed a joint New York State income tax return that set forth adjusted gross income of $54,164.00 and itemized deductions of $42,321.00. Taxable income was stated as $10,843.00, on which tax of $433.00 was due. After applying a credit of $759.00 for tax withheld, petitioners reported an overpayment and refund due of $326.00.

2. Petitioners' itemized deductions consisted of the following:

a. Taxes paid:	$ 8,204.00
b. Interest paid:	5,631.00
c. Gifts to charity:	800.00
d. Casualty and theft losses:	17,844.00
e. Job and Miscellaneous expenses:	9,842.00
Total	$42,321.00

3. By letter, dated April 28, 2008, the Division of Taxation (Division) informed petitioners that their income tax return for 2007 had been selected for review, and requested very specific additional documentation to verify the accuracy of their itemized deductions for that year. The April 28, 2008 letter also stated:

> "Please note that the Tax Department will review the documentation submitted for this particular tax year and make a reasonable assumption regarding allowance of the deductions claimed for other tax years remaining in statute. You may submit documentation for the years remaining in statute at this time."

4. By letter, dated September 3, 2009, the Division informed petitioners that since they had not properly documented the itemized deductions claimed on their 2007 return, the itemized deductions claimed on the 2005 return were also disallowed. The letter continued:

> "If you disagree please submit documentation to support the itemized deductions claimed on your 2005 return. Our letter dated 04/28/08 lists the information necessary to verify the most commonly claimed itemized deductions."

5. The April 28, 2008 letter stated that, if petitioners were claiming a deduction for a casualty loss, they needed to submit a copy of the federal form 4684, Casualties and Thefts; a copy of the fire, accident, insurance, or police report; a copy of a letter from petitioners' insurance company showing that petitioners were not reimbursed for losses due to the casualty; and, a copy of the insurance policy documenting the value of the property damages claimed.

In the case of job or miscellaneous deductions, the April 28, 2008 letter asked for petitioners to provide an employer's letter verifying that the claimed expenses were related to petitioners' employment and not reimbursed; a copy of federal form 2106, Employee Business Expenses, if required; and, documentation to support the expenses and mileage claimed on that form (for example, travel log or diary).

6. A transcript of petitioners' 2005 federal income tax return indicates that they filed a form 1040, individual income tax return, schedule A, and form 2441, Child and Dependent Care Expenses. However, there is no record of petitioners filing a form 2106, Employee Business Expenses or a form 4684, Casualties and Thefts, both of which are required by the instructions. Neither form was submitted into evidence herein. The federal return transcript indicates that petitioners reported job and miscellaneous expenses of $10,925.00, and following the required 2% of adjusted gross income subtraction, a deduction of $9,842.00. The transcript also indicates that petitioners' claimed deduction of $8,204.00 for taxes paid consists of $3,745.00 in real estate taxes and $4,259.00 in state and local income taxes.

7. With respect to their claimed casualty loss for the year 2005, petitioners submitted a 16-page handwritten list and a typed inventory of items they claimed to have lost in a 1997 house

fire. Petitioners also submitted a "Sworn Statement in Proof of Loss," dated August 14, 1997, setting forth certain details regarding a fire loss that petitioners sustained on May 21, 1997, as compiled by Adjusters International of Utica, New York. This document reports that "the actual cash value of the property at the time of the loss" was "undetermined" and "the whole loss and damage" was $35,773.94. In addition, petitioners submitted an undated document that lists the name and address of Adjusters International, references the May 21, 1997 fire loss, and appears to indicate a total loss of $211,414.07. Petitioners offered no explanation as to the origin, meaning, or purpose of this document.

8. The 16-page handwritten list of items lost in the 2005 casualty contained a listing of the item, a value, and the length of time owned. No further substantiation was provided, including an appraisal or the required federal form 4684, which specifies the items lost, their cost, insurance reimbursement, if any, and fair market values before and after the loss.

9. With regard to the disallowance of petitioners' claimed job and miscellaneous expense deduction, petitioner Richard Sperl submitted an email from his employer, Kodak Merchandise Support, dated July 2, 2001, which stated that it did not pay for drive time or mileage expenses.

Petitioners also submitted eight pages of a spreadsheet that purported to list days during 2005 when mileage expense was incurred, including the unpaid drive time and the number of miles driven. The spreadsheet does not list the cities or destinations to which Mr. Sperl purportedly traveled. The spreadsheet lists total mileage for the 2005 year of 31,395 miles and computes an expense of $12,714.98 based on 40.5 cents per mile. Additionally, and without explanation, handwritten notations on the spreadsheet multiply the $12,714.98 amount by 0.75 to reach $9,536.00. Although required, no federal form 2106 was submitted with their federal return. That form sets forth vehicle information, total miles driven during the year in said vehicle,

and business miles driven. The form also inquires if written support for the deduction was maintained.

10. The Division issued to petitioners a Statement of Proposed Audit Changes, dated February 5, 2009, that asserted additional income tax due for the year 2005 in the sum of $1,429.00, plus interest. The reason given by the Division was as follows:

> "The itemized deductions claimed on your 2005 New York State RESIDENT income tax return have been disallowed since you did not provide documentation to substantiate the amounts claimed.
>
> You have been allowed the appropriate New York standard deduction.
>
> The 2005 Standard Deduction for married Filing Joint [sic] is $14,600.00.
>
> Interest is due for the late payment or underpayment at the applicable rate. Interest is required under the New York State Tax Law."

After allowing the standard deduction in place of the itemized deductions, the Division calculated a revised total tax liability of $1,862.00 and, after an adjustment of $433.00 for tax previously paid, net tax due of $1,429.00.

11. On April 6, 2009, the Division issued a Notice of Deficiency to petitioners asserting additional tax due of $1,429.00 for 2005, plus interest.

12. Petitioners subsequently filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). A conciliation conference was held on August 17, 2010. A Conciliation Order denying the request and sustaining the statutory notice was issued on February 11, 2011.

13. Petitioners submitted two self-created lists of clothing donations in support of their charitable deduction. The lists total $936.00 in value for the donated clothing. In support of their deduction for taxes paid, petitioners submitted a City of Rome, New York, real estate tax

statement indicating tax payments in respect of their residence for the years 2007 through 2011, but not the year at issue. Petitioners submitted no evidence regarding their claimed interest expense.

14. Consistent with their federal return, the transcript of petitioners' New York return, also submitted in evidence, indicates a deduction of $8,204.00 for taxes paid. The New York return transcript further indicates that petitioners made no adjustment for state and local income taxes included in their federal deduction for taxes paid (***see*** Finding of Fact 6).

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that petitioners failed to meet their burden of proof to show that they were entitled to the claimed deductions for a casualty loss and employee business expenses. The Administrative Law Judge thus sustained the subject Notice of Deficiency.

Petitioners did not specifically contest the Division's denial of their deductions for taxes paid, interest paid, or gifts to charity, although they did present some evidence in support of these deductions (***see*** Finding of Fact 13). The Administrative Law Judge's determination did not address the denial of these deductions.

ARGUMENTS ON EXCEPTION

As they argued below, petitioners contend that the evidence submitted is sufficient to establish entitlement to the claimed deductions. Petitioners seek to clarify their position by noting that their claimed casualty loss deduction is a carryover of a loss that occurred in 1997. Petitioners make apparently contradictory claims regarding their submission of federal form 4684. In their notice of exception, petitioners assert that they provided a copy of form 4684 to the Division's auditor. In their brief on exception, petitioners assert that no form 4684 was required

because the subject casualty loss was a carryover from an earlier year. They also contend that no form 2106 was filed with their 2005 return because the tax preparation program that they were using did not create one. Petitioners further assert that certain unnamed Internal Revenue Service personnel verbally advised them that a form 2106 was not required.

On exception, petitioners make no argument against the Division's denial of their deductions for taxes paid, interest paid, or gifts to charity.

Petitioners also contend that they provided all documents that were requested and that the auditor and the conciliation conferee essentially moved the goalposts by changing their rationale for denying the deductions.

The Division asserts that the Administrative Law Judge properly concluded that petitioners did not substantiate their claimed deductions.

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 expenses" (***Matter of Temple***, Tax Appeals Tribunal, July 8, 2004). Petitioners also were required to maintain adequate records of their items of deduction for the years in issue (Tax Law § 658 [a]; 20 NYCRR 158.1 [a]).

We agree with the Administrative Law Judge that petitioners have failed to prove entitlement to their claimed 2005 casualty loss.

Internal Revenue Code (26 USC) § 165 (a) provides a deduction for any loss sustained during the taxable year and not compensated by insurance or otherwise. Individuals are permitted a deduction for losses arising from fire, storm, shipwreck, theft or other casualty (26 USC § 165 [c] [3]). The amount of loss from a casualty is the lesser of the difference in fair market value immediately before and immediately after the casualty or the adjusted basis for determining the loss from the sale or other disposition of the property (Treas Reg § 1.165-7 [b] [1] [i], [ii]). Generally, the fair market value of property before and after the casualty is determined by a competent appraisal (Treas Reg § 1.165-7 [a] [2]).

Although petitioners clarified that the claimed 2005 loss is premised on a 1997 house fire, they have not established the amount of their resulting loss. We note the conflicting evidence regarding the amount of the loss in the record (***see*** Finding of Fact 7). We further note that there is no evidence in the record reconciling this apparent conflict. Moreover, even if petitioners had proven the total amount of their 1997 casualty loss, there is no evidence to show that petitioners properly deducted $17,884.00 of that loss in 2005, as claimed. Generally, a casualty loss is allowable as a deduction for the taxable year in which the loss is sustained (26 USC § 165 [a]; Treas Reg § 1.165-7 [a] [1]). While, under certain circumstances, a casualty loss may be carried forward to subsequent years (***see*** 26 USC § 172; Treas Reg § 1.172-3), petitioners have not shown that such circumstances are present in this case. Indeed, there is no evidence in the record showing how petitioners calculated their claimed 2005 casualty loss.

We also agree with the Administrative Law Judge that petitioners have not proven their entitlement to $9,842.00 in job and miscellaneous expenses, as claimed.

Petitioners sought to establish their entitlement to their claimed job and miscellaneous expenses by submitting evidence of their business mileage and vehicle expenses. Such expenses

are deductible pursuant to 26 USC §162 where, *inter alia*, the taxpayer "substantiates by adequate records or by sufficient evidence corroborating the taxpayer's own statement (A) the amount of such expense . . . (B) the time and place of the travel, entertainment . . . [and] (C) the business purpose of the expense . . . " (26 USC § 274 [d] [4]).

Petitioners contend that the spreadsheet listing dates and mileage and the email from Mr. Sperl's employer prove the deduction (***see*** Finding of Fact 9). There is no evidence in the record, however, establishing that the spreadsheet is a contemporaneous log or a record made at or near the time of the purported business travel. The spreadsheet is thus not sufficiently credible to establish the mileage listed thereon (***see*** Treas Reg 1.274-5T [c] [1]). Furthermore, the spreadsheet appears to list, without explanation, two different totals for vehicle expenses, further undermining the spreadsheet's probative value (***see*** Finding of Fact 9). Additionally, the lack of evidence as to how petitioners computed their claimed $9,842.00 in job and miscellaneous expenses, as well as the lack of a filed form 2106 for the year at issue, likewise compel the rejection of petitioners' claim. We note that petitioners' excuses for the absence of a form 2106 are unconvincing.

Additionally, given the scant evidence submitted (***see*** Finding of Fact 13), we find that petitioners have failed to establish their entitlement to the other categories of deductions that were disallowed by the Division.[1] We further note that petitioners' claim for a deduction of taxes paid improperly includes state and local income taxes (***see*** Finding of Fact 14). To the extent that New York State and local income taxes are deductible in determining federal adjusted gross income, such taxes must be added back to federal adjusted gross income in determining New

[1] Under the circumstances, we choose to exercise our authority to review the record *de novo* with respect the claimed deductions for taxes paid, interest paid, and gifts to charity (***see*** 20 NYCRR 3000.17 [e] [1]; ***Matter of Jay***, Tax Appeals Tribunal, September 9, 2004).

York adjusted gross income (Tax Law § 612 [b] [3] [A]). Therefore, $4,259.00 of petitioners' deduction for taxes paid is properly disallowed on this basis, as well.

Petitioners' argument regarding the conciliation process is misguided. As the Administrative Law Judge noted, even if accurately characterized, petitioners' BCMS experience has no bearing on proceedings in the Division of Tax Appeals. BCMS is an informal process conducted by the Division of Taxation that is intended to resolve taxpayer disagreements with statutory notices (20 NYCRR 4000.5 [c]). When, as in the instant matter, the BCMS process does not resolve the disagreement, the taxpayer may file a petition with the Division of Tax Appeals (Tax Law § 170 [3-a] [e]). Such petition, it should be noted, is filed in protest of the statutory notice, not the conciliation order (20 NYCRR 4000.5 [c] [4]). Accordingly, issues regarding whether certain documents were requested or provided at a conciliation conference, or whether the conferee improperly changed his or her rationale in denying a request are immaterial in Division of Tax Appeals proceedings.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Richard A. and Christine L. Sperl is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Richard A. and Christine L. Sperl is denied; and

4. The Notice of Deficiency, dated April 6, 2009, is sustained.

DATED: Albany, New York
May 8, 2014

/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