

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

MARK GERINGER :

for Redetermination of a Deficiency or for Refund of :
New York State and New York City Personal :
Income Taxes under Article 22 of the Tax Law and :
the New York City Administrative Code for the :
Years 2006, 2007 and 2008. :

DETERMINATION
DTA NOS. 825304
AND 825903

In the Matter of the Petition :

of :

MARK AND ROBIN GERINGER :

for Redetermination of a Deficiency or for Refund of :
New York State and New York City Personal :
Income Taxes under Article 22 of the Tax Law and :
the New York City Administrative Code for the :
Years 2009 and 2010. :

Petitioner Mark Geringer filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 2006, 2007 and 2008.

Petitioners, Mark and Robin Geringer, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 2009 and 2010.

On July 18, 2014, petitioners, appearing by petitioner Mark Geringer, and the Division of Taxation (Division), appearing by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel), waived a hearing and submitted these matters for determination based on documents and briefs to be submitted by February 18, 2015, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioners have substantiated their entitlement to certain claimed losses and costs that were disallowed upon audit.

II. Whether, assuming petitioners are unable to substantiate entitlement to the disallowed losses and costs, they have nonetheless established any bases warranting reduction or cancellation of penalties imposed.

FINDINGS OF FACT¹

1. Petitioner Mark Geringer was a partner in an accounting firm known as Koch, Geringer & Company, LLP. This firm ceased its business activities in or about 2002.

2. By a letter dated October 28, 2009, the Division advised petitioner that while there was information indicating he had received income for the years 2006 and 2007, there was no information indicating that he had filed a New York State or New York City personal income tax return for either of such years.

¹ Petitioner Robin Geringer's name appears herein by virtue of the fact that she filed a joint return with petitioner Mark Geringer for the years 2009 and 2010. Since there is no assertion that her actions are in any manner relevant to the issues presented, unless otherwise specified or made necessary by context, references to petitioner herein shall be to petitioner Mark Geringer.

3. Petitioner eventually (and apparently as a result of the foregoing letter) filed a Resident Income Tax Return (Form IT-201) for each of the years 2006 and 2007. He also filed a return for 2008. His filing status for each of these years was "single." The returns for the years 2006 and 2007 were dated as signed on November 10, 2009, and it is undisputed that each of such returns was filed late. Petitioner's 2008 return was filed on or about October 15, 2009.

4. Petitioners, Mark Geringer and Robin Geringer, filed a Resident Income Tax Return for each of the years 2009 and 2010, under the filing status "Married filing joint return."

5. In connection with the filing of his Form IT-201 for 2008, petitioner also filed a Claim for Credit or Refund of Personal Income Tax (Form IT-113-X), dated as signed on October 20, 2009, for both of the years 2006 and 2007.

6. As is relevant to this matter, on his return for the year 2008 petitioner claimed a loss (at line 11) in the amount of \$553,237.00. This loss appears on (Federal) Schedule E at Part II (Income or Loss From Partnerships and S Corporations) as a claimed ordinary business nonpassive loss from Schedule K-1, along with the notation "P" for partnership and the advice "see footnote regarding judgement."

7. The foregoing claimed loss on petitioner's return for the year 2008 served to offset reported income (wages, salaries, tips) in the amount of \$152,543.00, and resulted in a net loss, reported by petitioner as New York negative adjusted gross income (AGI), in the amount of \$400,694.00. This net loss amount was adjusted by: a) increasing the same to account for unused itemized deductions in the amount of \$16,099.00, and b) by decreasing the same to account for nonbusiness deductions (taxes paid) in the amount of \$5,300.00, thus resulting in a claimed unused net loss in the amount of \$411,493.00.

8. On his return for 2006, and in conjunction with his claim for refund (Form IT-201-X) for such year, petitioner applied the \$411,493.00 unused portion of the foregoing 2008 claimed business loss as a net operating loss carry back against his income for 2006. Petitioner utilized such unused claimed loss to offset income (wages, salaries, tips) in the amount of \$130,415.00, resulting in a claimed New York negative AGI in the amount of \$281,078.00. This net loss amount was adjusted by increasing the same to account for unused itemized deductions in the amount of \$25,073.00, thus resulting in a claimed unused net loss in the amount of \$306,151.00.

9. On his return for 2007, and again in conjunction with his claim for refund (Form IT-201-X) for such year, petitioner applied \$304,133.00 as the remaining unused portion of the claimed 2008 business loss as a net operating loss carryover against his income for 2007.² Petitioner utilized such unused claimed loss to offset income (wages, salaries, tips) in the amount of \$143,764.00, resulting in a claimed New York negative AGI in the amount of \$160,369.00. This net loss amount was adjusted by: a) increasing the same to account for a separately claimed partnership loss in the amount of \$42,840.00 (*see* Finding of Fact 10), b) a claimed expense (cost of goods sold) on (Federal) Schedule C in the amount of \$13,725.00 (*see* Finding of Fact 11), and c) unused itemized deductions in the amount of \$27,947.00, thus resulting in a claimed unused net loss in the amount of \$244,881.00.

10. As referenced above for 2007, petitioner claimed a separate loss (at line 11) in the amount of \$42,840.00. This loss appears on (Federal) Schedule E at Part II (Income or Loss From Partnerships and S Corporations) as a claimed ordinary business nonpassive loss from Schedule K-1, along with the notation “P” for partnership, the listed partnership name of “MJG

² The amount of claimed loss carryover applied for 2007 (\$304,133.00) is \$2,018.00 less than the claimed remaining unused net loss calculated for 2006 (\$306,151.00 [*see* Finding of Fact 8]). The record does not reveal the basis for the discrepancy.

Consulting Associates,” and the statement “Applied For” under the column requesting (the partnership’s) “Employer identification number.” The partnership’s address on Schedule K-1, as issued to petitioner, is listed as MJG Consulting Associates, 780 South Sapodilla Avenue, Unit 5, West Palm Beach, Florida, and Schedule K-1 lists for petitioner a loss in the amount of \$56,565.00.³

11. As referenced above for 2007, petitioner claimed “gross receipts or sales” at Schedule C (Profit of Loss from Business”), line 1, in the amount of \$13,725.00, and claimed “other costs” on such schedule, at line 39, in the like amount of \$13,725.00, resulting in net profit of \$0.00. Schedule C, in turn, lists petitioner as the “proprietor,” the “principal business or profession” as “consulting,” and the “business address” as 116 Central Park South, New York, New York. Statement 5 to petitioner’s Form 1040 (U. S. Individual Income Tax Return) for 2007 describes this “cost” amount as “Nominee Transfer - 1099 Misc. reported within MJG Consulting—see Schedule E.” The record on submission contains no further explanation with regard to this cost item, including the manner in which it was computed or reported. It is noted, however, that adding the reported loss for MJG Consulting Associates per Schedule E (\$42,840.00) to the Schedule C amount of “other costs” or “cost of goods sold” (\$13,725.00) equals the amount of the loss set forth on Schedule K-1 for MJG Consulting Associates (\$56,565.00).

12. For the year 2009, petitioner claimed a loss (at line 15) in the amount of \$411,493.00. This amount equaled the unused portion of the previously claimed \$553,237.00 business loss for 2008 (*see* Finding of Fact 6) that had been reported as a net operating loss carry back and had

³ Judgment listings indicate petitioner’s name as “Mark Jeffrey Geringer,” and it is presumed that the name of the partnership (“MJG Consulting Associates”) reflects petitioner’s initials “MJG.”

been applied against his income for 2006 (*see* Finding of Fact 7). Petitioner identified this claimed loss as a “prior year NOL” (i.e., a net operating loss carryforward or carryover). As filed, petitioner’s return for 2009 makes no adjustment in reporting the claimed net operating loss carryover to account for any amounts thereof previously utilized as net operating loss carry backs or carry overs in reduction of income either of the years 2006 or 2007 (*see* Findings of Fact 8 through 11).

13. For the year 2010, petitioner reported income in the total amount of \$282,394.00.⁴ Petitioner claimed a loss (at line 15) in the amount of \$180,407.00. Petitioner identified this claimed loss as a “prior year net operating loss” (i.e., a net operating loss carryforward or carryover). The manner of calculating this claimed loss amount (described at Finding of Fact 23) is, at best, unclear.

14. In addition, and for 2010, petitioner also claimed a separate loss (at line 11) in the amount of \$76,762.00. This loss appears on (Federal) Schedule E at Part II (Income or Loss From Partnerships and S Corporations) as a claimed ordinary business nonpassive loss from Schedule K-1, along with the notation “P” for partnership, the listed partnership name of “MJG Consulting Associates,” and the statement “Applied For” under the column requesting (the partnership’s) “Employer identification number.”

15. The Division initially audited petitioner’s returns for the years 2006, 2007 and 2008, and thereafter audited petitioners’ returns for the years 2009 and 2010. In its audits, the Division requested that petitioner furnish documents substantiating the \$553,237.00 amount claimed as a business loss in 2008, as carried back to 2006, and subsequently carried over (forward) to 2007,

⁴ This sum consists of wages, salaries, tips, etc. (line 1--\$248,405.00), taxable interest income (line 2--\$1,084.00), ordinary dividends (line 3--\$1,492.00) and business income (line 6--\$31,413.00)

2009 and 2010, as an unused net operating loss. Specifically, the Division requested documents and work papers calculating the amount of the loss and showing the computation of the subsequent carry back and carry overs thereof, as well as substantiation supporting petitioner's claim that the loss was a business loss and that such loss (or expense) had been paid by petitioner. The Division also sought documentary support for the other losses claimed by petitioner, as detailed above.

16. Petitioner supplied very little in response to the Division's repeated audit requests for substantiation. On or about January 11, 2010, petitioner submitted his federal income tax returns for the years 2006 and 2007, and a Schedule K-1 from MJG Consulting Associates. By a letter dated May 5, 2010, petitioner set forth the dollar amounts applied as carried back and carried over net operating losses for 2006 and 2007, together with his statement that such carried loss amounts represented unused losses remaining from a \$553,237.00 business loss claimed in 2008 as the result of a prior lawsuit brought against petitioner by a former client. By a letter dated June 24, 2010, the Division responded to petitioner's May 10, 2010 letter, again requesting work papers calculating the initially claimed loss, documents substantiating such loss as a business loss, proof of payment of the claimed amount, and calculations of the carry back and carryover loss amounts. No further substantiation for the claimed amounts was furnished by petitioner.

17. The Division issued to petitioner Mark Geringer a Notice of Deficiency (L-036292505-3), dated June 23, 2011, asserting additional New York State and New York City personal income taxes due in the aggregate amount of \$41,507.00 for the years 2006, 2007 and 2008, plus interest and penalties for late filing (Tax Law § 685[a][1], negligence (Tax Law § 685[b][1] and [2]), failure to supply information (Tax Law § 685[i]) and substantial understatement of liability (Tax Law § 685[p]).

18. The Division issued to petitioners Mark and Robin Geringer a Notice of Deficiency (L-038294481-2) dated July 17, 2012, asserting additional New York State and New York City personal income taxes due in the aggregate amount of \$50,929.00 for the years 2009 and 2010, plus interest and penalties for negligence (Tax Law § 685[b][1] and [2]) and failure to supply information (Tax Law § 685[i]).

19. The record on submission includes a number of judgment and lien filing reports. Of relevance to the claimed losses here are two judgment and lien reports. The first report lists a judgment amount of \$553,237.00, identifies the judgment creditor as Chris Fountoukis, and identifies two judgment debtors, petitioner Mark J. Geringer and Biltmore Development Corporation. The second report lists a judgment amount of \$763,125.00, identifies the judgment creditor as Smrzlic Marica, and identifies two judgment debtors, petitioner Mark Geringer and Boler Associates.⁵ The record does not disclose any information with regard to either Biltmore Development Corporation or Boler Associates nor, with respect to the foregoing two judgements, does it disclose any information tying the same to petitioner's former accounting firm (Koch, Geringer & Company, LLP).⁶

20. The record also references a decision of the Appellate Division, Second Department concerning a lawsuit brought by Chris Fountoukis against petitioner and Eric D.W. Cohler, Inc.

⁵ "Smrzlic Marica" is referred to in other instances as "Marcia Smrzlic." Presumably, the former name listing is a misspelling.

⁶ The record includes a report of a separate lawsuit brought against petitioner's former accounting firm (*Lonuzzi v. Koch, Geringer & Co., LLP*, 2009 NY Slip Op 51051[U] [23 Misc 3d 1132(A)], May 28, 2009, Sup Ct., Kings County, Demarest, J.). That suit, concerning allegations of professional negligence, breach of contract, breach of fiduciary duty, and (as against petitioner solely) fraud with respect to the misappropriation of one million dollars of petitioner Lonuzzi's money, commenced in 2003. There is nothing in the record to tie that lawsuit, either by dollar amount, resolution, judgment listing or named plaintiff, in any manner to the losses at issue in this matter claimed by petitioner to be business losses arising out of his association with the firm of Koch, Geringer & Company, LLP, or any relationship to either of the other named judgment creditors Chris Fountoukis or Smrzlic Marica (Marcia Smrzlic).

(*Fountoukis v. Geringer*, 33 AD3d 756 [2d Dept. 2006]). The Court affirmed the December 22, 2004 order of Supreme Court, Kings County (Hubsher, J) denying plaintiff Fountoukis' motion for summary judgment and dismissing his complaint as asserted against defendant Cohler, Inc., thus effectively limiting plaintiff's avenue for recovery only to defendant Geringer (petitioner herein). The Court's recitation of facts is relevant to the issues presented herein as follows:

“The plaintiff, Chris Fountoukis, was induced by his accountant, the defendant Mark Geringer, to transfer the sum of \$200,000 to the defendant Eric D.W. Cohler, Inc. (hereinafter Cohler). Fountoukis did so based upon Geringer's representation that the \$200,000 purchased a tax loss that would result in a \$50,000 tax credit, and that the principal sum would be fully repaid four days later. In fact, Cohler applied the \$200,000 toward a \$332,617.39 debt owed to it by Geringer for furniture and interior decorating services, and the money was disbursed by Cohler to its third-party suppliers based on its belief that the payment was intended to partially discharge Geringer's debt. Only after the \$200,000 was not timely repaid and Fountoukis communicated with Cohler, did Fountoukis and Cohler learn of the true circumstances by which the payment was made and received. Geringer moved to Panama, and is subject to a default judgment.”⁷

21. Petitioner's submission of documents herein consisted of:

- a) a newspaper article describing his incapacitation as the result of an August 9, 2002 incident in the Republic of Panama wherein petitioner, apparently in fear of being abducted and harmed by two individuals, suffered severe injury when he either leapt or fell from an eighth floor apartment in which he was staying.
- b) a copy of a January 6, 2005 cashier's check in the amount of \$1,049,531.30, drawn on Hanvit America Bank and payable jointly to “Robinson Brog Leinwand Greene Genovese & Gluck and the Barrisons.” The remitter is listed as Crescent Street, LLC.
- c) the two judgment and lien filings reflecting petitioner, as debtor, and Smrzlic Mracia (Marcia Smrzlic) and Chris Fountoukis, respectively, as creditors, and indicating The Barrisons as attorneys of record for both of the creditors (*see* Finding of Fact 19).

⁷ Attorneys of record for appellant (creditor) Chris Fountoukis were listed as Earl Barrison (Steven M. Barrison, of counsel).

d) a credit report pertaining to petitioner and reflecting the judgment against petitioner in favor of Chris Fountoukis in the amount of \$553,237.00.

e) a Schedule K-1 for petitioner, pertaining to the partnership MJG Consulting Associates, reflecting his share of partnership income, deductions, credits and other items (at lines 1 thereof) as an ordinary business loss in the amount of \$42,840.00.

f) a chart wherein petitioner lists:

the amount of loss he claimed for 2008	-----(\$553,237.00)
less: the amounts of income offset by such loss:	
-for 2008 (income offset by loss)-----	<u>\$152,543.00</u>
- available unused loss	-----(\$440,694.00)
-for 2006 (income offset by loss)-----	<u>\$130,415.00</u>
-available unused loss	-----(\$270,279.00)
-for 2007 (income offset by loss)-----	\$100,924.00
-available unused loss	-----(\$169,355.00)

22. Petitioner submitted, with his brief, additional documents consisting of:

a) a Form 1065 (U.S. Return of Partnership Income) in the name of MJG Consulting Associates for the year 2007, reporting gross receipts of \$66,275.00, total deductions of \$109,115.00, and a resulting loss (at line 22) in the amount of \$42,840.00. This return was accompanied by a Schedule K-1 for petitioner, reflecting his share of partnership income, deductions, credits and other items (at lines 1 thereof) as an ordinary business loss in the amount of \$42,840.00, and a Schedule K-1 for one Raissa Vikki, reflecting guaranteed payments (reflected on Form 1065 at line 10 as “guaranteed payments to partners”) in the amount of \$33,000.00.

b) a Schedule K-1 for petitioner for the year 2010, pertaining to the partnership “Wadsworth Ave/Wadsworth Terrace,” LLC, 24-15 Queens Plaza North, Ste. 11A, Long Island City, NY., indicating a contribution of capital during the year in the amount of \$160,000.00, a current year capital decrease in the amount of \$160,000.00 and an ordinary business loss (at line 1) in the amount of \$149.00. A “supplemental information” page describes the net impact of the foregoing as an “abandonment of partnership interest - section 165 ordinary loss (\$159,851.00).” By brief, petitioner asserts this loss was claimed for 2010 but was disallowed on audit as unsubstantiated. No additional information or documents were provided concerning this claimed item. Review of the audit work papers reveals no information or indication that this amount was addressed in any

manner, questioned on audit or in fact disallowed by the Division so as to result in any portion of the deficiency asserted and at issue for 2010.

c) an expansion of the foregoing chart (*see* Finding of Fact 21 [f]) describing petitioner's version of the application of the 2008 claimed loss as used to offset income for the years at issue herein, as follows:

the amount of loss he claimed for 2008 -----(\$553,237.00)
less: the amounts of income offset by such loss:
-for 2008 (income offset by loss)----- \$152,543.00
- available unused loss (NOL) -----(\$440,694.00)
-for 2006 (income offset by loss)----- \$130,415.00
-available unused loss (NOL) -----(\$270,279.00)
-for 2007 (income offset by loss)----- \$100,924.00
-available unused loss (NOL) -----(\$169,355.00)
-for 2009 (income offset by loss)----- \$242,644.00

23. Petitioner's chart goes on to indicate an additional loss in the amount of \$253,700.00 "recognized in 2009." Petitioner attributes this amount to the "Smrzlic litigation." According to petitioner, combining such amount (\$253,700.00) with the claimed unused NOL carryover allegedly available for 2009 (\$169,355.00) results in a total loss of \$423,055.00 available for 2009. Thus, petitioner asserts that offsetting income of \$242,644.00 for such year by a portion of such total available loss results in a \$180,411.00 unused loss available to be carried over and used to offset income for 2010. Combining such amount with the claimed loss of \$76,762.00 (*see* Finding of Fact 14) results in a total loss of \$257,000.00 available for 2010. Although unstated, it would appear that petitioner claims such available loss amount, plus the noted claimed \$160,000.00 Wadsworth partnership loss for 2010 (*see* Finding of Fact 22[b]), results in available losses sufficient to offset petitioner's reported income for 2010 (\$282,394.00; *see* Finding of Fact 13).

24. In his brief, petitioner also alludes to a loss in the amount of \$17,429.00 allegedly stemming from claimed "unreimbursed partner expenses in 2010 that were reflected as income

on petitioner's K-1 for 2011 from Nasberg CPA, PLLC." No such Schedule K-1 or other documentation or additional explanation as to this claimed item was provided for the record.

SUMMARY OF PETITIONER'S POSITION

25. Petitioner asserts he was held responsible, via summary judgment, for the unpaid costs or debts of his former firm based on a renovation and redecoration project undertaken by such firm. Petitioner alleges such costs were never capitalized, claimed as expenses, or otherwise deducted against receipts on the books and records of his former firm, or on any tax returns filed by such former firm. Petitioner claims this obligation as a \$553,237.00 loss on his 2008 tax return. Petitioner specifically maintains that he paid a judgment taken against him stemming from amounts advanced by his (and the firm's) former client Chris Fountoukis. Petitioner alleges that the amounts underlying the judgment had been advanced by Mr. Fountoukis to pay for the renovation and redecoration of the offices of his former firm, and that he was not compensated by such (now defunct) firm, or by any of his former partners, for satisfying such judgment. Petitioner, in very general terms, describes the obligation upon which such judgment, and the resulting claimed loss is based, as "relating to the office redecoration project." He describes the amount of the judgment obligation (\$553,237.00) as consisting of: a) \$200,000.00 advanced by a former client "to an outside decorator," b) another \$150,000.00 advanced by the same former client "toward the office project," and c) \$203,237.00 in "interest, plaintiff's attorneys fees and court costs." Petitioner maintains the lawsuit and resulting judgment was the "direct result of 'taxpayer's business' with such former client," and that petitioner was "unable to fulfill 'the conditions as it regarded the specificity of the business arrangement' with [such former client]." Petitioner states that "financing was 'afforded' by which Mr. Fountoukis [and other creditors], via their attorney [the Barrisons], received payment

on the summary judgment” (on January 6, 2005; *see* Finding of Fact 21-b). Finally, petitioner states he recognized the loss in 2008 “when all resources had been exhausted in trying to remedy the situation and it became evident [that he] would bear sole financial responsibility.”

26. Although somewhat difficult to clearly discern, petitioner appears to argue, alternatively, that the loss amount claimed represents an unpaid debt obligation owed to him by virtue of his alleged purchase of the “vendor’s right” to collect on the summary judgment. In this latter alternative claim, petitioner avers that he was personally liable for the unpaid obligations of the firm as a partner therein, and that the holder of the unpaid obligation sued petitioner and received judgment for the unpaid invoices underlying the obligation.⁸ Petitioner states that he entered into a payment plan with the vendor holding the unsatisfied debt, and that he thereafter purchased the right of that vendor to collect payment thereon (presumably via and upon his alleged satisfaction of the summary judgment against him). Petitioner maintains that he tried to collect via foreclosure on the allegedly pledged collateral (allegedly consisting of unspecified items of furniture, equipment and leasehold equipment), or otherwise obtain payment for the collateral, but discovered that the collateral had been abandoned by his former firm, that the firm was no longer in business, and that he was unable to collect on the amount he is allegedly owed. Under this alternative argument, petitioner seeks to deduct such amount (the “purchased right to collect”) as a business bad debt again resulting in a net loss for 2008.

27. Finally, petitioner seeks the additional claimed loss or expense amounts regarding MJG Consulting, upon the allegation that he was active in the entity and had sufficient tax basis to absorb the claimed, but disallowed amounts. He also continues to seek allowance of the other

⁸ It is unclear from petitioner’s submissions whether the “vendor” and the “holder of the obligation” refers to either the contracted individual or entity who was allegedly engaged to perform the renovation and redecoration project, or refers to the judgment creditor, Chris Fountoukis.

losses or expenses described in Findings of Fact 22-b (Wadsworth Terrace), 23 (Smrzlic litigation) and 24 (Nasberg CPA, PLLC).

CONCLUSIONS OF LAW

A. A properly issued notice of deficiency is presumed to be correct and the taxpayer has the burden of demonstrating the incorrectness of such an assessment (*Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768, 589 NYS2d 383 [1992], *lv denied* 81 NY2d 704, 595 NYS2d 398 [1993]; *Matter of Kourakos v. Tully*, 92 AD2d 1051, 461 NYS2d 540 [1983], *appeal dismissed* 59 NY2d 967, 466 NYS2d 1030 [1983], *lv denied* 60 NY2d 556, 468 NYS2d 1026 [1983], *cert denied* 464 US 1070, 79 L Ed 2d 215 [1984]; *Matter of Tavolacci v. State Tax Commn.*, 77 AD2d 759, 431 NYS2d 174 [1984]). Tax Law § 689(e) provides, with certain specific exceptions not relevant here, that in any matter brought before the Division of Tax Appeals under Article 22 of the Tax Law, the burden of proof is upon the petitioner. Accordingly, it is necessary to ascertain whether petitioner has provided evidence sufficient to sustain his burden of proof to show that he was entitled to the loss amount claimed on his 2008 personal income tax return, and to the additional losses and expenses claimed for the other years at issue, as described, so as to be entitled to the consequent benefit of carrying and applying the unutilized portion of such losses and expenses thereafter to other years in reduction of his income for such years.

B. As an initial matter, the Division raises no dispute as to the deductibility of losses incurred in a trade or business (*see generally* Internal Revenue Code [IRC] § 165), or to the deductibility of bona fide bad debts (*see generally* IRC § 166). Likewise, the Division does not dispute that the unused portion of a net loss for a given year may, in accordance with the applicable rules, be carried back and/or carried over to other years in reduction of income for

such other years (*see generally* IRC § 172).⁹ Notwithstanding the foregoing, however, the Division maintains that petitioner has not, despite repeated requests, provided substantiation sufficient to establish entitlement to any of the losses or expenses claimed herein, including most specifically the claimed net loss (or bad debt) for 2008, as carried back to 2006 and carried over to 2007, 2009 and 2010, as well as the other claimed loss or expense items. Accordingly, resolution of this matter turns specifically on whether petitioner has established entitlement to the losses and expenses claimed.

C. Petitioner's scant submission of evidence falls far short of that necessary to prove his claims and assertions, or support entitlement to the net operating loss claimed in 2008 or to any of the other claimed losses and expenses. Petitioner elected to proceed in this matter via submission as opposed to a hearing. As a result, there was no testimony elicited and, consequently, there was no opportunity to inquire, via cross examination, as to petitioner's essentially bare assertions. In addition, the record on submission contains no testimony by affidavit. In his documentary submissions, and accompanying explanatory assertions, petitioner alludes to: a) judgments against him; b) legal pleadings in "related" lawsuits; c) books, records and tax returns of his former firm; d) a project involving renovation and redecoration of the firm's offices by an outside decorator; e) furniture, equipment and leased equipment allegedly pledged as collateral in connection with such project; f) advances of monies by a former client to finance the claimed business office renovation and redecoration project; g) a payment plan between petitioner and the "vendor" (apparently either the outside decorator or the former client)

⁹ The application of any unused portion of a given year's claimed and substantiated net loss as carrybacks and carryovers to other years is essentially a mechanical computation following from the initial net loss year, and is dependent only upon the validity of the claimed loss in such initial loss year (here 2008).

for the sums owed; and h) petitioner's alleged purchase of the vendor's right to collect on such sums via summary judgment.

D. Petitioner supplied almost none of the documents alluded to above. For example, petitioner has provided no promissory notes or other documents concerning or establishing the obligation owed to the former client or to anyone else, either by the firm itself or by petitioner individually, in connection with the alleged renovation and redecoration project. Instead, and despite repeated requests by the Division, petitioner only very generally described the claimed amount of loss (\$553,237.00) as the amount of a summary judgment against him comprised of three items, to wit, client advances of \$200,000.00 and \$150,000.00, plus "interest, plaintiff's attorney's fees and court costs" of \$203,237.00. In fact, while there is reference to a client transfer of \$200,000.00 (*see* Finding of Fact 20), there is no mention elsewhere in the record of the additional \$150,000.00 allegedly supplied by the same former client. Moreover, there is no documentation supporting the manner in which "interest, plaintiff's attorney's fees, and court costs" (\$203,237.00) were calculated.

The record includes no contracts, project specifications or other documents regarding the renovation and redecoration project itself, or accompanying agreements or pledges concerning the collateral (furniture, equipment and leased equipment) allegedly securing such project, or even tying such project to petitioner's former firm. Thus, there is no supporting evidence substantiating that the claimed amounts involved pertained in fact to petitioner's former firm (as asserted) as opposed to representing personal obligations incurred by petitioner for services provided personally for petitioner (e.g., renovations or redecoration at petitioner's personal, non-business premises). None of the pleadings from the noted lawsuits were furnished, nor were any books, records or tax returns for petitioner's former firm provided. In addition, there is no

explanation concerning how the other referenced lawsuits, judgments and related creditors (Smrzlic Marica [or Marcia Smrzlic] and Lonuzzi) relate in any fashion to the loss claimed herein for 2008 (*see* Finding of Fact 19). In addition, and with regard to petitioner's alternative "bad debt" argument, the record includes no information concerning petitioner's attempts to foreclose on the collateral items allegedly securing the renovation and redecorating project. Finally, to the extent petitioner claims other Schedule E and Schedule C losses or expenses, the record fails to include evidence sufficient to bear out the same. As the Division pointed out on audit, the claimed amount of loss initially carried over to 2009 was duplicative, the claimed loss calculations for 2009 and 2010 are unclear at best and, more to the point, are entirely unsubstantiated by supporting evidence in the record (*see* Findings of Fact 12, 13, 14, 22-b and 23). In this latter respect, it is noted that the mere submission of tax returns, after the fact and without more by way of substantiation of the items set forth thereon, is simply insufficient to substantiate the nature of the claimed expense or loss items or support petitioner's entitlement thereto.¹⁰ In sum, petitioner has failed to establish his entitlement to any of the losses claimed and, consequently, to any right to utilize the same for the year 2008, or to carry or apply any of such claimed but unsubstantiated amounts to any of the other years at issue.

E. Petitioner has provided no basis to support any reduction to or abatement of penalties properly imposed in these matters, and the same are, therefore, sustained.

¹⁰ As noted, the claimed "Wadsworth" loss for 2010 does not appear to have been addressed in any manner, challenged on audit or disallowed by the Division so as to result in any portion of the deficiency asserted for 2010 (*see* Finding of Fact 22[b]).

F. The petitions of Mark Geringer, and of Mark and Robin Geringer, are hereby denied.

DATED: Albany, New York
August 13, 2015

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE