STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GEORGETTE FLEISCHER	:	DETERMINATION DTA NO. 825817
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 2009 through 2011.	:	

Petitioner, Georgette Fleischer, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 2009 through 2011.

A hearing was held before Arthur S. Bray, Administrative Law Judge, in New York, New York, on December 11, 2014 at 10:30 A.M., with all briefs to be submitted by April 6, 2015, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Leo Gabovich).

ISSUES

I. Whether it was proper for the Division of Taxation to deny deductions claimed by petitioner for unreimbursed employee business expenses.

II. Whether it was proper for the Division of Taxation to deny a deduction for the legal expenses incurred by petitioner.

FINDINGS OF FACT

1. During the years in issue, petitioner, Georgette Fleischer, was an adjunct professor of English at Barnard College. She taught literature and English and had the title of Lecturer. She also taught classes at Columbia University, which is associated with Barnard College.

2. Petitioner filed a New York State Resident Income Tax Return for the year 2009 wherein she claimed job expenses and miscellaneous deductions in the amount of $3,265.00. The return included wage and tax statements from Columbia University and Barnard College. Petitioner did not report any business income for this year. The corresponding federal income tax return for 2009 listed the following unreimbursed employee business expenses that were subject to the two percent of adjusted gross income limitation:

Union and professional dues	$130.00
Professional subscriptions	$439.00
Supplies and research materials used at job	$2,550.00
Computer used only for work $2467.00 @ 20%	$494.00

3. Petitioner filed a Resident Income Tax Return for the year 2010 wherein she reported job expenses and miscellaneous deductions in the amount of $14,212.00. The record does not contain a listing of the specific expenses claimed. The return included wage and tax statements from Columbia University and Bernard College and a schedule C-EZ wherein she reported income from a business or profession of writing and editing.

4. Petitioner filed a Resident Income Tax Return for the year 2011 wherein she reported job expenses and miscellaneous deductions in the amount of $21,064.00. The return included

wage and tax statements from Columbia University and Barnard College. Petitioner did not report any business income for this year.

5. Petitioner's federal income tax return for 2011 reported the following amounts as unreimbursed employee expenses on line 21:

Excess educator expenses	$1,817.00
Professional subscriptions	$585.00
Supplies/research materials used at jobs	$2,180.00

6. At the hearing, petitioner offered the following breakdown of the foregoing unreimbursed employee expenses:

Research	$835.00
Publications	$383.00 plus $202.00 New York Times
Gifts	$138.00
Photocopy/Paper (including printer ink)	$599.00
Postage and FedEx	$265.00
Photos (developing)	$34.00
Transportation	$317.00
Meals and Entertainment	$322/2 = 50%
Professional Computer Help	$300.00
Office Equipment (purchases)	$1,144.00
Office Equipment (repair and replacement parts)	$191.00

7. Petitioner reported the following legal expenses on her federal schedule A as other expenses subject to the two percent limitation:

"Legal bills for the preservation of income (Taxpayer lost her employment due to various situations and in [sic] involved in legal action for her livelihood)"	$16,801.00

8. On or about March 19, 2012, the Division of Taxation (Division) sent a letter to petitioner asking for documentation verifying certain deductions claimed for job expenses and miscellaneous deductions. Among other things, the Division requested that petitioner provide a letter from her employer verifying that the reported expenses were necessary for her employment and were not reimbursed or reimbursable. Petitioner was also asked to explain the nature of each expense as well as provide cancelled checks and receipts that identify the items purchased.

9. In response to the request, the Division received hundreds of pages of documentation including receipts, copies of tickets that were purchased for travel or entertainment, expense verification for items such as cost of supplies and verification of expenses, letters of explanation, newspaper clippings and copies of blog entries. Petitioner also presented a list of invoices pertaining to legal expenses and a letter from Bernard College that explained that the expenses of adjunct professors were not reimbursed.

10. Petitioner did not feel that she could pressure her employer to provide a more detailed letter regarding unreimbursed expenses because she felt that doing so would place her employment in jeopardy.

11. Following a review of the documentation, the Division found that a substantial portion of the expenses were for legal fees and concluded that these fees were not deductible because the legal action that petitioner was engaged in was not for the preservation and maintenance of income.[1] The Division also concluded that the letter from petitioner's employer

[1] Substantiation of the amount of the deductions is not in issue.

was unsatisfactory because it did not mention any expenses that may have been required. Rather, it only stated that expenses were not reimbursed.

12. On October 10, 2012, the Division issued a Notice of Deficiency to petitioner stating that, following a review of her documentation for 2009, the itemized deductions claimed as job expenses and the other miscellaneous deductions had been disallowed for lack of acceptable verification as requested. The notice further explained that in order to claim amounts as job expenses, the taxpayer was required to provide a letter from her employer stating that the expenses were required and necessary for her position and that no reimbursement was given for the expenses being claimed. The Division also stated that the amounts deducted as legal fees required proof of lost wages or income. On the basis of the foregoing conclusions, the Division issued a series of notices of deficiency that stated that additional New York State and New York City personal income tax was due as follows:

Year	Date of Notice	Tax	Interest	Balance Due
2009	10/10/12	$337.00	$69.12	$406.12
2010	10/10/12	$1,412.00	$165.68	$1,577.68
2011	10/17/12	$637.50	$24.69	$662.19

13. Barnard is a distinguished leader in higher education offering a rigorous liberal arts education to young women. It prides itself on using the resources of New York City, and in the first year writing seminar, Bernard faculty are expected to go into the city and establish connections with cultural activities that pertain to their courses.

14. Barnard describes the first year seminar as a course that gives students the experience of being in New York City. Lecturers are provided with a budget of $20.00 per student to bring

them to a theater, opera, museum or other experience pertinent to the course. The $20.00 is for the entire semester and lecturers often contribute their own money.

15. Teachers are expected to go out on their own in order to be cultured and knowledgeable. If lecturers are not at a certain standard, they are not invited to continue in the program. The acquisition of theater tickets to performances of plays that petitioner teaches, as well as other events, is necessary for the research and cultural development of Columbia and Barnard professors.

16. Petitioner deducted three tickets to the Radio City Christmas Spectacular as an employment expense. In response to the question of what was the business reasoning behind the deduction, petitioner replied "I guess I would consider it very general."

17. Books, literary publications and other research expenses are necessary for petitioner to develop her knowledge and writing skills in order to teach courses that require a great deal of writing. The disciplines taught include English, American Studies, Human Rights and a variety of other cultural and historical studies.

18. If an individual employed in a teaching position is on a tenured track, that person would have financial support to do research in libraries, go to other cities to attend conferences, to travel overseas for research related to schools' scholarships and to be present in the city at various cultural events. This type of support is not available to adjunct lecturers.

19. The only office available to petitioner at Bernard is shared with other faculty. Consequently, petitioner has only a certain number of hours a week to work in an office environment.

20. Petitioner needs a computer and printer in order to perform her job. When petitioner is away from the campus, she needs to be available to students via email. She also needs to

create and print assignment sheets and to print drafts of students' essays that she receives as email attachments. Personal computers or other equipment are not generally available to petitioner at the college. The college does not reimburse petitioner for the cost of computers, printing and paper.

21. With respect to the travel expenses, petitioner explained that she is in the process of writing a memoir about her father. As a writing teacher, she is expected to be viable as a writer in order to be effective as a teacher. Petitioner also deducted the expense of cab rides between visits to the doctor and Barnard. These expenses were regarded as deductible because taking a cab was the only way she could get to class on time.

22. In or about 2005, a restaurant opened in the Soho area of New York City. Over time, the owners mounted amplifiers and wide screen televisions on the outside of the building and the restaurant expanded its operation by turning its sidewalk café into a sports bar. On one occasion, petitioner was awakened at 1:30 A.M. by a crowd watching a fight. Petitioner was one of a number of residents in this neighborhood who opposed the operation of the restaurant. In petitioner's opinion, problems were presented by the noise, police activity and the potential for a fire. As a result, petitioner, who regards herself as a community organizer, testified against the restaurant at a Community Board hearing, complained to her elected representatives and made a number of telephone calls concerning the noise emanating from the restaurant.

23. In May 2010, the New York Post published an article that identified petitioner as the individual who called in complaints about the restaurant. The next day another newspaper article appeared about petitioner titled "It's a Case of Whine and Dine." The online version of the newspaper stated "Bernard Professor annoys in class as well as in SoHo" and that petitioner was bothersome to students as well as revelers. Comments appearing in the article criticized

petitioner's scholarship, writing and teaching. One article quoted a student who stated that petitioner had mood swings before and after class. Other critical articles appeared in the Gothamist and in Gawker that referred to petitioner as the "Soho Noise Nazi" who shuttered another bar. Subsequently, additional articles appeared in the New York Post that stated that petitioner would have mood swings before and after class and would create issues for students. Four of the articles were republished in the school newspaper.

24. CULPA is the Columbia Underground Listing of Professor Ability. Some of the language from the defamatory articles seeped into the CULPA reviews.

25. In addition to the tenured faculty, there are senior lecturers who are in charge of portions of the program. Some senior lecturers become upset if there is any public attention arising from events external to the college given to one of the lecturers. In addition, petitioner believed that public relations was very important to those in the college administration and that, if it was believed that petitioner was tarnishing the school's marketability, she would be dismissed. Since she regarded her employment at Bernard as tenuous, petitioner felt that the articles described above could be damaging to her part-time employment.

26. An associate of petitioner overheard discussions by administrators who were concerned by the publicity. These administrators did not want any of the faculty to be associated with anything that might damage or hurt the reputation of the college. One supervisor was placed in a position of having to defend petitioner's employment because a professor associated with Barnard was not expected to be subject to critical publicity.

27. Petitioner felt that she had been defamed as a Bernard professor and consulted attorneys regarding commencing a lawsuit against the New York Post. Petitioner was worried about her work, her ability to support herself and her professional reputation. The consultation

led to a lawsuit against the publisher of the New York Post, the publisher of the website "Gothamist" and the publisher of the website "Gawker," wherein she sought damages for injury to her professional reputation as well as personal damages.[2] The complaint alleged that her good name and reputation as an academic and scholar were ruined. It further alleged that petitioner lost the esteem and respect of her friends, colleagues and present and potential employers. The attorney handling the matter felt sorry for petitioner and charged her one-half of his standard hourly rate. An associate working with petitioner also charged one-half of his hourly rate. In the complaint, petitioner sought damages for among other things: damages for injury to her reputation, loss of an existing teaching assignment and emotional and psychological injury, damages for portraying petitioner as "a crazy man hating 'cat lady,'" invasion of privacy and intentional infliction of mental distress. Ultimately, the lawsuit was dismissed on the ground that the allegations were conclusary and unsubstantiated. However, petitioner believes that the lawsuit deterred further publication of offending articles.

28. After the defamation, many students dropped her class. Petitioner had never experienced an exodus from her class like this in the past. Between the offering of her summer course and the beginning of the critical articles, petitioner's income was reduced by 25 percent because she lost two writing workshops and a summer teaching job. Prior to the defamation, she had been offered the workshops on a continuing basis. The following year, her income returned to a pre-defamation level.

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[2] Petitioner considered suing one student who appeared to be prompting the articles in the New York Post but decided against it because the attorneys felt that suing a student would make her look bad. However, she did speak to the police about the student.

SUMMARY OF THE PARTIES' POSITIONS

29. Petitioner contends that her treatment has been highly prejudicial. She submits that if she were on a tenure track she would have been provided with a letter stating that her unreimbursed expenses were necessary, but since she did not have job security she was unable to pressure her employer for such a letter. With respect to the legal fees that were deducted, petitioner submits that if she were at the peak rather than at the base of her field, the legal expenses for the defense of her reputation would more likely have been accepted. Lastly, petitioner takes issue with the audit methodology. In particular, petitioner posits that the Division's policy controverts the principle that a taxpayer is innocent until proven guilty. Petitioner's brief argues that: the auditor's unreliability demonstrates prejudice against petitioner; petitioner has established that the job-related expenses were ordinary and necessary for her work; petitioner's deductions for legal fees to protect her income and professional reputation are allowable; and a survey of case law shows how prejudicial the treatment of her has been.

30. In response, the Division points out that its determination is based on petitioner's claiming unverifiable itemized deductions as well as legal expenses that were not deductible. The Division notes that the letter from her employer merely stated that expenses were not reimbursed without stating what expenses petitioner would normally be required to incur. It also points out that although petitioner's income decreased for one year, it returned to its previous level following the unsuccessful defamation lawsuit. The Division submits that petitioner has not proven that the job expenses were ordinary and necessary for her employment and that the legal expenses were necessary for the preservation and maintenance of income.

31. In a reply brief, petitioner submits that in order to be deductible, an expense does not have to be required. Rather, it is sufficient if the expense is common and accepted, appropriate

and helpful. Petitioner also reiterated her argument that it is unreasonable to require her to obtain a letter from a supervisor to substantiate unreimbursed expenses. Petitioner believes that she would have jeopardized her teaching position by asking for a more descriptive letter. Petitioner further submits that her legal expenses were allowable and that the Division has continued its prejudicial treatment of her.

CONCLUSIONS OF LAW

A. The adjusted gross income of a New York resident is federal adjusted gross income, with certain modifications not applicable in this case (Tax Law § 612[a]). Section 62(a)(1) of the Internal Revenue Code defines the adjusted gross income as an individual's gross income minus certain deductions. Among the deductions permitted are expenses that are "ordinary and necessary" for the production of income in carrying on a trade or business (IRC § 162[a]). An ordinary expense is one that is common and acceptable (***Welch v. Helvering***, 290 US 111, 114 [1933]). A necessary expense is considered to be one that is appropriate and helpful in conducting a trade or business (***Heineman v. Commr.***, 82 TC 538, 543 [1984]). Miscellaneous itemized deductions, not to exceed two percent of the individual's adjusted gross income, are permitted by section 67 of the Internal Revenue Code for such items as unreimbursed employee expenses (Treas Reg § 1.67-1T).

B. Certain preliminary matters should be addressed before proceeding to a discussion of the deductions in issue. In the course of conducting an audit, the Division is not prohibited from asking a taxpayer to provide a letter from an employer verifying that the reported expenses were necessary for her employment and were not reimbursed or reimbursable. An inquiry of this type is permissible because an expense that may be reimbursed is not deductible if it is not necessary (***Putnam v. Commr.***, TC Memo 1998-285 [1998]). However, the inability to produce such a

letter does not preclude a taxpayer from producing evidence at a hearing in order to establish that the item was properly deducted. It is also noted that petitioner's attempt to discredit the testimony of the auditor constitutes an improper attempt to shift the burden of proof. A properly issued notice of deficiency is presumed to be correct and the burden is on the taxpayer to establish that the notice was issued in error (***Matter of Leogrande v. Tax Appeals Tribunal***, 187 AD2d 768 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]; ***Matter of Tavolacci v. State Tax Commn.***, 77 AD2d 759 [3d Dept 1984]).

C. The taxpayer has the burden of demonstrating entitlement to the deduction and substantiating the amount of the deduction (***see*** Tax Law § 689(e); 20 NYCRR 158.1; ***Matter of Temple***, Tax Appeals Tribunal, July 8, 2004). As set forth above, the Division has acknowledged that the amount of each deduction has been substantiated. Therefore, only the appropriateness of the deductions for each year will be addressed.

2009

D. The testimony presented at the hearing directly supports the conclusion that petitioner needed the use of a computer for her employment and that a computer and supplies were largely unavailable. The Division maintains that the expense should be disallowed because petitioner did not keep a personal log as opposed to a business log of her use of the computer and printer.

The problem presented is ascertaining the amount of the business use of the computer and printer when records have not been maintained. In estimating the business use of the computer and printer, a court should try to achieve a close approximation "bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making" (***Cohan v. Commr.***, 39 F2d 540, 543 [2d Cir 1930]; ***see Matter of Coleman***, Tax Appeals Tribunal, May 18, 1989). The tax return for 2009 shows that petitioner claimed a deduction for 20 percent of the cost of the

computer. In view of petitioner's position as an adjunct professor of English it is readily evident that petitioner has a business use of a computer and printer. Moreover, it is recognized that petitioner has substantiated the cost of the computer. Accordingly, the deduction for the computer is accepted. The record also supports the conclusion that petitioner was required to provide her own supplies. Again, since petitioner has substantiated the cost of her supplies, this deduction is accepted.

On its face, the union dues are deductible subject to the two-percent-of-adjusted-gross-income limitation (Treas Reg 1.162-15[c]). Similarly, the expenses for professional journals are also deductible (Treas Reg 1.162-5). Accordingly, the Notice of Deficiency for 2009 is cancelled.

2010

E. A problem is presented for 2010 because the record does not contain a list of what was deducted. In the absence of a list of what was deducted, it is impossible to determine whether the deductions were appropriate. Since petitioner has the burden of proof, the Notice of Deficiency issued for the year 2010 is sustained (Tax Law § 689[e]).

2011

F. As set forth above, petitioner deducted legal expenses arising from an action for defamation and emotional distress as a deduction subject to the two percent limitation. In essence, petitioner claims that the expenses for this lawsuit were properly deductible because it was necessary to pursue this lawsuit in order to protect her professional reputation and employment as a lecturer at Bernard. In response, the Division contends that the expenses were not deductible because they were not necessary for the preservation and maintenance of income.

The difficulty presented with petitioner's position is that she is relying upon an erroneous standard. The criterion for determining whether legal expenses are deductible as an expense is not based upon whether the lawsuit is necessary to protect one's professional reputation or employment. Rather, the courts have employed a test that examines the origin of the claim in order to determine whether legal expenses for the defense of character are deductible because they arise from profit seeking activities or are nondeductible because they are a personal expense (***United States v. Gilmore***, 372 US 39 [1963]). For example, a taxpayer was not permitted to deduct the cost of bringing a lawsuit claiming that an earlier lawsuit was a malicious prosecution. The earlier lawsuit alleged that the taxpayer improperly caused a change in the beneficiaries of a life insurance policy. The Court concluded that the latter suit was prompted by the earlier lawsuit, which had its genesis in the taxpayer's personal relationship with the decedent. Therefore, the expenses were not deductible. The Court also determined that the fact that the taxpayer initiated the lawsuit to protect her business reputation was irrelevant (***Steibling v. Commr.***, 113 F3d 1242 [9th Cir 1997]).

G. In this instance, petitioner's lawsuit arose from her activities as a neighborhood activist and not from her occupation as a lecturer. Although petitioner, as in ***Steibling***, brought the lawsuit in order to protect her professional reputation, this does not render the expenses for the lawsuit deductible. Accordingly, the Division properly denied the deduction for legal expenses.

H. Petitioner claimed expenses for the cost of meals and entertainment. In support of this deduction petitioner testified that she discussed teaching with coworkers while having a meal. This testimony is not questioned. However, it does not follow that the lunch was a

necessary business expense (***Moss v. Commr.***, 758 F2d 211[7th Cir 1985], ***cert denied*** 474 US 979 [1985]). The expense for this deduction is denied.

I. Petitioner also claimed entertainment expenses. In view of the fact that attendance at the theater, opera or museum is a part of the curriculum, petitioner has established that these expenses qualify as unreimbused employee expenses. However, the deduction for three tickets to the Radio City Christmas Spectacular was properly denied as a personal expense. No convincing explanation has been offered as to why petitioner deducted the cost of three tickets to this show.

J. The expenses incurred for research and publications are properly deductible. However, the deduction for the cost of the New York Times is denied as personal (***Matter of Temple***).

K. Petitioner has not presented any evidence to support the premise that the transportation expense was an ordinary and necessary expense of her occupation as a lecturer. It is noted that taking a cab because one is late for work does not transform a personal commuting expense into a deductible unreimbursed employee business expense (***Moss***).

L. Petitioner's justification of her travel expenses is that she needed to travel because she was in the process of writing a memoir about her father and that the writing of the memoir was related to her employment because she taught writing. According to petitioner, she needed to be viable as a writer in order to be effective as a writing teacher. At best, this explanation is an attempt to transform a personal expense into a business expense. It is noted that petitioner only reported her business as a writer in 2010.

M. The record does not establish that the remaining employee business expenses are properly deductible. Therefore, the remaining expenses are denied (Tax Law § 689[e]).

N. The petition of Georgette Fleischer is granted to the extent of Conclusions of Law D, I, and J; the Notice of Deficiency asserting that tax is due for 2009 is cancelled; and, except as so granted, the petition is denied.

DATED: Albany, New York
October 1, 2015

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE