

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

JACOB GUTMAN

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
Administrative Code of the City of New York for the
Year 2015.

DETERMINATION
DTA NO. 850080

In the Matter of the Petition

of

SARAH SINGER

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
Administrative Code of the City of New York for the
Year 2015.

DTA NO. 850081

In the Matter of the Petition

of

MENDY GUTMAN

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
Administrative Code of the City of New York for the
Year 2015.

DTA NO. 850082

In the Matter of the Petition

of

PERRY AND LAZAR LERNER

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
Administrative Code of the City of New York for the
Year 2015.

DTA NO. 850083

In the Matter of the Petition

of

SHLOMA GUTMAN

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
Administrative Code of the City of New York for the
Year 2015.

DTA NO. 850085

In the Matter of the Petition

of

CHAIM GUTMAN

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
Administrative Code of the City of New York for the
Year 2015.

DTA NO. 850086

In the Matter of the Petition :
of :
BORUCH GUTMAN : DTA NO. 850684
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 :
Administrative Code of the City of New York for the :
Year 2015. :

In the Matter of the Petition :
of :
ELIEZER GUTMAN : DTA NO. 850685
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 :
Administrative Code of the City of New York for the :
Year 2015. :

In the Matter of the Petition :
of :
ELKY GUTMAN : DTA NO. 850686
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 :
Administrative Code of the City of New York for the :
Year 2015. :

In the Matter of the Petition

of

ESTHER GUTMAN

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
Administrative Code of the City of New York for the
Year 2015.

DTA NO. 850687

In the Matter of the Petition

of

FEIGY LEFKOWITZ

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
Administrative Code of the City of New York for the
Year 2015.

DTA NO. 850688

In the Matter of the Petition

of

ZVI (HERSHEY) GUTMAN

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
Administrative Code of the City of New York for the
Year 2015.

DTA NO. 850689

In the Matter of the Petition :
of :
HINDY MILLER-GUTMAN : DTA NO. 850690
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 :
Administrative Code of the City of New York for the :
Year 2015. :

In the Matter of the Petition :
of :
NACHMAN GUTMAN : DTA NO. 850691
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 :
Administrative Code of the City of New York for the :
Year 2015. :

In the Matter of the Petition :
of :
SHMUEL GUTMAN : DTA NO. 850692
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 :
Administrative Code of the City of New York for the :
Year 2015. :

Petitioner, Jacob Gutman, 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 Administrative Code of the City of New York for the year 2015.

Petitioner, Sarah Singer, 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 Administrative Code of the City of New York for the year 2015.

Petitioner, Mendy Gutman, 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 Administrative Code of the City of New York for the year 2015.

Petitioners, Perry and Lazar Lerner, 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 Administrative Code of the City of New York for the year 2015.

Petitioner, Shloma Gutman, 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 Administrative Code of the City of New York for the year 2015.

Petitioner, Chaim Gutman, 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 Administrative Code of the City of New York for the year 2015.

Petitioner, Boruch Gutman, 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 Administrative Code of the City of New York for the year 2015.

Petitioner, Eliezer Gutman, 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 Administrative Code of the City of New York for the year 2015.

Petitioner, Elky Gutman, 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 Administrative Code of the City of New York for the year 2015.

Petitioner, Esther Gutman, 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 Administrative Code of the City of New York for the year 2015.

Petitioner, Feigy Lefkowitz, 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 Administrative Code of the City of New York for the year 2015.

Petitioner, Zvi (Hershey) Gutman, 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 Administrative Code of the City of New York for the year 2015.

Petitioner, Hindy Miller-Gutman, 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 Administrative Code of the City of New York for the year 2015.

Petitioner, Nachman Gutman, 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 Administrative Code of the City of New York for the year 2015.

Petitioner, Shmuel Gutman, 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 Administrative Code of the City of New York for the year 2015.

A consolidated formal hearing by videoconference was held on July 15, 2025, before Jennifer L. Baldwin, Administrative Law Judge, with all briefs to be submitted by November 5,

2025, which date began the six-month period for the issuance of this determination. Petitioners appeared by Cohen, LaBarbera & Landrigan, LLP (Ronald J. Cohen, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Stefan M. Armstrong, Esq., of counsel).

ISSUES

I. Whether petitioners have established that no taxable gain resulted from an Internal Revenue Code (26 USC) § 1031 like-kind exchange.

II. Whether petitioners have established that they are entitled to deduct passive activity losses pursuant to Internal Revenue Code (26 USC) § 469.

III. Whether petitioners have established that penalties should be abated.

FINDINGS OF FACT

The parties entered into a stipulation of facts, pursuant to section 3000.11 of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules), in connection with this matter. The stipulated facts have been substantially incorporated herein. The Division of Taxation (Division) also submitted 180 proposed findings of fact pursuant to State Administrative Procedure Act (SAPA) § 307 (1) and section 3000.15 (d) (6) of the Rules. The Division's proposed findings of fact are supported by the record and have been substantially incorporated herein, except for proposed findings of fact 3, 14, 27, 29, 31, 36, 39, 42, 45, 140 and 180, which have been modified to more accurately reflect the record, and proposed finding of fact 47, which is irrelevant.

1. TOV Enterprises LLC (TOV) is owned in its entirety by 16 members of the Gutman family. Each of the 16 members owned a 6.25% interest in TOV. Petitioners, Jacob Gutman, Sarah Singer, Mendy Gutman, Perry and Lazar Lerner, Shloma Gutman, Chaim Gutman, Boruch Gutman, Eliezer Gutman, Elky Gutman, Esther Gutman, Feigy Lefkowitz, Zvi (Hershey)

Gutman, Hindy Miller-Gutman, Nachman Gutman and Shmuel Gutman (petitioners), together comprise 15 of the 16 Gutman family members who own an interest in TOV. The sixteenth member, Aryeh Gutman, also owned a 6.25% interest in TOV, but is deceased and is not a party to this proceeding.

2. TOV is a domestic limited liability company that owns a 99.99%¹ membership interest in Fulton Center LLC (Fulton). The other 0.01% membership interest was owned by Aryeh Gutman, who was the managing member of Fulton. TOV is required to file partnership returns for both federal and New York State tax purposes.

3. Fulton is a domestic limited liability company that was formed on December 23, 1999. Fulton is also required to file partnership returns for both federal and New York State tax purposes.

4. Fulton owned and operated real property located at 2440 Fulton Street, also known as 1495 Herkimer Street, in Brooklyn, New York (Fulton Street property), beginning in 1999. The property was acquired for \$6,000,000.00 in 1999 and was rented out by Fulton for 16 years until it was sold in 2015. Fulton's only material asset at the time of the sale was the Fulton Street property.

5. Fulton filed for chapter 11 bankruptcy on November 30, 2001 in United States Bankruptcy Court for the Eastern District of New York (Bankruptcy Court). The Bankruptcy Court appointed a receiver, Helene Blank (receiver), on November 30, 2001. During the term of the receivership, the receiver was responsible for managing the asset, collecting the rents and paying the expenses. The bankruptcy case was dismissed on January 24, 2006, and the case was closed on August 8, 2006.

¹ The parties stipulated that TOV's membership percentage was 99.9%. Other evidence in the record, however, indicates that a more accurate percentage is 99.99%.

6. Fulton engaged in an Internal Revenue Code (IRC) (26 USC) § 1031 like-kind exchange (LKE) transaction to defer the gain from the sale of the Fulton Street property and the purchase of a replacement property located at 6900 West Cliff Drive in Las Vegas, Nevada (West Cliff property).

7. After audit, the Division concluded that petitioners had engaged in a valid LKE. The parties dispute various costs, fees and other expenses that petitioners claim were incurred in connection with the sale of the Fulton Street property and the purchase of the replacement West Cliff property.

8. Fulton entered into a contract of sale, dated February 24, 2015, for the Fulton Street property with Abraham Lesser, a third party, for the purchase price of \$33,000,000.00. The parties also entered into an addendum to the contract of sale, dated February 24, 2015. The addendum to the contract of sale provided that Fulton would provide Mr. Lesser with financing of \$6,000,000.00 at the closing to be secured by a mortgage on the Fulton Street property.

9. On June 22, 2015, Fulton entered into an exchange agreement with a qualified intermediary, SS Sontag QI LLC (SS Sontag). The exchange agreement provided that it was the intention of the parties that SS Sontag was a qualified intermediary and the acquisition by Fulton of an interest in real property for the Fulton Street property qualified as an exchange for purposes of IRC (26 USC) § 1031.

10. By notice of assignment, dated June 22, 2015, Fulton assigned all rights and interests in the contract of sale to SS Sontag.

11. Fulton (as grantor) and TLG Fulton LLC (as grantee) executed a bargain and sale deed, dated June 23, 2015.

12. On June 29, 2015, Fulton sold the Fulton Street property to Mr. Lesser.²

13. On June 19, 2015, an unrelated third party, Win-Win Investments, LLC (Win-Win), entered into a purchase agreement for the West Cliff property with Westcore Westcliff, LLC (Westcore) for a purchase price of \$18,250,000.00 (purchase agreement). An addendum to the purchase agreement was made by the parties and incorporated into the purchase agreement.

14. An amendment to the purchase agreement was made by Westcore and Westcliff Properties, LLC on September 11, 2015. This amendment stated that Win-Win had assigned its interest as the buyer in the purchase agreement to Westcliff Properties, LLC.

15. A grant bargain and sale deed, dated November 5, 2015, conveyed the West Cliff property from Westcore to the following grantees in their undivided interest percentages:

Westcliff Properties, LLC	25.00%
Westcliff Holdings I LLC	9.58%
Westcliff Holdings II LLC	9.57%
Westcliff Holdings III LLC	9.57%
Westcliff Holdings IV LLC	9.57%
Westcliff Holdings V LLC	9.57%
Westcliff Holdings VI LLC	9.57%
Westcliff Holdings VII LLC	9.57%
Westcliff Holdings VIII LLC	8.00%

Westcliff Holdings I, II, III, IV, V, VI and VII LLC are all domestic limited liability companies that are 100% owned by Fulton.³

16. The Division initiated an audit of Fulton in 2017, and an initial audit letter was sent to Fulton's registered mailing address on August 8, 2017. The initial scope of the audit was to verify how the capital gains from the sale of the Fulton Street property were computed and reported at the New York State and federal levels.

² Per stipulation of the parties.

³ The parties' stipulation is silent as to the ownership of Westcliff Holdings VIII LLC.

17. During the audit, Fulton was asked to produce documentation to verify the LKE itself, as well as the various expenses and closing costs that Fulton claimed in connection with the LKE.

18. Fulton did not file a form IT-204, New York State partnership return, or a federal partnership return, for tax year 2015 prior to the initiation of the audit. On October 15, 2021, the Division received a form IT-204, with attachments, for tax year 2015 from Fulton, which included a schedule K-1 issued to TOV as a 99.99% shareholder.

19. TOV also did not file a form IT-204 or a federal partnership return, for tax year 2015 prior to the initiation of the audit. On or about October 22, 2021, the Division received a form IT-204, with attachments, for tax year 2015 from TOV, which included schedules K-1 issued to each petitioner as a 6.25% shareholder.

20. In connection with the sale of the Fulton Street property, Fulton claimed closing costs totaling \$14,528,242.00, including \$9,203,994.00 in mortgage payoffs and associated fees, as well as \$5,324,248.00 in additional expenses.

21. The Division determined that the \$9,203,994.00 in mortgage payoffs were substantiated, as were \$1,301,995.00 of other claimed closing costs, consisting of:

New York City real property transfer tax	\$866,250.00
New York State real property transfer tax	\$132,000.00
Legal fees	\$300,000.00
Title closer fees	\$1,000.00
Miscellaneous other closing costs	\$2,745.00

These expenses are not in dispute in this matter.

22. The Division disallowed the remaining \$4,022,253.00 in costs claimed in connection with the sale of the Fulton Street property. Petitioners allege that these remaining costs consist of:

Broker's fee paid to Edith Lesser	\$2,100,000.00
Broker's fee paid to David Goldberg	\$600,000.00
Miscellaneous other closing costs:	\$1,322,253.00
Bankruptcy counsel Moritt, Hock & Hamroff	\$1,100,000.00
Demolition charges	\$39,674.00
NYC Environmental Control Board	\$47,675.00
Riverside Title	\$8,289.00
Fulton Lumber	\$51,614.00
Worker's compensation	\$75,000.00

These alleged expenses, except for the \$75,000.00 in costs related to worker's compensation which have been conceded by petitioners, are in dispute in this matter.

23. To substantiate the expenses in dispute in connection with the sale of the Fulton Street property, Fulton provided: (a) a closing statement from Riverside Abstract, LLC⁴ for the sale of the Fulton Street property (Riverside closing statement); (b) a copy of a check paid to Edith Lesser in the amount of \$2,100,000.00; (c) a receipt for a wire transfer to David Goldberg in the amount of \$600,000.00; (d) a form 8824 worksheet; and (e) SS Sontag's reconciliation of payments from the exchange (Sontag reconciliation).

24. The Riverside closing statement lists closing costs of \$14,528,241.50, including broker's fees of \$2,700,000.00 and title fees and escrows of \$2,323,247.75. Included within title fees and escrows are the other disputed costs described in finding of fact 22.

25. The form 8824 worksheet appears to indicate that \$13,469,172.00 was taxable as boot as a result of petitioners' LKE, consisting of net cash received of \$4,265,178.00 and net debt relief of \$9,203,994.00. The form 8824 worksheet computes total cash received from the sale of the Fulton Street property of \$22,494,011.00 (\$33,000,000.00 sale price reduced by debt paid of \$9,203,994.00 and exchange expenses paid of \$1,301,995.00). The form 8824 worksheet

⁴ The closing statement appears on the letterhead of Fink & Zelmanovitz, P.C., listed as the seller's attorney, and includes an invoice, dated June 22, 2015, from Riverside Abstract, LLC.

computes the total cash paid of \$18,228,833.00 (\$18,085,627.00 purchase price increased by exchange expenses paid of \$143,206.00).

26. The form 8824 worksheet describes the exchange expenses paid in connection with the sale of the Fulton Street property as follows:

Commissions	\$0.00
Transfer tax	\$998,250.00
Legal fees	\$300,000.00
Title closer fee	\$1,000.00
Other closing costs	\$2,745.00

27. In connection with the purchase of the West Cliff property, Fulton claimed closing costs of \$503,206.00, consisting in part of transfer tax of \$46,638.00, title insurance fees of \$3,088.00, miscellaneous other closing costs of \$8,350.00 and a payment to Gemma Capital⁵ of \$360,000.00, in addition to a syndication fee of \$9,300,000.00.

28. The Division determined that \$143,206.00 of the claimed closing costs were substantiated, consisting of:

Legal fees	\$85,130.00
Real property transfer tax	\$46,638.00
Title insurance	\$3,088.00
Miscellaneous other closing costs	\$8,350.00

These expenses are not in dispute in this matter.

29. The Division disallowed the expenses related to the \$360,000.00 payment to Gemma Capital and the \$9,300,000.00 syndication fee.

30. To substantiate the expenses in dispute in connection with the sale of the West Cliff property, Fulton provided: (a) a closing statement from Ticor Title of Nevada, Inc. for the West Cliff property (Ticor closing statement); (b) a Chase Bank statement purporting to show

⁵ The parties stipulated that the \$360,000.00 cost was for a payment to "Gamma Capital." Other evidence in the record, however, indicates that the correct name is "Gemma Capital Group, LLC."

expenses paid in connection with the West Cliff property; (c) the form 8824 worksheet; and (d) the Sontag reconciliation.

31. The Ticor closing statement includes the costs described in finding of fact 28 as well as the \$360,000.00 fee to Gemma Capital. The Ticor closing statement does not list the \$9,300,000.00 syndication fee.

32. The form 8824 worksheet describes the exchange expenses paid in connection with the purchase of the West Cliff property as follows:

Title insurance	\$3,088.00
Transfer tax	\$46,638.00
Legal fees	\$85,130.00
Other closing costs	\$8,350.00

33. At the hearing, petitioners requested and were granted time to submit the Gemma Capital invoice and timely did so. The invoice is dated November 5, 2015 and lists “Consulting Fee” for the West Cliff property.

34. With respect to the syndication fee, petitioners provided a syndication agreement, dated November 5, 2015, made between David Horowitz (as syndicator) and Fulton (as investor). The syndication agreement provides, in pertinent part, as follows:

“The Syndicator has syndicated and brought an investment opportunity to the Investor to purchase the [West Cliff property]. The Investor has agreed to move forward with the Purchase of the [West Cliff property] . . . The Investor has agreed to pay the Syndicator for their services and bringing the Investor this investment a Syndication Fee of [\$9,300,000.00] to be paid at the earlier of the sale of the [West Cliff property] by the Investor or five (5) years from the date hereof.”

35. The parties to the syndication agreement executed a promissory note, dated November 5, 2015, wherein Fulton promised to pay \$9,300,000.00 to Westcliff Nevada Equities Trust on the earlier of the sale of the West Cliff property or five years from the date of the

agreement. Mr. Horowitz signed the agreement on behalf of Westcliff Nevada Equities Trust as its trustee.

36. Petitioners also provided a cost segregation study for the West Cliff property that was commissioned in May 2019 and completed in July 2019. The purpose of the study “was to analyze capitalized expenditures, identify specific asset classifications, and segregate those items qualifying for accelerated recovery periods as set forth in the [IRC] from the building and its structural components.” The study found that the total costs of the West Cliff property’s non-depreciable land, building costs and segregated costs were \$27,550,000.00.

37. The original conclusion of the Division’s audit was that Fulton had not completed a valid LKE and, therefore, all the gain from the sale of the Fulton Street property, totaling \$25,991,961.00, was taxable to petitioners through their interests in Fulton through TOV.

38. Beginning in January 2020, notices of deficiency were issued to petitioners, as members of TOV, in connection with the additional \$25,991,961.00 in taxable gain attributed to Fulton, due to TOV’s 99.99% ownership interest in Fulton. Petitioners were assessed additional tax based on their proportionate share of the gain flowing through TOV. Petitioners each owned a 6.25% interest in TOV, resulting in \$1,624,498.00 in gain attributed to each petitioner.

39. These amounts were subsequently reduced based on adjustments made during the audit process and at the Division’s Bureau of Conciliation and Mediation Services (BCMS).

40. Fulton’s revised adjusted net taxable gain, as calculated by the Division, was \$13,469,172.00. This revised amount reflects the Division’s acknowledgement that Fulton had completed a valid LKE. However, it is also the Division’s position that this LKE resulted in taxable boot totaling \$13,469,172.00. This amount includes the additional costs of

\$4,022,253.00 in connection with the sale of the Fulton Street property and of \$242,925.00⁶ and \$9,300,000.00 (syndication fee) in connection with the purchase of the West Cliff property as described herein.

41. The Division issued a revised statement of audit changes to Fulton, dated May 13, 2022, reflecting the adjustments made at BCMS. TOV owned a 99.99% interest in Fulton, therefore, \$13,334,480.00⁷ of that net taxable gain flowed through to TOV.

42. Based on each member's equal 6.25% interest in TOV, this adjustment resulted in \$840,981.00⁸ of net taxable gain flowing through to each petitioner.

Petitioner Jacob Gutman

43. The Division performed an audit of petitioner Jacob Gutman for tax year 2015 to investigate the income flowing through TOV from Fulton based on petitioner's 6.25% interest in TOV.

44. Petitioner Jacob Gutman was a resident of New York State and New York City for tax year 2015 with a home address in Brooklyn, New York.

45. As a result of the audit, petitioner Jacob Gutman was issued a consent to field audit adjustment reflecting an additional \$1,624,498.00 in capital gain income attributed to petitioner from Fulton and TOV and \$16,634.00 in unreported schedule K-1 income from TOV. These adjustments resulted in additional New York State tax due of \$144,051.00 and New York City tax due of \$63,179.00 for a total of \$207,230.00 in additional tax due for tax year 2015.

⁶ Per stipulation of the parties. It is not clear why this amount is not the \$360,000.00 expense related to Gemma Capital.

⁷ Per stipulation of the parties.

⁸ Per stipulation of the parties.

46. The Division imposed penalties on petitioner Jacob Gutman for failure to file a tax return on or before the due date under Tax Law § 685 (a) (1) and for negligence under Tax Law § 685 (b) (1) and (2).

47. Petitioner Jacob Gutman did not file a New York State tax return for tax year 2015.

48. On July 15, 2020, the Division issued a notice of deficiency, notice number L-051698003, to petitioner Jacob Gutman asserting additional tax due of \$207,230.00, plus penalties and interest, for tax year 2015.

49. Petitioner Jacob Gutman filed a timely request for conciliation conference with BCMS, which was held on May 25, 2021. By conciliation order (CMS number 000323913), dated December 17, 2021, the conferee recomputed the statutory notice to tax of \$89,231.00, plus penalties of \$50,557.00 and interest. The adjustments reflect the recognition that petitioner engaged in a valid LKE, the reduction of taxable gain to boot from the LKE and the reduction of ordinary income from TOV to \$0.00 due to carryover net operating loss.

50. The Division issued a consent to field audit adjustment, dated December 8, 2021, to petitioner Jacob Gutman consistent with the adjustments made at BCMS.

Petitioner Sarah Singer

51. The Division performed an audit of petitioner Sarah Singer for tax year 2015 to investigate the income flowing through TOV from Fulton based on petitioner's 6.25% interest in TOV.

52. Petitioner Sarah Singer was a resident of New York State and New York City for tax year 2015 with a home address in Brooklyn, New York.

53. As a result of the audit, petitioner Sarah Singer was issued a consent to field audit adjustment reflecting an additional \$1,624,498.00 in capital gain income attributed to petitioner

from Fulton and TOV and \$16,634.00 in unreported schedule K-1 income from TOV. These adjustments resulted in additional New York State tax due of \$144,051.00 and New York City tax due of \$63,179.00 for a total of \$207,230.00 in additional tax due for tax year 2015.

54. The Division imposed penalties on petitioner Sarah Singer for failure to file a tax return on or before the due date under Tax Law § 685 (a) (1) and for negligence under Tax Law § 685 (b) (1) and (2).

55. Petitioner Sarah Singer did not file a New York State tax return for tax year 2015.

56. On July 15, 2020, the Division issued a notice of deficiency, notice number L-051698108, to petitioner Sarah Singer asserting additional tax due of \$207,230.00, plus penalties and interest, for tax year 2015.

57. Petitioner Sarah Singer filed a timely request for conciliation conference with BCMS, which was held on May 25, 2021. By conciliation order (CMS number 000323848), dated December 17, 2021, the conferee recomputed the statutory notice to tax of \$89,231.00, plus penalties of \$50,557.00 and interest. The adjustments reflect the recognition that petitioner engaged in a valid LKE, the reduction of taxable gain to boot from the LKE and the reduction of ordinary income from TOV to \$0.00 due to carryover net operating loss.

58. The Division issued a consent to field audit adjustment, dated December 8, 2021, to petitioner Sarah Singer consistent with the adjustments made at BCMS.

Petitioner Mendy Gutman

59. The Division performed an audit of petitioner Mendy Gutman for tax year 2015 to investigate the income flowing through TOV from Fulton based on petitioner's 6.25% interest in TOV.

60. Petitioner Mendy Gutman was a resident of New York State and New York City for tax year 2015 with a home address in Brooklyn, New York.

61. As a result of the audit, petitioner Mendy Gutman was issued a consent to field audit adjustment reflecting an additional \$1,624,498.00 in capital gain income attributed to petitioner from Fulton and TOV and \$16,634.00 in unreported schedule K-1 income from TOV. These adjustments resulted in additional New York State tax due of \$144,051.00 and New York City tax due of \$63,179.00 for a total of \$207,230.00 in additional tax due for tax year 2015.

62. The Division imposed penalties on petitioner Mendy Gutman for failure to file a tax return on or before the due date under Tax Law § 685 (a) (1) and for negligence under Tax Law § 685 (b) (1) and (2).

63. Petitioner Mendy Gutman did not file a New York State tax return for tax year 2015.

64. On July 15, 2020, the Division issued a notice of deficiency, notice number L-051697920, to petitioner Mendy Gutman asserting additional tax due of \$207,230.00, plus penalties and interest, for tax year 2015.

65. Petitioner Mendy Gutman filed a timely request for conciliation conference with BCMS, which was held on May 25, 2021. By conciliation order (CMS number 000323851), dated December 17, 2021, the conferee recomputed the statutory notice to tax of \$89,231.00, plus penalties of \$50,557.00 and interest. The adjustments reflect the recognition that petitioner engaged in a valid LKE, the reduction of taxable gain to boot from the LKE and the reduction of ordinary income from TOV to \$0.00 due to carryover net operating loss.

66. The Division issued a consent to field audit adjustment, dated December 8, 2021, to petitioner Mendy Gutman consistent with the adjustments made at BCMS.

Petitioners Perry and Lazar Lerner

67. The Division performed an audit of petitioners Perry and Lazar Lerner for tax year 2015 to investigate the income flowing through TOV from Fulton based on petitioner Perry Lerner's 6.25% interest in TOV.

68. On or about May 3, 2018, petitioners Perry and Lazar Lerner late-filed a joint New York State resident income tax return for tax year 2015, which reported New York adjusted gross income of \$13,771.00 and requested a refund of \$3,094.00. Petitioner did not report having received any flow through income from Fulton or TOV on the return.

69. As a result of the audit, petitioners Perry and Lazar Lerner were issued a consent to field audit adjustment reflecting an additional \$1,624,498.00 in capital gain income attributed to petitioner Perry Lerner from Fulton and TOV and \$16,634.00 in unreported schedule K-1 income from TOV. The Division also modified or disallowed certain tax credits claimed by petitioners on their return due to the income adjustments described above. These adjustments resulted in additional New York State tax due of \$115,012.00 and New York City tax due of \$63,150.00 for a total of \$178,162.00 in additional tax due for tax year 2015.

70. The Division imposed penalties on petitioners Perry and Lazar Lerner for failure to file a tax return on or before the due date under Tax Law § 685 (a) (1) and for negligence under Tax Law § 685 (b) (1) and (2).

71. On July 15, 2020, the Division issued a notice of deficiency, notice number L-051698057, to petitioners Perry and Lazar Lerner asserting additional tax due of \$178,162.00, plus penalties and interest, for tax year 2015.

72. Petitioners Perry and Lazar Lerner filed a timely request for conciliation conference with BCMS, which was held on May 25, 2021. By conciliation order (CMS number

000323858), dated December 17, 2021, the conferee recomputed the statutory notice to tax of \$92,338.00, plus penalties of \$52,297.00 and interest. The adjustments reflect the recognition that petitioner Perry Lerner engaged in a valid LKE, the reduction of taxable gain to boot from the LKE and the reduction of ordinary income from TOV to \$0.00 due to carryover net operating loss.

73. The Division issued a consent to field audit adjustment, dated December 8, 2021, to petitioners Perry and Lazar Lerner consistent with the adjustments made at BCMS.

Petitioner Shloma Gutman

74. The Division performed an audit of petitioner Shloma Gutman for tax year 2015 to investigate the income flowing through TOV from Fulton based on petitioner's 6.25% interest in TOV.

75. Petitioner Shloma Gutman was a resident of New York State and New York City for tax year 2015 with a home address in Brooklyn, New York.

76. As a result of the audit, petitioner Shloma Gutman was issued a consent to field audit adjustment reflecting an additional \$1,624,498.00 in capital gain income attributed to petitioner from Fulton and TOV and \$16,634.00 in unreported schedule K-1 income from TOV. These adjustments resulted in additional New York State tax due of \$144,051.00 and New York City tax due of \$63,179.00 for a total of \$207,230.00 in additional tax due for tax year 2015.

77. The Division imposed penalties on petitioner Shloma Gutman for failure to file a tax return on or before the due date under Tax Law § 685 (a) (1) and for negligence under Tax Law § 685 (b) (1) and (2).

78. Petitioner Shloma Gutman did not file a New York State tax return for tax year 2015.

79. On July 15, 2020, the Division issued a notice of deficiency, notice number L-051697861, to petitioner Shloma Gutman asserting additional tax due of \$207,230.00, plus penalties and interest, for tax year 2015.

80. Petitioner Shloma Gutman filed a timely request for conciliation conference with BCMS, which was held on May 25, 2021. By conciliation order (CMS number 000323843), dated December 17, 2021, the conferee recomputed the statutory notice to tax of \$89,231.00, plus penalties of \$50,557.00 and interest. The adjustments reflect the recognition that petitioner engaged in a valid LKE, the reduction of taxable gain to boot from the LKE and the reduction of ordinary income from TOV to \$0.00 due to carryover net operating loss.

81. The Division issued a consent to field audit adjustment, dated December 8, 2021, to petitioner Shloma Gutman consistent with the adjustments made at BCMS.

Petitioner Chaim Gutman

82. The Division performed an audit of petitioner Chaim Gutman for tax year 2015 to investigate the income flowing through TOV from Fulton based on petitioner's 6.25% interest in TOV.

83. Petitioner Chaim Gutman was a resident of New York State and New York City for tax year 2015 with a home address in Brooklyn, New York.

84. As a result of the audit, petitioner Chaim Gutman was issued a consent to field audit adjustment reflecting an additional \$1,624,498.00 in capital gain income attributed to petitioner from Fulton and TOV and \$16,634.00 in unreported schedule K-1 income from TOV. These adjustments resulted in additional New York State tax due of \$144,051.00 and New York City tax due of \$63,179.00 for a total of \$207,230.00 in additional tax due for tax year 2015.

85. The Division imposed penalties on petitioner Chaim Gutman for failure to file a tax return on or before the due date under Tax Law § 685 (a) (1) and for negligence under Tax Law § 685 (b) (1) and (2).

86. Petitioner Chaim Gutman did not file a New York State tax return for tax year 2015.

87. On July 15, 2020, the Division issued a notice of deficiency, notice number L-051698053, to petitioner Chaim Gutman asserting additional tax due of \$207,230.00, plus penalties and interest, for tax year 2015.

88. Petitioner Chaim Gutman filed a timely request for conciliation conference with BCMS, which was held on May 25, 2021. By conciliation order (CMS number 000323910), dated December 17, 2021, the conferee recomputed the statutory notice to tax of \$89,231.00, plus penalties of \$50,557.00 and interest. The adjustments reflect the recognition that petitioner engaged in a valid LKE, the reduction of taxable gain to boot from the LKE and the reduction of ordinary income from TOV to \$0.00 due to carryover net operating loss.

89. The Division issued a consent to field audit adjustment, dated December 8, 2021, to petitioner Chaim Gutman consistent with the adjustments made at BCMS.

Petitioner Boruch Gutman

90. The Division performed an audit of petitioner Boruch Gutman for tax year 2015 to investigate the income flowing through TOV from Fulton based on petitioner's 6.25% interest in TOV.

91. Petitioner Boruch Gutman was a resident of New York State and New York City for tax year 2015 with a home address in Brooklyn, New York.

92. As a result of the audit, petitioner Boruch Gutman was issued a consent to field audit adjustment reflecting an additional \$1,624,498.00 in capital gain income attributed to petitioner

from Fulton and TOV and \$16,634.00 in unreported schedule K-1 income from TOV. These adjustments resulted in additional New York State tax due of \$144,051.00 and New York City tax due of \$63,179.00 for a total of \$207,230.00 in additional tax due for tax year 2015.

93. The Division imposed penalties on petitioner Boruch Gutman for failure to file a tax return on or before the due date under Tax Law § 685 (a) (1) and for negligence under Tax Law § 685 (b) (1) and (2).

94. Petitioner Boruch Gutman did not file a New York State tax return for tax year 2015 prior to the commencement of the audit.

95. On July 15, 2020, the Division issued a notice of deficiency, notice number L-051698055, to petitioner Boruch Gutman asserting additional tax due of \$207,230.00, plus penalties and interest, for tax year 2015.

96. Based on the field audit adjustment made at BCMS for the other similarly situated petitioners, the Division reduced petitioner Boruch Gutman's additional tax liability to \$89,231.00, with penalties and interest adjusted accordingly.

97. On or about February 6, 2023, petitioner Boruch Gutman submitted payment in the amount of \$205,770.20 through a check made payable to the Commissioner of Taxation and Finance. The Division issued a satisfaction of judgment, dated March 24, 2023, acknowledging that notice number L-051698055 had been paid in full.

98. On or about September 8, 2023, petitioner Boruch Gutman filed a New York State resident income tax return for tax year 2015, which requested a refund of \$205,396.00.

99. On September 13, 2023, the Division issued a notice of disallowance denying petitioner Boruch Gutman's refund claim in full.

Petitioner Eliezer Gutman

100. The Division performed an audit of petitioner Eliezer Gutman for tax year 2015 to investigate the income flowing through TOV from Fulton based on petitioner's 6.25% interest in TOV.

101. Petitioner Eliezer Gutman was a resident of New York State and New York City for tax year 2015 with a home address in Brooklyn, New York.

102. As a result of the audit, petitioner Eliezer Gutman was issued a consent to field audit adjustment reflecting an additional \$1,624,498.00 in capital gain income attributed to petitioner from Fulton and TOV and \$16,634.00 in unreported schedule K-1 income from TOV. These adjustments resulted in additional New York State tax due of \$144,051.00 and New York City tax due of \$63,179.00 for a total of \$207,230.00 in additional tax due for tax year 2015.

103. The Division imposed penalties on petitioner Eliezer Gutman for failure to file a tax return on or before the due date under Tax Law § 685 (a) (1) and for negligence under Tax Law § 685 (b) (1) and (2).

104. Petitioner Eliezer Gutman did not file a New York State tax return for tax year 2015 prior to the commencement of the audit.

105. On July 15, 2020, the Division issued a notice of deficiency, notice number L-051698054, to petitioner Eliezer Gutman asserting additional tax due of \$207,230.00, plus penalties and interest, for tax year 2015.

106. Based on the field audit adjustment made at BCMS for the other similarly situated petitioners, the Division reduced petitioner Eliezer Gutman's additional tax liability to \$89,231.00, with penalties and interest adjusted accordingly.

107. On or about January 30, 2023, petitioner Eliezer Gutman submitted payment in the amount of \$188,848.26 through a check made payable to the Commissioner of Taxation and Finance. The Division issued a satisfaction of judgment, dated March 17, 2023, acknowledging that notice number L-051698054 had been paid in full.

108. On or about September 8, 2023, petitioner Eliezer Gutman filed a New York State resident income tax return for tax year 2015, which requested a refund of \$188,848.00.

109. On September 13, 2023, the Division issued a notice of disallowance denying petitioner Eliezer Gutman's refund claim in full.

Petitioner Elky Gutman

110. The Division performed an audit of petitioner Elky Gutman for tax year 2015 to investigate the income flowing through TOV from Fulton based on petitioner's 6.25% interest in TOV.

111. Petitioner Elky Gutman was a resident of New York State and New York City for tax year 2015 with a home address in Brooklyn, New York.

112. As a result of the audit, petitioner Elky Gutman was issued a consent to field audit adjustment reflecting an additional \$1,624,498.00 in capital gain income attributed to petitioner from Fulton and TOV and \$16,634.00 in unreported schedule K-1 income from TOV. These adjustments resulted in additional New York State tax due of \$144,051.00 and New York City tax due of \$63,179.00 for a total of \$207,230.00 in additional tax due for tax year 2015.

113. The Division imposed penalties on petitioner Elky Gutman for failure to file a tax return on or before the due date under Tax Law § 685 (a) (1) and for negligence under Tax Law § 685 (b) (1) and (2).

114. Petitioner Elky Gutman did not file a New York State tax return for tax year 2015 prior to the commencement of the audit.

115. On July 16, 2020, the Division issued a notice of deficiency, notice number L-051700342, to petitioner Elky Gutman asserting additional tax due of \$207,230.00, plus penalties and interest, for tax year 2015.

116. Based on the field audit adjustment made at BCMS for the other similarly situated petitioners, the Division reduced petitioner Elky Gutman's additional tax liability to \$89,231.00, with penalties and interest adjusted accordingly.

117. On or about January 30, 2023, petitioner Elky Gutman submitted payment in the amount of \$205,235.90 through a check made payable to the Commissioner of Taxation and Finance. The Division issued a satisfaction of judgment, dated March 17, 2023, acknowledging that notice number L-051700342 had been paid in full.

118. On or about September 8, 2023, petitioner Elky Gutman filed a New York State resident income tax return for tax year 2015, which requested a refund of \$205,236.00.

119. On September 13, 2023, the Division issued a notice of disallowance denying petitioner Elky Gutman's refund claim in full.

Petitioner Esther Gutman

120. The Division performed an audit of petitioner Esther Gutman for tax year 2015 to investigate the income flowing through TOV from Fulton based on petitioner's 6.25% interest in TOV.

121. Petitioner Esther Gutman was a resident of New York State and New York City for tax year 2015 with a home address in Brooklyn, New York.

122. As a result of the audit, petitioner Esther Gutman was issued a consent to field audit adjustment reflecting an additional \$1,624,498.00 in capital gain income attributed to petitioner from Fulton and TOV and \$16,634.00 in unreported schedule K-1 income from TOV. These adjustments resulted in additional New York State tax due of \$144,051.00 and New York City tax due of \$63,179.00 for a total of \$207,230.00 in additional tax due for tax year 2015.

123. The Division imposed penalties on petitioner Esther Gutman for failure to file a tax return on or before the due date under Tax Law § 685 (a) (1) and for negligence under Tax Law § 685 (b) (1) and (2).

124. Petitioner Esther Gutman did not file a New York State tax return for tax year 2015 prior to the commencement of the audit.

125. On July 15, 2020, the Division issued a notice of deficiency, notice number L-051697922, to petitioner Esther Gutman asserting additional tax due of \$207,230.00, plus penalties and interest, for tax year 2015.

126. Based on the field audit adjustment made at BCMS for the other similarly situated petitioners, the Division reduced petitioner Esther Gutman's additional tax liability to \$89,231.00, with penalties and interest adjusted accordingly.

127. On or about January 30, 2023, petitioner Esther Gutman submitted payment in the amount of \$205,395.68 through a check made payable to the Commissioner of Taxation and Finance. The Division issued a satisfaction of judgment, dated March 17, 2023, acknowledging that notice number L-051697922 had been paid in full.

128. On or about September 8, 2023, petitioner Esther Gutman filed a New York State resident income tax return for tax year 2015, which requested a refund of \$205,396.00.

129. On September 13, 2023, the Division issued a notice of disallowance denying petitioner Esther Gutman's refund claim in full.

Petitioner Feigy Lefkowitz

130. The Division performed an audit of petitioner Feigy Lefkowitz for tax year 2015 to investigate the income flowing through TOV from Fulton based on petitioner's 6.25% interest in TOV.

131. On or about October 14, 2016, petitioner Feigy Lefkowitz and her spouse jointly filed a New York State resident income tax return for tax year 2015, which calculated an overpayment of tax in the amount of \$8,766.00. Petitioner did not report having received any flow through income from Fulton or TOV on the return.

132. As a result of the audit, petitioner Feigy Lefkowitz was issued a consent to field audit adjustment reflecting an additional \$1,624,498.00 in capital gain income attributed to petitioner from Fulton and TOV and \$16,634.00 in unreported schedule K-1 income from TOV. The Division also modified or disallowed certain tax credits claimed by petitioner on the return due to the income adjustments described above. These adjustments resulted in additional New York State tax due of \$114,470.00 and New York City tax due of \$65,139.00 for a total of \$179,609.00 in additional tax due for tax year 2015.

133. The Division imposed penalties on petitioner Feigy Lefkowitz for substantial understatement of tax liability under Tax Law § 685 (p) and for negligence under Tax Law § 685 (b) (1) and (2).

134. On June 23, 2020, the Division issued a notice of deficiency, notice number L-051567686, to petitioner Feigy Lefkowitz asserting additional tax due of \$179,609.00, plus penalties and interest, for tax year 2015.

135. Based on the field audit adjustment made at BCMS for the other similarly situated petitioners, the Division reduced petitioner Feigy Lefkowitz's additional tax liability to \$93,785.00, with penalties and interest adjusted accordingly.

136. The Division issued a tax compliance levy to TD Bank, N.A., demanding that TD Bank transfer any personal property that it held on behalf of petitioner Feigy Lefkowitz and her spouse to the Division to satisfy an outstanding warrant. TD Bank complied with the levy. No satisfaction of judgment has been issued but the Division acknowledges that notice number L-051567686 has been paid in full.

137. On or about September 8, 2023, petitioner Feigy Lefkowitz filed a New York State resident income tax return for tax year 2015, which requested a refund of \$327,354.00.

138. On September 13, 2023, the Division issued a notice of disallowance denying petitioner Feigy Lefkowitz's refund claim in full.

Petitioner Zvi (Hershey) Gutman

139. The Division performed an audit of petitioner Zvi (Hershey) Gutman for tax year 2015 to investigate the income flowing through TOV from Fulton based on petitioner's 6.25% interest in TOV.

140. Petitioner Zvi (Hershey) Gutman was a resident of New York State and New York City for tax year 2015 with a home address in Brooklyn, New York.

141. As a result of the audit, petitioner Zvi (Hershey) Gutman was issued a consent to field audit adjustment reflecting an additional \$1,624,498.00 in capital gain income attributed to petitioner from Fulton and TOV and \$16,634.00 in unreported schedule K-1 income from TOV. These adjustments resulted in additional New York State tax due of \$144,051.00 and New York City tax due of \$63,179.00 for a total of \$207,230.00 in additional tax due for tax year 2015.

142. The Division imposed penalties on petitioner Zvi (Hershey) Gutman for failure to file a tax return on or before the due date under Tax Law § 685 (a) (1) and for negligence under Tax Law § 685 (b) (1) and (2).

143. Petitioner Zvi (Hershey) Gutman did not file a New York State tax return for tax year 2015 prior to the commencement of the audit.

144. On July 15, 2020, the Division issued a notice of deficiency, notice number L-051698063, to petitioner Zvi (Hershey) Gutman asserting additional tax due of \$207,230.00, plus penalties and interest, for tax year 2015.

145. Based on the field audit adjustment made at BCMS for the other similarly situated petitioners, the Division reduced petitioner Zvi (Hershey) Gutman's additional tax liability to \$89,231.00, with penalties and interest adjusted accordingly.

146. On or about January 30, 2023, petitioner Zvi (Hershey) Gutman submitted payment in the amount of \$205,395.68 through a check made payable to the Commissioner of Taxation and Finance. The Division issued a satisfaction of judgment, dated March 17, 2023, acknowledging that notice number L-051698063 had been paid in full.

147. On or about September 8, 2023, petitioner Zvi (Hershey) Gutman filed a New York State resident income tax return for tax year 2015, which requested a refund of \$205,396.00.

148. On September 13, 2023, the Division issued a notice of disallowance denying petitioner Zvi (Hershey) Gutman's refund claim in full.

Petitioner Hindy Miller-Gutman

149. The Division performed an audit of petitioner Hindy Miller-Gutman for tax year 2015 to investigate the income flowing through TOV from Fulton based on petitioner's 6.25% interest in TOV.

150. On or about April 11, 2016, petitioner Hindy Miller-Gutman filed a New York State resident income tax return for tax year 2015, which reported New York adjusted gross income of \$35,396.00 and requested a refund of \$1,163.00. Petitioner did not report having received any flow through income from Fulton or TOV on the return.

151. As a result of the audit, petitioner Hindy Miller-Gutman was issued a consent to field audit adjustment reflecting an additional \$1,624,498.00 in capital gain income attributed to petitioner from Fulton and TOV and \$16,634.00 in unreported schedule K-1 income from TOV. The Division also modified or disallowed certain tax credits claimed by petitioner on the return due to the income adjustments described above. These adjustments resulted in additional New York State tax due of \$145,819.00 and New York City tax due of \$63,737.00 for a total of \$209,556.00 in additional tax due for tax year 2015.

152. The Division imposed penalties on petitioner Hindy Miller-Gutman for substantial understatement of tax liability under Tax Law § 685 (p) and for negligence under Tax Law § 685 (b) (1) and (2).

153. On January 16, 2020, the Division issued a notice of deficiency, notice number L-051164208, to petitioner Hindy Miller-Gutman asserting additional tax due of \$209,556.00, plus penalties and interest, for tax year 2015.

154. Based on the field audit adjustment made at BCMS for the other similarly situated petitioners, the Division reduced petitioner Hindy Miller-Gutman's additional tax liability to \$90,860.00, with penalties and interest adjusted accordingly.

155. On or about January 30, 2023, petitioner Hindy Miller-Gutman submitted payment in the amount of \$213,065.86 through a check made payable to the Commissioner of Taxation and Finance. The Division did not issue a satisfaction of judgment because the warrant included

an assessment for tax year 2016 that had not yet been paid. Nonetheless, the Division acknowledges that notice number L-051164208 has been paid in full.

156. On or about September 8, 2023, petitioner Hindy Miller-Gutman filed a New York State resident income tax return for tax year 2015, which requested a refund of \$213,066.00.

157. On September 13, 2023, the Division issued a notice of disallowance denying petitioner Hindy Miller-Gutman's refund claim in full.

Petitioner Nachman Gutman

158. The Division performed an audit of petitioner Nachman Gutman for tax year 2015 to investigate the income flowing through TOV from Fulton based on petitioner's 6.25% interest in TOV.

159. On or about March 14, 2016, petitioner Nachman Gutman and his spouse jointly filed a New York State resident income tax return for tax year 2015, which reported New York adjusted gross income of \$113,628.00 and calculated additional tax due in the amount of \$2,358.00. Petitioner did not report having received any flow through income from Fulton or TOV on the return.

160. As a result of the audit, petitioner Nachman Gutman was issued a consent to field audit adjustment reflecting an additional \$1,624,498.00 in capital gain income attributed to petitioner from Fulton and TOV and \$16,634.00 in unreported schedule K-1 income from TOV. The Division also modified or disallowed certain tax credits claimed by petitioner on the return due to the income adjustments described above. These adjustments resulted in additional New York State tax due of \$116,044.00 and New York City tax due of \$65,995.00 for a total of \$182,039.00 in additional tax due for tax year 2015.

161. The Division imposed penalties on petitioner Nachman Gutman for substantial understatement of tax liability under Tax Law § 685 (p) and for negligence under Tax Law § 685 (b) (1) and (2).

162. On January 16, 2020, the Division issued a notice of deficiency, notice number L-051164166, to petitioner Nachman Gutman asserting additional tax due of \$182,039.00, plus penalties and interest, for tax year 2015.

163. Based on the field audit adjustment made at BCMS for the other similarly situated petitioners, the Division reduced petitioner Nachman Gutman's additional tax liability to \$96,214.00, with penalties and interest adjusted accordingly.

164. On or about January 30, 2023, petitioner Nachman Gutman submitted payment in the amount of \$174,469.88 through a check made payable to the Commissioner of Taxation and Finance. The Division issued a satisfaction of judgment, dated March 17, 2023, acknowledging that notice number L-051164166 had been paid in full.

165. On or about September 8, 2023, petitioner Nachman Gutman and his spouse jointly filed a New York State resident income tax return for tax year 2015, which requested a refund of \$174,470.00.

166. On September 13, 2023, the Division issued a notice of disallowance denying petitioner Nachman Gutman's refund claim in full.

Petitioner Shmuel Gutman

167. The Division performed an audit of petitioner Shmuel Gutman for tax year 2015 to investigate the income flowing through TOV from Fulton based on petitioner's 6.25% interest in TOV.

168. On or about April 10, 2016, petitioner Shmuel Gutman filed a New York State resident income tax return for tax year 2015, which reported New York adjusted gross income of \$39,238.00 and requested a refund of \$194.00. Petitioner did not report having received any flow through income from Fulton or TOV on the return.

169. As a result of the audit, petitioner Shmuel Gutman was issued a consent to field audit adjustment reflecting an additional \$1,624,498.00 in capital gain income attributed to petitioner from Fulton and TOV and \$16,634.00 in unreported schedule K-1 income from TOV. The Division also modified or disallowed certain tax credits claimed by petitioner on the return due to the income adjustments described above. These adjustments resulted in additional New York State tax due of \$145,889.00 and New York City tax due of \$63,664.00 for a total of \$209,553.00 in additional tax due for tax year 2015.

170. The Division imposed penalties on petitioner Shmuel Gutman for substantial understatement of tax liability under Tax Law § 685 (p) and for negligence under Tax Law § 685 (b) (1) and (2).

171. On February 26, 2020, the Division issued a notice of deficiency, notice number L-051280218, to petitioner Shmuel Gutman asserting additional tax due of \$209,553.00, plus penalties and interest, for tax year 2015.

172. Based on the field audit adjustment made at BCMS for the other similarly situated petitioners, the Division reduced petitioner Shmuel Gutman's additional tax liability to \$90,781.00, with penalties and interest adjusted accordingly.

173. On or about January 30, 2023, petitioner Shmuel Gutman submitted payment in the amount of \$169,774.87 through a check made payable to the Commissioner of Taxation and

Finance. The Division issued a satisfaction of judgment, dated March 17, 2023, acknowledging that notice number L-051280218 had been paid in full.

174. On or about September 8, 2023, petitioner Shmuel Gutman filed a New York State resident income tax return for tax year 2015, which requested a refund of \$169,775.00.

175. On September 13, 2023, the Division issued a notice of disallowance denying petitioner Shmuel Gutman's refund claim in full.

176. On March 17, 2022, petitioners Jacob Gutman, Sarah Singer, Mendy Gutman, Perry and Lazar Lerner, Shloma Gutman and Chaim Gutman timely filed petitions with the Division of Tax Appeals in protest of the conciliation orders. On October 11, 2023, petitioners Boruch Gutman, Eliezer Gutman, Elky Gutman, Esther Gutman, Feigy Lefkowitz, Zvi (Hershey) Gutman, Hindy Miller-Gutman, Nachman Gutman and Shmuel Gutman timely filed petitions with the Division of Tax Appeals in protest of the notices of disallowance.

177. Fulton reported losses on its federal and New York State partnership returns in several tax years during its period of ownership of the Fulton Street property from 1999 through 2015:

2000	\$558.00
2001	\$21,579.00
2002	\$296,092.00
2003	\$574,203.00
2004	\$380,234.00
2005	\$310,852.00
2006	\$664,367.00
2007	\$317,251.00
2008	\$279,142.00
2009	\$730,361.00
2010	\$89,913.00
2013	\$130,189.00

178. The parties stipulated that, pursuant to IRC (26 USC) § 469, investors in TOV, which owned a 99.99% interest in Fulton, are individually entitled to apply unused passive losses

from the period of ownership to offset gain recognized on the sale of the Fulton Street property, provided those losses are substantiated.

179. On October 18, 2024, the Division requested records from petitioners concerning the claimed passive losses, including federal forms 8582 and schedules K-1 for all years in which the losses were accrued, in addition to New York State and federal tax returns for Fulton, TOV and petitioners.

180. In response, petitioners provided: Fulton's federal partnership returns (forms 1065) for tax years 1999 through 2006; Fulton's New York State partnership returns (forms IT-204) for tax years 2007 through 2014; and TOV's New York State partnership returns (forms IT-204) for tax years 2009 through 2014. Fulton's New York State partnership returns are all dated in March 2018. TOV's partnership returns are not dated but appear to have been prepared in June 2018.

181. Based on the losses reported by Fulton during the ownership period of the Fulton Street property from 1999 through 2015, each petitioner, through their 6.25% interest in TOV, would individually have an available passive loss up to an amount of \$237,171.31 to offset gain recognized on the sale of the Fulton Street property, if the passive losses reported by Fulton are substantiated.

182. The Division's position is that none of the passive losses claimed by petitioners have been substantiated. The Division acknowledges, however, that unused passive losses from the period of Fulton's ownership of the Fulton Street property can be applied to offset passive gain from the sale of the property pursuant to IRC (26 USC) § 469, provided that those losses are substantiated.

183. At the hearing, the Division presented the testimony of Nishi Gupta, Tax Auditor 2 with the Division. Ms. Gupta explained that she did not perform the audit of Fulton but took on the responsibility for the audit after the BCMS conference. She testified that she reviewed the audit file as well as the prior auditor's workpapers and determination, which concluded that petitioners engaged in a valid LKE but that certain expenses related to both the sale of the Fulton Street property and the purchase of the West Cliff property were not substantiated. She further explained that the additional taxable gain that resulted from the disallowance of those expenses was attributed to the individual partners, petitioners, based on their share of the gain that flowed through Fulton.

184. In connection with the sale of the Fulton Street property, Ms. Gupta explained that the Division disallowed two broker's fees and some additional costs. To verify the broker's fees, the Division requested proof of payment, the brokerage agreements and the listing for the property. She testified that the Division received a copy of a check made payable to Edith Lesser in the amount of \$2,100,000.00 and a copy of a wire transfer to David Goldberg in the amount of \$600,000.00 but did not receive any brokerage agreements or listing documents. Without the agreements, the Division determined that the fees were not substantiated. Similarly, the Division determined that certain other closing costs, including a \$1,100,000.00 payment to the law firm of Moritt, Hock & Hamroff, LLP (Moritt Hock), were not substantiated because the Division did not receive any invoices or proof of payment for these expenses. Ms. Gupta testified that the Division does not rely on the closing statements to verify expenses because "we do not know how much due diligence that company might have done to substantiate those costs."

185. In connection with the purchase of the West Cliff property, Ms. Gupta explained that the Division disallowed a syndication fee in the amount of \$9,300,000.00 and a payment to

Gemma Capital in the amount of \$360,000.00. To verify the syndication fee, the Division requested a copy of the syndication agreement, proof of payment and documentation showing work performed by David Horowitz, the syndicator. She testified that the Division received a copy of the syndication agreement between Fulton and Mr. Horowitz and a promissory note between the parties. The Division did not receive any proof of payment. Ms. Gupta explained that there was a provision in the syndication agreement that the \$9,300,000.00 fee would be paid either on the sale of the West Cliff property or five years from the date of the agreement. Without proof of payment or “documentation to substantiate work that was performed to receive more than 50 percent of [the] purchase price,” the Division determined that the syndication fee was not substantiated. Similarly, the Division disallowed the \$360,000.00 expense related to the payment to Gemma Capital because no documentation was received to substantiate that cost.

186. The Division also requested documentation to support the passive activity loss claimed by petitioners, including federal forms 8582, passive activity loss limitations, and schedules K-1 for all petitioners for the years the losses accrued, as well as tax returns for Fulton, TOV and all petitioners for such years. The Division received some documentation, including tax returns for Fulton and TOV, but not forms 8582 or petitioners’ tax returns. Ms. Gupta testified that without such “we had no way to substantiate how much the passive loss was worth and whether they were used [in] the five years or not, and how much the partners can use in the year.”

187. Petitioner Shloma Gutman testified on behalf of petitioners at the hearing. Mr. Gutman testified that his father purchased the Fulton Street property through Fulton in 1999 for approximately \$6,000,000.00. He explained that petitioners were passive members of Fulton through TOV. Mr. Gutman testified that the property became financially troubled, due to the

inability to refinance the seller's mortgage, and, therefore, Fulton filed for bankruptcy. Mr. Gutman explained that the goal of the bankruptcy filing was to give petitioners time to get financing and preserve any equity they had in the Fulton Street property. Mr. Gutman testified that they could not pay their bankruptcy attorneys, Moritt Hock, at the time the bankruptcy was discharged, so the firm placed a lien on the Fulton Street property.

188. Mr. Gutman testified that the Fulton Street property was previously a manufacturing building that they converted into office space. The Fulton Street property was Fulton's only asset.

189. Mr. Gutman explained that, after struggling with the Fulton Street property for years, his father decided to sell the property "to create a new situation for his family. For his kids." Mr. Gutman testified that he helped his father sell the property but that "it ended up being David Goldberg and Edith Lesser, who helped us make the sale to Abraham Lesser." He explained that he verbally negotiated Mr. Goldberg's fee for helping them locate a buyer, that this was typical in their community, and that Mr. Goldberg was able to secure a higher sales price for the property than they could on their own. Mr. Gutman also explained that the buyer required that they pay his relative, Ms. Lesser: "we agreed the buyer had the control because the buyer is the person that made the transaction happen. So, I couldn't get out of that. I had to pay that price, agree to pay the price for that, for that broker." This was also a verbal arrangement. Mr. Gutman testified that both "brokerage" fees were paid as evidenced by the wire payment to Mr. Goldberg and the check to Ms. Lesser.

190. Mr. Gutman also testified that the payments for demolition and the payments to Fulton Lumber and the New York City Environmental Control Board were made because each of

the “vendors” had a lien on the Fulton Street property, which had to be paid at the time of the closing. He further testified that each of the expenses was directly related to the property.

191. Mr. Gutman testified that Mr. Horowitz, a friend of his, introduced the West Cliff property to him. When Mr. Gutman saw its income producing potential, he believed it had the value to replace the Fulton Street property. Mr. Gutman explained that Mr. Horowitz wanted a significant interest in the property but, because of the LKE rules, “it was complicated.” Instead, petitioners decided to “buy out” his participation and the syndication agreement represented this arrangement. Mr. Gutman explained that “we would pay the agreed upon amount in order to buy out his rights to this. He had the right to buy this property. He had this property first.” He further explained that the syndication agreement required, via a promissory note, that the fee be paid at the time of a sale of the property or five years from the agreement, whichever came first. Mr. Gutman testified that the fee has not been paid yet, and petitioners still own the West Cliff property.

192. Mr. Gutman believed the West Cliff property was worth at least \$30,000,000.00, much more than the purchase price of \$18,250,000.00, and, therefore, believed it to be undervalued based on the income it was producing. Mr. Gutman testified that a cost segregation study later valued the West Cliff property at \$27,500,000.00.

193. Mr. Gutman testified that Gemma Capital:

“was the consultant that we hired to do all our work in order to decide whether to actually buy the building together. Because where we came from, we came from a lot of hardship, we came from selling this property that we worked that hard, and the goal was to make it easier, and this was the consultant that worked for us to look through everything for us.”

194. Mr. Gutman believed that the “total consideration” for the West Cliff property would equal or exceed the net sales price of the Fulton Street property.

195. When asked if he ever claimed the passive losses attributed to him from Fulton, Mr. Gutman stated: “To the best of my knowledge, no, I did not.” When asked if he was aware if the other petitioners herein, utilized any of the passive losses from Fulton, Mr. Gutman stated: “I’m not aware.”

196. Mr. Gutman testified that he relied on his advisors, including legal counsel, the qualified intermediary, Gemma Capital and his brokers, in effecting the IRC (26 USC) § 1031 LKE and a certified public accountant in filing the tax returns. He explained that he had between 15 and 25 meetings in connection with the LKE.

197. Mr. Horowitz also testified on behalf of petitioners. Mr. Horowitz testified that he is in the real estate business and that “I look for deals constantly, underwrite deals. When I’m a buyer’s syndicator, most of the time I stay a partner, and sometimes when people object that I stay a partner, then they give me a fair share or amount so that I’m satisfied.” Mr. Horowitz stated that, over the last 20 years, he participated in approximately eight of these transactions.

198. When asked why he backed away from being an investor in the West Cliff property, Mr. Horowitz explained:

“There’s a saying, I’d rather give up an opportunity to have something. So, I felt there was good potential over here. I wasn’t in a rush to have money right away. Actually, a longer investment, and I was promised interest as well, besides the \$9.3 [million].

So, sometimes I do a deal, I get bought out. Many times I get bought out. Unless it doesn’t make sense. If it makes sense and I’m happy, so I just take a stake and/or money, and I’m happy, and continue finding other deals.”

Mr. Horowitz further testified that syndicators usually take 30% of a deal, and that’s what he asked for but, because of petitioners’ desire to do a LKE, he could not stay a partner in the deal.

199. Mr. Horowitz also testified that Westcliff Nevada Equities Trust, the payee on the \$9,300,000.00 promissory note from Fulton, was the trust his syndicate used and that the trust would receive payment at the time the West Cliff property was sold.

200. Mr. Horowitz believed that the West Cliff property was worth more than \$27,500,000.00 in 2015 based on the income it produced.

CONCLUSIONS OF LAW

A. IRC (26 USC) § 1031 is an exception to the general rule requiring recognition of gain or loss on the sale or exchange of property (*see* IRC [26 USC] § 1001 [c]; Treas Reg [26 CFR] § 1.1002-1 [a]). Under IRC (26 USC) § 1031 (a) (1), as was in effect during the year at issue, “[n]o gain or loss shall be recognized on the exchange of property held for productive use in a trade or business or for investment if such property is exchanged solely for property of like kind which is to be held either for productive use in a trade or business or for investment.” Recognition of such gain or loss is only deferred, however, as the taxpayer must carry over its basis in the transferred (relinquished) property to the like-kind property for which it is exchanged (replacement property) (*see* IRC [26 USC] § 1031 [d]). If a taxpayer receives non-like-kind property, such as cash, in addition to the like-kind property, gain is recognized to the extent of the non-like-kind property received (referred to as “boot”) and the basis in the like-kind property received is adjusted accordingly (*see* IRC [26 USC] § 1031 [b]; Treas Reg [26 CFR] §§ 1.1031[a]-1 [a] [2], 1.1031[b]-1, 1.1031[k]-1 [f]). Accordingly, if a taxpayer exchanges property for other like-kind property (and satisfies the requirements of IRC [26 USC] § 1031) but also receives cash, the cash is taxable to the extent that the taxpayer realizes gain on the LKE transaction.

The parties do not dispute that petitioners engaged in a valid LKE under IRC (26 USC) § 1031. The issue here is whether the LKE produced taxable boot that flowed through to petitioners based on their ownership interests in Fulton (through TOV). It is noted that determinations made in a notice of deficiency are presumed correct, and the burden of proof is on petitioners to establish, by clear and convincing evidence, that those determinations are erroneous (*see Matter of Leogrande v Tax Appeals Trib.*, 187 AD2d 768, 769 [3d Dept 1992], *lv denied* 81 NY2d 704 [1993]; Tax Law § 689 [e]). The burden does not rest with the Division to demonstrate the propriety of the deficiency (*see Matter of Scarpulla v State Tax Commn.*, 120 AD2d 842, 843 [3d Dept 1986]).

B. On its face, petitioners purchased the West Cliff property for an amount that was substantially less than the amount they sold the Fulton Street property for and, in turn, received boot. However, the amount of boot received in a LKE is decreased by the taxpayer's exchange expenses (*see Blatt v Commr.*, TC Memo 1994-48 [1994]; Rev Rul 72-456, 1972-2 CB 468 [1972]). Internal Revenue Service (IRS) Publication 544 provides that exchange expenses generally include the costs paid in connection with a LKE and include brokerage commissions, attorney fees and deed preparation fees.

IRS Revenue Ruling 72-456 specifically addresses brokerage commissions. Relying on example 2 in Treasury regulation (26 CFR) § 1.1031(d)-2, the revenue ruling found that "money paid out in connection with an exchange under [IRC (26 USC) § 1031] is offset against money received in computing gain realized and gain recognized and is also added in determining the basis of the acquired property." The revenue ruling concluded that brokerage commissions were paid in connection with a LKE, reduced realized gain and increased the basis of the replacement property.

Treasury regulation (26 CFR) § 1.1031(k)-1 (g) (7), while not specially addressing exchange expenses and their effect on realized gain, provides that a taxpayer will not be in actual or constructive receipt where certain “transactional items” are paid from the proceeds of a LKE.

These include:

“[t]ransactional items that relate to the disposition of the relinquished property or to the acquisition of the replacement property and appear under local standards in the typical closing statements as the responsibility of the buyer or seller (e.g., commissions, prorated taxes, recording or transfer taxes, and title company fees)” (Treas Reg [26 CFR] § 1.1031(k)-1 [g] [7] [ii]).

Petitioners claimed expenses in connection with the LKE, some of which were allowed by the Division and some not. Remaining in dispute here are two categories of expenses in connection with the sale of the Fulton Street property: the so-called broker’s fees and, as described by Mr. Gutman, the payments to satisfy liens on the property. The expenses in dispute in connection with the purchase of the West Cliff property include the payment to Gemma Capital and the so-called syndication fee. Each will be addressed separately.

C. As noted, broker’s fees or brokerage commissions appear to be a commonly accepted exchange expense. Broker’s fees of \$2,700,000.00 appear on the Riverside closing statement and petitioners provided proof of a \$600,000.00 payment to Mr. Goldberg and a \$2,100,000.00 payment to Ms. Lesser. The Division nonetheless disallowed these expenses on the basis that petitioners have not established the validity of the broker’s fees: no agreements were provided and neither so-called broker testified at the hearing. The Division also questions whether Mr. Goldberg or Ms. Lesser were licensed to act as real estate brokers in New York State.

Mr. Gutman testified that he had a verbal agreement with Mr. Goldberg to help petitioners locate a buyer for the Fulton Street property and that Mr. Goldberg helped them secure a higher sales price for the property than they could on their own. The record otherwise

does not describe what, if any, services Mr. Goldberg actually performed. With respect to Ms. Lesser, Mr. Gutman testified that the buyer of the Fulton Street property required that he pay Ms. Lesser. Again, the record does not describe what, if any, services Ms. Lesser actually performed.

Petitioners provided a form 8824 worksheet to substantiate the expenses in dispute. The form 8824 worksheet lists exchange expenses paid in connection with the sale of the Fulton Street property as transfer tax, legal fees, title closer fee and other closing costs. Reported on the line for commissions is \$0.00. No explanation of this form was provided at the hearing. It is unclear why petitioners themselves did not include the fees paid to Mr. Goldberg and Ms. Lesser as exchange expenses in the computation of gain from the LKE. Given the lack of agreements or testimony explaining actual services provided, as well as the conflicting information in the record of the treatment of these fees, petitioners have failed to satisfy their burden of proving that the fees paid to Mr. Goldberg and Ms. Lesser are exchange expenses.

D. The remaining disputed expenses in connection with the sale of the Fulton Street property include payments to Fulton's bankruptcy counsel, the New York City Environmental Control Board, Riverside Title, Fulton Lumber and for demolition charges. The \$1,100,000.00 payment to Fulton's bankruptcy counsel, Moritt Hock, was for legal services provided during Fulton's bankruptcy proceeding, which was closed in 2006. Mr. Gutman explained that Fulton could not pay for the legal services at the time the bankruptcy was discharged so Moritt Hock placed a lien on the property. Similarly, Mr. Gutman explained that the other expenses, except Riverside Title, related to payments to satisfy liens placed on the property. No explanation was provided with respect to the Riverside Title expense.

All these expenses appear on the Riverside closing statement under title fees and escrows. Such fact, however, is not determinative as not all expenses reflected on a closing statement are

exchange expenses (*see* IRS Publication 544 [“some expenses and receipts that may be reflected on the closing statement (for example, property taxes, rent prorations, security deposits, and repairs) are not exchange expenses”]). Based on Mr. Gutman’s explanation, these payments relate to past-due debts and, while the liens ultimately had to be satisfied to sell the property, that does not make them expenses paid in connection with an exchange, only paid at the time of the exchange. As the Division points out, paying expenses from the proceeds of the sale does not convert them into exchange expenses. Had these expenses been paid when they were due, they would not appear on the closing statement. As for the Riverside Title expense, without further explanation, it cannot be determined that it is an exchange expense.

E. In connection with the purchase of the West Cliff property, the Division disallowed a \$360,000.00 expense paid to Gemma Capital. This expense appears on the Ticor closing statement but is not included as an exchange expense on the form 8824 worksheet. Mr. Gutman explained that Gemma Capital was a consultant that petitioners hired to help them decide whether to purchase the West Cliff property together. After the hearing, petitioners provided a copy of an invoice from Gemma Capital that indicates that the expense related to a consulting fee but does not otherwise describe the services provided to petitioners. Again, given the lack of agreements or testimony explaining actual services provided, as well as the conflicting information in the record of the treatment of this fee, petitioners have failed to satisfy their burden of proving that the \$360,000.00 fee paid to Gemma Capital is an exchange expense.

F. The Division also disallowed the \$9,300,000.00 expense related to the so-called syndication fee. The syndication fee does not appear on the Ticor closing statement or on the form 8824 worksheet. Petitioners provided a copy of the syndication agreement and a promissory note. The syndication agreement provided that the \$9,300,000.00 payment to Mr.

Horowitz was for bringing the West Cliff property investment opportunity to petitioners and required payment at the time of the sale of the property or five years from November 5, 2015. Mr. Gutman testified that the payment was to “buy out” Mr. Horowitz as he had the right to buy the property before petitioners and that he believed that the property was worth at least \$30,000,000.00. Mr. Gutman further testified that petitioners still own the West Cliff property, and the \$9,300,000.00 fee has not been paid. Mr. Horowitz added that syndicators usually take 30% of a deal, and that is what he asked for, but, because of petitioners’ desire to do a LKE, he could not stay a partner in the deal. He believed that the West Cliff property was worth more than \$27,500,000.00 in 2015.

Exchange expenses are those costs paid in connection with a LKE (*see* IRS Publication 544). Petitioners admit that they have not paid the \$9,300,000.00 fee to Mr. Horowitz and, as such, the fee is not an exchange expense. Further, the syndication agreement required payment no later than November 5, 2020, five years after the date of the agreement, and it appears that either petitioners are in violation of the agreement or that the agreement was never valid in the first place. The syndication fee does not appear on the Ticor closing statement or the form 8824 worksheet and represents more than half of the purchase price of the West Cliff property and substantially more than what Mr. Horowitz testified that syndicators usually take. Petitioners’ belief that the West Cliff property was worth far more than what they paid for it does not justify the fee. Accordingly, petitioners have not proven that the syndication fee is an exchange expense.

G. Petitioners make an additional argument that some, if not all, of the disallowed expenses, if found not to be exchange expenses, should nonetheless be added to the basis of the property thereby reducing the gain realized on the LKE. Specifically, petitioners contend that

“the fact remains that the actual tax calculation of gain would remain the same assuming these disallowed 1031 costs were recharacterized as capital expenditures. They would simply be added to basis under the normal rules so that there does not appear to be the need to over-analyze the technical [1031] issue.” Petitioners do not elaborate on these “normal rules” but add, in their reply brief, support for the ability to capitalize certain bankruptcy expenses.

If petitioners’ legal fees related to Fulton’s bankruptcy proceeding were capitalizable at the time they were due, 2006, petitioners have provided no amended returns or tax computations showing the effect of such on the basis of the Fulton Street property or its depreciation since then. If the legal fees, or any other expenses, were capitalizable at the time they were paid, from the proceeds of the sale, it is unclear how they would be added to the basis of property petitioners no longer own. In either case, petitioners have not satisfied their burden of proof in this regard.

H. Taxpayers are allowed deductions for certain business and investment expenses under IRC (26 USC) §§ 162 and 212. IRC (26 USC) § 469, however, generally disallows passive activity losses that exceed passive activity income in the current tax year (*see* IRC [26 USC] § 469 [a], [d] [1]). A taxpayer can carry forward disallowed passive losses to the next tax year (*see* IRC [26 USC] § 469 [b]). Passive activities are those trade or business activities in which “the taxpayer does not materially participate” (*see* IRC [26 USC] § 469 [c] [1]). Generally, a taxpayer may deduct any previously disallowed passive activity loss in the year the taxpayer disposes of its entire interest in the passive activity in a fully taxable transaction; otherwise, a taxpayer may only use such losses to offset taxable passive gain (*see* IRC [26 USC] § 469 [g] [1]). Taxpayers report passive activity losses, including carryover losses from prior years, on federal form 8582, passive activity loss limitations.

There is no dispute that petitioner's investment in the Fulton Street property was a passive activity and that, if substantiated, petitioners may use passive loss up to \$237,171.31 to offset their proportionate share of gain recognized on the sale of the Fulton Street property.

I. Petitioners have not substantiated their claimed passive losses. The Division requested records, including federal forms 8582 and schedules K-1, as well as both entity level and individual level tax returns, to verify petitioner's ability to use the passive losses to offset gain from the sale of the Fulton Street property. Petitioners provided certain entity level returns (most of which were prepared or dated well after the Fulton Street property was sold) but provided no source documentation to support the losses reported on the returns. Petitioners did not provide any forms 8582, which are used by taxpayers to determine the amount of any passive activity loss for the current tax year and to report the application of prior year unallowed passive activity losses (*see* Instructions for form 8582 [2015]). Petitioners also did not provide any individual tax returns. Without the individual level returns, it cannot be determined if petitioners already used the claimed passive losses to offset gains from other passive interests held by petitioners.

Mr. Gutman's testimony did little to shed light on the availability of petitioners' claimed passive losses. When asked if he ever claimed the passive losses attributed to him from Fulton, Mr. Gutman stated, "[t]o the best of my knowledge, no, I did not." When asked if he was aware if the other petitioners herein utilized any of the passive losses from Fulton, Mr. Gutman stated, "I'm not aware." Accordingly, petitioners have not satisfied their burden of proof.

J. The Division imposed penalties on all petitioners for negligence in reporting their tax liabilities for 2015 pursuant to Tax Law § 685 (b) (1) and (2). The Division imposed penalties on 11 petitioners, including Jacob Gutman, Sarah Singer, Mendy Gutman, Perry and Lazar Lerner, Shloma Gutman, Chaim Gutman, Boruch Gutman, Eliezer Gutman, Elky Gutman, Esther

Gutman and Zvi (Hershey) Gutman, for failure to file returns on or before the due date pursuant to Tax Law § 685 (a) (1). The Division also imposed penalties on four petitioners, including Feigy Lefkowitz, Hindy Miller-Gutman, Nachman Gutman and Shmuel Gutman, for substantial understatement of their tax liability pursuant to Tax Law § 685 (p). As a result of the reduction to the tax asserted due by the Division made at BCMS and applied to all petitioners, penalties were adjusted accordingly.

To abate negligence penalties, petitioners must establish that no part of their deficiency was attributable to negligence or intentional disregard of the Tax Law (*see Matter of Wiesen*, Tax Appeals Tribunal, September 13, 2018). Failure to timely file and substantial understatement penalties may be abated if such failure or understatement was due to reasonable cause and not due to willful neglect (*see* Tax Law § 685 [a] [1], [p]; 20 NYCRR 2392.1 [a] [1], [g] [1]). The burden of proof to show reasonable cause is on petitioners, and in establishing reasonable cause, petitioners face an “onerous task” (*Matter of Philip Morris Inc.*, Tax Appeals Tribunal, April 29, 1993).

K. It cannot be said that petitioners acted without negligence in these matters. While petitioners engaged in a notably complex LKE transaction, petitioners did not act accordingly. Petitioners sold property located in New York State for a substantial gain, yet petitioners did not maintain or could not produce adequate records of the transaction. Petitioners, as New York State residents, did not, for that matter, timely file tax returns reporting the transaction, taxable or not. Moreover, petitioners claimed expenses that do not appear on any closing statement and admittedly were never paid. Petitioners sought non-taxability by means of an IRC (26 USC) § 1031 LKE and it was their obligation to properly document it.

Similarly, petitioners have not shown reasonable cause or good faith to abate failure to timely file and substantial understatement penalties. Petitioners argue that they relied on their advisors, including legal counsel, the qualified intermediary, Gemma Capital and their brokers in effecting the IRC (26 USC) § 1031 LKE and a certified public accountant in filing the tax returns. Reliance on advice from a professional does not, by itself, shield a taxpayer from the imposition of penalties (*see Matter of Wiesen*). A taxpayer must show that the reliance was reasonable and “[s]omething more than merely seeking and relying on professional advice is required to show that such reliance is reasonable” (*Matter of Techar*, Tax Appeals Tribunal, December 12, 2024). Petitioners provided no detail of the facts and circumstances of their reliance on their advisors and, having determined that petitioners acted negligently in their tax obligations, it cannot be determined that petitioners reasonably relied on professional advice. Accordingly, petitioners have not proven that penalties should be abated.

L. Petitioners also request attorney’s fees and costs in connection with these matters. Petitioners’ request, however, is premature as it would ultimately be addressed pursuant to the provisions of Tax Law § 3030.

M. The petitions of Jacob Gutman, Sarah Singer, Mendy Gutman, Perry and Lazar Lerner, Shloma Gutman and Chaim Gutman are denied and the notices of deficiencies, dated July 15, 2020, as modified by the conciliation orders are sustained. The petitions of Boruch Gutman, Eliezer Gutman, Elky Gutman, Esther Gutman, Feigy Lefkowitz, Zvi (Hershey) Gutman, Hindy Miller-Gutman, Nachman Gutman and Shmuel Gutman are denied and the notices of disallowance, dated September 13, 2023, are sustained.

DATED: Albany, New York
April 30, 2026

/s/Jennifer L. Baldwin
ADMINISTRATIVE LAW JUDGE