

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
STEVEN AND JUDITH KIRKPATRICK : DECISION
DTA NO. 830077 :
for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax Law :
and the New York City Administrative Code for the :
Year 2015. :

Petitioners, Steven and Judith Kirkpatrick, filed an exception to the determination of the Administrative Law Judge issued on March 2, 2023. Petitioners appeared pro se, by Mr. Kirkpatrick. The Division of Taxation appeared by Amanda Hiller, Esq. (Maria Matos, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a reply brief. Oral argument was heard on November 16, 2023 in New York, New York, which date began the six-month period for issuance of this decision.

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

ISSUE

Whether petitioners have established that petitioner Steven Kirkpatrick qualifies as a real estate professional.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except finding of fact 5, which we have modified to reflect the record more completely. The modified finding of fact,

together with the facts as determined by the Administrative Law Judge, are set forth below.

1. Petitioners, Steven and Judith Kirkpatrick, jointly filed a New York resident personal income tax return (form IT-201) for the year 2015 (2015 return), reporting their address as 66 Edgecombe Avenue, New York City, New York. Petitioners' 2015 return reflects wage income in the amount of \$581,456.00, federal adjusted gross income of \$509,606.00, and New York State adjusted gross income of \$506,013.00.¹ On line 11 of the 2015 return, petitioners claimed a deduction of \$72,480.00 from rental real estate activities. Line 11 of the 2015 return instructs the filer to "submit copy of federal schedule E, Form 1040." The copy of the 2015 return in the record does not have schedule E attached.

2. The Division of Taxation (Division) conducted an audit of petitioners' return to determine whether either petitioner qualified as a real estate professional and whether they were entitled to the claimed deduction. By letter dated December 4, 2018, the Division requested that petitioners provide additional information regarding the rental real estate loss claimed for tax year 2015. The letter stated, in part:

"We need additional information about the rental real estate loss you claimed for the tax year above. It appears that you may not be entitled to claim the full amount of the loss.

Generally, rental real estate activities are considered to be passive. You may only claim losses from passive activities up to the amount of passive income on your return. Any unused passive loss from rental real estate is carried forward to the next tax year.

Some exceptions that allow rental real estate losses to offset nonpassive income include:

Special allowance based on modified adjusted gross income.

¹ Form W-2 Wage and Tax Statements attached to petitioners' return indicates that Steven Kirkpatrick received wages from Belkin Burden Wenig & Goldman LLP in the amount of \$362,543.00, and that Judith Kirkpatrick received wages from Tishman Speyer in the amount of \$142,448.00 and from TIAA in the amount of \$76,465.00.

If you actively participated in a rental real estate activity, you may be able to deduct your rental loss or the special allowance, whichever is less.

Real estate professional.

If you meet all IRS requirements to be considered a real estate professional, rental real estate losses are considered nonpassive and are not limited.

Qualifying disposition

If you sold the rental property to an unrelated party in a fully taxable event, all current and carryover losses are deductions.

Send us:

- Completed Form DTF-973.1-A, Federal Schedule E Rental Real Estate Loss Questionnaire.
- All applicable supporting documentation.”

3. By correspondence dated December 26, 2018, petitioners responded to the Division’s request for information and provided a copy of their 2015 federal schedule E and form 8582, passive activity loss limitations.

Petitioners responded “yes” to question 1 on the federal schedule E rental real estate loss questionnaire (Questionnaire), which asks “Did you meet the real estate professional qualifications, as set forth in Internal Revenue Code section 469(c)(7)?” The Questionnaire further states:

“If Yes, send us the following documentation. If you are married, be sure to include this information for both you and your spouse:

- A description of your occupation that is not related to your rental real estate activities
- The total number of hours worked in that occupation during the tax year
- A list of services performed for each rental property and hours attributable to those services
- Appointment books, calendars, narrative summaries, or any other records to support those hours
- If you elected to group your rentals as one activity, send a copy of the election”

In the correspondence, Mr. Kirkpatrick stated, in part:

“The number of rental units at each property in 2015 was as follows: 24 Fulton Street – 4, 66 Edgecombe – 11, 175 Central – 1. The units were rented on various days, as more fully set forth on the Schedule E form, with 24 Fulton Street being rented year round, 66 Edgecombe being rented for storage purposes, and 175 Central Avenue being rented for a portion of the year as a vacation/summer rental although available for rent year round. I personally managed and was responsible for the maintenance of all properties, which included advertising, taking rental applications, preparing lease and rental documents, overseeing repairs and maintained [sic], research record keeping and legal compliance work. I did not employ any outside property manager, and did everything relating to management of the properties myself. I spent an average of 20 hours a week on work relating to the properties, and management thereof, and elected to group the rentals into one activity. My occupation not relating to my rental real estate activities is a real estate attorney, and I worked approximately 2,000 hours in that occupation.”

Petitioners did not include any substantiating documentation with the correspondence.

4. Petitioners’ 2015 federal schedule E reports the following information:

Physical Address of Property	Fair Rental Days	Personal Use Days
24 Fulton St, Weehawken NJ	365	0
66 Edgecombe Ave, New York City, NY	1	0
175 Central Ave, Greenport, NY	365	0

Petitioners reported the following income and expenses on the 2015 schedule E, resulting in reported net real estate losses of \$72,480.00:

	24 Fulton St	66 Edgecombe Ave	175 Central Ave
Income:			
Rents Received	\$64,440.00	\$100.00	\$34,212.00
Expenses:			
Cleaning & maintenance	\$3,616.00		\$7,300.00
Insurance	\$4,918.00		\$5,607.00
Mortgage Interest	\$32,832.00	\$549.00	\$17,119.00
Repairs	\$2,204.00		
Supplies	\$737.00		\$1,350.00
Taxes	\$18,759.00	\$2,443.0	\$6,818.00
Utilities	\$4,307.00	\$1,509.00	\$2,733.00
Depreciation	\$19,180.00	\$20,245.00	\$18,182.00

Other	\$699.00	\$140.00	
Total Expenses	\$87,247.00	\$24,876.00	\$59,109.00

5. On January 18, 2019, the Division issued a statement of proposed audit changes (Statement) denying the claimed deductions and calculating tax due in the amount of \$9,480.47 plus interest. The Statement explained the denial, in part, as follows:

“We have reviewed the information you sent in response to our inquiry letter regarding the rental real estate loss claimed on your 2015 tax return.

The documentation submitted is not sufficient for us to determine if you qualify as a real estate professional and materially participated in the rental activity. We would require a daily hour log or calendar for the personal activities performed by each individual on each rental property during the tax year in question.

In order for hours worked as an employee in a real estate trade or business to count toward the real estate professional qualifications, you must be at least 5% owner of that business.

Since you have not verified that you qualify as a real estate professional, and your MAGI [modified adjusted gross income] is greater than \$150,000.00, the rental real estate loss claimed on line 26 of your federal schedule E is considered passive, and subject to the passive activity loss (PAL) rules. The PAL rules state that losses from passive activities are limited to any passive income and cannot offset non-passive income.

Based on your federal schedule E, you had no net passive income reported. Therefore, the passive rental loss has been disallowed in full. Any unused or disallowed passive loss can be carried forward to the following tax year on Form 8582.”

It also stated:

“It appears that the rental expenses reported for the property at 66 Edgecomb [sic] Ave. are not allocated correctly. Since this is your primary residence, rental expenses must be allocated between personal and rental use of the property as a ratio of the percentage of the property used for personal and rental space.

In order to qualify as a rental property, the space must be a separate dwelling unit such as a house or separate section of a house, apartment, boat, or similar such property which provides basic living accommodations such as sleeping, toilet, and cooking facilities.

Since the property has rents received reported far below the fair rental value of the property, and the fair rental days listed is less than the full year, the expenses

allowed on the property are pro-rated as a ratio of the percentage of the fair rental days versus total days in the tax year.”

6. Petitioners sent correspondence to the Division indicating their disagreement with the Statement.² In the correspondence, Mr. Kirkpatrick stated, in part, that “[a]fter reviewing my records, it turns out that the time that I spent was significantly greater than [sic] I originally estimated and stated” and estimated that he spent 400 hours for the 24 Fulton Street property, 725 hours for the 66 Edgecombe property, and 320 hours for the 175 Central property in 2015. Mr. Kirkpatrick further stated that he also spent an average of five to seven hours a week doing market research, speaking with brokers and evaluating other properties for purchase. Mr. Kirkpatrick concluded in the correspondence that he spent at least 1,695 hours performing duties relating to the management of properties currently owned and managing his real estate business in 2015.

7. On April 5, 2019 the Division issued a notice of deficiency, notice number L-049375081, asserting tax due for the year 2015 in the amount of \$9,480.47, plus interest (notice).

8. During the hearing in this matter, the Division introduced into the record correspondence dated July 6, 2020 and submitted by petitioners during proceedings with the Division’s Bureau of Conciliation and Mediation Services (BCMS). In this correspondence, Mr. Kirkpatrick estimated that he spent 540 hours working for the 24 Fulton Street property, 725 hours for the 66 Edgecombe Avenue property, and 310 hours for the 175 Central property in 2015. He further estimated an additional 200 hours of time traveling to the 175 Central Avenue property and contended that such hours should be included when calculating the amount of time spent managing the property. Mr. Kirkpatrick further stated that he also spent an average of four

² The correspondence is dated February 8, 2018, but should be February 8, 2019.

to six hours a week doing market research, speaking with brokers and evaluating other properties for purchase in 2015. He concluded that, “during calendar year 2015, I spent at least 1,575 hours personally performing duties for the management of my three properties, not including travel time or market research time. When these additional times spent are added (200 hours travel time and 250 for market research), the time spent performing the duties of a real estate professional increased to 2025 hours.”

Petitioners included a copy of a 2015 calendar with the correspondence. The calendar contains references to certain properties as follows:

Date	Time	Description
Saturday 1/3/15	9:00 a.m.	“Greenport”
Sunday 1/11/15	10:00 a.m. – 5:00 p.m.	“Greenport”
Saturday 1/24/15	10:00 a.m. (no end time indicated but another event scheduled at 4:00 p.m.)	“Greenport”
Sunday 2/1/15	9:00 a.m. (no end time indicated but another event scheduled at 6:30 p.m.)	“Greenport”
Tuesday 2/3/15	3:00 p.m.	“66 Edgecombe meeting”
Saturday 2/14/15	12:00 p.m.	“Greenport meeting”
Saturday 2/21/15	9:00 a.m.	“Greenport”
Sunday 3/1/15	10:30 a.m.	“Greenport meeting”
Saturday 3/21/15	9:00 a.m.	“Greenport”
Saturday 3/28/15	12:00 p.m.	“Greenport”
Saturday 4/4/15	10:30 a.m.	“Greenport”
Sunday 4/12/15	9:30 a.m.	“Greenport”
Saturday 4/18/15	12:00 p.m.	“Greenport”
Sunday 4/26/15	11:00 a.m.	“Greenport”
Sunday 5/3/15	3:00 p.m.	“Greenport”
Sunday 5/10/15	11:00 a.m.	“Greenport”
Saturday 5/30/15	4:00 p.m.	“Greenport meeting”
Saturday 6/13/15	10:00 a.m. (no end time indicated but another event scheduled at 8:00 p.m.)	“Greenport”
Sunday 6/21/15	11:30 a.m.	“Greenport”
Saturday 6/27/15	9:30 a.m. (no end time indicated but another event scheduled at 6:00 p.m.)	“Greenport”
Saturday 7/11/15	10:30 a.m. (no end time indicated but another event scheduled at 7:30 p.m.)	“Greenport”
Monday 7/13/15	11:30 a.m. (no end time indicated but another event scheduled at 4:00 p.m.)	“Appraisal Inspection 66 Edgecombe”

Sunday 7/19/15	12:00 p.m.	“Greenport”
Sunday 8/2/15	10:00 a.m.	“Greenport”
Saturday 8/15/15	11:30 a.m. (no end time indicated but another event scheduled at 6:00 p.m.)	“Greenport”
Saturday 8/22/15	12:30 p.m.	“Greenport”
Sunday 8/30/15	10:00 a.m.	“Greenport”
Saturday 9/5/15	10:00 a.m. (no end time indicated but another event scheduled at 5:00 p.m.)	“Greenport”
Sunday 9/13/15	10:00 a.m. (no end time indicated but another event scheduled at 12:00 p.m.)	“Greenport”
Saturday 9/26/15	2:00 p.m. (no end time indicated but another event scheduled at 6:30 p.m.)	“Greenport”
Sunday 10/18/15	2:00 p.m.	“Greenport”
Saturday 10/24/15	9:00 a.m. (no end time indicated but another event scheduled at 6:00 p.m.)	“Greenport”
Tuesday 10/27/15	9:30 a.m. (no end time indicated but another event scheduled at 10:30 a.m.)	“66 Edgecombe”
Sunday 11/1/15	10:00 a.m.	“Greenport”
Wednesday 11/4/15	11:00 a.m. (no end time indicated but another event scheduled at 2:00 p.m.)	“66 Edgecombe”
Thursday 11/12/15	10:00 a.m. (no end time indicated but another event scheduled at 6:00 p.m.)	“66-68 Edgecombe Ave site meeting”
Saturday 11/14/15	10:30 a.m. (no end time indicated but another event scheduled at 6:00 p.m.)	“Greenport”
Saturday 11/21/15	9:00 a.m.	“Greenport”
Saturday 11/28/15	10:30 a.m.	“Greenport”
Tuesday 12/1/15	9:30 a.m. (no end time indicated but another event scheduled at 10:30 a.m.)	“66 Edgecombe”
Sunday 12/6/15	10:30 a.m.	“Greenport”
Saturday 12/12/15	10:30 a.m.	“Greenport”
Saturday 12/19/15	10:00 a.m.	“Greenport”
Tuesday 12/22/15	4:00 p.m.	“66 Edgecombe”
Saturday 12/26/15	9:00 a.m.	“Greenport”

9. In 2015, Mr. Kirkpatrick worked full-time as a partner at the law firm of Belkin Burden Wenig & Goldman LLP. Mr. Kirkpatrick testified that he worked at the law firm approximately 40 hours per week or approximately 2000 hours in 2015.

10. As noted above, petitioners reported their residence as 66 Edgecombe Avenue, New York City, New York on the 2015 New York resident return (*see* finding of fact 1). Mr. Kirkpatrick also “often lived” at the 24 Fulton Street property in 2015 and testified that:

“24 Fulton Street I was at the property every day. I often lived at that property. There was a unit at that property that I would stay in and so that’s why I was for the most part there every day.

There were days that I was at 66 Edgecombe that I stayed there as well. I did establish my primary residence - - the intent when buying that house was - - it’s not a house, it’s a building. It’s a brownstone type building that it - - you know I would be eventually living there. This was the longer term plan that this would be my residence and it would and it would also be a rental property and it’s for - - I you know, so I listed that I believe properly as my residence.

. . . . I lived for the most part at 24 Fulton Street at the time. I spent some time at 66 Edgecombe where I stayed at night.”

11. Mr. Kirkpatrick testified that in 2015 he was the sole owner of the 66 Edgecombe property, did not recall if he was the sole owner of the 175 Central Avenue property, and co-owned the 24 Fulton Street property.

12. Mr. Kirkpatrick testified that he performed real estate activities on weekends and after-hours, with the exception of occasions when he went to the building department during weekdays. He did not keep records or logs of the time he spent performing rental real estate activities on the properties in 2015. He testified regarding the activities he performed at the properties and estimated the time he spent performing such activities in 2015. According to Mr. Kirkpatrick, for the 24 Fulton Street property, he cleaned the inside hallways of the property at least once a week, cleaned the outside of the property, cut the grass and performed yard care, shoveled snow, performed garbage removal and tenant management. He testified that he spent about 540 hours performing these tasks for the 24 Fulton Street property.

Mr. Kirkpatrick testified that for the 66 Edgecombe Avenue property, he cleaned litter in front of the building “regularly,” put out garbage and recycling, performed cleaning and snow removal, and spent time doing demolition, renovation, and preservation work. He testified that he spent a minimum of 725 hours managing the Edgecombe Avenue property in 2015.

Regarding the 175 Central Avenue property, Mr. Kirkpatrick testified that such property was a two-to-three hour drive from his location and that he would go to the property on weekends. He testified that because of the distance, he was not as “hands on” for this property and he did not shovel or clean the sidewalks. Mr. Kirkpatrick testified that his activities were mainly supervising, dealing with rentals and requirements of the Village of Greenport including paperwork and permits, ordering oil for the boilers and heaters, and scheduling plumbers and other professionals. He testified that rentals for this property were marketed online through platforms such as “Air B&B” and “VRBO” and there were no leases in 2015. According to Mr. Kirkpatrick, he spent approximately 310 hours performing activities for the 175 Central Avenue property in 2015.

Mr. Kirkpatrick further testified that in addition to time spent on the three properties listed on the schedule E, he spent “a minimum of 200, 250 hours, probably more” looking for additional properties to expand his real estate business.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed all of the evidence and testimony to determine whether petitioners met their burden of proving that they could properly deduct rental real property expenses against ordinary income as permitted by taxpayers who qualify as real estate professionals. The Administrative Law Judge considered petitioners’ argument that the evidence was credible and sufficient to establish the amount of expense claimed and that petitioner Steven Kirkpatrick was a real estate professional in accordance with section 469 of the Internal Revenue Code (IRC).

Specifically citing, among other things, inconsistencies that existed between returns filed, documents provided at various times and testimony, the Administrative Law Judge determined that petitioners did not establish with credible evidence that the nature of activities, the number

of hours or the qualification of specific properties supported a finding that petitioner Steven Kirkpatrick met the requirements to be treated as a real estate professional for New York State income tax purposes. The Administrative Law Judge concluded that petitioners failed to meet their burden of proof in that the evidence was not credible or otherwise sufficient to meet the requirements set down in federal law.

The Administrative Law Judge also found that the Edgecombe Avenue property did not qualify as rental property, as it was petitioner's primary residence and, even if a portion of the property was used for rental purposes, petitioners did not rent the property, by their own admission, for a sufficient number of days to qualify. The Administrative Law Judge further determined that even if the property or a portion thereof so qualified, petitioners failed to establish a breakdown of hours between activities for home improvements and those dedicated to the rental portion of the property.

The Administrative Law Judge denied the petition and sustained the notice of deficiency.

ARGUMENTS ON EXCEPTION

On exception, petitioners argue that they did indeed provide credible evidence that the activities of Steven Kirkpatrick met the standards to be designated a real estate professional and that the documentation offered on the return, on audit, at the BCMS conference and at hearing should be accepted as comporting with federal requirements. Petitioners assert that the activities were conducted in relation to qualified rental real estate properties, for more than 750 hours during the tax year and that those activities consumed more than half of the time petitioner Steven Kirkpatrick spent carrying out personal services in a trade or business.

Petitioners further claim that they were deprived of an opportunity to present evidence to rebut the finding regarding one of the properties, which was disallowed as their personal residence.

The Division takes the position that the determination of the Administrative Law Judge was correct. Specifically, it asserts that expenses associated with real estate rentals are not generally deductible except as against passive income and, while an exception exists for those qualifying as real estate professionals, that petitioners failed to present credible evidence to rebut disqualification under the rule pertaining to the non-deductibility of passive activity losses or to otherwise overcome the presumption of correctness that attaches to a notice issued by the Division.

The Division argues that the Administrative Law Judge correctly concluded that petitioners failed to provide “contemporaneous records maintained showing rental activities performed for the tax year 2015” and that “post event letters and calendars containing guesstimates of hours spent . . . were [properly] rejected as ‘varied and unreliable.’”

The Division also points to the failure of petitioners to distinguish the amount of time spent on their residence as opposed to time spent on rental activities. Finally, the Division asserts that petitioners did not substantiate that Steven Kirkpatrick spent only 2000 hours during 2015 in the practice of law, separate from his other activities.

OPINION

We start with the Division’s argument regarding the substantiation of Mr. Kirkpatrick’s hours associated with his employment in the practice of law. We first note that the Division did not file an exception to the determination below. The Division presented no evidence to counter petitioners’ claim of 2000 hours of employment in a law firm, but instead offered the general argument that it was unlikely that an attorney in a firm would only work an average of 40 hours a week.

This approach appears to be counter to what the Division relied upon in the computation of at least 2000 hours in other employment to sustain the initial disallowance during audit, at the

BCMS conference, in their answer to the petition, at the hearing below and in responsive papers filed with the Tax Appeals Tribunal. The point was, however, raised, considered and rejected by the Administrative Law Judge. Consistent with unrefuted finding of fact 9 below, this premise offered by the Division is rejected here again. Indeed, as the claim was expressly noted by the Administrative Law Judge and the Division did not take an exception, the finding should remain undisturbed (*Matter of Adams*, Tax Appeals Tribunal, September 3, 2021).

Next, we consider petitioners' argument that they were not provided an opportunity to present evidence regarding the nature of the Edgecombe Avenue property, the duration of rentals on that property or the activities they carried out with regard to it.

Petitioners are incorrect in their characterization of the issue as being grounds that were not previously raised. Indeed, a finding on behalf of petitioners here would require manifold proof, including the nature and extent of their activities and the characterization of the subject real property. The Administrative Law Judge's determination in this regard goes to the very heart of the matter.

The Administrative Law Judge found that, even if Mr. Kirkpatrick's evidence of his real estate activities was accepted as substantiated, the hours engaged in activities associated with Edgecombe Avenue could not be considered in determining whether Mr. Kirkpatrick was a real estate professional because that property was not rental real estate as defined in the relevant federal law (*see* IRC [26 USC] § 469 [c] [7] [B]).

Without these hours, the total of hours worked on real estate activities by Mr. Kirkpatrick falls short of the necessary amount. In reaching this conclusion, the Administrative Law Judge relied on evidence in the record indicating that the Edgecombe Avenue property was petitioners' primary residence in 2015 and was used for rental on only one day during that year.

We also disagree with petitioners' contention that it was unfair for the Administrative Law Judge to use this rationale as an alternative basis for the determination. As noted previously, petitioners had the burden to demonstrate that they met all requirements necessary to qualify as a real estate professional and thereby show entitlement to their claimed rental real estate loss (*Moss v Commr.*, 135 TC 365, 368 [2010]). Qualification as a real estate professional requires a showing of hours worked on rental real estate (*see* Treas Reg [26 CFR] § 1.469-9 [b] [3]). Petitioners thus had the burden to show that Edgecombe Avenue was rental property.

As to the substance of this question, expenses related to renovating a personal residence are not deductible and hours worked in that activity are not includable in hours spent engaged in a real property business for purposes of the real estate professional rules (*see Bailey v Commr.*, TC Memo, 2001-296). The Administrative Law Judge correctly found that the evidence presented does not distinguish between the amount of time Mr. Kirkpatrick worked on Edgecombe Avenue as petitioners' personal residence and the amount of time he alleged to have worked on the property as rental property. The burden of proof thus requires a finding against petitioners on this point.

Given the reported use of Edgecombe Avenue for only one "fair rental day" during 2015 (*see* finding of fact 4), the Administrative Law Judge also found that such use of that property was not "rental activity" as that term is defined in Treas Reg (26 CFR) §§ 1.469-9 (b) (3) and 1.469-1T (e) (3). There is no evidence in the record to support petitioners' contention on exception that the reported usage of one fair rental day was in error and petitioners make no claim that the Administrative Law Judge's interpretation of the regulations was in any way erroneous.

Petitioners' assertion that the Edgecombe Avenue property's status as rental real estate was not contested at any point prior to the determination is inconsistent with the record. From

the outset, the Division's January 18, 2019 statement of audit changes raised the very point of whether petitioners had properly claimed rental expenses for this property (*see* finding of fact 5).

With these matters out of the way, we now address the issue of whether petitioners have shown that Mr. Kirkpatrick was a real estate professional under the IRC and that, accordingly, petitioners' rental real estate loss should be allowed during the tax year at issue.

In a Division of Tax Appeals proceeding, a notice of deficiency is presumed correct and the burden of proof is generally on the petitioner to show, by clear and convincing evidence, that the proposed deficiency is erroneous (Tax Law § 689 [e]; 20 NYCRR 3000.15 [d] [5]; *see Matter of Gilmartin v Tax Appeals Trib.*, 31 AD3d 1008 [3d Dept 2006]; *see also Matter of Leogrande v Tax Appeals Trib.*, 187 AD2d 768 [3d Dept 1992], *lv denied* 81 NY2d 704 [1993]). Petitioners' burden includes a showing that they have met all the requirements necessary to be entitled to the claimed loss (*see Moss v Commr.*, 135 TC at 368).

The starting point for determining tax liability is a taxpayer's New York adjusted gross income (NYAGI). Here, petitioners claimed a deduction from NYAGI for losses associated with rental real property. If those losses are not allowed, their NYAGI increases and so will their tax liability, resulting in a deficiency.

NYAGI is based on federal adjusted gross income (Tax Law §§ 611 [a], 612 [a]). Accordingly, terms used in federal tax law are applicable to state computations, unless a different meaning is clearly required (Tax Law § 607 [a]). The federal computation starts, insofar as deductions are concerned, with IRC (26 USC) §§ 162 and 212, which allow certain losses. Rental income is considered passive income (IRC [26 USC] § 469 [c] [7]). Losses associated with passive income are usually limited to a maximum of passive income (IRC [26 USC] § 469 [a], [b]).

Petitioners sought to charge claimed losses from rental real estate activities against ordinary income. While such a deduction is permitted for those with incomes \$150,000.00 and below, petitioners' AGI for the year in question is in excess of \$500,000.00. Accordingly, petitioners would have to qualify for an exception to the passive income rule stated above by establishing that the losses were associated with activities as a "real estate professional" as that term is defined in the IRC and associated regulations. The IRC sets forth the test for determining whether a taxpayer is a real estate professional as follows:

“(i) more than one-half of the personal services performed in trades or businesses by the taxpayer during such taxable year are performed in real property trades or businesses in which the taxpayer materially participates, and

(ii) such taxpayer performs more than 750 hours of services during the taxable year in real property trades or businesses in which the taxpayer materially participates” (IRC [26 USC] § 469 [c] [7] [B], *see also* Treas Reg [26 CFR] § 1.469-5T [a]).

In the present case, petitioner Steven Kirkpatrick claimed to have spent more than half of his time in a trade or business performing personal services regarding three properties. Though the amount of time he claimed to have spent as a real estate professional varied, the greatest amount claimed was 2025 hours, or 25 hours more than he estimated without refutation to have been engaged separately in the practice of law. As noted, the three properties included a single-family home on Long Island, an apartment building in Weehawken, New Jersey and a brownstone on Edgecombe Avenue in New York City. The latter two properties were also claimed by petitioners to have been personal residences, with the Edgecombe Avenue address included on their 2015 tax return as their place of residence.

In addition to meeting the standards for the real estate professional passive activity exception, it is also necessary for petitioners to establish that the properties in question qualify as rental properties. For example, expenses associated with a property that is a personal residence

do not qualify (*Smith v Commr.*, TC Summ Op 2014-13 [2014]).

Petitioners' arguments fail on multiple grounds. First, while petitioners rightly point out that detailed records contemporaneous with the activities in question are not required (*see* Treas Reg [26 CFR] § 1.469-5T [f] [4]), they cite no authority for the proposition that mere testimony together with documents prepared for audit or litigation are sufficient (*see e.g. Bailey v Commr.*, 82 TCM 868 [2001]; *Bailey v Commr.*, TC Memo 2001-296 [2001]).

Next, even if the listing of activities is accepted as true and sufficient, and there is no reason to reach such a conclusion, particularly in view of contradictory and inconsistent claims by petitioners on returns and at various stages of the dispute in this matter, the information provided is insufficient to reasonably determine that more than half of petitioner Steven Kirkpatrick's time was uniquely devoted to the activities of being a real estate professional. The documentation provided lacked specificity in terms of hours, provided no information about one of the three properties in question and listed only six days, two of which petitioner acknowledged no more than one hour of activity, for a third property.

Regarding the issue of that third property, Edgecombe Avenue in New York City, petitioners claimed that address as their personal residence on their tax return. Petitioner Steven Kirkpatrick testified that in fact he did live on those premises during the audit period. The federal schedule E in the record shows that petitioners claimed only a single day of rental income and activity for the property for the period in question. As stated earlier, there is an amply clear and rational basis for the Division's conclusion that the property was a personal residence. Petitioner offered nothing other than vague and conflicting testimony and documents in rebuttal regarding this location. Like the details pertaining to petitioner Steven Kirkpatrick's activities, the testimony regarding this property was inconsistent with returns and other information presented. The Division properly denied petitioners' claims, specifically with regard to that

property.

In view of the inconsistencies and sometimes contradictory information provided by petitioners, the Division was also correct in determining that petitioners did not establish that Steven Kirkpatrick was a real estate professional as that term is used here for the period in issue.

Petitioners have thus failed to establish both key points, that more than half of Steven Kirkpatrick's time was spent as a real estate professional or that each of the properties in question qualify as rental properties. Petitioners have, in every respect, failed to meet their burden of presenting clear and convincing evidence to establish that the notice of deficiency is erroneous or that the determination of the Administrative Law Judge is incorrect (*Matter of Strachan*, Tax Appeals Tribunal, June 28, 2018).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Steven and Judith Kirkpatrick is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Steven and Judith Kirkpatrick is denied; and
4. The notice of deficiency dated April 5, 2019 is sustained.

DATED: Albany, New York
May 2, 2024

/s/ Anthony Giardina
Anthony Giardina
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner