STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
KEVIN RUBENSTRUNK	:	DECISION DTA NO. 823118
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2007.	:	

Petitioner, Kevin Rubenstrunk, filed an exception to the determination of the Administrative Law Judge issued on October 28, 2010. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark Volk, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on June 15, 2011 in New York, New York.

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

ISSUE

Whether the Division of Taxation properly disallowed petitioner's claimed deduction for a casualty or theft loss.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below:

Petitioner, Kevin Rubenstrunk, timely filed his 2007 New York State resident income tax

return. He reported $101,354.00 in New York adjusted gross income and $83,659.00 in New York itemized deductions, including $52,633.00 claimed as a casualty or theft loss. A 2007 federal Form 4684 (Casualties and Thefts) identifies this deduction as "theft of monies from contractor" and indicated the date of such theft as February 1, 2007. This form reports the amount of the theft as $62,500.00, which, after statutory adjustments, resulted in a claimed deduction of $52,633.00.

By letter dated February 25, 2008, the Division of Taxation (Division) requested that petitioner provide verification of his claimed deductions. Petitioner responded to this request with certain documentation, but by Statement of Proposed Audit Changes dated July 24, 2008, the Division advised petitioner that it was disallowing $67,159.00 of his claimed itemized deductions, including his claimed deduction for casualty or theft loss. The July 24, 2008 statement recomputed petitioner's New York income tax liability accordingly and thereby calculated $433.26 tax due from petitioner for the 2007 tax year.

On September 18, 2008, the Division issued to petitioner a Notice of Deficiency, which asserted $433.26 in tax due, plus interest, for the 2007 tax year.

Following a conciliation conference conducted by correspondence, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order, dated May 29, 2009, that cancelled the September 18, 2008 Notice of Deficiency and recommended a refund to petitioner of $190.00. The BCMS recomputation resulted from the allowance of $26,612.00 of petitioner's claimed itemized deductions and the disallowance of the balance, including all of petitioner's claimed casualty or theft loss deduction.

In or about May 2006, petitioner entered into a contract with a local contractor for an

extensive renovation and expansion of his residence in Selden, New York. Prior to signing the contract, petitioner verified that the contractor was licensed and that he maintained a general liability insurance policy. With respect to the former, petitioner went to his town's licensing department for verification. With respect to the latter, the contractor produced a certificate of liability insurance. The contract called for a 212 square foot extension to the rear of the home, a 594 square foot side extension for a two-car garage, a new second story on the structure over the existing house and partially over the new garage, extensive renovations to the existing house, a new roof over the entire structure, new siding over the entire structure, and new windows throughout the structure. The total contract price for all labor and materials was $180,000.00. The contract required a $9,000.00 deposit to start construction. The contract had a one-year warranty on the contractor's labor to address any problems arising from the work performed thereunder.

The contractor began work on petitioner's house in early July 2006. He continued to work regularly on the house until about September 22, 2006, by which time, according to petitioner, the contractor had completed about 50 percent of the project. At that point, the first floor of the house was sheet rocked, but not painted. The second floor was framed and the outside of the house was framed and sided. The kitchen floor had been tiled, but the work was shoddy and the tiles had to be replaced. The contractor did not return to the job site after about September 22, 2006.

In order to finance the construction project, petitioner obtained a $91,500.00 home equity line of credit from Chase in late June 2006 and a $25,000.00 loan from his credit union in August 2006. In addition, a friend of petitioner obtained a personal loan from a credit union in

September of 2006 and loaned the proceeds to petitioner. Petitioner drew from all three of these sources to finance the construction on his home. He also "maxed out" his credit cards to help pay for the project.

Petitioner made payments to the contractor totaling $116,700.00 for work under the contract. Most of these payments were in cash, although the record contains three of petitioner's personal checks payable to the contractor, each in the amount of $9,000.00 and dated July 6, 11 and 14, 2006.

Petitioner made purchases totaling $39,409.00 for materials used on the construction project through September 22, 2006. Included in such purchases was $2,721.76 for kitchen tile.

After September 22, 2006, petitioner worked on his own and with the help of friends to complete the project. Petitioner had to make payments owed to two subcontractors, a plumber and an electrician. According to petitioner, the contractor advised him that the plumber and the electrician had been paid. As of the date of the hearing, the project was not yet fully completed.

On January 31, 2008, petitioner contacted the Suffolk County police regarding the contractor. The police report states:

> Compl.[complainant, i.e., petitioner] reports he paid $62,500 to [the contractor] as partial payment for work to be done on compl.'s home. Compl. states subj. [the contractor] left the country with compl.'s money. Compl. states he needs a report for tax purposes. This is it.

In February 2008, petitioner filed a claim against the contractor's general liability insurer. By letter dated February 11, 2008, the insurer advised petitioner that his third-party claim under the general liability policy was untimely. The letter indicates that petitioner reported May 26, 2006 as the date of his loss to the insurance company. The insurance company also provided petitioner with a copy of a letter dated February 11, 2008 from the insurer to the contractor

referencing petitioner's claim against the policy. This letter states the insurer's position that the policy did not cover faulty or shoddy work and also did not cover a failure to complete work. Accordingly, the letter indicates that petitioner's claim was not covered by the general liability policy. The policy number as listed on the insurance company's letter to the contractor was identical to the policy number listed on the certificate of liability insurance provided by the contractor to petitioner (see Finding of Fact above).

The Division's records indicate that the contractor timely filed New York resident income tax returns for the years 2006, 2007 and 2008 from the same Shirley, New York, address as that listed on the contract.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that petitioner failed to substantiate the subject deductions. After reviewing the relevant provisions of the Internal Revenue Code (IRC), Treasury Regulations and New York Penal Law, the Administrative Law Judge construed petitioner's claim, if proven, to constitute larceny, specifically larceny by false promise, as opposed to embezzlement. The Administrative Law Judge found that petitioner failed to show criminal intent as required by statute because the contractor did, in fact, comply with his promise for a period of ten weeks. The Administrative Law Judge also found that the losses were impermissible as "other casualty" under the same section.

ARGUMENTS ON EXCEPTION

Petitioner raises the same arguments as those presented below. Petitioner argues that the loss does meet the definition of larceny under the New York Penal Code. Petitioner notes that he need not prove sufficient evidence for a successful criminal or civil lawsuit, but that reasonable

evidence supports that a theft occurred. In the alternative, petitioner contends that the deduction meets the definition of "other casualty" because rain damaged the unfinished house.

The Division argues that the determination should be affirmed because petitioner failed to substantiate the claimed casualty loss deductions. The Division asserts that the Administrative Law Judge applied the proper legal standard and arrived at the correct result.

OPINION

We affirm the determination of the Administrative Law Judge.

Tax Law § 612(a) provides that the adjusted gross income of a New York resident is his or her Federal adjusted gross income, with certain modifications not applicable herein. Petitioner has the burden to show entitlement to the deductions claimed on his return and to substantiate the amount of the deductions (***see*** Tax Law §§ 658[a]; 689[e]; 20 NYCRR 158.1; ***Matter of Macaluso***, Tax Appeals Tribunal, September 22, 1997, ***confirmed*** 259 AD2d 795 [1999]). Further, the Tax Law requires that taxpayers maintain adequate records to substantiate their deductions for the years in issue (Tax Law § 658[a]; 20 NYCRR 158.1[a]).

The present matter concerns deductions claimed under IRC § 165(a), which permits a deduction for losses "sustained during the taxable year and not compensated for by insurance or otherwise." When the loss is not connected to a trade, business or for-profit transaction, an individual may only deduct the loss if it arises from "fire, storm, shipwreck, or other casualty, or from theft" (IRC § 165[c][3]). Petitioner claims that his contractor's failure to perform amounts to a loss under either the theft loss or other casualty loss provision.

We first address petitioner's claim that amounts paid to the contractor are deductible as theft loss (IRC § 165[c][3]). We note that pursuant to the Treasury Regulations, the term "theft"

as used in IRS § 165(c) includes larceny and embezzlement (Treas Reg § 1.165-8[d]). The determination of whether a loss is properly deducted under the theft loss provision is controlled by the laws of the jurisdiction where the claimed loss occurred (***see Hartley v. Commissioner***, 36 TCM 1281 [1977]).

Herein, the proper reference is to the New York Penal Law. Initially, we find that the Administrative Law Judge correctly concluded that the facts, as alleged by petitioner, do not resemble embezzlement (***see*** Penal Law § 155.05[2][a]). The essence of that crime is "the conversion by the embezzler of property belonging to another, which has been entrusted to the embezzler to hold on behalf of the owner" (***People v. Yannett***, 49 NY2d 296, 297 [1980]). In the instant matter, petitioner does not allege that the contractor converted property that the contractor was entrusted to hold. Rather, petitioner claims that the contractor stole his money because the contractor did not complete the contracted-for project.

We agree with the Administrative Law Judge's conclusion that the alleged crime must be construed as larceny, which is defined as:

> A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof (Penal Law § 155.05[1]).

The Administrative Law Judge correctly construed the taking as most closely resembling "larceny by false promise." As recently stated by the Appellate Division in ***People v. Abeel*** (67 AD3d 1408, 1409):[1]

---

[1] In ***People v. Abeel*** (***supra***), the Appellate Division found that a breach of contract could be larceny by false promise under certain facts. Therein, the contractor won a bid and, on the day he received funds for the work, he took the money and paid various personal and business bills, wholly unrelated to the contracted work. The contractor never started the work and avoided communication. Therein, the Court found the facts sufficient to conclude that the contractor had no intent to work on the project at the time he entered into the agreement.

> "A person obtains property by false promise when, pursuant to a scheme to defraud, he obtains property of another by means of a representation, express or implied, that he [or she] . . . will in the future engage in particular conduct, and when he [or she] does not intend to engage in such conduct" (Penal Law § 155.05 [2] [d]). It is well established that, "[i]n any prosecution for larceny based upon a false promise, the defendant's intention or belief that the promise would not be performed may not be established by or inferred from the fact alone that such promise was not performed" (***id.***). Rather, the defendant's "intent must be inferred from the facts and circumstances" (***People v Carey***, 103 AD2d 934, 934 [1984]).

In order to prevail, petitioner must prove that the contractor had a present intent not to perform (i.e., work on the house) when the contractor entered into the agreement (***People v. Norman***, 85 NY2d 609, 619 [1995]["larceny by false promise is limited to situations in which an individual has made a promise while harboring a *present* intention not to perform"]). The alleged perpetrator's criminal intent "must be ascertained by looking backward from the failure to perform and finding that *at the time that the accused made the promise* he did not intend to carry out his end of the bargain" (***People v. Churchill***, 47 NY2d 151, 157 [1979]) (emphasis added).

We find the record insufficient to establish that the contractor had no intent to work on the project when he entered into the contract with petitioner. Unlike cases where larceny by false promise was found (***see People v. Abeel***, ***supra***), herein the contractor actually worked on the renovations from early July 2006 through September 20, 2006. The contractor partially fulfilled his obligation, completing roughly half of the project according to petitioner's accounts. This strongly suggests that the contractor intended to comply with his contract because he did, actually, complete a portion of the renovations. In light of this partial performance, we can find no evidence that would support the conclusion that the contractor had no intention of complying with his promise. We cannot accept the allegation that this was all part of a scheme by the

contractor because this argument lacks evidentiary support. Accordingly, we conclude that petitioner is not entitled to the deduction as a theft loss under IRC § 165(c).

We further agree with the Administrative Law Judge's conclusion that petitioner cannot claim the deduction as a casualty loss under IRC § 165(c). As used in that provision, the term "other casualty" has long been interpreted to mean "an accident, a mishap, some sudden invasion by a hostile agency, it excludes the progressive deterioration of property through a steadily operating cause" (***Fay v. Helvering***, 120 F2d 253 [2d Cir 1941]). "It connotes a loss proximately caused by a sudden, unexpected, or unusual event" (***Maher v. Commissioner***, 76 TC 593, 596 [1981]). An event will be considered an "other casualty" under IRC § 165(c) where:

> an unexpected, accidental force is exerted on property and the taxpayer is powerless to prevent application of the force because of the suddenness thereof or some disability, the resulting direct and proximate damage causes a loss which is like or similar to losses arising from the causes specifically enumerated in section 165(c)(3) (***White v. Commissioner***, 48 TC 430, 435 [1967]).

As may be inferred from the foregoing cases, physical damage to or destruction of property is a necessary element of a casualty loss under IRC § 165(c) (***see Dubin v. Commissioner***, 35 TCM 1120 [1976]). In the present matter, petitioner's loss is monetary, caused by the contractor's failure to complete the job. That is, petitioner paid for services he did not receive. As this loss does not involve property damage, it may not be deducted as a casualty loss. While petitioner's situation in the present matter is sympathetic, it must be noted that the Internal Revenue Code is not "designed to take care of all losses that the economic world may bestow on its inhabitants" (***Billman v. Commissioner***, 73 TC 139, 141 [1979]).

We find the remaining issues properly addressed by the Administrative Law Judge, including petitioner's failure to substantiate the amount of the deduction. Petitioner has not

presented any valid grounds for modifying the determination below.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Kevin Rubenstrunk is denied;

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

3. The petition of Kevin Rubenstrunk is denied; and

4. The Division of Taxation is directed to refund $190.00 plus applicable interest to petitioner, pursuant to the Conciliation Order, dated May 29, 2009.

DATED: Troy, New York
November 23, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner