STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CONSTANTINE AND THEOFANI ANGELOS	:	
for Redetermination of a Deficiency or for Refund of Personal Income Taxes Under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1986, 1987, 1988, 1989 and 1990.	:	DETERMINATION DTA NO. 813980

Petitioners, Constantine and Theofani Angelos, 86-05 188th Street, Jamaica, New York 11423 filed a petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1986, 1987, 1988, 1989 and 1990.

Petitioners appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (David C. Gannon, Esq., of counsel).

Petitioners and the Division of Taxation executed a consent waiving a hearing in this matter and agreeing to have the controversy determined on submission. The Division of Taxation's response to petitioner's reply was received on November 3, 1997, which date began the six-month period for the issuance of this determination.

After review of the evidence and arguments presented, Roberta Moseley Nero, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether 130 pages of evidence submitted by petitioners after the record in this matter was closed, should be accepted into evidence.

II. Whether petitioners are entitled to a deduction for transportation expenses related to the use of an automobile for business purposes.

III. Whether petitioners have established reasonable cause for the abatement of penalties.

IV. Whether refunds should be granted to petitioners for the years in question.

FINDINGS OF FACT

1. Pursuant to section 307 of the State Administrative Procedure Act and 20 NYCRR 3000.15(d)(6), the Division of Taxation ("Division") submitted three proposed findings of fact. Proposed Findings of Fact "1" and "2" are accepted and incorporated in Findings of Fact "1" and "2" below. Proposed Finding of Fact "3" is partially accepted as set forth in Finding of Fact "4" below.

2. Petitioner Constantine Angelos worked both as an employee and as a self-employed tax preparer, consultant and accountant for the years in question.

3. Petitioners Constantine and Theofani Angelos reported[1] New York income of $78,984.00 for 1986, $70,821.00 for 1987, $74,268.00 for 1988, $81,641.00 for 1989, and $117,453.00 for 1990. For these years, petitioners reported the following amounts as wages and business income.

[1]The proposed finding of fact as submitted by the Division stated that Constantine Angelos had earned these amounts rather than reported these amounts. Since these amounts include the amounts Constantine Angelos asserts as income from his business, and one of the issues in this case is the amount of that income, the word reported was used.

	Wages and Salaries	Business Income
1986	$81,566.00	$4,634.00
1987	$33,741.00	$50,795.00
1988	$23,077.00	$60,664.00
1989	$30,000.00	$60,154.00
1990	$40,000.00	$100,375.00

For 1986 and the first three months of 1987 Constantine Angelos was employed as the tax manager at J. Henry Schroder Bank and Trust and Associated Companies. The amounts reflected in the above chart for wages and salaries for those years are equal to the amounts listed on Constantine Angelos's W-2 forms as reported by J. Henry Schroder Bank and Trust and Associated Companies. The amounts listed as wages and salaries for 1988, 1989 and 1990, equal the amounts listed on Constantine Angelos's W-2 forms as reported by Geoffrey Bell and Company, Inc.

4. Petitioners' 1986, 1987 and 1988 tax returns were filed on January 26, 1993, their 1989 tax return was filed on March 24, 1993, and their 1990 return on August 19, 1993.[2] Petitioners had requested as a finding of fact that their 1986, 1987 and 1988 returns were filed as early as October 8, 1992. This was based on a note in the Tax Field Audit Record prepared by Bola Lawal as auditor, dated January 26, 1993, which stated: "Original IT201 were not supposed to be sent to Al Bloomer. I [sic] was decided to process the IT201's as filed with the State." (Division's Exhibit G, attachment p.2.) The Division introduced original returns for 1986, 1987 and 1988 each bearing a date stamp indicating receipt by the Division on March 24, 1993.

[2]There is no dispute as to the date of filing of the 1989 or 1990 returns.

However, since the notation in the Division's audit report indicates that the Division understood the returns to be filed on January 26, 1993, it is determined that January 26, 1993 is the date of filing.

5. Petitioners had requested and obtained several extensions of time to file for each of the tax years in question, as follows: the 1986 return was due October 15, 1987; the 1987 return was due October 15, 1988; the 1988 return was due October 15, 1989; the 1989 return was due October 15, 1990; and, the 1990 return was due October 15, 1991. Therefore, all of petitioners' returns were filed late as follows: the 1986 return was filed five years and three months late; the 1987 return was filed four years and three months late; the 1988 return was filed three years and three months late; the 1989 return was filed two years and five months late; and, the 1990 return was filed one year and ten months late. On average, petitioners' returns were filed 3.4 years late.

6. For 1987 through 1990 petitioners' returns indicated that an overpayment had been made and should be applied to petitioners' estimated tax payments for the following years. Petitioners' 1986 return indicated that they owed $54.00 in taxes.

7. After reviewing petitioners' returns as filed and after a September 8, 1993 conference with Constantine Angelos, the Division issued a Notice of Deficiency ("notice") on February 4, 1994. The notice set forth $12,559.58 in tax due, $7,094.96 in interest due, $9,121.21 in penalty due,[3] and a payment for 1986 of $1,783.39, for a current balance due of $26,992.36. According to the Division's Income Tax Report of Audit, the disagreed issues at the time of the issuance of the notice were: 1). whether the refunds claimed by petitioners were barred by the statute of

[3]The Division submitted, apparently as a further explanation of the figures set forth in the notice, a Statement of Personal Income Tax Audit Changes dated November 10, 1993. According to this statement petitioners were assessed penalties for failure to file a return (Tax Law § 685[a][1][A]), failure to pay the tax shown on the return (Tax Law § 685[a][2]) and deficiencies due to negligence (Tax Law § 685[b]), for the years 1986, 1987 and 1988. For the years 1989 and 1990, petitioners were assessed only penalties for deficiencies due to negligence.

limitations; 2). whether Constantine Angelos's ill health constituted reasonable cause for failure to file; and, 3). whether petitioners were entitled to Schedule C expenses for transportation.[4] The audit report also indicates that petitioners were given multiple opportunities to submit substantiation for the transportation expenses and did not provide any information. There is no mention in the audit report of the issue of whether Constantine Angelos's home office was his principal place of business.

8. Petitioners filed a request for a conciliation conference and a Conciliation Order was issued on March 31, 1995 recomputing the notice. The order sets forth a credit of $137.94 as the tax due. Submitted by the Division were the Advocate's Comments on Conciliation Conference dated February 6, 1995 apparently to explain the adjustments that were made. The Division's advocate notes in the comments that he agrees with the findings of the conferee. The tax due as originally set forth in the notice and as set forth in the conciliation order documentation is compared in the chart below.

[4]There were indications in the audit report that petitioners were arguing that they were entitled to deductions for Constantine Angelos's travel to and from work because of his ill health. However, this argument was not discussed by either party in these proceedings.

Year	Tax per notice	Tax per conciliation order
1986 (State)	$754.45	$754.45
1986 (City)	$334.85	$334.85
1987 (State)	$6,309.83	($162.14)
1987 (City)	$2,642.03	$0.00
1988 (State)	$1,826.97	$0.00
1988 (City)	$691.45	$0.00
1989 (State)	$0.00	($1,065.10)
1989 (City)	$0.00	$0.00
1990 (State)	Not Assessed	Not Assessed
1990 (City)	$0.00	$0.00
Totals	$12,559.58	($134.94)

The order notes that a credit of $1,783.39 had already been applied to the notice and states that penalty[5] and interest are to be computed at the applicable rate.

9. The documents submitted by the Division regarding the conciliation conference and order indicate that it was the Division's position and that of the conferee that petitioners had not substantiated their Schedule C expenses. However, it is also mentioned in these documents that these were commuting expenses and not deductible business expenses.

10. On June 22, 1995, petitioners filed a petition with the Division of Tax Appeals protesting the Conciliation Order. The Division filed an Answer in response to the petition. The answer denies knowledge and information sufficient to form a belief as to the majority of the

[5]The Division submitted, apparently as a further explanation of the figures set forth in the order, a Statement of Personal Income Tax Audit Changes dated February 13, 1995. According to this statement at the time of the order petitioners were assessed penalties for failure to file a return (Tax Law § 685[a][1][A]), failure to pay the tax shown on the return (Tax Law § 685[a][2]) and deficiencies due to negligence (Tax Law § 685[b]), for 1986 only. For the years 1987, 1988, 1989 and 1990, petitioners were assessed only penalties for deficiencies due to negligence.

petition, and objected to the form of the petition. The Answer affirmatively stated that since Constantine Angelos's residence was not his principal place of business, the transportation expenses were not deductible.

11. On January 30, 1997 the Division of Tax Appeals received an executed consent to have this matter heard by submission of documents without a hearing. By letter dated January 31, 1997 addressed to petitioners and the Division , the Division of Tax Appeals established the schedule for submission of documentary evidence and briefs as follows: 1). filing of documents by the Division - March 7, 1997; 2). filing of petitioners' documents and brief - April 11, 1997; 3). filing of the Division's brief - May 16, 1997; and, 4). filing of petitioners' reply brief - June 5, 1997. This January 31, 1997 letter also contained the following instructions:

> In presenting your case by submission please keep in mind that:
>
> 1). Other than the petition, the answer and the hearing memorandum submitted by the Division in this matter, I have no prior knowledge of the facts or issues in this case.
>
> 2). I have no access to any information that is not placed into the record pursuant to the procedure set forth in this letter. This means that if the parties have exchanged information in the past, for example during the course of an audit or conciliation conference, and you want me to consider this information in reaching my determination, it must be submitted into evidence in accordance with the above schedule.
>
> 3). In most cases, the petitioner carries the burden of proof and must prove all relevant and material facts by submission of documents. This may include affidavits if necessary.
>
> 4). *The record shall be closed as of April 11, 1997, i.e., the date of petitioner's* [sic] *submission of documents and initial brief. No further evidence shall be admitted thereafter.*
>
> 5). Any requests for extensions of time shall be in writing and must be received by me by the due date for filing your brief or documents.
>
> 6). It is the responsibility of each party to adhere to the above-scheduled due

> dates (regardless of whether a party receives scheduled briefs or documents from the opposing party). Any briefs or documents not filed in accordance with the schedule may be returned to the party submitting them. (emphasis added.)

12. The Division was granted an additional week to file its documents, which were then timely filed on March 21, 1997 making petitioners' documents and brief due on April 25, 1997. By letter dated April 7, 1997 the Division explained that the copy of the documents it had sent to petitioners was returned by the Postal Service due to the Division's using the wrong address. The Division remailed the documents to petitioners on April 7, 1997 and made clear that it had no objection to an extension being granted to petitioners. Petitioners then requested, by letter dated April 10, 1997, an extension of the "due date for petitioners'/taxpayers' documents" from April 25 until May 21, 1997 because of the recent receipt of the Division's documents and Constantine Angelos's visual impairments. This request was granted as was an additional request for a further week for the submission of "petitioners'/taxpayers' documents" because of Constantine Angelos's visual impairments. This made petitioners' documents and brief due on June 6, 1997. The documents and brief were received on June 9, 1997 and were filed on June 7, 1997. Petitioners offered no explanation as to why the documents and brief were filed a day late, but did again mention Constantine Angelos's health problems.[6] The Division was granted a one-week extension for the filing of its brief making the Division's brief due July 18, 1997. The Division's brief was timely filed, leaving petitioners' reply brief due on August 7, 1997. By letter dated August 5, 1997 from petitioners' son, petitioners requested a four-week extension of the "due date for the petitioners'/taxpayers' reply" until September 5, 1997, as Constantine Angelos was in the hospital. This request was granted. By letter dated September 5, 1997, petitioners' son

[6]Considering Constantine Angelos's health and the fact that the filing was only one day late, together with no objection being voiced from the Division, the filing was accepted without comment.

requested a one-week extension of the "due date for the petitioners'/taxpayers' reply" until September 12, 1997, as Constantine Angelos had been readmitted through the emergency room to the hospital, and was at the present time home recuperating. This request was granted. Petitioners' reply was filed on September 30, 1997 with a cover letter from petitioners' son explaining that the late filing was due to complications with Constantine Angelos's health.

Together with the cover letter and the reply brief, petitioners at this time submitted a 130-page bound document entitled "PETITIONERS' EXHIBITS II". In the cover letter petitioners' son expressed thanks for the various extensions granted for the "filing of their documents", and requested that even though petitioners' were attempting to file the documents and brief over two weeks late, that the "reply and supporting exhibits" be accepted. Finally, the letter provided: "Furthermore, although we suspect that the inclusion of additional documents might be met with some resistance, we must insist that they do not introduce any new arguments on behalf of my parents and are issued in direct response to each and every of the Division's arguments." By letter dated October 31, 1997, the Division of Tax Appeals accepted the late brief due to Constantine Angelos's illness. With regard to the documents submitted the Division was given until October 31, 1997 to address the issue of whether such documents should be accepted and to respond substantively to the documents. The letter also provided that the issue of whether the documents would be part of the record upon which this determination is based would be addressed in the determination. The Division's response was filed on October 31, 1997 and received by the Division of Tax Appeals on November 3, 1997.

13. Constantine Angelos was in the New York Hospital Medical Center of Queens from July 31, 1997 through August 6, 1997. Constantine Angelos also had a history of eye problems resulting in his visual impairment. Petitioners submitted a letter from Martin M. Kay, M.D.,

dated September 18, 1997, detailing Constantine Angelos's current medical condition as follows:

> I've cared for Constantine Angelos since his emergency admission to NYHQ 7/97 and can verify the following diagnoses.
>
> 1. CHF, NYHA Class IV.
> 2. Unstable angina.
> 3. ASHD, status post CABG.
> 4. Peripheral vascular disease, severe decompensated.
> 5. AODM.
> 6. Chronic renal insufficiency with significantly impaired kidney function.
> 7. Significant anemia.
> 8. Severe diffuse arteriosclerosis affecting legs, neck, and heart.
> 9. Prostatism.
> 10. Valvular heart disease including aortic and mitral regurgitation.
>
> The above diagnoses are all well advanced, complex, and the patient has a very marked limitation of physical effort, has very severe symptoms with minimal or no physical exertion with diseases that are near end-stage. (Petitioners' Exhibit AA, p. 1.)

14. The medical history of petitioners and their son is set forth in detail both in the petition filed in this matter and in petitioners' brief. Numerous medical bills and letters from doctors have been submitted into the record. The medical history set forth below is that both described by petitioners and supported by the independent evidence.

In 1987 petitioners' son underwent surgery at Memorial Sloan Kettering Cancer Center. This cancer surgery required physical therapy.

Constantine Angelos is an insulin dependent diabetic. In September of 1988 he underwent triple bypass surgery at New York Hospital. Immediately thereafter he developed a sternal wound infection which involved a critical reoperation and private duty nurses for at-home care after his release from the hospital. At about the same time Constantine Angelos developed severe peripheral vascular disease problems which eventually resulted in limited ability to ambulate or travel. Constantine Angelos underwent angioplasty procedures for both of his legs in April of

1990. The procedures were not effective. Constantine Angelos was a diabetic with a history of vein occlusion in the left eye. This caused difficulties for Constantine Angelos throughout 1990 and 1991 and Constantine Angelos's left eye was treated with lasers in 1991. Constantine Angelos's vision remained impaired despite this treatment. Constantine Angelos had a cataract removed in October of 1991, somewhat improving his vision. Constantine Angelos was also diagnosed during 1992 and 1993 with bilateral diabetic macular edema, and had postponed another cataract operation due to an infection in his feet. In July of 1993 Constantine Angelos was hospitalized for the infection in his feet and his right big toe was amputated. In November of 1993 Constantine Angelos had bypass operations in both legs to improve his circulation and avoid having to amputate his left big toe.

15. In support of their position that they are entitled to a deduction for certain automobile expenses on Schedule C, petitioners first introduced five pages, one page for each year in question, listing as car expenses: gasoline, repairs, tires, car wash, insurance, registration, inspection, garage expenses and miscellaneous supplies. Petitioners then totaled all of these expenses for each year and multiplied the total by the percentage of business usage to arrive at the amount of the deduction. Listed as the percentage of business usage of the automobile was 85% for 1986 and 1987, 90% for 1988 and 1989, and 80% for 1990. Petitioners did not attempt to explain the origin of the percentage of business usage figures. Petitioners then submitted revised schedules with a column for documented deductions. The amounts of automobile expenses originally claimed and then listed as documented are set forth in the following table.

	Original	Documented
1986	$6,665.70	$4,956.80
1987	$4,816.84	$3,858.56

	Original	Documented
1988	$8,676.80	$7,291.50
1989	$5,239.50	$3,472.80
1990	$10,070.97	$7,200.35

The documented figures were arrived at by totaling the expenses for which petitioners claimed to have documentation, and multiplying those numbers by the same percentage of business use figures originally used. Petitioners again did not explain how they arrived at the business percentage use figure.

16. Petitioners submitted numerous documents in support of the documented expenses listed for each year. For 1986 petitioners submitted photocopies of the following: $1,630.85 in canceled checks made out to Exxon Company, U.S.A. as documentation for gasoline costs; $2,297.68 in canceled checks to Allstate Insurance Co. as documentation of insurance costs; $353.00 in canceled checks to Frank Fanelli as documentation of auto repair costs; and a $350.00 canceled check to Alpha Tires, Inc. For 1987 petitioners submitted photocopies of the following: $1,123.44 in canceled checks made out to Exxon Company, U.S.A. as documentation for gasoline costs; $1,897.45 in canceled checks to Allstate Insurance Co. as documentation of insurance costs; and $232.20 in credit card receipts for Park Pontiac and a Sears invoice marked paid in the amount of $86.39 as documentation of auto repair costs. For 1988 petitioners submitted photocopies of the following: $1,012.79 in canceled checks made out to Exxon Company, U.S.A. as documentation for gasoline costs; $1,486.23 in canceled checks to Allstate Insurance Co. as documentation of insurance costs; $738.10 in credit card receipts for Park Pontiac and a canceled check to Auto Barn in the amount of $21.55 as documentation of auto

repair costs; and a $400.00 canceled check to Alpha Tires, Inc. For 1989 petitioners submitted photocopies of the following: $1,032.40 in canceled checks made out to Exxon Company, U.S.A. as documentation for gasoline costs; $1,514.58 in canceled checks to Allstate Insurance Co. as documentation of insurance costs; $69.44 in credit card receipts for Park Pontiac as documentation of auto repair costs; and a $42.25 canceled check for the registration of the automobile. For 1990 petitioners submitted photocopies of the following: $1,3411.10 in canceled checks made out to Exxon Company, U.S.A. as documentation for gasoline costs; $2,259.80 in canceled checks to Allstate Insurance Co. as documentation of insurance costs; a Meineke invoice indicating payment by credit card in the amount of $151.12, two G.P. Diagnostic invoices marked paid in the amount of $380.00, a Midas invoice and canceled check in the amount of $299.80 and a Sears invoice in the amount of $86.59 as documentation of auto repair costs; and, an $84.50 canceled check for the registration of the automobile.

For the years 1986 through 1989 petitioners also claimed $1,200.00 in garage expenses each year, and $1,500.00 in garage expenses for 1990. To support this claim petitioners submitted surveys of their residence including a cinder block garage, an ad for a parking garage and figures for the monthly cost of the garage for the years in question "Based Upon Quotes From Local Garages" (Petitioners' Exhibit LL, p. 78).

For 1988 petitioners claimed depreciation on the automobile of $3,243.00, and for 1990 petitioners claimed depreciation on the automobile of $2,897.53. Depreciation was not claimed for any other years. Petitioners provided copies of two 1984 canceled checks in the amounts of $500.00 and $987.66 (with a notation on the face of the check that is the balance on a 1984 Parisienne) together with a copy of their check register page for the $987.66 check, indicating that the total price of the Parisienne was $14,487.66. Petitioners also provided depreciation

calculations.

17. Petitioners also introduced three letters from the IRS, all dated in 1993, indicating that petitioners' 1988, 1989 and 1990 returns were accepted as filed. The letters concerning the 1988 and 1990 returns specifically state that petitioners should not regard these letters as the result of an audit with a no change determination in that petitioners' returns were not examined.

18. Petitioners made various factual assertions in their briefs filed in this matter. However, petitioners did not file any affidavits. Factual assertions not supported by any evidence have not been included in these findings of fact.

SUMMARY OF THE PARTIES' POSITIONS

19. Petitioners argue that Constantine Angelos's home office was his principal place of business during the years in question. Furthermore, petitioners assert that Constantine Angelos utilized the automobile for which they are claiming expense deductions for transportation from his home office to various other work locations. Therefore, petitioners conclude that they are entitled to deduct the claimed Schedule C transportation expenses. With regard to the penalties imposed, petitioners assert that they made timely estimated tax payments and were simply not able to file timely tax returns due to the major illnesses of petitioners and their family members. Therefore, petitioners assert they have established reasonable cause to abate the penalties pursuant to Tax Law § 685(a)(1)(A) and 20 NYCRR 107.6(1). Also, petitioners assert that since they have established their transportation expense deductions and reasonable cause for failure to timely file their tax returns, they are entitled to refunds for the years in question. Finally, petitioners state that their late filed Federal returns were accepted by the IRS as filed. It is unclear whether this statement is offered in support of petitioners' argument regarding the transportation expense or petitioners' argument regarding the establishment of reasonable cause to abate the

penalties imposed.

20. The Division argues that Constantine Angelos's home office was not his principal place of business and that therefore petitioners are not entitled to the transportation expenses claimed. The Division also argues that petitioners have failed to substantiate the expenses claimed. Furthermore, the Division argues that even if petitioners have established some entitlement to transportation deductions, but not sufficient evidence to calculate the exact amount of the deductions, the deduction cannot be estimated under the ***Cohan*** rule (***Cohan v. Commissioner***, 39 F2d 540) because petitioners have provided no basis for making such an estimate. The Division asserts that petitioners are not entitled to a refund for 1987 and 1988 as any refund would be barred by the time limitations of Tax Law § 687(a).[7] With regard to 1989 and 1990, while refunds would not be barred by the time limitations, petitioners on their returns elected to have any overpayment applied to estimated taxes for the following year. Therefore, should any overpayment be determined, the result would be a recalculation of petitioners' tax liabilities from 1989 forward. With regard to the penalty issue, the Division argues that petitioners' claim that they were unable to timely file their returns for each of these years due to illness is negated by the fact that Constantine Angelos was earning income as a self-employed tax preparer and planner for the years in question, and the fact that the returns were filed years late. The Division also asserts the timely paying of estimated taxes is irrelevant to the penalty of failure to file tax returns, and the only penalty imposed for failure to timely pay taxes was for the year 1986, where the return as filed by petitioner indicated tax was due. Finally, the Division, citing 20 NYCRR 159.4 and ***Matter of Dufton*** (Tax Appeals Tribunal, April 6, 1995) asserts that

[7]The Division notes that with regard to 1986 the return as filed by petitioners does not indicate that an overpayment of tax was made, therefore, there is no issue regarding any refund for that year.

it is not bound by the IRS "accepted as filed" letters.

21. In reply petitioners again argue that Constantine Angelos's home office was his principal place of business. With regard to the refund issue, petitioners argue that they are entitled to a refund for 1989 and that they are entitled to refunds in general because the Division did not give them credit for estimated taxes for the years in question, effectively nullifying their election. Petitioners assert that the fact that Constantine Angelos made a living during the years in question as a tax preparer, accountant and tax planner does not negate his illness. Petitioners explain that he had to turn down new clients and drop clients during the time period at issue and that with his background it is clear he should have made substantially more money. Finally, the only argument petitioners made with regard to accepting the documents filed with their reply brief was that no new arguments were presented, the documents were submitted only in response to the Division's brief.

22. In its response to the documents submitted with petitioners' reply brief the Division argues, citing ***Matter of Schoonover*** (Tax Appeals Tribunal, August 15, 1991), that the record had been closed in June of 1997 and petitioners should not be allowed to submit evidence in September of 1997. In response to the documents submitted by petitioners, the Division argues that the documents are irrelevant, vague or do not substantiate petitioners' claims.

CONCLUSIONS OF LAW

A. The first issue to be addressed is the issue of whether the 130-page bound document entitled "PETITIONERS' EXHIBITS II", submitted by petitioners with their reply brief, should be allowed to be accepted as part of the record in this matter. Petitioners were clearly instructed that the record in this matter would be closed upon submission of their original documents and brief. With extensions, the record was closed on June 9, 1997, when these documents were received by the Division of Tax Appeals. The documents in question were submitted almost four months after the record was closed. It is clear that petitioners were aware of this and were aware of the difference between submitting documents and submitting a brief. This is evidenced by petitioners' correspondence referring to submission of documents in the first instance and submission of a reply at a later time. Petitioners never requested at any point in these proceedings additional time for the submission of documents. Rather, they requested several extensions of time to file their reply. Furthermore, the cover letter submitted with petitioners' reply brief and the exhibits clearly states that petitioners were aware "that the inclusion of additional documents might be met with some resistance", another indication that petitioners realized the record was closed.

The Division cites ***Matter of Schoonover*** (Tax Appeals Tribunal, August 15, 1991) in support of its argument that the additional documents submitted with petitioners' reply should not be accepted into evidence. **Schoonover** held that "in order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing."

Balancing the importance of having definition and finality in the hearing the process as

expressed in ***Schoonover*** with the special circumstances of this case, petitioners' Exhibits AA and EE through MM are accepted into the record and the contents of such exhibits are reflected in this determination. The remainder of petitioners' submission is not accepted and no part of this determination is based on any of those remaining exhibits.

Exhibits AA and MM concern the current status of Constantine Angelos's health, and were submitted only as an explanation for the various delays in the Division of Tax Appeals process. Exhibits EE through LL relate to the substantive issue of whether petitioners have substantiated their claimed Schedule C expenses. Petitioners chose to waive their right to a hearing and handle this matter through submission of documents because of Constantine Angelos's well-documented health problems. After reviewing the audit and conciliation conference documents submitted and the answer of the Division filed in this matter, it is quite possible that petitioners could have assumed that there was no issue regarding the substantiation of the business use of the automobile or the amount of the expenses, but that the only issue was whether Constantine Angelos's home office was his principal place of business. If there had been a hearing the Division's position that petitioners had not substantiated the business use of the automobile or the amount of the expenses would have been revealed to petitioners during the course of the hearing and they would have had an opportunity to request time to respond with documentation. Since this matter was handled by submission - which was chosen by petitioners due to Constantine Angelos's health problems - it is quite possible that petitioners were not aware that substantiation was an issue until the receipt of the Division's brief. At that time the record was already closed. In fact the covering letter submitted with the documents and reply brief specifically states that the documents were being submitted in response to the Division's brief. Due to all these factors and the fact that the information was submitted with the reply (i.e., the

hearing process remained open) petitioners Exhibits EE through LL are accepted.

B. As relevant to this proceeding, Tax Law § 612(a) provides that New York State adjusted gross income is equal to Federal adjusted gross income. Pursuant to IRC § 62(a)(1) and § 162(a), in arriving at Federal adjusted gross income a taxpayer is allowed to deduct "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business" (IRC § 162[a]). Automobile expenses incurred in carrying on a business are deductible business expenses under IRC §162(a) (***Keating v. Commissioner***, 69 TCM 2052; ***Clark v. Commissioner***, 67 TCM 2458, ***affd*** 68 F3d 469, 95-2 US Tax Cas ¶50,507). However, no deductions for passenger automobiles are allowed, unless the substantiation requirements of IRC § 274(d) are met.[8] No deduction of expenses for an automobile used in carrying on a business are allowed unless the taxpayer:

> substantiates by adequate records or by sufficient evidence corroborating the taxpayer's own statement (A) the amount of such expense or other item, (B) the time and place of the travel, . . . or use of the facility or property, . . . (C) the business purpose of the expense or other item, and (D) the business relationship to the taxpayer of persons . . . using the facility or property (IRC § 274[d]).

No deductions are allowed for automobile expenses unless a taxpayer substantiates each element of each expense in the manner provided by the regulations (Treas Reg § 1.274-5T[a]; IRC § 280F[d][4]). The intent of IRC § 274(d) and the regulations is specifically addressed in the regulations as follows:

> This limitation supersedes the doctrine founded in *Cohan v. Commissioner*, 39 F.2d 540 (2d Cir. 1930). The decision held that, where the evidence indicated a taxpayer incurred deductible travel or entertainment expenses but the exact amount could not be determined, the court should make a close approximation and not disallow the deduction entirely. Section 274(d) contemplates that no

[8]Specifically, IRC § 274(d)(4) provides that no deduction shall be allowed unless the substantiation requirements are met with regard to the types of property listed in IRC § 280F(d)(4). Passenger automobiles are listed in IRC §280F(d)(4)(A)(i).

> deduction or credit shall be allowed a taxpayer on the basis of such approximations or unsupported testimony of the taxpayer. (Treas Reg § 1.274-5T[a].)

The elements required to be substantiated in the case of automobile expenditures are: the amount of each expenditure, including the amount of usage (i.e., the number of miles the automobile was used for business purposes together with the total mileage the automobile was used during the period in question); the date of the expenditures; and the business purpose of the expenditure (Treas Reg § 1.274-5T[b][6]).

The regulations repeat the requirement set forth in IRC § 274(d)(4) that the taxpayer must substantiate each of these elements with adequate records or "sufficient evidence corroborating his own statement" (Treas Reg § 1.274-5T[c]).

C. There are numerous Tax Court cases applying the provisions of IRC § 274(d)(4) and the regulations to business deductions for automobile expenses. In ***Cooke v. Commissioner*** (61 TCM 2647), submitted in support of the claimed expenses was Curtis A. Cooke's[9] testimony and a diary. Curtis A. Cooke was an insurance salesman who traveled between his office and meetings with prospective clients. The diary presented by Curtis A. Cooke contained names, sometimes only names or sometimes names together with phone numbers, addresses or both. At the top of each page of the diary was a business mileage figure for the day which was the total number of miles traveled for the day minus commuting miles. The court held that the petitioners had failed to substantiate the business use of the vehicles as required by IRC § 274(d). In particular the court stated: "Petitioners have failed to meet these requirements, as they cannot demonstrate the time and place the vehicles were used or the business purpose of the use."

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[9]The petitioners in ***Cooke*** were Curtis A. and Jeanne H. Cooke, husband and wife.

(***Cooke v. Commissioner***, ***supra*** at 2649.)

In ***Keating v. Commissioner*** (***supra***), the petitioners claimed automobile expense deductions for the leasing and repair of the automobile, and gasoline and toll charges. In support of these claims Keith Keating[10] testified as to the places he traveled to and the frequency of the trips. The petitioners also submitted into evidence a vehicle lease and various canceled checks and bills regarding insurance and repair expenses. Again, the Tax Court determined that this evidence was not adequate to substantiate automobile expenses as required by IRC § 274(d)(4).

In ***Clark v. Commissioner (supra)***, petitioners claimed a deduction for automobile expenses regarding Monroe S. Clark's[11] use of an automobile for business purposes as a pastor at Pilgrim Rest. In support of this claim petitioners introduced a schedule of business miles traveled and a letter from six members and officers of Pilgrim's Rest stating that Monroe S. Clark was the pastor and statements concerning his business use of the automobile. The Tax Court found that his evidence, in that it included a statement from witnesses was sufficient to prove the business use of the car. Although petitioners did not have adequate records the evidence presented contained sufficient evidence to corroborate Monroe S. Clark's testimony. The Tax Court went on to disagree with petitioners' calculation of the percentage of the miles that were for business use deducting commuting miles and miles regarding another business that petitioners had submitted no evidence for.

In ***Reems v. Commissioner*** (67 TCM 3050) Stuart L. Reems[12] was a traveling salesman whose territory included seven states, who traveled almost exclusively by automobile and who

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[10]The petitioners in ***Keating*** were Keith and Pia Keating, husband and wife.

[11]The petitioners in ***Clark*** were Monroe S. Clark, Jr. and Barbara A. Clark, husband and wife.

[12]The petitioners in ***Reems*** were Stuart L, Reems and Elizabeth Becker-Reems, husband and wife.

traveled thousands of miles each year. Petitioners claimed a deduction for automobile expenses, such as depreciation, interest, taxes and insurance. Stuart L. Reems kept contemporaneous records of the business miles he traveled and of car expenses. The Tax Court held that these records together with Stuart L. Reems's testimony, proved that the automobile was an ordinary and necessary expense of Stuart L. Reems's business and that the business use of the automobile was 80% of the total use.

D. Petitioners have the burden of proving that they are entitled to deduct certain expenses associated with an automobile on their Schedule C (Tax Law § 689[e]). In support of their contention that they are entitled to deduct these expenses petitioners introduced schedules showing transportation expenses for each year, and a second group of schedules showing lesser amounts as those expenses for which documentation is available. In support of the schedules for documented expenses petitioners submitted canceled checks, credit card receipts and invoices to support expenses for gasoline, insurance, auto repair, tires and automobile registration costs. In support of depreciation deductions petitioners provided evidence concerning the cost of the automobile in question and depreciation calculations. In support of garage expenses petitioners introduced surveys of their residence and monthly cost quotes from local garages.

Petitioners have not met their burden of proof with regard to substantiating their claimed deduction for automobile expenses for an automobile used for business purposes. Petitioners have provided no evidence regarding the mileage used for business or total mileage for the years in question and no evidence to even attempt to explain where the business usage percentages they utilized in calculating the expenses originated from. This is clearly insufficient to meet the substantiation requirements of IRC § 274(d) or the relevant regulations (Treas Reg § 1.274-5T[b][6]; [c]).

The same conclusion is reached when a comparison of the evidence presented by petitioners is compared to the evidence presented in the Tax Court cases discussed above. Petitioners in this matter presented no testimony (or affidavits) regarding the business use of the automobile or mileage traveled for business. This is less evidence than that presented by the taxpayers in the two cases discussed above where the Tax Court denied deductions based on failure to prove either business purpose in the use of the vehicle or the amount of such use (***see***, ***Cooke v. Commissioner***, ***supra***; ***Keating v. Commissioner***, ***supra***). In ***Clark v. Commissioner*** (***supra***), the Tax Court, while not accepting the amount of usage figures of the taxpayer, did hold that the taxpayer had proven a business use of the vehicle. This was done through a statement of independent witnesses. There is no evidence in the current record from any independent witnesses. Finally, in ***Reems v. Commissioner*** (***supra***), the Tax Court held that the taxpayers had substantiated their transportation deduction through the following: testimony regarding the nature and extent of the business and contemporaneous records of the miles traveled for business and expenses. The only evidence of this nature in the current record are the receipts tending to show the amount of the expenses; there is no detailed description of the business use of the car or any evidence concerning the miles traveled.

Petitioners presented "accepted as filed" letters from the IRS for the years 1988, 1989 and 1990 as evidence. These letters do not assist petitioners on this issue. First, the letters concerning the years 1988 and 1990 specifically state that petitioners' returns were not examined and that petitioners should not consider the letters a determination of no change after audit. Second, the Division is correct that it is not bound by a determination of an issue by the IRS, but may conduct its own examination (***see***, 20 NYCRR 159.4; ***Matter of Dufton***, Tax Appeals Tribunal, April 6, 1995).

In conclusion, IRC § 274(d) requires petitioners to substantiate by records or sufficient corroborating evidence, the amount of the expenditures, the number of business and total miles traveled, the dates of the expenditures and the business purpose of the expenditure. Since the only evidence submitted by petitioners concerns the amount of the expenditures, petitioners have clearly failed to prove that they are entitled to the claimed deductions.

E. Having determined that petitioners did not substantiate their claimed Schedule C deductions for transportation or automobile expenses, the issue of whether Constantine Angelos's home office constituted his principal place of business, and the issue of whether petitioners are entitled to a refund, are rendered moot and will not be discussed in this determination.

F. The next issue to be addressed is whether petitioners have established reasonable cause for the abatement of penalties. Petitioners allege that all of the various penalties assessed for the different years involved - failure to file a return (Tax Law § 685[a][1][A]), failure to pay the tax shown on the return (Tax Law § 685[a][2]) and deficiencies due to negligence (Tax Law § 685[b]) - should be abated because they have established reasonable cause as set forth in 20 NYCRR 107.6(d)(1) which provides:

> The following exemplify grounds for reasonable cause, where clearly established by or on behalf of the taxpayer, employer or other person:
>
> The death or serious illness of the taxpayer, employer, or other person against whom the additions to tax or penalties have been assessed or are assessable, a member of such party's family, such party's personal representative or employer, or the unavoidable absence of the taxpayer, employer, other person or personal representative from the usual place of business, which precluded timely compliance, may constitute reasonable cause provided that:
>
> (i) in the case of the failure to file any New York State income tax return, the applicable New York State income tax return is filed; or

> (ii) in the case of the failure to pay or deposit any New York State income tax, such amount is paid or deposited;
>
> within a justifiable period of time after the death, illness, or absence. A justifiable period of time is that period which is substantiated by or on behalf of the taxpayer employer or other person as a reasonable period of time for filing the New York State income tax return and/or for paying any New York State income tax based on the facts and circumstances in each case.

Petitioners base their claims on the established ill health of Constantine Angelos and his family and on their estimated payments being made even though they did not file their tax returns.

For the year 1986 penalties were imposed for failure to file a return (Tax Law § 685[a][1][A]), failure to pay the tax shown on the return (Tax Law § 685[a][2]) and deficiencies due to negligence (Tax Law § 685[b]). Petitioners' 1986 return was filed five years and three months late with a balance due of $54.00. During the years from 1986 through and including 1990, Constantine Angelos reported average wages of $41,677.00, and an average business income of $55,324.00. Both his wages and business income were as a result of his work as a tax preparer, accountant and tax planner. Based on these facts petitioners have not proven that over five years was a justifiable time within which to either file a return or pay the tax. The penalties imposed for 1986 are sustained.

G. With regard to 1987, 1988, 1989 and 1990, I am somewhat confused by the Division's arguments concerning penalties. In its brief the Division argues that petitioners' arguments concerning payment of estimated taxes are not relevant because petitioners were only assessed penalties for failure to file returns, not failure to pay the tax due. As noted in footnote "5", the materials submitted by the Division explaining the calculations used in arriving at the conciliation order, which were agreed to by the advocate, do not contain any penalties for failure to file tax returns. The only penalties remaining for these years is a negligence penalty. Tax Law

§ 685(b)(1) provides that "If any part of a *deficiency* is due to negligence or intentional disregard of this article or rules or regulations hereunder (but without intent to defraud), there shall be added to the tax an amount equal to five percent of the *deficiency*." (Emphasis added.) Regardless of whether or not petitioners were negligent, having reviewed the tax due for each year that was the basis for the Conciliation Order as set forth in Finding of Fact "8", I simply cannot find any deficiency that was caused by that negligence. Each year listed reflects a tax of zero or less. While the burden of proof is on petitioners to establish reasonable cause to abate penalties, the Division must at least show a deficiency to sustain a section 685(b) penalty for a deficiency due to negligence. The Tax Law § 685(b) penalties for 1987 through 1990 are canceled.

H. The petition of Constantine and Theofani Angelos, is granted to the extent set forth in Conclusion of Law "G", but is in all other respects denied. The Notice of Determination dated February 4, 1994, as recomputed by the conciliation Order dated March 31, 1995, and modified by conclusion of Law "G", is sustained.

DATED: Troy, New York
April 30, 1998

/s/ Roberta Moseley Nero
ADMINISTRATIVE LAW JUDGE