

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>BERNARD BAUMRIN AND</b>	:	
<b>JUDITH A. BAUMRIN</b>	:	DETERMINATION
	:	DTA NO. 818754
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes: under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1997 and 1998.	:	

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Petitioners, Bernard and Judith A. Baumrin, 590 West End Avenue, Apt. 12C, New York, New York 10024, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1997 and 1998.

A small claims hearing was held before Joseph W. Pinto, Jr., Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on February 13, 2003 at 10:45 A.M., which date began the three-month period for the issuance of this determination. Petitioners appeared *pro se*. The Division of Taxation appeared by Barbara G. Billett, Esq. (Jacob Tiwary).

***ISSUES***

I. Whether the Division of Taxation properly disallowed all of petitioners' Schedule C losses related to Bernard Baumrin's law and real estate businesses for lack of a profit motive for the years 1997 and 1998.

II. Whether the Division of Taxation properly disallowed certain itemized deductions for unreimbursed business expenses for the years 1997 and 1998 because they were personal in nature.

***FINDINGS OF FACT***

1. Based on an audit of petitioners' income tax returns, the Division of Taxation ("Division") issued a Notice of Deficiency to petitioners on November 17, 2000 which asserted additional New York State and City of New York personal income tax for the years 1997 and 1998 in the sum of \$9,375.53, plus penalties and interest.

2. The auditor disallowed all of petitioners' Schedule C losses related to Mr. Baumrin's law and real estate businesses for the years 1997 and 1998 because he determined that the businesses lacked a profit motive. In addition, the auditor disallowed certain of petitioners' unreimbursed business expenses for both years because they were determined to be personal in nature.

3. The Statement of Personal Income Tax Audit Changes, dated June 11, 2001, explained that Schedule C losses attributable to Bernard Baumrin's legal business and his real estate business were disallowed for 1997 in the combined sum of \$27,555.00. In addition, the amount of \$7,413.00 was disallowed for Schedule A itemized deductions. This resulted in corrected taxable income for 1997 of \$69,979.00, and a resultant New York State tax liability of \$4,094.36 and City of New York liability of \$2,381.08. After credit for tax paid, the additional tax liability asserted was \$4,883.44.

The statement indicated disallowance of the same claimed Schedule C losses for 1998 in the combined sum of \$26,921.00. The Division disallowed 1998 Schedule A itemized deductions of \$8,091.00. This resulted in a corrected tax liability of \$89,090.00, New York State

tax of \$5,861.13 and New York City tax of \$3,671.96. After credit for tax paid, the additional tax asserted was \$4,492.09.

4. Other than a one-paragraph entry in the auditor's log and the Statement of Proposed Audit Changes, the Division did not present any evidence, either documentary or testimonial, to elaborate on its reasons for concluding that Mr. Baumrin's business endeavors were without a profit motive and that the travel expenses were personal in nature.

5. During the years in issue, petitioner Bernard Baumrin was a university professor at the City University of New York, Lehman College, The Graduate School and University Center, and at the Mount Sinai School of Medicine. He was Chair of the American Philosophical Association's Committee on Philosophy and Law.

6. In addition, he was a lawyer in a New York law partnership with two other attorneys and practiced law outside of the partnership as well. He was an active member of the New York State Bar Association's Committee on Legal Education and Admission to the Bar and Chair of the Legal Ethics Award programs.

7. Finally, Mr. Baumrin was involved in real estate activities and development, principally in Martha's Vineyard, Massachusetts, but also in New York State. His real estate involvement in Massachusetts began as early as 1970 and continued for over three decades.

8. Mr. Baumrin's real estate business that he accounts for on a Schedule C has generated over two and one half million dollars in sales of real estate in Martha's Vineyard, Upstate New York and New York City. Although not profitable during the years in issue, his personal real estate business has yielded profits in other years since sales are sporadic. Further, the properties owned by petitioner required maintenance and upgrades, which expenses were accounted for on

the Schedule C, e.g., the road work, purchase of gravel and wells indicated on the 1998 Schedule C.

9. Mr. Baumrin has practiced law for more than 30 years. Apart from his legal partnership, he has maintained a practice out of his home in which he renders legal advice and representation to clients on matters of taxation, matrimony and probate. In addition, Mr. Baumrin has been very active in the New York State Bar Association, serving on the Committee on Legal Education and Admission to the Bar. He was the founder of the "Pro Bono" award. His professional work with the Bar Association required travel to many meetings in Albany, New York.

10. In 1999, the year after the years in issue, the personal law practice generated receipts of \$52,200.00, while the real estate business again generated no income, but incurred additional costs for the maintenance and upgrading of real estate held for sale.

11. During 1997 and 1998, Mr. Baumrin spent approximately 25 percent of his time on his law business, 25 percent of his time on his real estate business and 50 percent of his time on educational activities.

12. After a conference in the Bureau of Conciliation and Mediation Services, an order was issued on July 6, 2001 which sustained the tax and canceled the penalty.

#### ***CONCLUSIONS OF LAW***

A. Tax Law § 689(e) places the burden of proof on petitioners to show wherein a notice of deficiency is erroneous. After reviewing the testimony and documentary evidence, it is decided that petitioners have established that the Schedule C law practice and real estate business were legitimate, ongoing enterprises, the losses from which should be allowed. However, the record

does not contain enough information for petitioners to prevail on the disallowed unreimbursed business expenses.

B. The Internal Revenue Code (“IRC”) provides that if an individual engages in an activity that is not engaged in for profit, then no deduction attributable to that activity will be allowed. (IRC § 183[a].) The IRC provides that there is a presumption that an activity is for profit if, for three of the five years ending with the year in issue, income exceeds deductions. The presumption is not a factor in the instant matter because no evidence concerning the prior five years was introduced and the Division did not disclose if the presumption had any bearing on its decision to disallow the losses for the years in issue. Further, even if applicable, it does not foreclose petitioner from offering proof to the contrary.

C. The determination whether an activity is engaged in for profit is to be made by reference to objective standards, taking into account all of the facts and circumstances of each case. Although a reasonable expectation of profit is not required, the facts and circumstances must indicate that the taxpayer entered into the activity, or continued the activity, with the objective of making a profit. (Treas Reg § 1.183-2[a].)

Mr. Baumrin credibly testified that his real estate business had gross receipts of over two and a half million dollars. This was a result of his business strategy of purchasing, holding and then selling real property when it was most advantageous. In the interim, he paid to maintain and improve the property and incurred expenses associated with marketing the property. This strategy did not yield profits every year and was never meant to do so, but it was always Mr. Baumrin’s objective to make a profit. In the long run, it appears he did just that.

The regulation states that “substantial profit, though only occasional, [is] generally . . . indicative that an activity is engaged in for profit.” (Treas Reg § 1.183-2[b][7].) Given the

handsome profit generated by the real estate business, it is deemed an activity engaged in for profit for both 1997 and 1998 and the losses incurred valid. Therefore, the Division's disallowance was in error.

D. With respect to Mr. Baumrin's law practice, the same rules would apply. Mr. Baumrin credibly testified that he actively engaged in the practice of matrimonial, tax and probate law and, although the years of 1997 and 1998 were lean ones, he did have substantial receipts in 1999. He devoted about 25 percent of his time to his law business in addition to his many hours of time spent on New York State Bar Association activities, selflessly promoting the profession.

The fact that Mr. Baumrin carried on the activity in a businesslike manner and maintained complete and accurate books and records (not challenged by the Division) further supports the conclusion that the activity was engaged in for profit. (Treas Reg § 1.183-2[b][1]; *see also*, *Richards v. Commr.*, 77 TCM 2006.)

In addition, the fact that this particular activity required a great deal of knowledge and expertise in the subject areas on which advice was rendered and placed Mr. Baumrin at risk of malpractice further supports the decision that this activity was engaged in for profit.

It is concluded that Mr. Baumrin's personal practice of law was entered into and carried on with a profit motive and the Division erred in disallowing the losses associated with this Schedule C business.

E. Finally, as mentioned earlier, petitioners have the burden of proving wherein the notice of deficiency is erroneous. (Tax Law § 689[e].) With respect to the disallowed unreimbursed business expenses, petitioners have not demonstrated an entitlement thereto. First, since only a fraction of the expenses were disallowed, it was incumbent upon petitioners to identify those items and then demonstrate an entitlement. This they failed to do. Further, at a

minimum, petitioners should have submitted form 2106, Employee Business Expenses, and a Schedule A for each of the years in issue. This they failed to do also.

Therefore, even though there was no dispute as to the fact or amount of the expenses in issue, it is impossible to determine which of the disallowed expenses are challenged and petitioners' rationale for their entitlement to those specific expenses. For this reason, the Division's disallowance of the employee business expenses for the years in issue must be sustained.

F. The petition of Bernard Baumrin and Judith A. Baumrin is granted to the extent set forth in Conclusions of Law "C" and "D", but in all other respects is denied, and the Notice of Deficiency, dated November 17, 2000, as modified,<sup>1</sup> is sustained.

DATED: Troy, New York  
May 1, 2003

/s/ Joseph W. Pinto, Jr.  
PRESIDING OFFICER

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<sup>1</sup>As set forth in Finding of Fact "12", penalty was canceled by the Bureau of Conciliation and Mediation Services and included in its Order, dated July 6, 2001. That modification of the Notice of Deficiency is incorporated herein.