STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WILLIAM J. AND DAWN B. TEMPLE	:	
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the years1998 and 1999.	:	DETERMINATION DTA NO. 819717

Petitioners, William J. and Dawn B. Temple, 5 Heidi's Path, Ballston Lake, New York 12019, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1998 and 1999.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York on August 24, 2004 at 10:30 A.M., with all briefs submitted by March 21, 2005, which date began the six-month period for the issuance of this determination. Petitioner appeared by Hiscock and Barclay LLP (Philip J. Vecchio, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Kevin R. Law, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly disallowed petitioners' deduction for research and experimental expenses incurred with respect to Tesco (Temple) International, a Schedule C business, for 1998 and 1999, based on its determination that Tesco was not engaged in business for profit.

II. Whether the Division of Taxation properly denied certain casualty losses claimed by petitioners for the years 1998 and 1999.

III. Whether the Division of Taxation properly denied certain deductions claimed by petitioners on behalf of Dawn B. Temple for unreimbursed business expenses for the years 1998 and 1999.

FINDINGS OF FACT

1. Following an income tax audit of William J. and Dawn B. Temple for the years 1998 and 1999, the Division of Taxation issued to petitioners a Notice of Deficiency, dated July 5, 2002, which asserted additional income tax due for the year 1998 in the amount of $5,761.19 and for the year 1999 in the amount of $6,595.63, plus interest for both years in the sum of $2,559.52, for a total amount due of $14,916.34.

2. This audit followed an audit conducted for the years 1996 and 1997 (hereinafter the "prior case") and began with two letters to petitioners requesting documentation, dated March 3, 2001 and April 2, 2001. Petitioners responded on December 27, 2001, and after several attempts to set a date for an appointment, a meeting took place on May 20, 2002.

3. During the period March 3, 2001 through May 21, 2002 and thereafter, the prior case was being litigated before the Division of Tax Appeals. However, when asked to sign a waiver to extend the period of limitations on assessment herein, petitioners refused, and the Division of Taxation ("the Divison") issued the notice of deficiency referred to above on July 5, 2002.

4. Petitioners submitted documentation to the Division when the auditor met with them on May 20, 2002 and then sent a packet of information with respect to the casualty losses, office expenses and Mrs. Temple's unreimbursed employment expenses.

5. At the outset, it is noted that the parties stipulated on the record that expenditures claimed to have been made by petitioners with respect to Tesco International were, in fact,

incurred. In addition, the parties similarly stipulated that the unreimbursed employee expenses claimed on behalf of Mrs. Temple were incurred also.[1]

6. During the years in issue, Mr. Temple was a senior project manager for Sempra Energy Services Company of Latham, New York. In this position, Mr. Temple was responsible for establishing and supervising satellite offices; customer liaison; auditing; planning; scheduling; developing; design engineering; reviewing drawings and specifications for constructability and cost; quality assurance/control; estimating and instituting budgets; preparing bid packages; negotiating and procuring consultants' services, equipment and subcontractors; managing construction phase; controlling job costs; and preparing bills. Mr. Temple also administered subcontracts, coordinated and maintained construction schedules, held weekly progress meetings and finalized the project closeouts.

7. As of the date of hearing and for approximately three years prior, Mr. Temple was working on a Federal research project in Silver Springs, Maryland, requiring him to be present in Maryland five or more days per week. During the period in issue, 1998 and 1999, Mr. Temple worked for Sempra on two projects, one at the Shenendehowa Central School District and the other at State University of New York at Cortland.

8. Mr. Temple began his development of the water saving flush valve, called the flushometer, in early 1995. The goal of Mr. Temple's efforts was to custom engineer the flushometer to maximize pressure and volume while minimizing the number of gallons used per flush, thereby reducing the cost of water and sewer charges. Basically, he began with an existing

[1]The parties did not stipulate to the mileage charges associated with Mrs. Temple's unreimbursed employee expenses. The Division contended that such charges were not legally allowable or properly substantiated.

model, the Royal Sloan flushometer, and modified the orifice regulating water intake and the equalizing rivet.

9. Before marketing the flushometer, its efficacy needed to be demonstrated to a bonding company to qualify for a performance bond. A performance bond was required for Federal and state projects, including hospitals and public educational institutions. There was no evidence in the record that Mr. Temple had demonstrated the flushometer to a bonding company, which was consistent with his testimony that he had not yet "nailed" the design of the modified flushometer.

10. Mr. Temple believed his improved flushometer would be ready to market at some time after the hearing in 2004, but conceded that he was not ready to market the device in 1998 and 1999 and that his plans had been delayed by the traveling his job with Sempra Energy demanded. In fact, he testified that the product was "pretty close" in 1999 and "closer" in 2000 and 2001.

11. Mr. Temple had established a "business plan" for his flushometer, which included hand calculations of water savings on various toilets and urinals from 1995 until 1999. He never shared this plan with the Division on audit. He believed there was a market for the invention because of the projected savings the flushometer could generate if it operated as planned. However, he admitted he had not approached any potential clients, which he believed would include hospitals and institutions within a six-hour drive of his home. He estimated that he could sell between 275 and several thousand flushometers to each hospital, enabling him to earn between $32,000.00 and $38,000.00. Mr. Temple believed he could train subcontractors to do the installation and that he could manage approximately six of these projects each year. Petitioner estimated that he could recoup all of his research and development expenses incurred since 1995 with two hospital projects.

12. Mr. Temple had invented other products prior to the flushometer, including a high temperature recuperator, a turbine cleaner, distribution hubs for waste treatment and an albatross heat chamber. Mr. Temple did not disclose if he had a business plan for these products, only saying that he made a profit on some and covered his expenses, which were not divulged. The record does not reveal how long it took for these products to reach the market and at what cost. Some, like the high temperature recuperator and the albatross heat chamber, were developed while in the employ of other companies and the cost was absorbed by them.

13. Although the auditor saw no evidence of a testing laboratory or other trial facility at petitioners' home, Mr. Temple insisted one existed and that he pointed out a urinal to the auditor when he visited on May 20, 2002.

14. Petitioners also leased an Acura automobile,[2] the cost of which was deducted as an expense of the business for both of the years in issue. For 1998, the cost was $7,118.64 and for 1999 the cost was $6,832.64. The primary use for the vehicle was to transport toilets and urinals to petitioners' house for testing with the flushometer.

15. Petitioners reported a total business loss from Tesco of $26,180.88 for the year 1998 and $41,982.29 for the year 1999. These amounts were disallowed by the Division of Taxation as "hobby losses."

16. Petitioner Dawn B. Temple was a registered nurse employed by St. Clare's Hospital in Schenectady, New York during the years in issue.

[2]Mr. Temple testified he leased a Lexus during 1998 and 1999, but his Schedule C attached to the tax returns in both years indicated an Acura automobile was leased.

17. St. Clare's Hospital had a dress code for its registered nurses to which Mrs. Temple was subject, but the hospital did not supply or pay for uniforms for its staff. The dress code in effect as of June 1996 provided, as pertinent to all nursing service employees, as follows:

> All Nursing Service Employees can wear color coordinating scrubs, i.e. printed top/color coordinated pants; solid top/color coordinated pants; [or] solid top/solid pants.
>
> Color coordinated turtlenecks may be worn under scrub tops - no T-shirts and/or sweatshirts allowed.
>
> Color coordinated scrub jackets may be worn - no sweaters with scrubs.
> Unit specific scrub color will be the option of each nursing unit . . . (restricted area colors cannot be chosen).
>
> The option of wearing white uniforms is an alternative with/without a solid colored sweater or scrub jacket over top as desired.

18. Mrs. Temple chose to wear white and purchased her clothing items for work at various stores. In all, Mrs. Temple claimed unreimbursed employee expenses for the purchase and cleaning of uniforms of $4,822.35 for the year 1998 and $2,601.38 for 1999. In addition, she claimed the mileage associated with the purchase and maintenance of the uniforms.

19. Petitioners submitted documentation in support of Mrs. Temple's unreimbursed employment expenses for 1998 and 1999. For 1998, petitioners submitted a summary sheet of expenses for mileage and costs of cleaning, cleaning supplies, clothing items and furniture. The numerous entries for "Bev Ro Fab," a cleaner, had no receipts which detailed what was being cleaned. The receipt from DiSiena Furniture of Mechanicville, New York indicated a $400.00[3] deposit on a desk, the purpose for which was to support a computer used for continuing education. In addition, there were numerous entries for CVS, Walmart, Boscov's, K-Mart, Macy's, Sears, Sheron's, Filene's, JC Penney, Steinbach's, Dexter's and Charter Club. The

[3]The receipt from DiSiena Furniture does not support a cost of $400. That amount was the deposit on the desk.

seven receipts submitted indicated the purchase of such items generally described only as shirts, skirts, pantyhose, crew socks, blouses and shorts.

20. For 1999, much the same evidence of Mrs. Temple's unreimbursed employee expenses was introduced. Petitioners submitted a summary sheet of mileage and costs for clothing. The stores listed included JC Penney, Sheron's, Filene's, Boscov's, Uniform Village, Easy Spirit, Eddie Bauer, and Lord & Taylor. In addition, there were listed numerous entries for mileage and purchases at Price Chopper supermarket and Bev Ro Fabrics. Only one receipt from Lord & Taylor was introduced for 1999 which indicated the purchase of a dress for $129.99. Petitioners submitted no evidence to substantiate the other purchases, making it impossible to discern if the charges were proper employee business expenses for the purchase and maintenance of uniforms.

21. In addition, petitioners claimed an expense of $50.00 paid to the New York State Education Department and associated mileage of 20 miles. There was also a receipted claim for the purchase of a stethoscope, eartips and identification tags in the sum of $261.60, associated mileage of 70 miles and engraving for the stethoscope in the sum of $8.64 from Littman Jewelers with associated mileage of 70 miles.

22. The Division of Taxation disallowed all the expenses claimed by petitioners for the unreimbursed employee business expenses of Mrs. Temple because the auditor determined that there was no proof that any of the articles of clothing purchased were distinctive to the nursing profession.

23. Although petitioners claimed unreimbursed business expenses for Mr. Temple for the years in issue which were denied by the Division, petitioners did not contest that determination.

24. For the years 1998 and 1999, petitioners claimed casualty loss deductions in the amounts of $50,015.35 and $46,457.55, respectively, purportedly caused by flooding.

25. The recurring flooding problem, also present in prior years, was caused by runoff from a neighbor's farm which, due to farmwork thereon, no longer properly drained. Petitioners did not have insurance coverage for the losses caused by the floods in 1998 and 1999, and efforts to obtain flood insurance were fruitless due to the fact that petitioners' property did not lie in a flood plain.

26. Petitioners had experienced flooding at their home since at least 1996, with the flood in January of 1996 reaching the first floor.[4] They also experienced flooding in their basement in 1997, in addition to the two years in issue when flooding occurred several times.[5]

27. During the course of the audit, which took place generally between March 2001 and June 2002, the Division requested substantiation of the casualty losses claimed by petitioners on their returns. Petitioners did not supply any documentation until May 21, 2002, when they provided values of property lost but no appraisals to substantiate values before and after the flooding. Petitioners provided some purchase receipts for items they claimed were destroyed or damaged in the flooding of 1999 as well. However, petitioners did not produce any photographs of the flooding or the damaged articles.

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[4]This fact was established in ***Matter of Temple*** (Tax Appeals Tribunal, July 8, 2004). Courts of the State of New York may take judicial notice of their own record of the proceeding of the case before them, the records of cases involving one or more of the same parties or the records of cases involving totally different parties (***Berger v. Dynamic Imports, Inc.***, 51 Misc 2d 988, 274 NYS2d 537; 57 NY Jur 2d, Evidence and Witnesses, § 47; ***Matter of Trifon Kolovinas***, Tax Appeals Tribunal, December 28, 1990).

[5]Petitioners claim that they needed to place items back in the basement even after several floods and the resulting destruction because there was no where else to store the items while they were doing work on other parts of the house. In addition, petitioners argue that they could not predict when a flood would strike, but conceded it was risky to place valuable goods in the basement.

28. For 1998, petitioners submitted no receipts or appraisals in support of their claimed casualty loss of $50,015.35. Instead, the $44,954.82 in household goods and $7,055.00 in automotive collector's parts were merely listed on sheets prepared by petitioners, accompanied by unsubstantiated values for each item.

29. For 1999, petitioners submitted receipts for numerous items, mostly clothing, some of which were nine years old. Some receipts were undated. Petitioners made no adjustment to the cost of these items, using their original cost as the basis for their loss and disregarding the age, wear and tear and obsolescence of the items. Also in 1999, petitioners claimed a loss on the value of their home in the sum of $28,000.00. No appraisal was submitted to establish the value of the real property before and after the flooding.

30. The Division noted at the time petitioners originally submitted the documentation for the claimed losses that the values were not substantiated by appraisals of before and after values. At no time since have petitioners submitted any valid proof of the values or existence of all the items claimed to have been destroyed.

SUMMARYOF PETITIONERS' POSITION

31. Petitioners contend that during 1998 and 1999, Mr. Temple spent an average of 6 hours a day and up to 16 hours every other weekend working on development of the flushometer. Concurrently in 1998, petitioners contend that Mr. Temple spent 6 hours a week and 16 hours every other weekend, when his spouse was home, cleaning in the aftermath of the flooding.

32. Petitioners argue that IRC § 174 was enacted to benefit start-up businesses like Tesco, to encourage expenditure for research and experimentation and to dilute the conception of ordinary and necessary business expenses under IRC § 162.

33. Petitioners contend that Mr. Temple's experimentation with the flushometer was not a hobby and his expenses were not "hobby losses." They argue that the measure of whether the activity was engaged in for profit is the nine-point test set forth in the Treas Reg § 1.183-2(b).

34. Petitioners claim that because Mrs. Temple had to wear a uniform and keep it clean, it met the Federal guidelines for deduction pursuant to Rev Rul 70-474. In addition, because she came into contact with bodily fluids and an array of dangerous diseases, she could and would never wear her uniforms on the street.

35. Petitioners believe that the Division's stipulation at hearing to the fact that expenses were incurred by petitioners should prohibit the Division from asserting that petitioners have the burden of substantiating the claimed losses.

CONCLUSIONS OF LAW

A. Initially, it is noted that the issues in this matter are almost identical to the issues decided by the Tax Appeals Tribunal in ***Matter of Temple*** (Tax Appeals Tribunal, July 8, 2004), wherein the rationale for finding that Tesco was not engaged in a business for profit, equally applicable to the facts herein, was stated as follows:

> Section 174(a)(1) of the IRC allows a taxpayer to deduct research and experimental expenses which are paid or incurred during the taxable year "in connection" with a trade or business not chargeable to a capital account. This section applies to research or experimental expenditures only to the extent that the amount thereof is "reasonable under the circumstances" (26 USC § 174[e]). Under early interpretations of IRC § 174(a)(1), research or experimental expenses were held to be not deductible unless they were incurred or paid after the actual commencement of business. The Supreme Court departed from this approach in its decision and opinion in ***Snow v. Commissioner*** (416 US 500, 40 L Ed 2d 336). Accordingly, since the decision in ***Snow,*** a taxpayer need not be engaged in a trade or business at the time of expenditure in order to qualify for a deduction under IRC § 174(a)(1), but ***Snow*** did not eliminate the trade-or-business requirement. The trade-or-business requirement continues to limit the scope of IRC § 174 to activities carried on with the goal of realizing a profit (***see***, ***Green v. Commissioner***, 83 T.C. 667). To paraphrase the Court in ***Diamond v. Commissioner*** (930 F2d 372, 91-1 USTC ¶ 50,186), the question is not whether it is possible in principle, or by further

> contract, to engage in a trade or business, but whether, in reality, petitioners possessed the capability and the objective intent during the subject years to enter into a new trade or business in connection with their proposed product. Put another way, to qualify for a deduction under § 174, petitioners' evidence must establish that they had a "realistic prospect" and intent *at the time of the expenditures* that they would enter a trade or business involving the technology being developed (***Lewin v. Commissioner***, 335 F3d 345***,*** 2003-1 USTC ¶ 50,330***; Kantor v. Commissioner***, 998 F2d 1514, 93-2 USTC ¶ 50,433 [wherein it was held that a taxpayer demonstrates such a prospect by manifesting both the objective intent to enter such a business and the capability of doing so]; ***Diamond v. Commissioner***, ***supra***). Internal Revenue Code § 183 provides, generally, that where an activity is not engaged in for profit, deductions attributable to such activity are allowable only to the extent of income from such activity. Resolution of this issue, in turn, rests on whether the taxpayer had an actual and honest objective of making a profit from his purported business activity (***see***, ***Dreicer v. Commissioner***, ***supra***). The existence of a profit motive is an important factor because it distinguishes between an enterprise carried on in good faith as a trade or business and an enterprise merely carried on as a hobby (***see***, ***International Trading Co. v Commissioner,*** 275 F 2d 578, 60-1 USTC ¶ 9335).

Just as in the prior case, the evidence in the instant matter did not support an intent or realistic prospect of entering a trade or business in 1998 or 1999.

Here, Mr. Temple testified that in 1998 and 1999 the product was not ready to bring to market. During those years he was employed full time by Sempra Energy Services Company. By 2001, his position with Sempra required him to travel extensively and remain out of state for five or more days a week, circumstances that continued through the day of the hearing in August 2004. Indeed, Mr. Temple raised his extensive job-related travel as the primary reason he was unable to answer letters from the Division regarding the audit or make arrangements to attend meetings with the auditor in 2002.

The dominant role his position with Sempra played is consistent with the conclusion that his development of the flushometer was a hobby that was worked on when his job and personal life permitted in 1998 and 1999. This conclusion is supported by other evidence as well. When the auditor visited petitioners' home in May of 2002 and saw no evidence of testing, it was because Mr. Temple's focus was his job in Maryland and that his interest in the flushometer had

been curtailed by the demands of his job. His willingness to set the flushometer development aside when his job at Sempra called belied Mr. Temple's projections of a very lucrative business. It would seem that if the project was so close to fruition and promised such significant financial gain Mr. Temple would have expedited development. Also, given the demands of his job, Mr. Temple's claim that he worked 6 hours a day during the week and 16 hours every other weekend developing the modified flushometer is simply incredible. In addition, his time commitment to the flushometer seemingly conflicted with his assertion that he spent 6 hours a week and 16 hours every other weekend in 1998 cleaning up from the floods and rebuilding his home, leading to an erosion of Mr. Temple's credibility.

Mr. Temple speculated that he would have had the opportunity to bring his product to market in the fall of 2004, five years after the years in issue when the deductions were taken. He testified that he still did not have the design "nailed" in 2004 and that he did not want to demonstrate the flushometer until it was ready. It is beyond belief that he had a "realistic prospect" and intent at the time of the expenditures in 1998 and 1999 to enter into a trade or business with respect to the flushometer, on which he began work in early 1995, given his lack of progress and prospects in the five years that followed. Notwithstanding his very rosy revenue forecasts and business plan, Mr. Temple's first allegiance and focus was his job with Sempra and his work on a new and improved flushometer was a side interest or "hobby" on which he toiled when time permitted. The evidence does not demonstrate the capability and objective intent to enter into a new trade or business as required by the interpretation of IRC § 174 in ***Lewin***. (***See also*** IRC § 183, which provides generally that deductions attributable to an activity which is not engaged in for profit are not allowable beyond the amount of the income derived from the activity [zero herein].)

In the prior case, the Tribunal faulted petitioner for not having a business plan in place for Tesco with regard to the flushometer. Obviously, in response to this criticism, petitioners submitted hand calculations of the water and sewer savings to be had from use of the flushometer and the projected profit from the sale of 700 units to a hospital. Whether the calculations were prepared for the fledgling business in 1995 is uncertain, but what was submitted into evidence does not contain the basic elements of a business plan. For example, the hand calculations did not contain a business description, detailed marketing plan, operating procedures, personnel needs or business insurance. In addition, there was no discussion of financial data including loans, capital equipment and supply lists, balance sheet or profit and loss and cash flow statements. Finally, there was no detailed financial data for the first year of operations, and no evidence of space requirements, legal documents or supplier information. This thumbnail is not exhaustive or exclusive, but does highlight some important points petitioners' hand calculations did not contain, and indicates that the flushometer business had not been carefully planned and contradicts any notion that there was a realistic prospect and intent at the time of the expenditures to enter into a trade or business involving the flushometer.

In addition, Treas Reg § 183-2(b), which defines activities not engaged in for profit, sets forth nine nonexclusive criteria for determining if an activity is engaged in for profit. These factors are as follows: (1) the manner in which the taxpayer carries on the activity, (2) the expertise of the taxpayer or his advisors, (3) the time and effort expended by the taxpayer in carrying on the activity, (4) expectation that assets used in the activity may appreciate in value, (5) the success of the taxpayer in carrying on other similar or dissimilar activities, (6) the taxpayer's history of income or losses with respect to the activity, (7) the amount of occasional

profits, if any, which are earned, (8) the financial status of the taxpayer, and (9) elements of personal pleasure or recreation.

The facts adduced herein clearly indicated that petitioner was inconsistent in the pursuit of his experimentation, spending only time permitted by his day job and extending his research over almost ten years. Mr. Temple failed to demonstrate research on a regular, systematic basis or extensive, focused and serious efforts to market his flushometer. In addition, the activity has not shown any profit or income, yet Mr. Temple leased an expensive Acura automobile for the transport of toilets and urinals, costing him almost $14,000.00 for the years in issue. One must ask why one with no expectation of a profit or capability of bringing his flushometer to market for the years in issue would choose to incur such an expense.

Certainly, Mr. Temple was qualified in the area of flushometers and he did successfully develop, engineer and fabricate other inventions. However, Mr. Temple did not provide any evidence on the profitability of those products, except to say that he made a profit. In addition, at least one of the inventions was developed as an employee of another company which paid his expenses. Further, there was no testimony concerning the length of time it took for Mr. Temple to bring those products to market and at what cost.

Just as the Tribunal found that Mr. Temple had no realistic prospect in 1996 and 1997, the circumstances did not change in 1998 and 1999 and the same conclusions pertain. Therefore, it is found, as it was in the prior matter, that the schedule C business was merely a mechanism for shifting petitioners' nondeductible personal expenses to deductible business expenses, all of which were properly denied by the Division.

B. Generally, the cost of acquisition and maintenance of the uniforms for nurses is deductible as an ordinary and necessary business expense if the uniforms are specifically

required as a condition of employment and are not adaptable to general usage, taking the place of regular street clothing. (IRC § 162[a]; Rev Rul 70-474.)

In this matter, there was no dispute that Mrs. Temple was required to wear a uniform by her employer and that she chose to wear white clothing that she purchased at various stores. Unfortunately, the journal entries and receipts submitted as substantiation for the clothing expense incurred did not distinguish how a specific article of clothing was used exclusively for work. Although Mrs. Temple testified that she would not wear her white clothing on the street and that she came into contact with bodily fluids and disease, that is not sufficient to demonstrate that the items purchased were not adaptable to general usage as ordinary clothing. (***See, Yeomans v. Commissioner***, 30 TC 757, 767-769; ***Bradley v. Commissioner***, 72 TCM 1001.) The purchase of generic items such as sweaters, dresses, skirts, blouses and pantyhose totaling over $5,000.00 for the years in issue, without more, cannot be accepted as properly documented business expenses under IRC § 162(a) as opposed to personal expenses, for which there is no deduction. (IRC § 262.) The objective test called for by Rev Rul 70-474 is blind to subjective measures, which petitioners urge this forum to accept. As the court in ***Pevsner v. Commissioner*** (628 F2d 467) stated:

> An objective test, although not perfect, provides a practical administrative approach that allows a taxpayer or revenue agent to look only to objective facts in determining whether clothing required as a condition of employment is adaptable to general use as ordinary streetwear. (***Id.*** at 470.)

Since it has been determined that no deduction was warranted for uniforms, petitioners' claims for associated cleaning and mileage is properly denied also.

Finally, the $400.00 expense for the deposit on a desk from DiSiena Furniture is denied for not accurately establishing the cost of the item and its use vis-a-vis Mrs. Temple's

employment. Likewise, the $50.00 expense for the New York State Education Department was not adequately explained and substantiated in writing. (***See***, Treas Reg § 1.274-5T[c].) The $261.60 expense for the stethoscope from Marra's Pharmacy and the $8.64 charge to Littman's Jewelers for engraving the stethoscope were properly substantiated and are allowed.

Mr. Temple also claimed unreimbursed employee expenses for the years in issue which were disallowed by the Division. However, petitioners have not disputed the disallowance, submitted any evidence or argument at hearing of his expenses or otherwise substantiated his claim and that issue is deemed abandoned. If not abandoned, the claim would fail for lack of any credible evidence of said claims and petitioners' failure to carry their burden of proof. (Tax Law § 689[e].)

C. Internal Revenue Code § 165(a) provides a deduction for any loss sustained during the taxable year and not compensated by insurance or otherwise. Individuals are permitted a deduction for losses arising from fire, storm, shipwreck, theft or other casualty. (IRC § 165[c][3].)

The amount of loss from a casualty is the lesser of the difference in fair market value immediately before and immediately after the casualty or the adjusted basis for determining the loss from the sale or other disposition of the property (Treas Reg § 1.165-7[b][1][i],[ii]). Generally, the fair market value of property before and after the casualty is determined by a competent appraisal (Treas Reg § 1.165-7[a][2]).

Petitioners have the burden of refuting the Division's disallowance of their deductions and of establishing their entitlement to the claimed expenses. (Tax Law § 689[e]; ***Matter of Temple***, Tax Appeals Tribunal, July 8, 2004.)

Petitioners demonstrated that they were not covered by insurance for flooding and that there was an issue of drainage and flooding in their neighborhood on Heidi's Path. However, more is required to substantiate the losses they have claimed for 1998 and 1999.

In this matter, petitioners submitted a list of the items of personal property which were allegedly lost in 1998 in flooding in their home. The cost of the item was placed next to the item's description, but no evidence of the fair market value was provided. Hence, there was no way to determine the actual loss claimed. For 1999, petitioners repeated the same procedure, except receipts for clothing, some of which had been purchased nine years earlier, were included. Some receipts were undated. Without a competent appraisal of fair market value prepared close to the date of loss, the unsupported values listed do not establish values which can constitute the basis for the claimed losses. (Treas Reg § 1.165-7[a][2].)

In addition to the items of personal property, petitioners claimed a loss in value for 1999 to the real property of $28,000.00, and the cost of repairing damage to the home in the sum of approximately $24,318.00, for which no appraisal or other proof was offered in support. Although fair market values were listed, it was not disclosed how petitioners arrived at those values.

Petitioners have presented no reliable evidence of any repairs made to their home, the value of the home or the personal property items that it is alleged were damaged or destroyed as a result of the flooding. The only evidence presented in support of the claimed losses was the testimony of Mr. Temple, which this forum is not bound to accept, being unverified and self-serving. ***(See, Blodgett v. Commissioner***, 394 F3d 1030, 1036; ***Shea v. Commissioner***, 112 TC 183, 189.) In a matter very similar to this one, the Tax Court held that a taxpayer's summary

sheets, personal estimates and testimony alone were not sufficient to establish entitlement to a deduction for a casualty loss. (***Darling v. Commissioner***, TC Memo 2005-123, May 25, 2005.)

For these reasons, the Division's disallowance of the claimed casualty losses for 1998 and 1999 are sustained.

D. Petitioners' argument that the Division cannot challenge the expenditures made by petitioners with respect to Tesco and the unreimbursed employee expenses for Mrs. Temple is in error.

It is well settled that a stipulation made on the record at hearing is binding on the parties thereto. Although CPLR 2104 mentions stipulations made between counsel in open court, it does not specifically address them. However, the practice has traditionally been used to streamline proceedings and avoid delay and is binding on the parties when an agreement is read into the record in open court. (***See, Sontag v. Sontag,*** 114 AD2d 892, 495 NYS2d 65, ***appeal dismissed*** 66 NY2d 554, 498 NYS2d 133.) Based on this reasoning, the stipulation in this matter is enforceable.

However, petitioners' interpretation of what was stipulated is contrary to the literal terms taken from the record and succinctly summarized and set forth in Finding of Fact "5". The parties agreed that expenditures had been incurred by petitioners with respect to Tesco International and to Mrs. Temple's unreimbursed employee business expenses. Those issues, however, turned not on whether the expenditures were incurred, but on whether they were valid in the context of the respective issues, and the discussion in Conclusions of Law "A" and "B" reflect that.

E. The petition of William J. and Dawn B. Temple is granted to the extent set forth in Conclusion of Law "B", but in all other respects the petition is denied, and the Notice of Deficiency, dated July 5, 2002, as so modified, is sustained.

DATED: Troy, New York
August 18, 2005

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE