STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH AND MARLENE SCHNELL	:	DETERMINATION DTA NO. 819765
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1999 and 2000.	:	

Petitioners, Joseph and Marlene Schnell, 139 Sumpwams Avenue, Babylon, New York 11702-3712, 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 1999 and 2000.

The Division of Taxation, by its representative, Christopher C. O'Brien, Esq. (Justine Clarke Caplan, Esq., of counsel), brought a motion dated August 20, 2004 seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner Joseph Schnell, appearing *pro se*, filed an affirmation in opposition to the Division's motion on September 1, 2004. Accordingly, the 90-day period for the issuance of this determination began on September 1, 2004. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly disallowed petitioners' claimed bad debt deductions for the years at issue.

FINDINGS OF FACT

1. On December 26, 2002, following an audit, the Division of Taxation ("Division") issued to petitioners, Joseph and Marlene Schnell, a Notice of Deficiency which asserted $2,408.33 in additional income tax due, plus penalty and interest, for the years 1999 and 2000. The notice resulted from the Division's disallowance of expenses claimed on Federal schedule C's filed with petitioners' joint New York resident income tax returns (Form IT-201) for the years at issue.

2. Petitioners' 1999 return reports a business loss of $32,200.00. The schedule C filed with the return reports that such loss arose from the operation of sole proprietorship known as Barad Plumbing Corp. Petitioner Joseph Schnell is listed as the proprietor of this business. The reported business address is petitioners' home address. The 1999 schedule C reports zero gross receipts for the business and the following expenses: $1,200.00 advertising, $2,500.00 office expense, and $28,500.00 bad debts.

3. Petitioners' 2000 return reports a business loss of $33,700.00. The schedule C filed with this return also reports that such loss arose from petitioner Joseph Schnell's sole proprietorship known as Barad Plumbing Corp. The 2000 schedule C reports zero gross receipts for the business and the following expenses: $1,700.00 advertising, $2,000.00 office expense, and $30,000.00 bad debts.

4. Both the 1999 and 2000 schedule C's report that the business used a cash accounting method.

5. On audit, the Division disallowed the claimed expenses for advertising, office expense and bad debts on both the 1999 and 2000 schedule C's and recomputed petitioners' tax liability accordingly.

6. As indicated in the audit report filed by the Division's auditor and included with the Division's motion papers, petitioner Joseph Schnell advised the auditor that the bad debts claimed on the schedule C's for the years at issue were never reported as income.

7. Petitioners' petition also states that the business never had cash receipts or income.

8. The affirmation in opposition to the Division's motion filed by petitioner Joseph Schnell asserts that the motion should be denied because at a hearing petitioner will provide documentation and expert testimony as proof that petitioner's schedule C is in agreement with various Internal Revenue Code sections, regulations, and publications, New York State Tax Law § 612 and Form IT-201 for the years 1999 and 2000. The affirmation makes no specific factual allegations regarding the claimed bad debts or whether the amount of such claimed bad debts was previously reported as income.

9. In its motion papers, the Division conceded the issue of the claimed expenses for advertising and office expense and thus agreed to allow such claimed deductions for the years at issue.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

> if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR § 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (***Winegrad v.***

New York Univ. Med. Ctr, 64 NY2d 851, 487 NYS2d 316, 317, ***citing Zuckerman v. City of New York***, 49 NY2d 557, 427 NYS2d 595). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (***Glick & Dolleck v. Tri-Pac Export Corp.***, 22 NY2d 439, 293 NYS2d 93; ***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572, 536 NYS2d 177). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (***Gerard v. Inglese***, 11 AD2d 381, 206 NYS2d 879).

"To defeat a motion for summary judgment the opponent must produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,' and 'mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient'" (***Whelan By Whelan v. GTE Sylvania***, 182 AD2d 446, 582 NYS2d 170, 173 ***citing Zuckerman v. City of New York***, ***supra***).

C. Upon all of the proof presented, and pursuant to the following discussion, I conclude that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

Internal Revenue Code § 166 permits a bad debt deduction for businesses for any debt which becomes worthless within the taxable year. Section 1.166-1(e) of the Commissioner's regulations (Treas Reg § 1.166-1[e]), however, provides that such a deduction is allowable only where the income such worthless debt represents has been previously reported and included in income.

The evidence submitted by the Division in support of its motion establishes a prima facie showing of entitlement to judgment herein as a matter of law. Specifically, the statements in the

Division's audit report and the petition expressly indicate that the amounts claimed as bad debts were not previously reported as income. Moreover, the returns report zero gross receipts for the business for both of the years at issue, making it plain that petitioners did not report the amounts claimed as bad debts during those years. Further, the returns indicate that the business used a cash basis accounting method during the years at issue and therefore normally would not report income until actually received. The Division has thus made a prima facie showing that the claimed bad debts were not previously included in petitioners' income. As a matter of law, such deductions are properly disallowed (***see***, ***Gertz v. Commr.***, 64 TC 598; ***Odom v. Commr***., 38 TCM 217).

Petitioner's affirmation in opposition to the instant motion (***see***, Finding of Fact "8") consists of conclusory statements and unsubstantiated assertions and as such is insufficient to defeat the Division's motion (***see***, ***Zuckerman v. City of New York***, ***supra***, 49 NY2d at 562, 427 NYS2d at 598).

D. The petition of Joseph and Marlene Schnell is denied and the Notice of Deficiency dated December 26, 2002, as modified pursuant to Finding of Fact "9", is sustained.

DATED: Troy, New York
November 24, 2004

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE