

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**EZZAT AND NAWAL ELSHEEMY** : SMALL CLAIMS  
 : DETERMINATION  
 : DTA NO. 821060  
for Redetermination of a Deficiency or for Refund of :  
New York State and City Personal Income Taxes under :  
Article 22 of the Tax Law and the New York City :  
Administrative Code for the Year 2001. :  
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Petitioners, Ezzat and Nawal Elsheemy, 1958 - 50 Street, #4K, Brooklyn, New York 11204, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 2001.

A small claims hearing was held before Thomas C. Sacca, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on April 10, 2007 at 1:15 P.M., with all briefs to be filed by May 10, 2007, which date began the three-month period for the issuance of this determination. Petitioners appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (Mac Wyszomirski).

***ISSUE***

Whether the Division of Taxation has established that petitioners are not entitled to the itemized deductions claimed on their personal income tax return for the year in dispute.

***FINDINGS OF FACT***

1. Petitioners, Ezzat and Nawal Elsheemy, timely filed their New York State Resident Income Tax Return for the year 2001. The income, deductions and tax due as reported on the return are as follows:

<b>ITEM</b>	<b>AMOUNT</b>
Wages	\$56,050.00
Taxable Interest Income	130.00
Ordinary Dividends	23,884.00
Capital gain or loss	-3,000.00
NY Adjusted Gross Income	\$77,064.00
Itemized Deductions	-69,486.00
Tax Due	\$0.00
Refund	\$3,791.77

The itemized deductions as indicated on petitioners Form IT-201-ATT, Itemized Deduction, and Other Taxes and Tax Credits, are as follows:

Medical expenses	\$10,000.00
Taxes	7,000.00
Interest	24,026.00
Gifts to charity	8,800.00
Casualty and theft losses	12,959.00
Job expenses	1,200.00
Subtraction adjustment	-3,499.00
NY itemized deductions	\$69,486.00

2. On October 18, 2004, the Division of Taxation (“Division”) issued to petitioners a Statement of Proposed Audit Changes. The statement indicated that petitioners’ Federal

itemized deductions as reported for the year 2001 were \$39,959.00. As New York itemized deductions are based upon the itemized deductions claimed on the Federal return, the Division explained that it had used the Federal amount to recompute petitioners' New York taxable income, resulting in New York State, New York City and Yonkers taxes due of \$2,267.00.

3. The Division issued to petitioners, on February 22, 2005, a Notice of Deficiency asserting personal income tax due in the amount of \$2,267.00, plus interest, for the year 2001. In response, petitioners filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services.

4. The Division, in a letter dated May 27, 2005, requested that petitioners submit documentation to support the itemized deductions claimed on their return. Following a review of the documentation submitted, the Division explained in a letter dated June 25, 2005 that petitioners had only been able to provide acceptable documentation as to the charitable contributions claimed, and that all other itemized deductions had been denied. The letter further explained that:

Based on the information provided, your itemized deductions should be denied, and you should be allowed the standard deduction instead. This would result in a tax due in the amount of \$4,512.22, as shown on the enclosed attachment sheet.

The notice of deficiency dated October 18, 2004, was issued for tax due in the amount of \$2,267.00 plus accrued interest. The tax law does not permit us to increase the assessed tax at this time. Therefore, the assessment is sustained for tax due of \$2,267.00, plus interest of \$499.14.

The enclosed attachment sheet contained the following computation of the revised tax due:

Total NY Income per return	\$77,064.00
NY Standard Deduction	(\$13,400.00)
NY Exemptions	(\$10,000.00)
NY Taxable Income	\$53,664.00

	NY State	NY City	Total
NY Tax - Corrected	\$2,881.98	\$1,630.24	
NY Tax Previously Stated	\$ 0.00	\$0.00	
Additional Tax Due - Corrected	\$2,881.98	\$1,630.24	\$4,512.22

5. Petitioners filed with the Internal Revenue Service an Amended U.S. Individual Income Tax Return, Form 1040X, which corrected the itemized deductions as originally claimed from \$39,959.00 to \$72,985.00. The Internal Revenue Service, on February 25, 2005, sent to petitioners a transcript of their 2001 tax return which indicated itemized deductions in the amount of \$72,985.00. Subsequently, in a letter dated March 3, 2005, the Internal Revenue Service acknowledged that petitioners' itemized deductions as shown on their Schedule A totaled \$72,985.00.

6. In a police report originally written in Arabic and subsequently translated into English, petitioners indicate they were involved in an automobile accident in the town of Talkha, Egypt. According to petitioners, their automobile was a total loss exceeding \$30,000.00, Mrs. Elsheemy lost her pocketbook, which contained \$25,000.00 (a down payment for the purchase of a summer home in Alexandria, Egypt), and petitioners and three of their children were injured and taken to the hospital for treatment. A handwritten invoice (originally written in Arabic and translated into English) lists Mrs. Elsheemy's various treatments received at the Dr. Elhosienny Hospital in Mansoura, Egypt during the period July 25, 2001 through August 16, 2001. Total cost for the stay in the hospital was \$15,363.00, and the invoice is marked paid.

7. During the year 2001, petitioners paid \$62,965.37 in margin interest which was charged to their Schwab Brokerage Account. Petitioners' Investment Interest Expense

Deduction, Form 4952, indicates that petitioners were entitled to deduct \$24,026.00 in investment interest expense during the year 2001.

8. At the hearing, the Division's representative asserted a greater deficiency than that assessed in the Notice of Deficiency, based on the Division's letter dated June 25, 2005.

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

A. The Division of Taxation issued its Notice of Deficiency to petitioners on the basis that their claimed itemized deductions for Federal purposes were less than those claimed for New York State purposes. Petitioners have established, through the presentation of their amended Federal return, a transcript of their tax return as provided by the Internal Revenue Service and a letter from the Internal Revenue Service stating the revised amount of the itemized deductions allowed, that the amount of their Federal itemized deductions is equal to the amount of New York State itemized deductions claimed. Therefore, the Notice of Deficiency, dated February 22, 2005, is canceled.

B. The Tax Law provides that the Division of Taxation may assert a greater deficiency than that contained in the Notice of Deficiency if such claim is asserted at or before the hearing held by the Division of Tax Appeals (*see*, Tax Law § 689[d][1]). Where, as here, the Division asserts a greater deficiency, Tax Law § 689(e)(3) places the burden of proof on the Division to establish that it is entitled to such greater deficiency.

C. The Division initially issued a Notice of Deficiency to petitioners on the basis that their New York State itemized deductions exceeded the amount of itemized deductions claimed on their Federal return. Petitioners corrected this discrepancy by filing an amended Federal return with the same amount of itemized deductions as that claimed on their New York return. It appears that the Internal Revenue Service accepted the amended amount, and there is no

evidence in the record to the contrary. Following the issuance of the Notice of Deficiency, the expiration of the statute of limitations to assess petitioners for the year at issue and the correction of the Federal itemized deduction amount, the Division requested that petitioners substantiate the claimed itemized deductions. Petitioners attempted to comply with this request by providing documentation to the Division, and, in response, the Division has taken the position that petitioners have failed to substantiate most of the itemized deductions claimed. On the basis of this position, the Division, at the hearing, asserted a greater deficiency, upon which it bears the burden of proof.

D. The Division has failed to meet its burden of establishing that petitioners are not entitled to claim the itemized deductions shown on their 2001 New York State personal income tax return. By taking the position that petitioners are required to substantiate the claimed itemized deductions, the Division attempts, impermissibly, to shift the burden of proof to petitioners. This is contrary to Tax Law § 689(e)(3).

The Division relies on the documentation provided by petitioners after the issuance of the Notice of Deficiency to meet its burden, and has provided no independent evidence in support of its denial of the itemized deductions claimed by petitioners. It is noted that had petitioners chosen not to respond to the Division's request for substantiation of the itemized deductions, the Division would have no evidence in support of its request for a greater deficiency. Nothing on the face of the return or the documents provided by petitioners to the Division indicates that petitioners are not entitled to claim the itemized deductions. The Division had a three-year period to audit petitioners' claimed itemized deductions; however, it chose simply to assess based upon the difference in the amount of itemized deductions claimed on the New York return as compared to the Federal return. The Division did not raise the issue

of substantiation of the itemized deductions until after it had already issued the Notice of Deficiency and after the general three-year statute of limitations for assessment had expired. By choosing this course of action, the Division has placed itself in the position of having the burden of proof to show that petitioners are not entitled to the \$72,985.00 of claimed itemized deductions. As the Division has failed to establish by clear and convincing evidence that petitioners are not entitled to claim the itemized deductions shown on their return, its request for a greater deficiency is denied.

E. The petition of Ezzat and Nawal Elsheemy is granted; the Notice of Deficiency dated February 22, 2005 is canceled; and the Division of Taxation's request for a greater deficiency is denied.

DATED: Troy, New York  
July 19, 2007

/s/ Thomas C. Sacca  
PRESIDING OFFICER