STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions of **WILLIAM G. HALBY** for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Personal Income Tax under the Administrative Code of the City of New York for the Years 2002 through 2005.	DETERMINATION DTA NOS. 821494 AND 821810

Petitioner, William G. Halby, filed petitions 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 2002 through 2005.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 30, 2007 at 10:30 A.M., with all briefs to be submitted by March 24, 2008, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Daniel Smirlock, Esq. (Kevin R. Law, Esq., of counsel).

ISSUES

I. Whether the records of this proceeding should be sealed or, alternatively, whether petitioner should be permitted to proceed anonymously in this matter before the Division of Tax Appeals.

II. Whether the Division of Taxation properly disallowed petitioner's claimed itemized deduction of medical expenses for amounts paid for erotic materials, sexually related publications, male enhancement pills, and miscellaneous services performed by prostitutes.

III. Whether the Division of Taxation may disallow petitioner's claimed itemized deductions that were based on the deductions claimed on his federal income tax returns in the absence of a determination by the Internal Revenue Service disallowing such deductions.

IV. Whether the Division of Taxation may withhold refunds of tax claimed on petitioner's State and City income tax returns in the absence of prior determinations of additional State and City tax.

FINDINGS OF FACT

Petitioner submitted 10 proposed Findings of Fact and 8 proposed Conclusions of Law. In accordance with State Administrative Procedure Act § 307(1), petitioner's proposed Findings of Fact have been generally accepted, with the following exceptions:

(I) the last sentence of proposed Finding of Fact 3 and the entirety of Finding of Fact 10 are rejected because of their conclusive nature;

(ii) proposed Finding of Fact 6 is rejected because it is unsupported by medical evidence;

(iii) proposed Findings of Fact 8 and 9 are rejected as irrelevant to this proceeding; and the State Administrative Procedure Act does not require a ruling upon proposed Conclusions of Law.

1. In August 2005, the Division of Taxation (Division) commenced an audit of petitioner's resident income tax returns for the tax years 2002, 2003 and 2004. Specifically, the audit was limited to an examination of the federal medical expense deductions taken for such years by petitioner.

2. For the 2002 tax year, petitioner claimed a medical expense deduction of $105,271.00, after the 7.5% limitation on federal adjusted gross income (AGI). Included among the medical expenses claimed was an expense of $111,364.00, of which $40,588.00 was categorized on an

attachment to Schedule A on petitioner's federal return as "therapeutic sex"[1] and $70,776.00 as "massage therapy to relieve osteoarthritis and enhance erectile function through frequent orgasms." Also included as part of the medical expense deduction claimed were the sums of $658.00 for medical books, videos and periodicals and $2,173.00 for "pornography to enhance sexual performance in lieu of taking Viagra."

In the Division's field audit report, in the explanation of adjustments, the auditor stated as follows:

> The $111,364 of expense for sexual activities with prostitutes is being disallowed as an itemized deduction for medical expenses because these expenses are not deemed to be allowable medical expense deductions. Also, the expenses incurred are illegal in New York State. Illegal treatments cannot be included in medical expenses. In addition to being illegal in New York State, these expenses are not substantiated with receipts. In addition, $2,160 and $658 of expenses that were primarily pornographic or sexually related are also not allowed as a medical expense because these expenses are not deemed to be allowable medical deductions. In addition, some of these expenses are not substantiated with receipts.

3. For the 2003 tax year, petitioner claimed a medical expense deduction of $101,930.00, after the 7.5% limitation on federal AGI. Included in this amount was the sum of $4,015.00 for medical books, magazines, videos and pornographic material used to enhance sexual performance, the sum of $103,758.00 for therapeutic sex, genital massage and related expenses as well as $162.00 for sexual performance aids (lube, condoms and nipple clamps) and $431.00 for male enhancement pills.

The auditor disallowed $101,126.00 in expenses for sexual activities with prostitutes, $3,654.00 in "expenses that were primarily pornographic or sexually related," and the $162.00 for "sexual performance aids" and $431.00 for male enhancement pills. The audit report again

[1] In explaining this therapeutic sex, petitioner quoted certain books and publications that cited medical benefits resulting from using surrogate sex partners.

noted that the expenses for sexual activities with prostitutes and some of the other expenses claimed were not substantiated with receipts. The auditor also disallowed $2,632.00 of interest expense claimed because interest expense is not allowed as a medical expense and personal interest expense is not deductible.[2]

4. For the 2004 tax year, petitioner claimed a medical expense deduction of $70,760.00, after the 7.5% limitation on federal AGI. Of this expense, $65,934.00 was claimed for massage therapy, genital massage and therapeutic sex and related expenses for condoms, lubricants and male enhancement pills. In addition, petitioner claimed an expense of $2,368.00 for medical books, magazines, videos and pornographic material used to enhance sexual performance. Petitioner also claimed an expense of $5,632.00 for bank and credit card finance charges incurred in connection with loans needed to pay for these services.

The auditor disallowed the $65,934.00 as sexual activities with prostitutes and the expenses claimed because they are not deemed to be allowable medical deductions. The audit report noted that illegal treatments cannot be included in medical expenses and that the expenses were not substantiated with receipts. As to the $2,368.00 claimed, the auditor determined that such expenses were primarily pornographic or sexually related and are not allowable as a medical deduction. Finally, the auditor disallowed the $5,632.00 of bank and credit card finance charges on the basis that such charges are not allowed as a medical deduction and that personal interest expense is not deductible.

5. On January 30, 2006, the Division issued a Notice of Deficiency to petitioner which asserted the following deficiencies:

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[2] It is unclear where this $2,632.00 is derived from. Unlike petitioner's 2004 return where an interest and finance charge expense is claimed on an attachment to Schedule A, no such expense appears on the attachment to Schedule A on his 2003 return.

Period Ended	Jurisdiction	Tax	Interest	Penalty	Total Due
12-31-02	NYS	$6,269.00	$1,225.00	$927.00	$8,421.00
12-31-02	NYC	$3,352.00	$657.90	$504.45	$4,514.35
12-31-03	NYS	$4,473.00	$559.26	$505.13	$5,537.39
12-31-03	NYC	$2,475.00	$313.09	$279.04	$3,067.13
12-31-04	NYS	$386.00	$22.95	$30.47	$439.42
12-31-04	NYC	$966.00	$58.38	$79.69	$1,104.07
TOTAL		$17,921.00	$2,836.58	$2,325.78	$23,083.36

By a Conciliation Order (CMS No. 213123) dated December 1, 2006, the Division's Bureau of Conciliation and Mediation Services (BCMS) canceled the penalties asserted in the Notice of Deficiency dated January 30, 2006. The additional tax asserted in the Notice of Deficiency remained unchanged with interest computed at the applicable rate.

6. For the year 2005, petitioner timely filed his resident income tax return. On the return, he claimed itemized deductions totaling $44,035.00 which, on his petition filed for such year, he addressed as follows:

> [t]he expenses were for sexual massage therapy and therapy-related materials and represented an internationally recognized form of medical care for the treatment of geriatric depression and maintenance of sexual function. The nature of the expenses was fully disclosed on the Federal return.[3]
>
> The expenses were essential for Petitioner's health and were substantiated by contemporaneous records maintained by Petitioner.

Based upon his 2005 return with itemized deductions claimed in the amount of $44,035.00, petitioner claimed a refund due of $1,308.00.

7. On May 15, 2006, the Division advised petitioner that his 2005 New York State income tax return had been selected for review and that additional information was required to verify the

[3] Petitioner's 2005 federal return is not a part of the record herein.

accuracy of his refund claim. The Division asked for copies of bills, receipts, canceled checks and credit card receipts for the medical expenses claimed on the return.

On October 23, 2006, the Division issued a Notice of Deficiency to petitioner asserting State and City tax due in the amount of $1,136.50, plus interest, for a total due of $1,188.81 for the tax year ended December 31, 2005.

8. For the 2005 tax year, it is stipulated by and between the parties that:

a. The amount deducted from petitioner's Social Security benefit as a monthly premium for Medicare B supplemental medical insurance in the year 2005 was $78.20 ($938.40 for the year);

b. Petitioner's combined monthly after-tax contribution to his former employer's health care and dental plans in the year 2005 was $28.87 ($346.44 for the year);

c. Petitioner paid $21.94 to Ophthalmology Associates of Bay Ridge, Brooklyn, New York, in the year 2005 for the services of an eye doctor; and

d. Prescription drugs purchased by petitioner from Rite Aid Pharmacy for the year 2005 totaled $60.64.

9. As of the date of the hearing held in this matter, petitioner was 76 years old and was retired and living alone. Petitioner was a graduate of the University of Michigan with a Bachelors Degree in letters and law and he received a Juris Doctor Degree from the University of Michigan Law School in 1955.

10. For the years at issue, petitioner, in support of the services claimed as a medical expense deduction, provided schedules with dates, first names and amounts allegedly paid for "sensual massage and surrogate sex therapy." In his brief, he stated that the disallowed expenses "represented cash payments to unlicensed caregivers for whole body massage and included a

genital massage to orgasm with ejaculation by hand." Petitioner admitted that there are no licensed caregivers who provide the services for which he has claimed a medical expense deduction. He enlisted the unlicensed caregivers' services through advertisements in local newspapers. Petitioner stated that the services provided consisted mostly (approximately 90%) of massage and, in a few cases, intercourse.

The auditor requested backup materials such as receipts to substantiate the expenses claimed; however, petitioner informed the auditor that no receipts existed because receipts are not generally given by such providers, often due to a fear of prosecution, and that the names of the service providers listed in petitioner's schedules may not have been the real names of such providers.

For the 2002 and 2003 tax years, petitioner introduced into evidence a copy of a notebook entitled "Tax Journal," which contained dates, the first names of service providers and amounts allegedly paid to such providers. No other substantiation of these payments was provided. No receipts for any of the books, magazines, videos or sexual performance aids were provided; no mention of these items was made in the "Tax Journal." For the 2004 and 2005 tax years, petitioner introduced a copy of a similar notebook which set forth dates, first names of service providers and amounts allegedly paid to the providers. In addition, this notebook contained the dates and amounts allegedly paid for books, videos and magazines; no receipts for these items were included.

Petitioner provided the auditor with copies of his federal returns for the years at issue. The medical expense deductions claimed thereon as itemized deductions matched the deductions claimed on his State and City returns for these years. As a result of the audit that the Division commenced for 2004 (and then extended to include 2002 and 2003 as well), the Internal Revenue

Service (IRS) instituted an audit of petitioner for the years 2004 and 2005.[4] Petitioner indicated that his case was pending in the U.S. Tax Court, but no trial date had been set.

11. For the year 2002, the Division allowed $1,606.00 of the $105,271.00 claimed as a medical expense deduction, which represented payments for doctor visits, Medicare premiums, insurance premiums and prescription drugs. Similarly, for 2003, the Division allowed $2,322.00 of the $101,930.00 claimed by petitioner. For 2004, of the $70,760.00 claimed, the Division allowed $2,380.00.

12. By letters dated March 19, 2007 and April 1, 2007, petitioner made a motion that the record in this proceeding be sealed or, in the alternative, that he be permitted to proceed anonymously. On April 9, 2007, Chief Administrative Law Judge Andrew F. Marchese responded to petitioner's letters and suggested that petitioner renew his motion at the hearing held in this matter. Petitioner did, in fact, make the motion at the hearing and, in addition, addressed the issue in his brief submitted subsequent thereto.

SUMMARY OF PETITIONER'S POSITION

13. Based upon the intimate nature of the medical expense deductions of a sexual nature, petitioner seeks to seal the record or, alternatively, to proceed anonymously in this matter. Petitioner asserts that, should the media learn of the identity of petitioner, considerable stress would be caused to his family (his wife, from whom he is legally separated, three adult children and two minor grandchildren), all of whom live in the New York metropolitan area.

In support of his motion to proceed anonymously, petitioner cites to Rule 227 of the U.S. Tax Court Rules of Practice and Procedure, which permits a taxpayer to file a petition

[4] Petitioner stated that he was not audited by the IRS for 2002 and 2003 for the apparent reason that the statute of limitation for those years had either expired or was soon to expire.

anonymously in appropriate cases. For additional support of his motion to proceed anonymously, petitioner cites to a U.S. Tax Court case (***Anonymous v. C.I.R.***, 127 TC 89 [2006]) and to cases from various New York State courts.

14. Petitioner claims to have no regular sexual partner or social life. Massage therapy is his only sexual outlet and, in his opinion, is necessary for his sense of well-being, to maintain sexual function, to reduce stress and depression, to lower the risk of prostate cancer, to treat his arthritis, to enhance his immune system through the release of endorphins and to improve his breathing and circulation. Petitioner contends that a Revenue Ruling (Rev Rul 75-187, 1975-1 CB 92) holds that sex therapy is a deductible medical expense.[5]

15. Petitioner stated that while he has sought medical advice from physicians "for some things," he feels that "doctors are not very well trained in sexual matters generally, so I don't turn to them for sexual advice."

16. Petitioner stated that:

> [t]he disallowed portion of the medical expense deductions claimed on his State and City returns for the years at issue represents, for the most part, "cash payments for whole body massage from unlicensed caregivers and included as part of the massage a genital release by hand.
>
> Since receipts were not customarily given by the caregivers because they were unlicensed, I maintained a contemporaneous record of the amounts that were paid for each session, the date of service and the working names of the caregivers.
>
> Smaller amounts were spent on sexual health publications as well as erotic materials to enhance libido and sexual performance and were substantiated either by diary, receipts, or good faith estimates.

[5] It must be noted that, while petitioner introduced numerous articles from magazines, newspapers and the internet concerning the health benefits of sexual activities, massage and erotic materials, no medical evidence (e.g., scientific data) was produced from any physicians or other medical care providers who treated petitioner as a patient. Petitioner did not produce evidence indicating or suggesting a medical prescription for any of the sexual items or activities for which he claimed a medical expense deduction.

17. Petitioner contends that Tax Law § 615 requires the Division to recognize itemized deductions claimed on a federal income tax return in the absence of a federal determination that such deductions were disallowed.

18. Petitioner asserts that Tax Law § 681 provides that there is no authority to withhold a refund of tax claimed on a return without a prior tax assessment.

CONCLUSIONS OF LAW

A. The first issue to be decided is whether to grant petitioner's motion to seal the record or, alternatively, whether petitioner should be allowed to proceed anonymously. As this is a case of first impression before the Division of Tax Appeals, it is necessary to examine the language of relevant statutes and case law.

B. Rule 3000.23 of Tax Appeals Tribunal Rules of Practice and Procedure (20 NYCRR 3000.23) requires that "[a]ll decisions of the tribunal and determinations of administrative law judges shall be available for public inspection pursuant to the provisions of Part 800 of this Title."[6] State Administrative Procedure Act § 307(3) provides, in relevant part:

> 3. (a) Each agency shall maintain an index by name and subject of all written final decisions, determinations and orders rendered by the agency in adjudicatory proceedings. For purposes of this subdivision, such index shall also include by name and subject all written final decisions, determinations and orders rendered by the agency pursuant to a statute providing any party an opportunity to be heard, other than rule making. Such index and the text of any such written final decision, determination or order shall be available for public inspection and copying.
>
> (b) An agency may delete from any such index, decision, determination or order any information that, if disclosed, would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of the public officers law and may also delete at the request of any person all references to trade secrets that, if disclosed, would cause substantial injury to the competitive position of such person. Information which would reveal confidential material

[6]Part 800 was renumbered Part 2370, effective July 10, 1991.

> protected by federal or state statute, shall be deleted from any such index, decision, determination or order.

The requirements set forth in the Tax Appeals Tribunal Rules of Practice and Procedure and the State Administrative Procedure Act § 307(3) make clear that the Division of Tax Appeals has no authority to delete a petitioner's name from an index, decision, determination or order on the basis that such disclosure could cause the petitioner embarrassment or stress to petitioner or his family.[7] Accordingly, petitioner's motion to seal the records is denied.

C. Petitioner's motion in the alternative, to proceed anonymously, is similarly denied. As noted in Finding of Fact 13, petitioner asserts that his motion should be granted pursuant to U.S. Tax Court Rule 227(a), which provides, in relevant part:

> *Petitioners*: A petitioner in an action to restrain disclosure relating to either a written determination or a prior written determination may file the petition anonymously, if appropriate.

This argument must be rejected on its face because no rule in the Tax Appeals Tribunal Rules of Practice and Procedure corresponds to U.S. Tax Court Rule 227.

[8] As noted by many jurists (***see e.g. Doe v. Szul,*** 2008 NY Slip Op 31394 [NY County], ***Anonymous v. Anonymous,*** 191 Misc2d 707, 744 NYS2d 659), there is a dearth of New York case law speaking to a party's right to proceed anonymously. Reviewing the New York cases that do exist and the Federal cases on the subject, it is clear that courts have discretion in determining the issue and do so by balancing the privacy interests of the party seeking anonymity against the constitutionally-embedded presumption of openness in judicial proceedings. (***"J. Doe***

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[7]Petitioner's use of ***Anonymous v. C.I.R.*** (127 TC 89 [2006]) provides no support for his position. There, the Court granted the taxpayer's motion to seal the record because taxpayer provided good cause through evidence of past extreme physical harm (i.e., kidnaping) and the persistence of this threat to him and his family. The instant case may be distinguished from ***Anonymous*** because petitioner (1) does not seek to prevent extreme physical harm and (2) failed to produce evidence (e.g., testimony, factual data) making the harm credible.

[8]The following two paragraphs of this Conclusion of Law draw heavily from the decision of Justice Kornreich in ***Doe v. Szul***, 2008 NY Slip Op 31394 (NY County).

No. 1" v. CBS Broadcasting Inc., 24 AD3d 215, 806 NYS2d 39; ***Doe v. Porter***, 370 F3d 558; ***Doe v. New York Univ.***, 6 Misc 3d 879, 786 NYS2d 903; ***Anonymous v. Anonymous***, 191 Misc 2d 708, 774 NYS2d 660; ***Does 1 through XXIII v. Advanced Textile Corp.,*** 214 F3d 1058 at 1067-8; ***James v. Jacobson***, 6 F3d 233 at 242.)

Among the factors considered in allowing a party to proceed anonymously are: "whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of a sensitive and highly personal nature" (***James***, 6 F3d 238); whether the party seeking anonymity has an illegitimate ulterior motive; the extent to which the identity of the litigant has been kept confidential; and the magnitude of the public interest in maintaining confidentiality or knowing the party's identity. (***Does 1 through XXIII***, at 1068; ***James***, 6 F3d 238; ***Doe v. The Archdiocese of Portland in Oregon,*** 2008 WL 656021 (D Or); ***Doe H.M. v. St. Louis County***, 2008 WL 151629.) "Merely asserting annoyance, embarrassment, or harm to a person's personal reputation is generally insufficient to demonstrate good cause and overcome the strong common law presumption in favor of access to court records." (***Anonymous v. C.I.R.***, 127 TC at 92.)

The instant case involves a taxpayer's voluntary challenge to the Division's disallowance of itemized medical deductions for the purchase of prostitution services and pornographic materials. Petitioner has cited speculative stress and embarrassment to himself and his family as the rationale for his motion. These motives fail to merit the grant of his motion, particularly in light of the limited circumstances where New York courts allowed petitioners to proceed anonymously. (***See e.g. Doe v. New York Univ.***, 6 Misc 3d 866, 786 NYS2d 892 [plaintiffs permitted to proceed anonymously by pseudonym in civil sexual assault case]; ***Doe v Bellmore-Merrick Cent. High School Dist.,*** 1 Misc 3d 697, 770 NYS2d 847 [plaintiff permitted

to proceed anonymously in civil sexual abuse case]. Accordingly, petitioner's motion to proceed anonymously is denied.

D. The next issue to be addressed is whether the Division properly denied petitioner's claimed medical expense deductions for the years at issue. New York itemized deductions of a resident individual refers to the total amount of his deductions from federal AGI, other than federal deductions for personal exemptions, as provided in the Internal Revenue Code (IRC), with certain exceptions irrelevant herein (Tax Law § 615[a]). Therefore, in considering the validity of the medical expense deduction claimed by petitioner for the years at issue, it is appropriate to look to federal law for guidance.

IRC § 213(a) provides that a deduction shall be allowed for expenses paid during the taxable year for medical care of the taxpayer, his spouse or a dependent to the extent that such expenses exceed 7.5% of AGI not compensated for by insurance or otherwise. As relevant herein, IRC § 213(d)(1)(A) defines "medical care" to mean amounts paid "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body."

Treas Reg § 1.213-1(e)(1)(ii) states, in relevant part, that:

> Deductions for expenditures for medical care allowable under section 213 will be confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness. Thus, payments for the following are payments for medical care: Hospital services, nursing services (including nurses' board where paid by the taxpayer), medical, laboratory, surgical, dental and other diagnostic and healing services, X-rays, medicine and drugs (as defined in subparagraph (2) of this paragraph, subject to the 1 percent limitation in paragraph (b) of this section), artificial teeth or limbs, and ambulance hire. However, an expenditure which is merely beneficial to the general health of an individual, such as an expenditure for a vacation, is not an expenditure for medical care.

E. In ***Huff v. Commissioner*** (69 TCM 2551 [1995]), the petitioner invested in a horse syndication corporation that subsequently collapsed and went into a liquidating bankruptcy. Petitioner suffered severe financial pressure, resulting in stress and physical problems. Rather than go to a psychiatrist, petitioner went to the Maharishi Ayur-Veda Health Center in Florida and sought the assistance of Dr. Deepak Chopra, who specializes in the treatment of stress-related problems of the nervous system. In addition to her trip to the clinic, petitioner had received numerous massages prior to and following her clinic visit. Petitioner sought to claim the amounts paid for such massages as a deduction for medical expenses.

The Tax Court denied this deduction, stating:

> We have no doubt that petitioner believed that these massages would relieve her mental stress. Petitioner's acupuncturist also suggested massages for petitioner's "lymphatics," in addition to his treatment. Despite these factors, we do not find that the section 213 medical care definition covers petitioner's massages. In this setting, we find that the massages were more for petitioner's general well-being than for the cure, mitigation, treatment, or prevention of a specific disease.

F. In his brief, petitioner contends that Revenue Ruling 75-187 (1975-1 CB 92) qualifies sex therapy as a deductible medical expense. An examination of this Revenue Ruling reveals that the amounts therein were paid to psychiatrists to treat sexual inadequacy and incompatibility. These expenses are hardly similar to those at issue. From the outset, it must be noted that portions of petitioner's "sex therapy" were, in fact, sex for a fee, in violation of Penal Law § 230.02. Such expenses were not paid to medical professionals or for activities prescribed by medical professionals but were made to unlicensed providers for legally proscribed services. (***See*** Penal Law § 230.00.)

Additionally, even if it were accepted that sex constitutes medical care, such expenses would be more for petitioner's general well-being rather than cure, mitigation, treatment or

prevention of a specific disease or condition. As previously noted at Footnote 5 and Paragraph 15, petitioner failed to produce evidence that the claimed expenses were for prescribed activity, and he had little regard for physician's advice on sexually related matters. As the periodicals cited by petitioner were neither specific towards him nor for a specific illness, they cannot possibly constitute a prescription or medical advice. Because petitioner purchased the videos, books, periodicals, pornographic materials and sexual performance aids without prescription, and they were not medically necessary to treat a specific disease or condition, they are not medical expenses for which an income tax deduction is warranted.

G. It must be noted that petitioner seeks a tax deduction for an illegal activity. In ***Fuller v. Commissioner*** (213 F2d 102, 105, 54-1 US Tax Cas ¶ 9369 [1954]), the U.S. Court of Appeals for the Tenth Circuit, when considering the deductibility of the cost of sold confiscated whiskey, stated:

> It is the general rule that losses from illegal transactions are not deductible under Section 23(e). But the ultimate question of deductibility turns on a definition of illegal transactions. On the authority of cited cases, Merton says that 'A transaction is not illegal so as to make a loss arising from it nondeductible unless it is prohibited by statutory enactment, or frustrates 'sharply defined national or state policies proscribing particular types of conduct.'

As relevant to the present matter, Penal Law § 230.02 proscribes patronizing prostitutes (i.e., the hiring or solicitation of an individual for sexual conduct for a fee). Petitioner's activities, for which he seeks a tax deduction, are clearly proscribed by this statute. As such, permitting the deductions would be counter to public policy and therefore are disallowed.

H. Petitioner bears the burdens of (1) demonstrating entitlement to the deduction and (2) substantiating the amount of the deduction. (***See*** Tax Law § 658[a]; § 689[e]; 20 NYCRR 158.1; ***Matter of Macaluso***, Tax Appeals Tribunal, September 22, 1997 ***confirmed*** 259 AD2d 795, 686

NYS2d 193 [1999].) Petitioner has failed to demonstrate entitlement to the deduction. Even assuming that he had shown entitlement to medical expense deductions for the amounts paid for the services and materials, he has failed to substantiate the claimed amounts. Other than his own notebooks, petitioner has produced no receipts, canceled checks, credit card statements or any other documentary evidence to prove that he did, in fact, incur the expenses for the amounts claimed.

I. For the reasons set forth in Conclusions of Law E through I, it is hereby found that the Division properly disallowed petitioner's claimed medical expense deductions for the years at issue.

J. Petitioner argues that the Division may not disallow his claimed itemized deductions which were based upon deductions claimed on his federal income tax returns in the absence of an IRS determination disallowing such deductions. This argument is without merit.

Tax Law § 697(b)(1) provides that the Division:

> for the purpose of ascertaining the correctness of any return, or for the purpose of making an estimate of taxable income of any person, shall have the power to examine or to cause to have examined, by any agent or representative designated by it for that purpose, any books, papers, records or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take testimony and require proof material for its information, with power to administer oaths to such person or persons.

This statutory provision clearly enables the Division to conduct independent audits of any return or person in order to ascertain whether respective filed returns are correct. The Division is

not compelled to accept petitioner's itemized deductions as set forth on the relevant federal returns because the IRS did not conduct its own audit.[9] This argument is rejected.

K Finally, petitioner contends that Tax Law § 615 requires the Division to recognize (accept) itemized deductions claimed on a federal return and that the Division has no authority to withhold a refund claimed on the state return in the absence of a prior assessment of state tax.

First, as noted in Conclusion of Law G, it is clear that the Division does not have to accept the itemized deductions claimed on a federal return. The Division may conduct an independent audit to ascertain the veracity of the deductions claimed.

Second, petitioner timely filed his 2005 return which was dated April 5, 2006. Shortly thereafter, on May 15, 2006, the Division advised petitioner that his 2005 return had been selected for review. Presumably, this review resulted from the fact that his returns for the years 2002 through 2004 had recently been audited and a Notice of Deficiency had been issued for such years a few months prior to the filing of the 2005 return, which again claimed a medical expense deduction for the same expenses which had been disallowed for 2002 through 2004. Since the Division clearly had independent audit authority, it was well within its right to initiate an audit for 2005 when petitioner claimed a deduction for the same items which had just been disallowed. Therefore, petitioner's contention that the Division did not have the power to withhold the refund (overpayment) claimed on his 2005 return is rejected.

[9] Moreover, had the IRS conducted an audit and changed or corrected petitioner's federal returns for any or all of the years at issue, the Division would not be required to accept the federal change (20 NYCRR 159.4); it could conduct an independent audit.

L. The petitions of William G. Halby are denied; the Notice of Deficiency issued to petitioner on January 30, 2006, as modified by Conciliation Order CMS No. 213123, and the Notice of Deficiency issued to petitioner on October 23, 2006 are hereby sustained.

DATED: Troy, New York
September 18, 2008

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE