

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GLENVILLE L. ARMSTRONG : DETERMINATION
for Redetermination of Deficiencies or for Refund of New : DTA NO. 822278
York State and New York City Personal Income Tax under :
Article 22 of the Tax Law and the Administrative Code of :
the City of New York for the Years 2001, 2002 and 2003. :
:

Petitioner, Glenville L. Armstrong, filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 2001, 2002 and 2003.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 14, 2009 at 10:45 A.M., with all briefs to be submitted by April 22, 2010, which date began the six-month period for the issuance of this determination. Petitioner appeared by M. Bradford Randolph, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly determined petitioner's tax liability for the years 2001, 2002 and 2003.

FINDINGS OF FACT

1. The Division of Taxation (Division) received information indicating that petitioner, Glenville L. Armstrong, was involved in a New York State real estate transfer, and information from the Internal Revenue Service (IRS) indicating that he had sufficient income to require the filing of New York State income tax returns for the years 2001, 2002 and 2003. After searching its records and failing to locate petitioner's New York State income tax returns for the years 2001, 2002 and 2003, the Division sent inquiry letters to petitioner on December 13, 2005 and February 27, 2006. Petitioner did not respond to these letters.

2. On September 25, 2006, the Division issued a Statement of Proposed Audit Changes to petitioner for the year 2001. The statement contained the following explanation:

We previously sent you letters indicating that you were involved in a real estate transfer of a New York State property and you may have a New York State filing requirement.

This assessment represents an estimated liability (including penalty and interest) based on information available to this office. This assessment may be adjusted or canceled upon receipt of a personal income tax return. If a return is filed in response to this assessment, any tax liability will also be subject to penalty and interest charges.

We do not have a record of a New York State income tax return on file for you. You did not reply to our previous letters asking about your New York State return.

Section 6103(d) of the Internal Revenue Code allowed us to get information from the Internal Revenue Service. This information indicates you had sufficient income to require the filing of a New York State return.

We could not issue this statement before now because of the time needed to obtain and process the federal information.

We used the federal information and computed your tax as a New York State resident. In cases where the Internal Revenue Service provided us with information reported on the federal return, that information was used to compute your New York State tax. When federal return data was not available, your income was determined using information provided by the Internal Revenue

Service such as Form 1099 information, etc. This includes wages, interest, dividends, capital gains, and other sources of income.

* * *

Appropriate credits have been allowed based on available information.

If the New York standard deduction was greater than your allowable itemized deductions, the standard deduction was allowed.

If the address on your federal record or New York State record shows your residence was in New York City or the City of Yonkers, we have also computed the appropriate City resident tax.

You have been allowed the appropriate New York City school tax credit.

We will allow additional payments if your 2001 tax withheld from wages or estimated tax payments are greater than the amounts shown on this bill. Please furnish a wage and tax statement or canceled check showing a larger amount.

We have added a penalty for late filing at 5% per month up to a maximum of 25% (section 685(a)(1) of the New York State Tax Law).

We have added a negligence penalty of 5% as an addition to tax (section 685(b)(1) of the New York State Tax Law).

In addition to the 5% negligence penalty, an amount equal to 50% of any interest due on a deficiency or portion of a deficiency attributable to negligence or intentional disregard of the Tax Law has been imposed (section 685(b)(2) of the New York State Tax Law).

Interest is required by section 684(a) of the New York State Tax Law.

* * *

Interest is due for late payment or underpayment at the applicable rate. Interest is required under the New York State Tax Law.

Petitioner's New York State and New York City personal income tax was calculated as follows:

| | |
|---------------------------------|--------------|
| Federal adjusted gross income | \$111,101.00 |
| New York adjusted gross income | 111,101.00 |
| New York deduction | 89,034.00 |
| Dependent exemptions | 2,000.00 |
| New York taxable income | 20,067.00 |
| New York State tax | 1,010.15 |
| New York City resident tax | 571.00 |
| New York City school tax credit | 62.50 |
| Net New York City resident tax | 508.50 |
| Total net State & City tax due | \$1,518.65 |

The statement also asserted interest in the amount of \$518.82 and penalty in the amount of \$718.06 to be due. The Division based its estimation of tax asserted to be due upon information taken from petitioner's 2001 federal income tax return.

3. On September 25, 2006, the Division also issued statements of proposed audit changes for the years 2002 and 2003. Each of these statements explained that information available to the Division indicated that petitioner had sufficient income to require the filing of a New York State income tax return because he transferred New York State real property, and New York State source income includes the gain from the sale of such property. Since the Division was unable to locate petitioner's New York return and petitioner had not replied to its previous letters, the Division computed the New York tax that was due for 2002 and 2003 on the basis of information obtained from the IRS pursuant to Internal Revenue Code (IRC) § 6103(d). Because petitioner's address indicated that his residence was in New York City, the Division also computed City of New York resident tax for each of these years. In addition to the tax asserted to be due, the Division imposed a penalty of 25 percent for not filing a New York State tax return within 5

months of its due date pursuant to Tax Law § 685(a)(1) for the years 2002 and 2003. It also imposed a negligence penalty of 5 percent under Tax Law § 685(b)(1) and a penalty equal to 50 percent of the interest due on a deficiency or portion of a deficiency attributable to negligence or intentional disregard of the Tax Law pursuant to Tax Law § 685(b)(2) for each of those years.

4. For the years 2002 and 2003, the Division based its estimation of tax asserted to be due upon information obtained from its files, including information regarding real estate transfers in 2002 and 2003.

The Statement of Proposed Audit Changes issued to petitioner for the year 2002 stated that New York State and New York City personal income tax was due in the amount of \$50,027.31 plus interest in the amount of \$13,182.82 and penalty in the amount of \$21,605.64, for a current balance due of \$84,815.77. The statement reflected petitioner's federal adjusted gross income and New York adjusted gross income as \$491,559.00 and thereafter reduced same by \$10,500.00 (New York head of household standard deduction) and \$2,000.00 (two dependent exemptions), to arrive at New York taxable income of \$479,059.00 and a New York State tax liability of \$32,815.54 and a New York City resident tax liability of \$17,334.27 for the year 2002. Credits for New York State tax withheld and New York City school tax in the amounts of \$36.00 and \$86.50 were allowed against the New York State and New York City personal income taxes determined to be due. The statement also asserted interest in the amount of \$13,182.82 and penalty in the amount of \$21,605.64 to be due. The Statement of Proposed Audit Changes issued to petitioner for the year 2003 stated that New York State and New York City personal income tax was due in the amount of \$22,323.37 plus interest in the amount of \$4,240.03 and penalty in the amount of \$8,820.10, for a current balance due of \$35,383.50. The statement reflected petitioner's federal adjusted gross income and New York adjusted gross income as \$203,018.00

and thereafter reduced same by \$10,500.00 (New York head of household standard deduction) and \$2,000.00 (two dependent exemptions), to arrive at New York taxable income of \$190,518.00 and a New York State tax liability of \$14,288.85 and a New York City resident tax liability of \$8,097.02 for the year 2003. A New York City school tax credit in the amount of \$62.50 was allowed against the New York City resident tax liability. The statement also asserted interest in the amount of \$4,240.03 and penalty in the amount of \$8,820.10 to be due.

5. Petitioner never responded to the statements of proposed audit changes for the years 2001, 2002 and 2003. Consequently, the Division issued to petitioner three notices of deficiency, dated November 20, 2006, one for each year at issue. The first Notice of Deficiency (Notice No. L-027735440-5) asserts New York State and New York City personal income tax due for 2001 in the amount of \$1,518.65, plus penalty of \$732.22 and interest of \$547.14, for a total amount due of \$2,798.01. The second Notice of Deficiency (Notice No. L-027735446-8) asserts New York State and New York City personal income tax due for 2002 in the amount of \$50,027.31, plus penalty of \$22,045.02 and interest of \$14,061.59, for a total amount due of \$86,133.92. The third Notice of Deficiency (Notice No. L-027735442-3) asserts New York State and New York City personal income tax due for 2003 in the amount of \$22,323.37, plus penalty of \$9,004.74 and interest of \$4,609.32, for a total amount due of \$35,937.43.

6. Petitioner timely filed his federal income tax return for the year 2001. As of October 7, 2009, shortly before the hearing in this matter, petitioner had not filed Federal income tax returns for the years 2002 and 2003.

7. As indicated by a certification of nonfiling dated October 2, 2009 and signed by Thomas Engel, Deputy Tax Commissioner, the Division searched its personal income tax files for petitioner's 2001, 2002 and 2003 personal income tax returns and did not locate such returns.

8. At the hearing held on October 14, 2009, petitioner stated that he was no longer challenging the Division's determination of tax for the year 2001. He also conceded that the imposition of penalties was appropriate. However, petitioner continued challenging the Division's determinations of tax due for the years 2002 and 2003, offering his testimony and limited documentation, including, among other items, unfiled, unsigned copies of federal and New York State personal income tax returns for the years 2002 and 2003, and copies of the IRS e-services wage and income transcripts for petitioner for 2002 and 2003.

9. Petitioner, born in 1936, is an ordained Episcopal minister. Prior to, during and subsequent to the years at issue, petitioner was the rector of Cavalry & St. Cyprian's Episcopal Church (St. Cyprian's Church) located at 966 Bushwick Avenue, Brooklyn, New York. During the years 2002 and 2003, petitioner resided at the rectory located at 962 Bushwick Avenue, next door to the church. Petitioner continued to reside at the rectory until sometime in 2009.

10. For the year 2002, petitioner received \$77,726.00 in wages from St. Cyprian's Church, which issued a Form W-2, Wage and Tax Statement, to him. Petitioner also received \$5,697.00 in wages for the year 2002 from the City of New York's Office of Payroll Administration, which issued a Form W-2, Wage and Tax Statement, to him.

11. In 2002, petitioner received \$14.00 in dividends from the AXP Cash Management Fund, which issued a Form 1099-DIV to him.

12. Petitioner received \$50.00 in interest income in 2002 from Citibank N.A., which issued a Form 1099-INT to him.

13. Tyler Crusades, Inc., of Plymouth, Florida, paid petitioner nonemployee compensation in the amount of \$678.00 in 2002, which was reported on a Form 1099-MISC to the IRS.

14. Benefits statements (SSA-1099 forms) issued by the Social Security Administration indicate that petitioner received Social Security benefits totaling \$8,472.00 and \$10,145.00 in 2002 and 2003, respectively.

15. Statements of distributions from pensions, annuities, retirement or profit-sharing plans, IRAs, insurance contracts, etc. (forms 1099-R) for the year 2003 show that petitioner received gross distributions from Fidelity Investments and The Church Life Insurance Corporation in the respective amounts of \$4,300.00 and \$1,200.00, of which a total of \$4,365.00 was taxable for the year.

16. On May 7, 2002, petitioner sold a three-family house located on Bushwick Avenue in Brooklyn, New York, (Bushwick Avenue property) to an unrelated purchaser. The statement of settlement costs (HUD-1) issued by Wood Rafalsky & Wood, the settlement agent for Chase Manhattan Bank, shows that the gross amount due to petitioner, as seller, was \$400,264.25, consisting of the contract sales price of \$398,936.00, taxes of \$131.45 and transfer taxes in the amount of \$1,196.80. This statement also shows that the amount due to petitioner, as seller, was reduced by the following amounts: settlement charges of \$28,195.27, payoff of mortgage loan of \$198,762.95, concession of \$23,936.00, taxes of \$101.85 and the deposit of \$11,250.00. Further review of this statement indicates that the settlement charges consisted of a real estate commission paid to Trevor Holder Real Estate in the amount of \$20,000.00, a recording fee (release) of \$65.00, city/county tax/stamps in the amount of \$3,990.00, state tax/stamps in the amount of \$1,596.00, real property tax filing fee of \$25.00, escrow service charge of \$55.00, ECB violations in the amount of \$900.00 and water/sewer charges in the amount of \$1,564.27. At the closing, the purchaser was represented by J. N. Fairweather & Associates, P.C.

17. A printout from the Division's information return master file pertaining to petitioner indicates that Mid-Island Equities Corporation (Mid-Island) reported mortgage interest received from petitioner on the Bushwick Avenue premises beginning in 1998. For the year 2002, Mid-Island reported receiving \$8,881.00 in mortgage interest from petitioner.

18. In 2002, petitioner also owned Martense Court, and Willoughby Street - apartments 2D and 2E, all of which were located in Brooklyn, New York. Mortgage interest statements issued by Citimortgage, Inc., and Washington Mutual Bank, F.A., for the year 2002 show petitioner's payments of mortgage interest in the amounts of \$1,667.16 and \$9,635.01, respectively, and real estate taxes in the amounts of \$487.25 and \$2,379.49, respectively, on the Martense Court property. Mortgage interest statements issued by University Towers Apt. Corporation for the year 2002 show petitioner's payments of mortgage interest in the amounts of \$1,406.68 and \$1,023.71, real estate taxes in the amounts of \$879.90 and \$640.34 and amortization in the amounts of \$171.52 and \$124.83 on apartments 2D, and 2E, Willoughby Street, respectively.

19. On September 19, 2003, petitioner sold apartment 2E, Willoughby Street, to his sister. Review of the U.S. Department of Housing and Urban Development Settlement Statement issued for this transaction indicates that the gross amount due to petitioner, as seller, was the contract sales price of \$105,000.00, which was reduced by settlement charges in the amount of \$1,495.00, consisting of title insurance charges.

20. In its letter to petitioner, dated May 29, 1998, University Towers Apartment Corporation stated that the purchase prices for apartments 2D and 2E were \$42,402.00 and \$53,655.00, respectively.

21. In addition to Martense Court and the Willoughby Street apartments, petitioner also owned Hancock Street and Ashland Place, apartment 2D, Brooklyn, New York, in 2003.

22. For the year 2003, petitioner paid mortgage interest to University Towers Apartment Corporation in the amounts of \$1,257.00, \$1,471.00 and \$739.00, on Ashland Place and apartment 2D and 2E, Willoughby Street, respectively. Petitioner paid mortgage interest to Washington Mutual Bank, F.A., in the amount of \$12,675.00 on Martense Court in 2003. The IRS e-services transcript summary of the mortgage interest statement issued by Ideal Mortgage Bankers, Ltd., for 2003 shows petitioner's payments of \$378.00 and \$8,400.00 in mortgage interest and "points paid on purchase of principal residence," respectively, on Hancock Street.

23. The IRS e-services transcript also contains a summary of the mortgage interest statements issued by The Provident Bank, Ameriquest Mortgage Company (2 statements), Ocwen Federal Bank, F.S.B., and Fairbanks Capital Corporation that show petitioner's payments of mortgage interest in the amounts of \$378.00, \$5,027.00 (total for 2 mortgages), \$1,460.00 and \$3,372.00, respectively, for the year 2003. The summary of the mortgage interest statement issued by The Provident Bank also shows \$8,400.00 in points paid on the purchase of a principal residence in 2003. There are various mortgage account numbers listed on these five summary statements. However, the only address listed on each of these summary statements is the Bushwick Avenue rectory address.

24. Petitioner did not submit a copy of the 2001 Federal income tax return into the record. An Individual Federal Return Report, printed on June 11, 2008, from the Division's Federal Income Tax System, generally summarizes petitioner's 2001 Federal income tax return. A review of this report indicates that for tax year 2001, petitioner filed a Form 1040 and schedules A and E, claiming two unidentified dependents and head of household filing status. Further

review of this summary report for 2001 indicates that the total interest reported on petitioner's Schedule A consisted solely of \$18,202.00 in financial mortgage interest, and that on his Schedule E, petitioner reported total rents received in the amount of \$22,200.00, mortgage interest of \$16,212.00 and a total rental real estate loss of \$25,000.00. The summary report did not identify the rental real estate property listed on the Schedule E for the year 2001.

25. Documents in the record indicate that a holdover tenant escrow in the amount of \$10,000.00 was credited to the purchaser of the Bushwick Avenue property at the time of the sale in 2002. No other documentary evidence was submitted regarding any rental income or expenses related to the Bushwick Avenue premises, or any other properties owned by petitioner in either 2002 or 2003.

26. The record does not include any written documentation concerning petitioner's alleged payments of investment interest in 2002 and 2003.

27. In support of alleged charitable contributions for the years 2002 and 2003, petitioner submitted poor photocopies of 85 duplicate checks from one or more unidentified checking accounts. It is noted that the named payees on two of the duplicate checks are Gold Key Consulting Escrow Account and the United States Treasury. Additionally, six duplicate checks are so faint or illegible it is impossible to determine the names of the alleged payees or the amount of the alleged payments. Review of these duplicate checks indicates that the vast majority of the alleged payments on them ranged from \$250.00 to \$5,000.00. Further review indicates that St. Cyprian's Church was the alleged named payee on most of the duplicate checks. The record does not include any cancelled checks or bank statements for the years 2002 and 2003. The record also does not include any receipts or written acknowledgments from any religious or charitable organizations for either 2002 or 2003.

28. The record contains no written documentation concerning petitioner's alleged miscellaneous deductions for the year 2002.

29. Although he was granted the opportunity to submit additional documentation post-hearing concerning professional expenses and any amounts for the rental value of the parsonage excludable under IRC § 107 for the years 2002 and 2003, petitioner did not submit any additional documentation prior to the close of the record on November 19, 2009.

30. As of the close of the record on November 19, 2009, there is no indication that petitioner filed federal or New York State income tax returns for the years 2002 and 2003.

SUMMARY OF PETITIONER'S POSITION

31. Petitioner claims that the purchase price of the Bushwick Avenue property was \$170,000.00, and that he closed on the property on December 11, 1998, at which time he obtained a mortgage in the amount of \$214,300.00. He further claims that he made \$52,058.00 in improvements to the property shortly after purchasing it. In support of his claims, petitioner submitted a copy, fax dated May 1, 1998, of a partially executed Residential Contract of Sale between Edna Beckles and petitioner (G. Llewellyn Armstrong), a copy of an estimate of rehabilitation repairs dated August 19, 1998 from a HUD approved consultant signed by petitioner and a contractor on October 6, 1998, and a copy of the Specification of Repairs prepared by the HUD consultant.

32. Petitioner claims that the net gain on his 2002 sale of the Bushwick Avenue property was \$57,497.53, rounded to \$57,498.00, (\$398,936.00 [sales price] less \$341,438.47 [total basis]).¹ He asserts that the total basis for the Bushwick property should be computed as follows:

¹ Petitioner's computation of the sales price fails to include taxes of \$131.45 and transfer taxes of \$1,1196.80. If these amounts are included, the total received would be \$400,264.25, and the alleged gain on the sale would be \$58,825.70.

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|--|-----------------|
| Basis: | |
| Purchase price | \$170,000.00 |
| Improvements to property | 52,058.00 |
| Payment to Trevor Holder Real Estate | 20,000.00 |
| Payment to Traditional Abstract Corp. | 8,200.27 |
| Payment to Wood, Rafalsky & Wood | 550.00 |
| Settlement charges | 28,195.27 |
| Concession | 23,936.00 |
| Taxes | 101.85 |
| Deposit | 11,250.00 |
| Payment to Traditional Abstract Corp. | 10,534.00 |
| Payment to Julian Fairweather & Associates | 10,000.00 |
| Payment to Julian Fairweather & Associates | <u>6,613.08</u> |
| Total basis | \$341,438.47 |

In support of his computations regarding the sale of the Bushwick Avenue property, petitioner submitted copies of closing documents and checks drawn on the settlement agent's mortgage disbursement account.

33. Petitioner asserts that the following items are allowable federal and New York State itemized deductions for the year 2002: real estate taxes in the amount of \$4,680.00 paid on the Bushwick Avenue, Martense Court and the Willoughby Street apartments; investment interest totaling \$39,949.00, consisting of \$22,466.00 in investment interest expense paid or accrued in 2002 and \$17,483.00 in disallowed investment interest expense from the 2001 Form 4952, line 7; check gifts to charity totaling \$31,891.00; and employee business expenses in the amount of \$9,490.00 less 2% limitation of \$2,881.00, or \$6,609.00 in miscellaneous deductions. He further asserts that the federal itemized deductions for 2002 are limited to \$82,927.00, and that the New York State itemized deductions are limited to \$67,652.00.

34. In support of his claimed charitable gifts totaling \$31,891.00 in 2002, petitioner submitted a handwritten summary that listed the date, recipient and amount of each alleged charitable contribution.

35. Petitioner claims employee business expenses totaling \$9,490.00 for his business use of two vehicles, a van seating eight and a Mercedes Benz automobile, in 2002. He contends that the van was used approximately 83% of the time by him to transport members of St. Cyprian's Church's congregation to and from church related activities, including, among other things, church services, and that his business use of the van allegedly constituted 25,000 of the 30,000 miles that it was driven in 2002. Petitioner also contends that he used the automobile to visit hospitalized and homebound parishioners, and that as rector of St. Cyprian's Church, his business use of the automobile allegedly constituted 1,000 of the 6,000 miles that it was driven in 2002. Petitioner multiplied 26,000, the total alleged business mileage for both vehicles, by \$0.365, the standard mileage rate, and determined total vehicle expenses to be \$9,490.00. According to petitioner, he has no supporting records of his business use of either vehicle.

36. Petitioner claims that he received \$77,250.00 in wages from St. Cyprian's Church in 2003. According to petitioner, he obtained that figure from a record, covering a number of years, provided to him by the treasurer of St. Cyprian's Church. A copy of that document is not part of the record.

37. In determining the amount of taxable gain on his 2003 sale of apartment 2E, Willoughby Street, petitioner contends that the selling price of \$105,000.00 should be reduced by the settlement charges that he paid in the amount of \$1,495.00. He further contends that the property's cost basis for purposes of determining taxable gain was \$53,655.00, his July 27, 1990 purchase price. As such, petitioner asserts that the taxable gain on the sale of apartment 2E, Willoughby Street, was \$49,850.00.

38. Petitioner asserts that the following items are allowable federal and New York State itemized deductions for the year 2003: investment interest in amount of \$42,374.00² and check gifts to charity totaling \$21,024.00. He further asserts that the federal itemized deductions for 2003 total \$63,398.00, and that the New York State itemized deductions are limited to \$56,518.00.

39. In support of his claimed charitable gifts totaling \$21,024.00 in 2003, petitioner submitted a handwritten summary that listed the date, recipient and amount of each alleged charitable contribution.

40. Petitioner claims that the amounts of rent that he received from relatives and other parties were never in excess of the expenses that he incurred to maintain the properties, which were purchased as investments. However, petitioner was unable to recall the amounts of income received or the maintenance expenses incurred for any of the properties in the years 2002 and 2003.

41. According to petitioner, on some unidentified date in 2009, a flood at St Cyprian's rectory destroyed many of his records.

CONCLUSIONS OF LAW

A. Tax Law § 651(a)(1) provides, in pertinent part, as follows:

(a) General. On or before the fifteenth day of the fourth month following the close of the taxable year, an income tax return under this article shall be made and filed by or for:

(1) every resident individual (A) required to file a federal income tax return for the taxable year, or (B) having federal adjusted gross income for the taxable year, increased by the modifications under subsection (b) of section six hundred twelve, in excess of four thousand dollars, or in excess of his New York standard

² It appears that petitioner incorrectly totaled the mortgage interest and points reported on the 12 summary mortgage statements. The correct amount of alleged investment interest paid appears to be \$43,557.00.

deduction, if lower, or (C) subject to tax under section six hundred two, or (D) having received during the taxable year a lump sum distribution any portion of which is subject to tax under section six hundred three. . . .

Generally, New York income tax must be assessed within three years of the date of filing of the return (Tax Law § 683[a]). If no return is filed, however, then the tax may be assessed at any time (Tax Law § 683[c][1][A]).

B. Tax Law § 681(a) provides, in pertinent part, as follows:

If upon examination of a taxpayer's return under this article the tax commission determines that there is a deficiency of income tax, it may mail a notice of deficiency to the taxpayer. If a taxpayer fails to file an income tax return required under this article, the tax commission is authorized to estimate the taxpayer's New York taxable income and tax thereon, from any information in its possession, and to mail a notice of deficiency to the taxpayer.

C. In the instant matter, the Division commenced its audit of petitioner in 2005 after a review of its records failed to disclose any New York State income tax returns for the years 2001, 2002 and 2003. The Division made written requests to petitioner for documentation that would address the issue of petitioner's failure to file his personal income tax returns for the years at issue. Petitioner failed to supply any documentation. Indeed, petitioner did not file personal income tax returns for the years 2001, 2002 and 2003 prior to the issuance of the notices of deficiency. The Division was therefore authorized to estimate petitioner's personal income tax liability "from any information in its possession" (Tax Law § 681[a]; *see also Lysek v. Commr.*, 34 TCM 1267 [1975], *affd* 583 F2d 1088 [9th Cir 1978]). Here, the Division had in its possession reporting information for petitioner received from the IRS for the years 2001, 2002 and 2003. Pursuant to Tax Law § 681(a), the Division was authorized to use this information to estimate petitioner's personal income tax liability for the years at issue.

D. Where, as here, the Division properly issues a Notice of Deficiency to a taxpayer, a presumption of correctness attaches to such notice (*see Matter of Land Transport Corporation*, Tax Appeals Tribunal, June 29, 2000; *Matter of Atlantic & Hudson Ltd. Partnership*, Tax Appeals Tribunal, January 30, 1992). In proceedings for review of a properly issued notice of deficiency, the burden of proof is on the taxpayer to demonstrate that the deficiency assessment is erroneous (Tax Law § 689[e]). The starting point for determining New York personal income tax liability is a taxpayer's federal adjusted gross income (Tax Law § 612[a]; 20 NYCRR 112.1). Since the New York State personal income tax law is patterned after the federal income tax laws, the Internal Revenue Code provides guidelines with respect to the treatment of income and the deductibility of various expenses.

E. As noted above, petitioner failed to submit any documentation for the years 2001, 2002 and 2003 to the Division prior to the November 20, 2006 issuance of the notices of deficiency at issue in this matter. At the hearing held on October 14, 2009, petitioner conceded that the Division's deficiency assessment for the year 2001 was proper. However, petitioner submitted unsigned, unfiled copies of federal and New York State income tax returns for the years 2002 and 2003, and limited documentation in support of same. Although the record remained open for petitioner's submission of additional documentation concerning professional expenses and the parsonage exclusion under IRC § 107, no additional documentation was submitted and the record closed on November 19, 2009. The Division did not undertake an audit review of the documents submitted by petitioner in this proceeding. Petitioner asserts that he has submitted sufficient evidence to show that the Division's determinations of tax due for the years 2002 and 2003 are incorrect. He maintains that the submitted pro forma income tax returns reflect his income, adjustments to income, expenses and deductions for the years 2002 and 2003. Petitioner claims

that these pro forma income tax returns were based upon evidence that conforms with the Treasury Regulations, case law and his testimony at the hearing. He further claims that the available evidence was limited because many of his records were destroyed in a flood. The Division contends that petitioner's scarce documentary evidence and uncorroborated recollected narrative testimony concerning his claimed income and deductions lacks sufficient detail. It further contends that the evidence offered by petitioner to substantiate his income and deductions for the years 2002 and 2003 lacks foundation as to its accuracy and, therefore, is unreliable. The Division asserts that without any reliable documentary substantiation, petitioner's testimony alone is not sufficient to support the amounts of income and deductions that petitioner claims for the years 2002 and 2003. As such, the Division maintains that petitioner is not entitled to any further adjustments to the notices of deficiency issued for tax years 2002 and 2003.

F. As noted in Conclusion of Law D, the starting point for determining New York personal income tax liability is a taxpayer's federal adjusted gross income (Tax Law § 612[a]; 20 NYCRR 112.1). IRC § 62(a) defines federal adjusted gross income as in the case of an individual, as "gross income minus [specified] deductions." IRC § 61(a) defines gross income generally as "all income from whatever source derived. . .," including, but not limited to, compensation for services; gains derived from dealings in property; interest; rents; dividends; annuities; income from life insurance and endowment contracts; and pensions (*see* IRC § 61[a][1], [3], [4], [5], [7], [9], [10], [11]). Social Security benefits received during a year are also includible in gross income pursuant to the provisions of IRC § 86(a)(1), (2). Among the deductions permitted is a deduction for one-half of self-employment taxes (IRC § 164[f]). The taxpayer has the double burden 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]). Furthermore, petitioner was required to maintain adequate records of his items of income and deduction for the years at issue (Tax Law § 658[a]; 20 NYCRR 158.1[a]).

G. Using information in its possession in accordance with Tax Law § 681(a), the Division estimated petitioner's tax liability for the year 2002, and issued a Notice of Deficiency reflecting such determination. Specifically, the Division determined petitioner's New York adjusted gross income to be \$491,599.00, allowed a standard deduction of \$10,500.00 and dependent exemptions of \$2,000.00, and computed petitioner's New York State tax liability to be \$32,815.54 and his New York City resident tax liability to be \$17,334.27 for the year 2002.

Based upon documentation and his testimony presented at the hearing, petitioner asserts that his 2002 New York adjusted gross income would total \$136,842.00, and would consist of the following income items and adjustments to income: wage income totaling \$83,423.00 received from St. Cyprian's Church and the City of New York; interest income in the amount of \$50.00; ordinary dividends in the amount of \$14.00; capital gain in the amount of \$57,498.00 received from petitioner's sale of the Bushwick Avenue property; other income in the amount of \$678.00 received from Tyler Crusades, Inc.; a federal adjustment to income in the amount of \$4,821.00, representing one-half of petitioner's self-employment tax; and taxable amount of Social Security benefits in the amount of \$7,201.00. Petitioner further claims federal Schedule A total itemized deductions limited to \$82,927.00, consisting of real estate taxes in the amount of \$4,680.00; investment interest in the amount of \$39,949.00; check gifts to charity in the amount of \$31,891.00 and employee business expenses in the amount of \$9,490.00 for his business use of two vehicles prior to a 2% miscellaneous deduction adjustment of \$2,881.00, or \$6,609.00, and a New York itemized adjustment in the amount of \$15,275.00. Based upon a filing status of single

and the allowance of New York itemized deductions in the amount of \$67,652.00, petitioner contends that his 2002 New York taxable income would be \$69,190.00 and the New York State and New York City tax due on that amount would be \$4,636.00 and \$2,406.00, respectively.

H. As noted above, petitioner submitted limited documentation consisting of unfiled, unsigned copies of federal and New York State income tax returns for the year 2002, IRS e-services wage and income transcripts for him for 2002, mortgage interest statements, and closing documents related to his May 7, 2002 sale of the Bushwick Avenue three-family property. After careful review of the record, I find that the Division's estimation of petitioner's New York adjusted gross income for the year 2002 should be adjusted as follows. With respect to petitioner's sale of the Bushwick Avenue property in 2002, the Division included \$398,960.00, the full amount of the reported sales price, in its estimation of petitioner's federal adjusted gross income. Documentation in the record establishes that petitioner incurred costs totaling \$52,233.12, consisting of settlement charges of \$28,195.27; a seller's concession of \$23,936.00 and taxes of \$101.85, in his sale of the Bushwick Avenue property. I find that these selling costs are properly includible in petitioner's adjusted basis for determining his gain on the sale of the Bushwick Avenue property (Tax Law § 1001; § 1011[a]; § 1016[a][1]). Therefore, I find that petitioner's federal adjusted gross income should be reduced by \$52,233.12 for the selling costs. Petitioner also claims that his cost basis of the Bushwick Avenue property should include: the purchase price of \$170,000.00; improvements to property in the amount \$52,058.00 and \$67,147.35 in additional amounts³ related to his sale of the Bushwick Avenue property. I find petitioner's evidence, consisting of his vague testimony regarding the claimed December 11,

³ The additional amounts include a \$20,000.00 payment to Trevor Holder Real Estate; two payments totaling \$18,734.27 to Traditional Abstract Corp., a \$550.00 payment to Wood, Rafalsky & Wood; the deposit in the amount of \$11,250.00 and two payments totaling \$16,613.08 to J.N. Fairweather & Associates.

1998 purchase of the Bushwick Avenue property; a partially executed purchase contract fax dated May 1, 1998 for the Bushwick Avenue property and an estimate of rehabilitation repairs dated August 19, 1998 for the same property, to be insufficient to prove either his purchase price of that property or that any improvements were made to the Bushwick Avenue property.

Additionally, the record clearly indicates that petitioner rented the Bushwick Avenue property to tenants from whom security deposits were required. However, he could not recall any details regarding the rental income received from tenants or the maintenance of the property. Petitioner also did not submit any records concerning rental income that he received or maintenance expenses the he incurred for the Bushwick Avenue property, and, therefore, it is impossible to determine what his basis actually was for depreciation purposes. As for the additional amounts that petitioner claims were costs that he incurred in selling the Bushwick Avenue property, my review of the record indicates that some of these amounts were included in the settlement charges that I have already allowed and other amounts were the purchaser's obligations. Given petitioner's vague, limited testimony and the extremely limited documentation submitted regarding his purchase, ownership and sale of the Bushwick Avenue property, no additional amounts can be included in the adjusted basis for determining his gain on the sale of the property. Documentation submitted indicates that petitioner received Social Security benefits in the amount of \$8,472.00 for the year, which amount was included in the Division's estimation of petitioner's federal and New York adjusted gross income. Although petitioner's federal adjusted gross income should include 85% of the Social Security benefits received in a tax year under IRC § 86(a)(2), this taxable amount is a subtraction modification allowed pursuant to Tax Law § 612(c)(3-c). Therefore, a reduction in the amount of \$8,472.00 (the amount included by the Division in its estimate) is proper. Since there is no evidence that petitioner filed a federal

income tax return for the year 2002, he has failed to prove that he is entitled to a federal adjustment to income for one-half of the self-employment taxes in the amount of \$4,821.00 as he claims (Tax Law § 689[e]).

In sum, after careful review of the evidence submitted, I find that the Division's determination of petitioner's Federal adjusted gross income for the year 2002 should be reduced by \$60,705.12, the sum of the amounts (selling costs for the Bushwick Avenue property in the amount of \$52,233.12 plus Social Security benefits in the amount of \$8,472.00) that I have determined to be proper reductions in petitioner's income for the year.

I. For 2002, petitioner claims federal Schedule A total itemized deductions limited to \$82,927.00, and after a New York itemized deduction adjustment of \$15,275.00, he claims New York itemized deductions of \$67,652.00 consisting of real estate taxes in the amount of \$4,680.00, investment interest in the amount of \$39,949.00, gifts by check to charity in the amount of \$31,891.00 and employee business expenses in the amount of \$6,609.00.

The real estate taxes claimed were amounts paid on the Bushwick Avenue property, the Martense Court property and the Willoughby Street apartments (2D and 2E). Petitioner testified that he purchased all four properties as investments and that he rented all of them to relatives and unrelated parties for undisclosed amounts of rent. He further testified that the amounts of rental income received from the properties never exceeded the expenses related to their maintenance. Other than the mortgage interest statements issued by various financial institutions for all four properties for the year 2002, petitioner did not submit any other income or expense records related to these properties. Since these real estate taxes should be offset against the undisclosed amounts of rental income, petitioner is not entitled to the claimed deduction for real estate taxes.

The investment interest claimed consists of \$22,466.00 in mortgage interest paid on the Bushwick Avenue three-family property, the Martense Court property and the Willoughby Street apartments (2D and 2E) in the year 2002 and \$17,483.00 in disallowed investment interest from 2001. The only evidence submitted to support this claimed deduction were the mortgage interest statements issued by various financial institutions for all four properties for the year 2002. As noted above, petitioner testified that he rented all of the properties to relatives and other parties and received undisclosed amounts of rental income for such rentals. Petitioner claims that his receipt of nominal rent for these properties should not preclude treating the mortgage interest paid on these properties as investment interest as claimed. Petitioner's argument is without merit. First, since petitioner did not submit a copy of the federal income tax return that he filed for the year 2001, he has failed to prove that there was any investment interest disallowed in the year 2001. Second, investment interest does not include "any interest which is taken into account under [IRC] section 469 in computing income or loss from a passive activity of the taxpayer" (IRC § 163[d][3][B][ii]). Passive activity includes any "rental activity" (IRC § 469[c][2]), the meaning of which is "any activity where payments are principally for the use of tangible property" (IRC § 469[j][8]). It is clear that petitioner was engaged in a passive activity by his rental of the four properties to relatives and other parties during the year 2002, and, thus, is not entitled to the claimed deduction for investment interest. Furthermore, the mortgage interest should be offset against the undisclosed amounts of rental income.

In support of his claimed gifts to charity, petitioner submitted a handwritten summary that listed the date, recipient and amount of each alleged charitable contribution, and poor photocopies of some duplicate (carbon) checks from one or more unidentified checking accounts. Petitioner did not submit any cancelled checks showing donations to any charities or any bank

statements showing the payment of amounts listed on either the summary schedule or the duplicate (carbon) checks. He also did not produce any receipts or written acknowledgments from any religious or charitable organizations. Review of the duplicate checks indicates that St. Cyprian's Church was the alleged named payee on most of them, and that the vast majority of the alleged payments ranged from \$250.00 to \$5,000.00. Inasmuch as petitioner was the rector of St. Cyprian's Church in 2002, I find it incredible that he did not receive any written acknowledgment of his alleged donations for the year. Furthermore, the absence of any information regarding the banking institution, the owner of the checking account and the checking account number, makes it impossible for me to determine whether the payments reflected on these duplicate checks were payments made personally by petitioner or were payments made by petitioner as rector of St. Cyprian's Church. Petitioner's unreliable documentation fails to substantiate the amounts of the claimed check gifts to charity (*see* IRC §170[a][1]; 26 CFR 1.170A-13[a][1][iii], [2]; Tax Law § 689[e]), and, therefore, he is not entitled to the claimed charitable deduction.

Petitioner claims an employee business expense for his use of two vehicles, a van and an automobile, in his ministry. He contends that the van was used by him mostly to drive members of St. Cyprian's Church's congregation to and from church related activities, and that the business use of the van was 25,000 miles. He also contends that he used the automobile to visit hospitalized and homebound parishioners, and that the business use of the automobile was 1,000 miles. Petitioner did not submit any written documentation substantiating his business use of either vehicle. Instead, he relied solely on his testimony. I find it incredible that petitioner would have driven the van, which seats eight, almost 500 miles a week transporting members of his congregation. Given petitioner's duties as rector of St. Cyprian's Church, I believe it is

appropriate to allow 1,000 miles for his business use of the automobile, and \$365.00 (1,000 miles times \$0.365, the standard mileage rate) in total vehicle expenses. Since the allowed employee business expenses of \$365.00 are subject to a 2% miscellaneous deduction adjustment, and that adjustment is much greater than the employee business expenses I have allowed, petitioner is not entitled to an employee business expense deduction.

J. Inasmuch as petitioner has failed to prove any of his claimed itemized deductions, a New York standard deduction must be used in the calculation of his tax liability for the year 2002 (Tax Law § 689[e]).

K. Using information in its possession in accordance with Tax Law § 681(a), the Division estimated petitioner's tax liability for the year 2003, and issued a Notice of Deficiency reflecting such determination. Specifically, the Division determined petitioner's New York adjusted gross income to be \$203,018.00, allowed a standard deduction of \$10,500.00 and dependent exemptions of \$2,000.00, and computed petitioner's New York State tax liability to be \$14,288.85 and his New York City resident tax liability to be \$8,097.02 for the year 2003. Based upon documentation and his testimony presented at the hearing, petitioner asserts that his 2003 New York adjusted gross income would total \$121,707.00, and would consist of the following income items and adjustments to income: wage income in the amount of \$77,250.00 received from St. Cyprian's Church; capital gain in the amount of \$49,850.00 received from petitioner's sale of apartment 2E, Willoughby Street; taxable amount of pensions and annuities in the amount of \$4,365.00, representing amounts received from Fidelity Investments, Inc. (\$4,300.00), and The Church Life Insurance Company (\$65.00); a federal adjustment to income in the amount of \$5,458.00, representing one-half of petitioner's self-employment tax; taxable amount of Social Security benefits in the amount of \$8,623.00 and a pension and annuity income exclusion in the

amount of \$4,300.00. Petitioner further claims federal Schedule A total itemized deductions in the amount of \$63,398.00, consisting of investment interest in the amount of \$42,374.00; gifts paid by check to charity in the amount of \$21,024.00; and a New York itemized deduction adjustment in the amount \$6,880.00. Based upon a filing status of single and the allowance of a New York itemized deductions in the amount of \$56,518.00, petitioner contends that his 2003 New York taxable income would be \$65,189.00 and the New York State and New York City tax due on that amount would be \$4,240.00 and \$2,260.00, respectively.

L. As noted above, petitioner submitted limited documentation consisting of unfiled, unsigned copies of Federal and New York State income tax returns for the year 2003, IRS e-services wage and income transcripts for him for 2003, a letter, dated May 29, 1998, from University Towers Apartment Corporation regarding apartments 2D and 2E, Willoughby Street, and closing documents related to his September 19, 2003 sale of apartment 2E, Willoughby Avenue. After careful review of the record, I find that the Division's estimation of petitioner's New York adjusted gross income for the year 2003 should be adjusted as follows. Although petitioner testified that he received \$77,250.00 in wages from St. Cyprian's Church for the year, he failed to submit the form on which he claims the treasurer of St. Cyprian's Church reported his receipt of that amount for the year 2003. Given the absence of any supporting documentation, I find petitioner's vague testimony regarding this income source to be insufficient to warrant any adjustment in the Division's estimation of petitioner's federal adjusted gross income. With respect to petitioner's sale of the apartment 2E, Willoughby Street property in 2003, the Division included \$105,000.00, the full amount of the reported sales price, in its estimation of petitioner's federal adjusted gross income. Documentation in the record establishes that petitioner incurred settlement charges in the amount of \$1,495.00 when he sold apartment

2E. I find that these selling costs are properly includible in petitioner's adjusted basis for determining his gain on the sale of apartment 2E, Willoughby Street, (Tax Law § 1001; § 1011[a]; § 1016[a][1]). Therefore, I find that petitioner's federal adjusted gross income should be reduced by \$1,495.00 for the settlement charges. Petitioner also claims that his cost basis of the apartment 2E, Willoughby Street property should include the July 27, 1990 purchase price of \$53,655.00. Petitioner's testimony regarding his purchase of this apartment was extremely vague and lacked detail. In addition, although petitioner testified that he purchased apartment 2E, Willoughby Street as an investment, he offered no testimony regarding any details related to the apartment, such as, its size; the number of bedrooms and baths it had; the amount of rent received from tenants and the expense amounts incurred in the maintenance of this property. In support of his claim regarding the basis and the sales price of apartment 2E, Willoughby Street, petitioner submitted a letter, dated May 29, 1998, which stated that the purchase price was \$53,655.00, and the closing statement related to his September 19, 2003 sale of this apartment. Petitioner did not submit any records concerning rental income that he received or maintenance expenses that he incurred for apartment 2E, Willoughby Street, and therefore, it is impossible to determine what his basis actually was for depreciation purposes. Given petitioner's vague, limited testimony and the extremely limited documentation submitted regarding his purchase, ownership and sale of apartment 2E, Willoughby Street, no additional amounts can be included in the adjusted basis for determining his gain on the sale of the property. Documentation submitted indicates that petitioner received Social Security benefits in the amount of \$10,145.00 for the year, which amount was included in the Division's estimation of petitioner's federal and New York adjusted gross income. Although petitioner's federal adjusted gross income should include 85% of the Social Security benefits received in a tax year under IRC § 86(a)(2), this

taxable amount is a subtraction modification allowed pursuant to Tax Law § 612(c)(3-c). Therefore, a reduction in the amount of \$10,145.00 (the amount included by the Division in its estimate) is proper. Documentation in the record indicates that petitioner received a pension or an annuity distribution in the amount of \$4,300.00 from Fidelity Investments for the year, which amount was included in the Division's estimation of petitioner's federal and New York adjusted gross income. Although petitioner's federal adjusted gross income properly includes taxable amounts of pension distributions received in a year, petitioner is entitled to the subtraction modification allowed pursuant to Tax Law § 612(c)(3-a) because he established that he was 67 years of age in 2003, and the distributions were from a pension or annuity and not in excess of \$20,000.00. Therefore, a reduction in the amount of \$4,300.00 is proper. Since there is no evidence that petitioner filed a federal income tax return for the year 2003, he has failed to prove that he is entitled to a federal adjustment to income for one-half of the self-employment taxes in the amount of \$5,458.00 as he claims (Tax Law § 689[e]).

In sum, after careful review of the evidence submitted, I find that the Division's determination of petitioner's federal adjusted gross income for the year 2003 should be reduced by \$15,940.00, the sum of the amounts (selling costs for the Bushwick Avenue property in the amount of \$1,495.00 plus Social security benefits in the amount of \$10,145.00, plus taxable pension or annuity distributions in the amount of \$4,300.00) that I have determined to be proper reductions in petitioner's income for the year.

M. For the year 2003, petitioner claims federal Schedule A total itemized deductions in the amount of \$63,398.00, and after a New York itemized deduction adjustment of \$6,880.00, he claims New York itemized deductions of \$56,518.00 consisting of investment interest in the amount of \$42,374.00 and check gifts to charity in the amount of \$21,024.00.

The investment interest claimed consists of mortgage interest paid on the Martense Court property, the Willoughby Street apartments (2D and 2E), the Ashland Place property, the Hancock Street property and \$18,637.00 in mortgage interest paid on some unidentified properties. The only evidence submitted to support this claimed deduction were IRS e-services transcript summaries of the mortgage interest statements issued by various financial institutions for identified and unidentified properties for the year 2003. Petitioner testified that he rented all of the properties to relatives and other parties and received undisclosed amounts of rental income for such rentals. Petitioner claims that his receipt of nominal rent for these properties should not preclude treating the mortgage interest paid on these properties as investment interest as claimed. Petitioner's argument is without merit. First, the IRS e-services summaries of five mortgage interest statements fail to identify the properties on which the mortgage interest totaling \$18,637.00 was paid. In fact, the only address listed on these five mortgage interest statements is the Bushwick Avenue rectory address, a property that petitioner did not own. Second, investment interest does not include any interest taken into account under IRC § 469 in computing income or loss from a passive activity of the taxpayer (IRC § 163[d][3][B][ii]). Passive activity includes any rental activity where the payments for such activity are principally for the use of tangible property (IRC § 469[c][2]; § 469[j][8]). It is clear that petitioner was engaged in a passive activity by his rental of the five properties to relatives and other parties during the year 2003, and, thus, is not entitled to the claimed deduction for investment interest. Furthermore, the mortgage interest should be offset against the undisclosed amounts of rental income.

For the same reasons indicated for the year 2002, petitioner is not entitled to the claimed charitable deduction for 2003 (*see* IRC § 170[a][1]; 26 CFR 1.170A-13[a][1][iii], [2]; Tax Law § 689[e]).

N. Since petitioner has failed to prove any of his claimed itemized deductions, a New York standard deduction must be used in the calculation of his tax liability for the year 2003 (Tax Law § 689[e]).

O. The petition of Glenville L. Armstrong is granted to the extent indicated in Conclusions of Law H, J, L and N, but in all other respects is denied. The Division of Taxation is directed to recompute the subject deficiencies for the years 2002 and 2003 in accordance therewith. Notice of Deficiency (L-027735440-5), dated November 20, 2006, and notices of deficiency (L-027735446-8 and L-027735442-3), dated November 20, 2006, as so modified, are sustained.

DATED: Troy, New York
October 21, 2010

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE