STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KEVIN RUBENSTRUNK	:	DETERMINATION DTA NO. 823118
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2007.	:	

Petitioner, Kevin Rubenstrunk, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2007.

A hearing was held before Timothy Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on February 4, 2010 at 10:30 A.M., with all briefs due by April 29, 2010, 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. (Peter B. Ostwald, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly disallowed petitioner's claimed deduction for a casualty or theft loss.

FINDINGS OF FACT

1. Petitioner, Kevin Rubenstrunk, timely filed his 2007 New York State resident income tax return. He reported $101,354.00 in New York adjusted gross income and $83,659.00 in New York itemized deductions, including $52,633.00 claimed as a casualty or theft loss. A 2007 federal Form 4684 (Casualties and Thefts) identifies this deduction as "theft of monies from

contractor" and indicated the date of such theft as February 1, 2007. This form reports the amount of the theft as $62,500.00, which, after statutory adjustments, resulted in a claimed deduction of $52,633.00.

2. By letter dated February 25, 2008, the Division of Taxation (Division) requested that petitioner provide verification of his claimed deductions. Petitioner responded to this request with certain documentation, but by Statement of Proposed Audit Changes dated July 24, 2008, the Division advised petitioner that it was disallowing $67,159.00 of his claimed itemized deductions, including his claimed deduction for casualty or theft loss. The July 24, 2008 statement recomputed petitioner's New York income tax liability accordingly and thereby calculated $433.26 tax due from petitioner for the 2007 tax year.

3. On September 18, 2008, the Division issued to petitioner a Notice of Deficiency, which asserted $433.26 in tax due, plus interest, for the 2007 tax year.

4. Following a conciliation conference conducted by correspondence, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order dated May 29, 2009 that cancelled the September 18, 2008 Notice of Deficiency and recommended a refund to petitioner of $190.00. The BCMS recomputation resulted from the allowance of $26,612.00 of petitioner's claimed itemized deductions and the disallowance of the balance, including all of petitioner's claimed casualty or theft loss deduction.

5. In or about May 2006, petitioner entered into a contract with a local contractor for an extensive renovation and expansion of his residence in Selden, New York. Prior to signing the contract, petitioner verified that the contractor was licensed and that he maintained a general liability insurance policy. With respect to the former, petitioner went to his town's licensing department for verification. With respect to the latter, the contractor produced a certificate of

liability insurance. The contract called for a 212 square foot extension to the rear of the home, a 594 square foot side extension for a 2-car garage, a new second story on the structure over the existing house and partially over the new garage, extensive renovations to the existing house, a new roof over the entire structure, new siding over the entire structure, and new windows throughout the structure. The total contract price for all labor and materials was $180,000.00. The contract required a $9,000.00 deposit to start construction. The contract had a one-year warranty on the contractor's labor to address any problems arising from the work performed thereunder.

6. The contractor began work on petitioner's house in early July 2006. He continued to work regularly on the house until about September 22, 2006, by which time, according to petitioner, the contractor had completed about 50 percent of the project. At that point the first floor of the house was sheetrocked, but not painted. The second floor was framed and the outside of the house was framed and sided. The kitchen floor had been tiled, but the work was shoddy and the tiles had to be replaced. The contractor did not return to the job site after about September 22, 2006.

7. In order to finance the construction project petitioner obtained a $91,500.00 home equity line of credit from Chase in late June 2006 and a $25,000.00 loan from his credit union in August 2006. In addition, a friend of petitioner obtained a personal loan from a credit union in September of 2006 and loaned the proceeds to petitioner. Petitioner drew from all three of these sources to finance the construction on his home. He also "maxed out" his credit cards to help pay for the project.

8. Petitioner made payments to the contractor totaling $116,700.00 for work under the contract. Most of these payments were in cash, although the record contains three of petitioner's

personal checks payable to the contractor, each in the amount of $9,000.00 and dated July 6, 11 and 14, 2006.

9. Petitioner made purchases totaling $39,409.00 for materials used on the construction project through September 22, 2006. Included in such purchases was $2,721.76 for kitchen tile.

10. After September 22, 2006, petitioner worked on his own and with the help of friends to complete the project. Petitioner had to make payments owed to two subcontractors, a plumber and an electrician. According to petitioner, the contractor advised him that the plumber and the electrician had been paid. As of the date of the hearing the project was not yet fully completed.

11. On January 31, 2008 petitioner contacted the Suffolk County police regarding the contractor. The police report states:

> Compl.[complainant, ie., petitioner] reports he paid $62,500 to [the contractor] as partial payment for work to be done on compl.'s home. Compl. states subj. [the contractor] left the country with compl.'s money. Compl. states he needs a report for tax purposes. This is it.

12. In February 2008, petitioner filed a claim against the contractor's general liability insurer. By letter dated February 11, 2008, the insurer advised petitioner that his third-party claim under the general liability policy was untimely. The letter indicates that petitioner reported May 26, 2006 as the date of his loss to the insurance company. The insurance company also provided petitioner with a copy of a letter dated February 11, 2008 from the insurer to the contractor referencing petitioner's claim against the policy. This letter states the insurer's position that the policy did not cover faulty or shoddy work and also did not cover a failure to complete work. Accordingly, the letter indicates that petitioner's claim was not covered by the general liability policy. The policy number as listed on the insurance company's letter to the

contractor was identical to the policy number listed on the certificate of liability insurance provided by the contractor to petitioner (***see*** Finding of Fact 5).

13. The Division's records indicate that the contractor timely filed New York resident income tax returns for the years 2006, 2007 and 2008 from the same Shirley, New York, address as that listed on the contract.

CONCLUSIONS OF LAW

A. Pursuant to Internal Revenue Code (IRC) § 165(a) a taxpayer may deduct losses which are "sustained during the taxable year and not compensated for by insurance or otherwise." In the case of an individual, such as petitioner, where, as here, the claimed loss is not connected with a trade or business and does not involve a transaction entered into for profit, such loss is allowable as a deduction only if it arises from "fire, storm, shipwreck or other casualty, or from theft" (IRC § 165[c][3]). The term "theft" as used in IRC § 165(c) includes larceny and embezzlement (Treas Reg § 1.165-8[d]).

B. Petitioner has the burden to show entitlement to the deductions claimed on his return and to substantiate the amount of the deductions (***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 under the Tax Law to maintain adequate records of his items of deduction for the years in issue (Tax Law § 658[a]; 20 NYCRR 158.1[a]).

C. With respect to petitioner's claim of theft loss, for income tax purposes, whether a theft loss has occurred must be determined by reference to the law of the jurisdiction where the claimed losses occurred (***see Hartley v. Commissioner***, 36 TCM 1281 [1977]).

D. Here, the appropriate reference is to the New York Penal Law. Penal Law § 155.05(1) defines larceny generally as follows:

> A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

More specifically, the theft as alleged by petitioner, if proven, would appear to constitute a "larceny by false promise"[1] defined in Penal Law § 155.05(2)(d) as follows:

> A person obtains property by false promise when, pursuant to a scheme to defraud, he obtains property of another by means of a representation, express or implied, that he or a third person will in the future engage in particular conduct, and when he does not intend to engage in such conduct or, as the case may be, does not believe that the third person intends to engage in such conduct.
>
> In any prosecution for larceny based upon a false promise, the defendant's intention or belief that the promise would not be performed may not be established by or inferred from the fact alone that such promise was not performed. Such a finding may be based only upon evidence establishing that the facts and circumstances of the case are wholly consistent with guilty intent or belief and wholly inconsistent with innocent intent or belief, and excluding to a moral certainty every hypothesis except that of the defendant's intention or belief that the promise would not be performed.

E. As the foregoing statutory provisions make clear, criminal intent is a necessary element of larceny. Where, as in the present matter, the record lacks any direct evidence of larcenous intent, such intent must be "inferred from the circumstance surrounding the [alleged perpetrator's] actions" (***People v. Russell***, 41 AD3d 1094, 838 NYS2d 710 [2007]). With respect to larceny by false pretenses, the alleged perpetrator's intention "must be ascertained by looking backward from the failure to perform and finding that at the time that the accused made

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[1] Petitioner referred to the alleged conduct of the contractor as embezzlement. The essence of that crime is "the conversion by the embezzler of property belonging to another which has been entrusted to the embezzler to hold on behalf of the owner" (***People v. Yannett***, 49 NY2d 296, 301, 425 NYS2d 300, 301 [1980]). Since, in the present case, the contractor was not entrusted to hold petitioner's property on petitioner's behalf, the alleged crime does not appear to fit the definition of embezzlement (***see*** Penal Law § 155.05[2][a]).

the promise he did not intend to carry out his end of the bargain" (***People v. Churchill,*** 47 NY2d 151, 155, 156, 417 NYS2d 221, 224 [1979]).

F. Applying these principles to the present matter I find that petitioner has failed to establish the requisite criminal intent on the part of the contractor and has thus failed to establish that his loss resulted from theft. Most significant in weighing against a finding of larceny is the fact that, pursuant to his promise, i.e., the contract, the contractor worked regularly from early July 2006 through about September 20, 2006, a period of about ten weeks, to fulfill his obligation and, by petitioner's own accounting, completed about half of the project. Such conduct is inconsistent with the intent, as of the date of the contract, to renege on his obligation. The contractor's failure to return to the job after September 20 is unexplained in the record. Under the statute, however, as noted above, such failure to make good on his promise is insufficient to constitute larceny by false promise (Penal Law § 155.05[2][d]). As to other circumstances surrounding the contractor's failure to perform, considering that the contractor filed resident income tax returns for the years 2006, 2007 and 2008 from the same Shirley, New York, address as that listed on the contract (***see*** Finding of Fact 13), petitioner has failed to establish his claim that the contractor left the country. Petitioner has also failed to establish his contention that the contractor was not insured, considering that the February 11, 2008 letter from the insurance company to the contractor appears to acknowledge the existence of a liability policy (***see*** Finding of Fact 12). Additionally, the police report provides little support to petitioner's position. Petitioner made the report well over a year after the contractor quit the job and did so expressly for tax purposes (***see*** Finding of Fact 11). This conduct is more consistent with an individual trying to recoup a loss than that of a victim of a crime. Based on this record I cannot conclude that the contractor's conduct was wholly consistent with guilty intent and wholly

inconsistent with innocent intent as required under Penal Law § 155.05(2)(d). Ultimately, the record supports a finding that the contractor breached the contract. That such a breach has caused a significant financial hardship for petitioner is undisputed. Unfortunately for petitioner, a mere breach of contract does not constitute larceny (***People v. Churchill***) and any losses resulting from that breach are not deductible under the instant circumstances.

G. Petitioner has also failed to establish that the contractor's failure to complete the project was a casualty for purposes of IRC § 165(c). The term "other casualty" as used in that provision has long been interpreted to mean "an accident, a mishap, some sudden invasion by a hostile agency; it excludes the progressive deterioration of property through a steadily operating cause" (***Fay v. Helvering***, 120 F2d 253 [2d Cir 1941]). "It connotes a loss proximately caused by a sudden, unexpected, or unusual event" (***Maher v. Commissioner***, 76 TC 593, 596 [1981]). An event will be considered an "other casualty" under IRC § 165(c) where:

> an unexpected, accidental force is exerted on property and the taxpayer is powerless to prevent application of the force because of the suddenness thereof or some disability, the resulting direct and proximate damage causes a loss which is like or similar to losses arising from the causes specifically enumerated in section 165(c)(3) (***White v. Commissioner***, 48 TC 430, 435 [1967]).

H. As may be inferred from the foregoing cases, physical damage to or destruction of property is a necessary element of a casualty loss under IRC § 165(c) (***see Dubin v. Commissioner***, 35 TCM 1120 [1976]). In the present matter, petitioner's loss is monetary, caused by the contractor's failure to complete the job. That is, petitioner paid for services he did not receive. As this loss does not involve property damage, it may not be deducted as a casualty loss.[2] While petitioner's situation in the present matter is sympathetic, it must be noted that the

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[2] It is noted that the contractor's tile work was shoddy and needed replacement (***see*** Finding of Fact 6). While this relatively small part (***see*** Finding of Fact 9) of petitioner's loss may involve damage to property, it lacks the suddenness and violence characteristic of casualty losses as noted above. Further, the failure of a contractor to

Internal Revenue Code is not "designed to take care of all losses that the economic world may bestow on its inhabitants" (***Billman v. Commissioner***, 73 TC 139, 141 [1979]).

I. Alternatively, and just as significantly, petitioner's claim must fail because petitioner has not established the amount of his asserted loss. As noted previously, the basis of petitioner's claim of loss is that the contractor was paid more than the value of the work he completed. Petitioner contended that the job was "just under 50 percent" completed at the time the contractor quit and that the contractor was paid more than 50 percent.[3] Petitioner did not provide any specific testimony and did not point to any specific documentation to prove the validity of this "just under 50 percent" figure. Furthermore upon review of all of the documentation in the record, I am unable to determine the accuracy of this "just under 50 percent" amount. Having failed to prove the value of the work performed by the contractor, it follows that petitioner has failed to establish the amount of his claimed loss. The deduction in question is also properly denied on this basis.

J. In light of the foregoing conclusions, it is not necessary to address the issue of the timing of the subject deduction (***see*** Treas Reg § 1.165-1[d]).

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properly complete a home improvement project does not seem sufficiently unexpected or unusual to qualify for a casualty loss.

[3] It is noted that petitioner paid $116,900.00 to the contractor and claims a loss of $62,500.00. Petitioner thus contends that the value of the work performed was $54,400.00.

K. The petition of Kevin Rubenstrunk is denied and, pursuant to the Conciliation Order dated May 29, 2009, the Division is directed to refund to petitioner $190.00, plus such interest as may be applicable.

DATED: Troy, New York
October 28, 2010

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE