STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RICHARD A. AND CHRISTINE L. SPERL	:	DETERMINATION DTA NO. 824369
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2005.	:	

Petitioners, Richard A. and Christine L. Sperl, 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 2005.

On September 20, 2012 and September 21, 2012, respectively, petitioners, appearing pro se, and the Division of Taxation, appearing by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs to be submitted by January 28, 2013, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners have substantiated their claimed deductions for 2005.

FINDINGS OF FACT

1. During the year in issue, 2005, petitioners were New York State residents and filed a joint New York State income tax return that set forth adjusted gross income of $54,164.00 and itemized deductions of $42,321.00. Taxable income was stated as $10,843.00, on which tax of

$433.00 was due. After a credit of $759.00 was applied for tax withheld, petitioners reported an overpayment and refund due of $326.00.

2. Petitioners' itemized deductions consisted of the following:

a. Taxes paid:	$ 8,204.00
b. Interest paid:	5,631.00
c. Gifts to charity:	800.00
d. Casualty and theft losses:	17,844.00
e. Job and Miscellaneous expenses:	9,842.00
Total	$42,321.00

3. By letter dated April 28, 2008, the Division of Taxation (Division) informed petitioners that their income tax return for 2007 had been selected for review, and requested very specific additional documentation of their itemized deductions for that year.

4. By letter, dated September 3, 2009, the Division informed petitioners that since they had not properly documented the itemized deductions claimed on their 2007 return, the itemized deductions claimed on the 2005 return were also disallowed. The letter continued:

> If you disagree please submit documentation to support the itemized deductions claimed on your 2005 return. Our letter dated 04/28/08 lists the information necessary to verify the most commonly claimed itemized deductions.

5. The April 28, 2008 letter stated that, if petitioners were claiming a deduction for a casualty loss, they needed to submit a copy of the federal form 4684, Casualties and Thefts; a copy of the fire, accident, insurance, or police report; a copy of a letter from petitioners' insurance company showing that petitioners were not reimbursed for losses due to the casualty; and a copy of the insurance policy documenting the value of the property damages claimed.

In the case of job or miscellaneous expenses the April 28, 2008 letter asked for petitioners to provide an employer's letter verifying that the claimed expenses were related to petitioners' employment and not reimbursed, a copy of federal form 2106, Employee Business Expenses, if required, and documentation to support the expenses and mileage claimed on that form (for example, travel log or diary).

6. A transcript of petitioners' filing with the Internal Revenue Service for 2005 indicated that they filed a form 1040, individual income tax return, schedule A, and form 2441, child and dependent care expenses. However, there is no record of petitioners filing a form 2106 for employee business expenses or a form 4684, casualties and thefts, both of which are required by the instructions. Neither form was submitted into evidence herein.

7. With respect to the casualty loss claimed by petitioners for the year 2005, they submitted only a 16-page handwritten list of items they claimed they lost. All other documentation concerned other casualties and time periods. For instance, they submitted a sworn statement in proof of loss for a casualty loss suffered in 1997, which recited the details for a fire loss incurred in 1997 totaling $35,773.94, as compiled by Adjusters International of Utica, New York.

8. The 16-page handwritten list of items lost in the 2005 casualty contained a listing of the item, a value and the length of time owned. No further substantiation was provided, including an appraisal or the required federal form 4684, which specifies the items lost, their cost, insurance reimbursement, if any, and fair market values before and after the loss.

9. With regard to the other disallowed itemized deduction, unreimbursed employee expense for mileage, petitioner Richard Sperl submitted an electronic mailing from his employer, Kodak Merchandise Support, dated July 2, 2001, which stated that it did not pay for drive time or mileage expenses.

Petitioners also submitted eight pages of a spreadsheet that purported to list days during 2005 when mileage expense was incurred, including the unpaid drive time and the number of miles driven. Although required, no federal form 2106 was submitted with their federal return. That form sets forth vehicle information, total miles driven during the year in said vehicle and business miles driven. The form also inquires if written support for the deduction was maintained.

10. The Division issued to petitioners a Statement of Proposed Audit Changes, dated February 5, 2009, which asserted additional income tax due for the year 2005 in the sum of $1,429.00 plus interest. The reason given by the Division was as follows:

> The itemized deductions claimed on your 2005 New York State RESIDENT income tax return have been disallowed since you did not provide documentation to substantiate the amounts claimed.
>
> You have been allowed the appropriate New York standard deduction.
>
> The 2005 Standard Deduction for married Filing Joint is $14,600.00.
>
> Interest is due for the late payment or underpayment at the applicable rate. Interest is required under the New York State Tax Law.

After allowing the standard deduction in place of the itemized deductions, the Division calculated a revised total tax due of $1,862.00 and allowed a credit for tax paid of $433.00.

11. The Division issued a Notice of Deficiency to petitioners, dated April 6, 2009, setting forth additional tax due of $1,429.00 plus interest.

CONCLUSIONS OF LAW

A. A properly issued notice of deficiency is presumed to be correct and the taxpayer has the burden of demonstrating the incorrectness of such an assessment (***Matter of Leogrande v. Tax Appeals Tribunal***, 187 AD2d 768, 589 NYS2d 383, ***lv denied*** 81 NY2d 704, 595 NYS2d 398;

Matter of Kourakos v. Tully, 92 AD2d 1051, 461 NYS2d 540, ***appeal dismissed*** 59 NY2d 967, 466 NYS2d 1030, ***lv denied*** 60 NY2d 556, 468 NYS2d 1026, ***cert denied*** 464 US 1070, 79 L Ed 2d 215; ***Matter of Tavolacci v. State Tax Commn.***, 77 AD2d 759, 431 NYS2d 174). Tax Law § 689(e) provides that in any matter brought before the Division of Tax Appeals under Article 22 of the Tax Law, the burden of proof is upon the petitioner. Accordingly, it is necessary to ascertain whether petitioners have sustained their burden of proof in showing that they are entitled to the itemized deductions claimed on their 2005 personal income tax return.

B. Internal Revenue Code § 165(a) provides a deduction for any loss sustained during the taxable year and not compensated by insurance or otherwise. Individuals are permitted a deduction for losses arising from fire, storm, shipwreck, theft or other casualty. (IRC § 165[c][3].)

The amount of loss from a casualty is the lesser of the difference in fair market value immediately before and immediately after the casualty or the adjusted basis for determining the loss from the sale or other disposition of the property (Treas Reg § 1.165-7[b][1][i],[ii]). Generally, the fair market value of property before and after the casualty is determined by a competent appraisal (Treas Reg § 1.165-7[a][2]).

Petitioners have the burden of refuting the Division's disallowance of their deductions and of establishing their entitlement to the claimed expenses. (Tax Law § 689[e]; ***Matter of Temple***, Tax Appeals Tribunal, July 8, 2004.) The Division was quite clear in asking for specific information to substantiate the casualty loss, referring petitioners to its April 28, 2008 letter in which petitioners were asked to submit a copy of the federal form 4684; a copy of the fire, accident, insurance, or police report; a copy of a letter from petitioners' insurance company showing that petitioners were not reimbursed for losses due to the casualty; and a copy of the

insurance policy documenting the value of the property damages claimed. Petitioners did not comply with this request.

Petitioners have not met their burden of proof regarding their claim of a casualty loss for 2005. They submitted a handwritten list, presumably authored by them but not specified, with descriptions of items, their age and value. There was nothing to substantiate any of the information submitted, and the sheets on which the items were listed did not specify a date the casualty occurred or if any insurance proceeds were received. Although petitioners submitted a proof of loss on a prior casualty loss suffered in 1997, which listed their insurance carrier as the Kemper Insurance Companies of DeWitt, New York, they submitted no proof that this was their insurance carrier in 2005; if this company had any involvement with the 2005 claimed loss; or if the company prepared any documents with respect to the 2005 loss.

Petitioners have not established the fact that a casualty loss occurred much less a proper value of that loss. They submitted no appraisals or other proof of fair market value, insurance reports or reports of investigating governmental agencies, i.e., police or fire departments.

Without proof of a loss or a competent appraisal of fair market value prepared close to the date of loss, the unsupported values listed do not establish values which can constitute the basis for the claimed losses. (Treas Reg § 1.165-7[a][2].)

C. Petitioners' claim of an itemized deduction for mileage as an employee business expense must fail for lack of proof as well. Petitioners, who have the burden of proof (***Welch v. Helvering***, 290 US 111 [1933]), have presented scant evidence of the mileage expense claimed. Petitioners neglected to submit the documentation requested by the Division in its April 28, 2008 letter: a copy of federal form 2106, Employee Business Expenses, and documentation to support the expenses and mileage claimed on that form (e.g., travel log or diary).

Internal Revenue Code (IRC) § 274(d) requires that taxpayers substantiate travel expenses as a prerequisite for claiming such expenses as deductions. IRC § 274 provides in pertinent part as follows:

> Sec. 274. Disallowance of Certain Entertainment, etc., Expenses.
>
> (d) Substantiation Required – No deduction or credit shall be allowed –
>
> (1) under section 162 or 212 for any traveling expense (including meals and lodging while away from home),
>
> * * *
>
> unless the taxpayer substantiates by adequate records or by sufficient evidence corroborating the taxpayer's own statement (A) the amount of such expense . . . (B) the time and place of the travel, entertainment . . . (C) the business purpose of the expense . . . .

The statute is clear that a taxpayer must prove by his own records or by his corroborated testimony the amount spent, when he spent it, where he spent it and how the expenditures related to his business or employment. (***Smith v. Commissioner of Internal Revenue***, 80 TC 1165 [1983].) Regulations have been promulgated also to further explain the elements and standards of proof. (***See*** Treas Reg § 1.274-5[b][2]; [c].)

"General vague proof, whether offered by testimony or documentary evidence, will not suffice." (***Dowell v. United States***, 522 F2d 708 [5th Cir 1975] ***revg*** 370 F Supp 69 [ND Tex 1974].)

Petitioners have not offered any evidence herein that comes close to the substantiation requirements of IRC § 274(d). The summary sheet, which lists days, time spent in car and number of miles driven, lacks the specificity required to substantiate the mileage expenses claimed. Therefore, petitioners have failed to meet their burden of proof.

D. It is noted that petitioners submitted a significant amount of documentation. However, upon inspection it was observed that most of the documents pertained to incidents of loss and

periods of time other than for the period in issue, 2005. As such, these submissions were irrelevant to this proceeding and added nothing to petitioners' position on the issues for the year 2005.

In addition, petitioners' numerous contentions with regard to their less than ideal experience in the Bureau of Conciliation and Mediation Services, even if accurately characterized, have no bearing on the proceedings in the Division of Tax Appeals, where petitioners had the opportunity to contest all aspects of the notice of deficiency de novo. As admonished in a letter from the administrative law judge, dated September 24, 2012, prior to submitting documents and briefs, petitioners were told:

> You are reminded that petitioner has the burden of proof and must prove all relevant and material facts by submission of documents, including affidavits where appropriate. You should also be aware that I have no knowledge of the case beyond the documents in my file. Anything previously submitted to the Audit Division or the Bureau of Conciliation and Mediation Services must be resubmitted if you wish me to consider it in my determination.

Given the numerous opportunities afforded petitioners to produce evidence in support of their deductions for casualty losses and job and miscellaneous expenses, and their failure to do so, the Division's disallowance of said deductions must be upheld.

E. The petition of Richard A. and Christine Sperl is denied and the Notice of Deficiency, dated April 6, 2009 is sustained.

DATED: Albany, New York
July 25, 2013

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE