

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

DONALD NUSSBAUMER AND THEDA NUSSBAUMER

DETERMINATION

for Redetermination of Deficiencies or for
Refunds of New York State Personal Income Tax :
under Article 22 of the Tax Law for the Years
1981, 1982 and 1983.

Petitioners, Donald Nussbaumer and Theda Nussbaumer, c/o Robert J. Metzger, 74 South Main Street, Canandaigua, New York 14424, filed a petition for redetermination of deficiencies or for refunds of New York State personal income tax under Article 22 of the Tax Law for the years 1981, 1982 and 1983 (File No. 62540).

A hearing was held at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York 14604, on March 11, 1987 at 1:15 P.M., with all briefs to be submitted by May 11, 1987. Petitioners appeared by Robert J. Metzger, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly disallowed as unsubstantiated a portion of the expenses claimed by petitioner Donald Nussbaumer for meals and tips.

II. Whether the Audit Division properly disallowed petitioners' claimed deduction for the maintenance of an office in their home.

III. Whether the Audit Division properly disallowed as unsubstantiated petitioner Donald Nussbaumer's claimed casualty loss deduction.

FINDINGS OF FACT

1. Petitioners herein, Donald Nussbaumer and Theda Nussbaumer, timely filed New York State resident income tax returns for the years 1981, 1982 and 1983. On each of said returns, petitioners elected a filing status of "Married filing separately on one return". As relevant to this proceeding, petitioners claimed as deductions from income the following items and amounts:

	<u>1981</u>	<u>1982</u>	<u>1983</u>
Business expenses	\$7,621.95	\$7,575.50	\$7,640.77
Rent expenses	800.00	800.00	800.00
Casualty loss	N/A	2,800.00	N/A

2. On February 4, 1985, the Audit Division issued to petitioners three statements of personal income tax audit changes, one for each of the years at issue herein. Said statements (i) disallowed as unsubstantiated the business expenses claimed by Mr. Nussbaumer; (ii) disallowed as nondeductible the \$800.00 per year rental expense which was claimed one-half by Mr. Nussbaumer and one-half by Mrs. Nussbaumer; and (iii) disallowed as unsubstantiated the \$2,800.00 casualty loss deduction claimed by Mr. Nussbaumer in 1982. Based on the aforementioned statements, the Audit Division, on April 5, 1985, issued four notices of deficiency jointly¹ to petitioners for the following years and in the following amounts:

<u>Years</u>	<u>Taxpayer</u>	<u>Tax</u>	<u>Interest</u>	<u>Total</u>
1983	Mr. Nussbaumer	\$ 885.46	\$ 90.39	\$ 975.85
1982/1981	Mr. Nussbaumer	1,734.44	485.16	2,219.60
1983	Mrs. Nussbaumer	31.94	3.25	35.19
1982/1981	Mrs. Nussbaumer	52.57	14.77	67.34

1 The Audit Division incorrectly issued joint notices of deficiency inasmuch as petitioners filed separate returns. The table in Finding of Fact "2" sets forth the tax applicable to each petitioner separately.

3. Subsequent to the issuance of the four notices of deficiency, the Audit Division allowed petitioner Donald Nussbaumer all claimed business expenses with the sole exception that 30 percent of the claimed expenses for meals and tips were disallowed as unsubstantiated. The following table details the revised tax due from petitioners:

<u>Year</u>	<u>Mr. Nussbaumer</u>	<u>Mrs. Nussbaumer</u>
1981	\$ 265.28	\$28.02
1982	433.62	24.55
1983	315.30	31.94
	<u>\$1,014.20</u>	<u>\$84.51</u>

4. During the years at issue, petitioner Donald Nussbaumer was employed by Canandaigua Wine Co., Inc. as an over-the-road truck driver. Mr. Nussbaumer spent a substantial number of days and nights each week away from home in the discharge of his duties as a truck driver. While on the road, Mr. Nussbaumer incurred expenses for meals and tips for which he received no reimbursement from his employer. The following table details the deductions claimed by Mr. Nussbaumer for unreimbursed meals and tips:

	<u>1981</u>	<u>1982</u>	<u>1983</u>
Meals	\$6,313.85	\$6,415.35	\$6,414.03
Tips	679.90	704.80	749.25
Total	<u>\$6,993.75</u>	<u>\$7,120.15</u>	<u>\$7,163.28</u>

5. Although the Audit Division found that Mr. Nussbaumer did not maintain adequate records to substantiate his meal and tip expenses, it ultimately determined that 70 percent of said expenses represented a reasonable allowance and that the remaining 30 percent were unsubstantiated and, as such, not deductible.

6. For each trip driven by Mr. Nussbaumer he maintained a trip sheet envelope whereon he recorded his total trip expenses for tolls, repairs, meals and tips. Mr. Nussbaumer kept all his receipts for repairs and tolls since

these expenses were reimbursed by his employer; however, he did not keep receipts for meals and tips inasmuch as he received no reimbursement for said expenses. Mr. Nussbaumer started each trip with a specified amount of cash on his person and by subtracting the cash which remained at the conclusion of the trip from starting cash he was able to determine total expenses for each trip. By subtracting reimbursed expenses from total trip expenses Mr. Nussbaumer computed the amount he spent on meals and tips each trip. Since the majority of petitioner's trips extended beyond one day or one 24 hour period, the amount recorded on the trip sheet envelope for meals and tips aggregated expenses for several days. Mr. Nussbaumer asserts that he purchased no items of a personal nature while on trips and that all funds were expended solely for repairs, tolls and meals and tips.

7. Based on a review of his daily truck log books and trip sheet envelopes, Mr. Nussbaumer was able to determine the number of days per month that he was in a travel status and the number of meals he required while in travel status. The following chart represents a yearly synopsis of petitioner's analysis:

Year	<u>Full and Partial Overnight Trips</u>	<u>Breakfast</u>	<u>Lunch</u>	<u>Dinner</u>	<u>Total</u>
1981	292	181	188	235	604
1982	291	177	176	249	602
1983	289	192	167	241	600

Mr. Nussbaumer's average expense per meal was \$11.58 in 1981 (\$6,993.75 divided by 604); \$11.83 in 1982 (\$7,120.15 divided by 602); and \$11.94 in 1983 (\$7,163.28 divided by 600).

8. During the years at issue, petitioners jointly owned and managed a small five lot mobile home park. In computing the net rental income generated from said park, petitioners claimed a deduction of \$800.00 per year for the cost of maintaining an office in their home. Said office, purportedly used

solely for conducting business relative to the mobile home park, was 9 feet by 12 feet in size and contained a desk, telephone and two filing cabinets. There was no separate entrance to said home office other than through petitioners' house and the only telephone and desk in the household was located in the office.

9. On January 19, 1982, a fire completely destroyed petitioners' detached garage. Said garage, which was constructed approximately 4 years prior to its destruction, was 40 feet by 42 feet in size and had three overhead garage doors. When petitioners filed their State and Federal returns for 1982 they claimed a partial casualty loss deduction of \$2,800.00 on the destruction of their garage. Amended State and Federal returns were subsequently filed claiming an additional casualty **loss** deduction of \$11,263.38. The following table details the manner in which petitioners computed the original casualty loss of \$2,800.00 and the additional loss of \$11,263.38:

<u>Item</u>	<u>Gross</u> <u>Loss</u>	<u>Insurance</u> <u>Recovery</u>	<u>Net</u> <u>Loss</u>	<u>Loss Per</u> <u>Return</u>	<u>Additional</u> <u>Loss</u>
Building	\$ 7,900.00	\$2,800.00	\$ 5,100.00	\$ 300.00	\$ 4,800.00
Equipment	3,100.48	3,100.48	--	--	--
Snowmobiles	3,500.00	--	3,500.00	1,200.00	2,300.00
Dodge	1,000.00	--	1,000.00	1,000.00	--
Chevrolet	1,500.00	836.62	663.38	--	663.38
Motorcycle	3,500.00	--	3,500.00	--	3,500.00
Mower	300.00	--	300.00	300.00	--
Total	<u>\$20,800.48</u>	<u>\$6,737.10</u>	<u>\$14,063.38</u>	<u>\$2,800.00</u>	<u>\$11,263.38</u>

10. Petitioners have established through credible documentary and testimonial evidence that the figures shown in the "Gross Loss" column in Finding of Fact "9", supra, represent the lesser of the cost or fair market value of the items listed, with the following two exceptions:

(i) that the evidence submitted fails to establish that the Chevrolet had a cost or fair market value in excess of the insurance recovery; and

(ii) that the evidence submitted with respect to the mower was vague and contradictory and, as such, failed to establish the cost or fair market value of said mower.

CONCLUSIONS OF LAW

A. That Internal Revenue Code § 274(d)(1) provides that no deduction is allowable under I.R.C. §§ 162 or 212 for any traveling expenses, including meals while away from home, unless the taxpayer can substantiate by adequate records or by sufficient evidence supporting his statements (i) the amount of the expense, (ii) the time and place of travel, and (iii) the business purpose of the expense. Treasury Regulation § 1.274-5(c)(2) defines "adequate records" as an account book, diary, statement of expenses or similar record and documentary evidence (such as receipts or paid bills) which, when combined, establishes each element of the expense set forth in I.R.C. § 274(d). If a taxpayer lacks adequate records, he can satisfy I.R.C. § 274(d) by sufficient evidence corroborating his own statement. Although the general rule is that each expenditure must be separately recorded, Treasury Regulation § 1.274-5(b)(2)(i) provides that "the daily cost of the traveler's own breakfast, lunch, and dinner... may be aggregated". Furthermore, Treasury Regulation § 1.274-5(c)(2)(iii)(b) provides that a taxpayer need not provide documentary evidence of meal expenditures of less than \$25.00.

B. That the trip sheet envelopes maintained by petitioner whereon he recorded his total meal expense for each trip do not constitute adequate records as set forth in I.R.C. § 274(d). Said trip sheet envelopes do not provide a daily record of Mr. Nussbaumer's meal expense but instead aggregate meal expenses for several days. Furthermore, petitioner Donald Nussbaumer has failed to produce sufficient evidence corroborating his own testimony (Owen v.

Commissioner, 43 TCM 1022). Accordingly, the Audit Division, although by statute empowered to disallow the entire meal and tip expense (Schmidt v. Commissioner, 28 TCM 481, affd 70-2 USTC 9617), has properly disallowed 30 percent of Mr. Nussbaumer's claimed meal and tip expenses. Mr. Nussbaumer bears the burden of proof to show that the Audit Division's determination is incorrect (Tax Law § 689[e]). Finally, it must be noted that the allowance of 70 percent of petitioner's claimed meal and tip expenses produces an average per day meal expense in excess of \$24.00, an amount which greatly exceeds the \$14.00 per diem meal expense allowance set by the Internal Revenue Service for travel that requires a stay of less than 30 days in one general locality.

C. That I.R.C. § 280A(a) provides that no deduction is allowable for a dwelling unit which is used by the taxpayer during the year as a residence. Section 280A(c)(1), as relevant herein, provides for the following exception to the general disallowance contained in I.R.C. § 280A(a):

"Subsection (a) shall not apply to any item to the extent such item is allocable to a portion of the dwelling unit which is exclusively used on a regular basis --

(A) [as] the principal place of business for any trade or business of the taxpayer",

D. Petitioners herein have failed to establish that the office in their residence was "exclusively used on a regular basis" in the operation and management of the mobile home park.

E. That petitioners have established that they are entitled to a casualty loss deduction of \$13,000.00 (\$13,100.00 less \$100.00 limitation) in 1982. Petitioners have failed to sustain their burden of proof with respect to the loss claimed on the Chevrolet (\$663.38) and the loss claimed on the mower (\$300.00).

F. That the petition of Donald Nussbaumer and Theda Nussbaumer is granted to the extent indicated in Conclusion of Law "E", supra, that the Audit Division is directed to recompute the four notices of deficiency dated April 5, 1985 consistent with the conclusions rendered herein; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

SEP 11 1987


ADMINISTRATIVE LAW JUDGE