

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

MICHAEL STRACHAN :

DECISION
DTA NO. 826530

for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax Law and
the New York City Administrative Code for the Year 2009. :

Petitioner, Michael Strachan, filed an exception to the determination of Administrative Law Judge issued on February 9, 2017. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Tobias A. Lake, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Oral argument was heard in New York, New York, on January 11, 2018, which date began the six-month period for issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner has established that he is a real estate professional and thus entitled to claim a deduction for losses incurred from rental real estate activities for the tax year 2009.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact 2, which we have modified to better reflect the record. Finding of fact 16 has not been included,

as it dealt with the Administrative Law Judge's treatment of petitioner's proposed findings of fact. As so modified, the Administrative Law Judge's findings of fact are set forth below.

1. Petitioner, Michael Strachan, is a New York resident and filed a New York personal income tax return (form IT-201) for the year 2009. Petitioner's form IT-201 reflects a federal adjusted gross income of \$243,644.00 and a New York State adjusted gross income of \$236,727.00.

2. Attached to his form IT-201 for the year 2009 was form schedule E, wherein petitioner claimed a loss of \$73,769.00 incurred in connection with rental real estate activities. The Division of Taxation (Division) conducted an audit to determine whether petitioner qualified as a real estate professional and was therefore entitled to claim deductions in excess of income attributable to his real estate activities.

3. By letter dated October 15, 2012, the Division requested that petitioner provide documentation demonstrating that he qualified as a real estate professional. This letter requested information concerning petitioner's occupation, such as: a description of his occupation that was unrelated to his real estate rental activities, the total number of hours worked in that occupation during the tax year, the physical addresses of all rental properties listed on federal schedule E and the number of rental units in each property, the dates that all units were rented and the name of the property manager. Additionally, the Division requested a list of services performed and hours attributable to those services, such as: appointment books, calendars or narrative summaries to support hours claimed, any other records to support the hours attributable to the rental activities and a copy of form 8582, passive activity loss limitations, if such form was filed with the Internal Revenue Service (IRS).

4. Petitioner submitted the following to the Division on audit: a letter dated October 20, 2012, which stated that petitioner was the lead architect for a company called OMG BI (Omnicom Media Group or OMG).¹ The letter set forth that petitioner worked 37.5 hours per week, for a total of 1,950 hours, which included his vacation time. Petitioner stated that he performed real estate activities such as tenant interviews and service appointments during hours spent working for OMG. Through his employment at OMG, petitioner was responsible for seven employees who reported directly to him, and these seven employees also had OMG employees who reported to them, and as a result, petitioner claimed that he had a lot of free time to do other things during his full-time work schedule at OMG.

5. Petitioner provided a second letter to the Division, also dated October 20, 2012, that stated that none of petitioner's rental properties had a property manager. Petitioner argues that he was solely responsible for all management and repair work. Petitioner's response stated that the only property for which he kept a detailed work log was for the 665 Pennsylvania Avenue, Brooklyn, property because this property required most of his time due to its size. Attached to this letter were work logs in the form of Microsoft Excel spreadsheets that petitioner claims reflected the amount of time that he spent doing work to his various properties.

6. The work logs submitted by petitioner consist of five spreadsheets, each with the address of one of petitioner's five rental properties listed at the top of the page. These work logs state the number of hours worked at each location as follows:

Property location in Brooklyn	Hours worked for 2009
665 Pennsylvania Avenue	2,089

¹ Petitioner testified that he was director of global business intelligence at OMG.

970 East 32 nd Street	95
1386 East 37 th Street	86
Property location in Orlando, FL	Hours worked for 2009
8074 Old Grove Road	12
6595 Grosvenor Lane	82

7. After reviewing the documentation provided, the Division denied the claimed deductions in excess of rental income and issued a statement of proposed audit changes to petitioner, dated January 23, 2013, for tax in the amount of \$9,056.63 plus interest, which explained that rental real estate activities are generally passive activities and losses therefrom are not permitted to offset nonpassive income. This statement of proposed audit changes stated that in order for rental real estate losses to offset nonpassive income, a taxpayer must either be a real estate professional or have a modified adjusted gross income of less than \$150,000.00. As set forth in finding of fact 1, petitioner's modified adjusted gross income exceeded \$150,000.00. Thus, petitioner must establish that he was a real estate professional in order to claim the deductions.

8. The statement of proposed audit changes set forth the requirements to be considered a real estate professional, and it specifically addressed the documents reviewed and the Division's reasons for concluding that petitioner failed to establish that he was a real estate professional, in pertinent part, as follows:

“1. More than half of your personal services must be in real property businesses.

2. You must work more than 750 hours annually in real property businesses. Additionally, you must materially participate in EACH separate rental real estate activity unless a written election was filed with the ORIGINAL RETURN to treat all real estate rentals as one single activity.

You stated in your reply that you worked at OMG BI as a lead architect for 1,725 hours, if vacation time is not included. You also stated that you interviewed tenants and made service appointments while working at OMG BI. The hours you spent interviewing tenants and making service appointments while working at OMG BI cannot be claimed.

In our inquiry letter, we requested you provide the dates each rental unit in each property was rented. You stated that all units were rented 100% of the time or vacant during tenant transition. We need to know the actual dates each unit was rented.

You provided a summary of hours worked on each rental property; however, there is not enough detail in the summary to determine if the hours are allowable. Therefore, we need a more detailed time log of the activities that you performed for each rental property. An acceptable time log would include an entry for each day and it would include the date you performed the activity, a description of the activity and the amount of time spent on the activity. You are required to provide proof of the activities performed and hours attributable to those activities as indicated in federal regulation 1.469-5T(f)(4).

Please note that the following hours are not allowed to be claimed:

- travel time (analogous to personal commute)
- work which may have been performed by a contractor or other person
- renovation time if the property was not leased at that time

In order to determine if you meet the real estate professional tests for 2009, we must compare the amount of time you spent on your main job to the amount of time you spent on your rental properties. Since we are unable to determine the amount of time you spent on your rental properties, we are unable to determine if you meet the real estate professional tests. Additionally, you must also materially participate in each separate rental property.”

9. By letter dated February 3, 2013, petitioner provided additional documentation, consisting of 55 pages, in response to the statement of proposed audit changes. This response contained more detailed information regarding the properties than the initial response provided by petitioner in October of 2012 to the Division’s request for information. The last 16 pages of this exhibit reflect the year-end summary of transactions for card member “Michael F. Strachan” from “Blue from American Express/January 1, 2009 to December 31, 2009.” Petitioner refers to

this year-end summary as receipts, which is not accurate. The year-end summary merely reflects amounts charged to his credit card. Although the vendor is displayed in the summary, there is no way to determine what each charge reflects. In other words, without the ability to review receipts, it is unclear what was purchased, making it impossible to determine if it related to the claimed real estate activities. Moreover, petitioner did not testify whether this credit card was exclusively used for the rental properties.

After reviewing this packet of documents, the Division concluded that this submission contained information that was significantly different from the work logs submitted on October 20, 2012.

10. A notice of deficiency, No. L-039021137, dated April 2, 2013, was issued to petitioner for additional tax due in the amount of \$9,056.63 plus interest. No penalty was assessed.

11. The Division issued petitioner a notice of assessment resolution dated April 15, 2013. This correspondence reiterated the requirements for qualifying as a real estate professional in order to be entitled to the full amount of the claimed deductions. Moreover, the correspondence further explained the Division's position, in pertinent part, as follows:

“According to the time logs provided with your protest dated 02/03/13, the total time you spent working on the rentals was 1,483 hours. In your original reply dated 10/20/12, you stated you spent 2,364 hours working on the rentals and 1,725 hours spent working at [OMG]. Additionally, the hours you stated for each property in your protest did not match the hours claimed in your original reply.

Based on the time provided in your protest, you would not meet test one of the real estate professional qualification. Additionally, we noted numerous discrepancies between the time logs.

In the original time log provided, you stated that you renovated all units in your rental property at 665 Pennsylvania Ave, Brooklyn for six of the twelve months in 2009. However, the renovations were not listed in the time log provided with your protest. In the original time log provided, you stated that you spent 15 hours in January and 20 hours in February on an eviction for the property at 665

Pennsylvania Ave, Brooklyn; however, the listing of tenants sent with your protest showed the eviction was in October.

The original time log for 665 Pennsylvania Ave, Brooklyn did not list any time for snow removal, but the protest listed many hours for snow removal.

The time log provided with your protest stated you were in Florida on 12/30/09 & 12/31/09, however, the protest also stated that you were in Brooklyn replacing a thermostat, working with a vendor for smoke detector and boiler service. The time log provided with your original reply stated you were in Florida on 07/09/09, however, the protest stated you were in Brooklyn replacing windows and snaking sewer lines.

Based on the above information, the hours listed in both time logs are questionable.”

12. By letter dated April 17, 2013, petitioner responded to the notice of assessment resolution. Petitioner’s correspondence sought to clarify the discrepancies between the work logs submitted on October 20, 2012 and the documents submitted on February 3, 2013.

13. On August 7, 2013, a conciliation conference was held by the Bureau of Conciliation and Mediation Services (BCMS) and, by order dated August 8, 2014, the notice of deficiency was sustained in full. After receiving the conciliation order, petitioner sent further correspondence to the Division that stated, in pertinent part:

“I later found out that the NYS Audit agent went to [a] federal IRS agent in the same complex and presented [an] old incorrect log that I have always disputed (it was sent to the state audit in error from [an] old PC that crashed and was incomplete. I have provided documentations [sic] and receipts with the correct log to prove time spent) the agent would not accept or look at correct log with proof” (Exhibit P).

This was the first time that petitioner blamed a computer malfunction for the discrepancies between the two logs submitted on audit. Moreover, no receipts were provided.

14. Petitioner testified at the hearing. He addressed the issue regarding the two work logs presented and, in fact, submitted a third set of documents that he claimed were the most reliable.

When asked why the initial log was only five pages in length, petitioner testified several times that he misunderstood the request for information by the Division. Petitioner stated that he thought that the Division was requesting summaries and not detailed information. This contention is not credible. The Division asked for detailed documentation on numerous occasions. The Division explained exactly how the submitted information fell short of the proof required. At no point was there any miscommunication - the Division's requests for documents were clear and petitioner failed to comply.

15. Petitioner also claimed to keep very detailed logs, by inputting information contemporaneously into his cellphone, which he then entered into an Excel spreadsheet. He claimed that he was unable to print out the spreadsheet due to the fact that the output would be wide, i.e. wider than standard letter-sized paper. Petitioner states that he converted the information to a PDF format in order to print it. Moreover, petitioner stated that the Division required that the information be presented to it in paper form and it could not be supplied through email communication.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began her determination by stating the primary issue in this case; namely, whether petitioner is entitled to the deduction he claimed for real estate activities. The Administrative Law Judge noted that petitioner bears the burden of proof in demonstrating that he met the requirements necessary to claim such a deduction.

The Administrative Law Judge next described the provisions under Internal Revenue Code (IRC) (26 USCA) §§ 162 and 212, which allow deductions for certain business and investment expenses. She noted that passive activity losses in excess of passive activity gains generally cannot be claimed. According to the Administrative Law Judge, real estate rental activity is

deemed a passive activity unless a taxpayer is a real estate professional and materially participates in the rental activity.

Next, the Administrative Law Judge set forth the qualifications for finding a taxpayer to be a real estate professional and the minimum requirements for material participation in such an activity. According to the Administrative Law Judge, a taxpayer qualifies as a real estate professional if he or she performs personal services in real property trades or businesses that make up more than one-half of such taxpayer's total personal services performed in a taxable year, such participation constitutes greater than 750 hours in that taxable year, and those personal services were performed on a regular, continuous and substantial basis. The Administrative Law Judge noted that Treasury Regulation (26 CFR) § 1.469-5T provides that a taxpayer may demonstrate his or her participation in real estate activities by any reasonable means, including appointment books, calendars or narrative summaries.

The Administrative Law Judge began her analysis of the issue by examining whether petitioner qualifies as a real estate professional by describing petitioner's non-real estate occupation. According to the Administrative Law Judge, petitioner stated that his employment with OMG totaled roughly 1,700 hours over the taxable year, excluding vacations and weekends, and allowed him substantial time to perform real estate activities while working for OMG. The Administrative Law Judge observed, however, that any real estate services performed while working for OMG cannot be counted under federal law toward the hours required to satisfy the real estate professional personal services time requirement.

The Administrative Law Judge examined the three different work logs petitioner submitted during the course of the audit and at the hearing. Due to numerous discrepancies between the three records, the Administrative Law Judge found that the work logs were unreliable. The

Administrative Law Judge found petitioner's testimony regarding his record keeping lacked credibility where later-submitted records were found to be more detailed and conflicted with earlier record submissions. Similarly, the Administrative Law Judge found petitioner's explanation for why he did not submit the full work log as lacking credibility. The Administrative Law Judge consequently denied petitioner's protest and sustained the notice of deficiency.

Subsequent to the issuance of the Administrative Law Judge's determination on February 9, 2017, petitioner filed a motion to reopen the record on March 21, 2017, pursuant to 20 NYCRR 3000.16. By order dated June 29, 2017, the Administrative Law Judge denied petitioner's motion by reason that it was filed beyond the 30-day deadline following issuance of the determination and was thus untimely.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner first argues that his motion to reopen the record before the Administrative Law Judge should have been granted as it was timely filed and that this Tribunal should accept additional documents for consideration on exception as newly discovered evidence. Petitioner requests that we amend the Administrative Law Judge's findings of facts to reflect these additional documents. Petitioner also argues that the Administrative Law Judge's determination was erroneous in that it did not reflect the ultimate outcome of a stipulation he reached with the IRS, which he claims determined that he qualified as a real estate professional.

The Division argues that petitioner's motion to reopen was correctly denied for being untimely, and in the alternative, petitioner did not show that the documents he offered for inclusion in the record qualified as newly discovered evidence. The Division further argues that it is not bound by any determination of the IRS regarding petitioner's status as a real estate

professional. The Division concludes that there is no factual or legal basis for reversing the determination of the Administrative Law Judge and urges us to affirm the same.

OPINION

We first address petitioner's argument regarding the Administrative Law Judge's determination that his motion to reopen was untimely. Under our rules of practice and procedure, a motion to reopen the record of a hearing shall be made to the Administrative Law Judge who rendered the determination within 30 days of it being served (20 NYCRR 3000.16 [b]). The record shows that the motion to reopen was filed on March 21, 2017, which date falls more than 30 days after issuance of the Administrative Law Judge's determination. We concur with the Administrative Law Judge's determination that petitioner's motion to reopen was late-filed and consequently should be denied. In light of the motion's untimeliness, petitioner's argument that the additional documents offered post-hearing constituted newly discovered evidence is rendered moot.²

Turning to petitioner's substantive legal argument, we now consider whether the Administrative Law Judge correctly determined that petitioner failed to demonstrate that he was a real estate professional during tax year 2009. The Division's disallowance of petitioner's claimed deduction relating to his real estate rental activities had the effect of increasing petitioner's 2009 New York taxable income, resulting in the deficiency here at issue. New York taxable income is determined by reference to a taxpayer's New York adjusted gross income, which in turn is determined by reference to a taxpayer's federal adjusted gross income for that

² Petitioner also submitted documents in this exception that were not included in the record before the Administrative Law Judge. In accordance with our long-standing policy, we do not accept such documents into the record and we have not considered such documents in the rendering of this decision (*see e.g. Matter of Meltzer*, Tax Appeals Tribunal, February 29, 2018).

tax year, subject to New York modifications (Tax Law §§ 611 [a], 612 [a]). Tax Law § 607 provides that any term used under article 22 of the Tax Law shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required (Tax Law § 607 [a]). Thus, in order to ascertain whether petitioner is entitled to the deduction he claimed on his 2009 New York personal income tax return, we must turn to the IRC and federal case law relating to the deduction here at issue.

IRC (26 USCA) §§ 162 and 212 allow taxpayers to deduct ordinary and necessary expenses paid or incurred in carrying on a trade or business or for the production of income. However, not all income-producing activities are treated the same under the IRC. Passive activity losses are generally limited to the amount of passive income in that tax year (*see* IRC [26 USCA] § 469 [a] - [b]) and income from real estate rental activities is generally deemed to be income from passive activities unless the taxpayer qualifies as a real estate professional (*see* IRC [26 USCA] § 469 [c] [7]).

The IRC sets forth the test for determining whether a taxpayer is a real estate professional as follows:

“(i) more than one-half of the personal services performed in trades or businesses by the taxpayer during such taxable year are performed in real property trades or businesses in which the taxpayer materially participates, and
(ii) such taxpayer performs more than 750 hours of services during the taxable year in real property trades or businesses in which the taxpayer materially participates” (IRC [26 USCA] § 469 [c] [7] [B], *see also* Treas Reg [26 CFR] § 1.469-5T [a]).

Whether petitioner is entitled to deduct the full amount of losses stemming from real estate rental activities thus hinges upon whether petitioner has shown that: a) his total real estate rental

activities constitute more than one-half of his personal services performed in 2009; and b) he has performed more than 750 total hours in his real estate rental activities in 2009 (*id.*).

Having ascertained the rule applicable to the question of whether or not petitioner qualifies as a real estate professional under federal law, we observe that a presumption of correctness attaches to a notice of deficiency issued by the Division (*Matter of Tivolacci v State Tax Commn.*, 77 AD2d 759 [3d Dept 1980]). A taxpayer bears the burden of proof in showing by clear and convincing evidence that the Division's determination was incorrect or erroneous (Tax Law § 689 [e]). Similarly, a taxpayer bears the burden of proof in showing entitlement to any deduction he or she claims by maintaining adequate records to substantiate the amount of such deduction (*id.*, Tax Law § 658 [a], 20 NYCRR 158.1 [a]).

We concur with the Administrative Law Judge that the work logs that petitioner submitted during and following the Division's audit were unreliable to the extent that they were inconsistent with one another and thus did not constitute clear and convincing evidence in support of petitioner's position. In cases where the documentary evidence has not met that standard, we have held that a taxpayer's credible testimony can meet the clear and convincing evidentiary standard (*see Matter of Avildsen*, Tax Appeals Tribunal, May 19, 1994). Here, the Administrative Law Judge made a determination regarding petitioner's credibility after reviewing his testimony against the three work logs he submitted to substantiate his status as a real estate professional. It is a well-established principle in our prior decisions that the credibility of witnesses is a determination within the domain of the trier of facts who has had the opportunity to view the witnesses firsthand and evaluate the relevance and truthfulness of their testimony (*see Matter of Jay's Distributors*, Tax Appeals Tribunal, April 15, 2015; *Matter of Jericho Delicatessen*, Tax Appeals Tribunal, July 23, 1992; *Matter of Spallina*, Tax Appeals Tribunal,

February 27, 1992; *see also Matter of Berenhaus v Ward*, 70 NY2d 436 [1987]). In this case, the Administrative Law Judge found petitioner's testimony not to be credible. Although we are not bound by an Administrative Law Judge's credibility assessment (*see* Tax Law § 2006 [7]; 20 NYCRR 3000.11 [e] [1]; *see also Matter of Rizzo*, Tax Appeals Tribunal, May 13, 1993; *Matter of Jericho Delicatessen*; *Matter of Spallina*; *see also Matter of Stevens v Axelrod*, 162 AD2d 1025 [1990]), we find nothing in the record that would cause us to alter the Administrative Law Judge's finding that petitioner's testimony lacked credibility. Therefore, we find that the Administrative Law Judge correctly determined that petitioner failed to meet his burden of proof in demonstrating that he met the two-prong test provided under IRC (26 USCA) § 469 (c) (7) by clear and convincing evidence.

We now address petitioner's argument that the Administrative Law Judge erred by not adopting the IRS' determination that petitioner qualified as a real estate professional in tax year 2009. As stated above, Tax Law § 607 provides that terms under article 22 of the Tax Law shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes. This does not mean that the Division is bound by petitioner's stipulation with the IRS to which the Division was not a party (*see* 20 NYCRR 159.4; *cf. Matter of Am. Airlines, Inc.*, Tax Appeals Tribunal, February 1, 2007). The Division is not required to accept an IRS stipulation of liability reductions without proof that establishes a taxpayer's entitlement to such a reduction (*Matter of Clifford Dufton and Noreen Conlon*, Tax Appeals Tribunal, April 6, 1995). As we are not privy to the rationale underlying the stipulation in this case, we do not know that the IRS reached a determination that petitioner qualified as a real estate professional under IRC (26 USCA) § 469 for tax year 2009, and thus cannot be bound by the outcome (*Matter of Wendel*, Tax Appeals Tribunal, February 3, 2000).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Michael Strachan is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Michael Strachan is denied; and
4. The notice of deficiency dated April 2, 2013 is sustained.

DATED: Albany, New York
June 28, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner