

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MYRA MAYO	:	DECISION
for Redetermination of Deficiencies or for Refunds of	:	DTA NOS. 828862
New York State and New York City Personal Income	:	AND 828863
Tax under Article 22 of the Tax Law and the	:	
Administrative Code of the City of New York for the	:	
Years 2013, 2014, and 2015.	:	

Petitioner, Myra Mayo, filed an exception to the determination of the Administrative Law Judge issued on October 26, 2023. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel).

Petitioner filed brief in support of her exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Petitioner’s request for oral argument was denied. The six-month period for issuance of this decision began on March 22, 2024, the date that petitioner’s reply brief was received.

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

ISSUES

I. Whether the Administrative Law Judge erred in determining that petitioner had not established her entitlement to claimed business losses for tax years 2013, 2014, and 2015.

II. Whether the Administrative Law Judge erred in sustaining the penalties asserted by the Division of Taxation.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for finding of fact numbered 45, which we have deleted, as we have deemed it immaterial to the legal issues presented. Accordingly, we have renumbered findings of fact 46, 47, and 48 as 45, 46, and 47. As so modified, the Administrative Law Judge's findings of fact appear below.

1. Petitioner filed New York State resident income tax returns, form IT-201, as a resident of New York State and New York City for tax years 2013, 2014 and 2015. Petitioner filed such returns as head of household and claimed two dependents. The returns reflected that both claimed dependents had the last name of "Bass."

2. Petitioner's 2013 form IT-201 reported: (i) wage income of \$71,185.00; (ii) a federal schedule C business loss of \$52,507.00; (iii) a New York State household credit of \$90.00; (iv) a New York City household credit of \$45.00; (v) an Empire State child credit of \$660.00; (vi) a New York State earned income credit of \$1,449.00; (vii) a New York City earned income credit of \$257.00; (viii) a New York City school tax credit of \$63.00; and (ix) combined New York State/City withholding totaling \$5,619.00, which resulted in a requested refund of an overpayment in the amount of \$7,791.00.

3. Petitioner affirmatively requested the claimed 2013 overpayment of \$7,791.00 be refunded to her by direct deposit to her personal checking account rather than by debit card or paper check.

4. Attached to petitioner's 2013 form IT-201 was petitioner's 2013 individual federal income tax return, form 1040, that included a schedule C, profit or loss from business statement, which reported losses for petitioner as the sole proprietor of a "[p]hotography products and services" business. The reported loss of \$52,507.00 consisted of \$24,093.00 in gross receipts or

sales, and the following expenses: (i) legal and professional services in the amount of \$53,500.00; (ii) rent or lease for vehicles, machinery and equipment in the amount of \$2,600.00; and (iii) other expenses in the total amount of \$20,500.00 that petitioner described as \$12,000.00 for selling, general and administrative expenses and \$8,500.00 in photography expenses.

5. The Division initially selected petitioner's 2013 form IT-201 for a processing review and sent an account adjustment notice, form DTF-160, on November 10, 2014, adjusting petitioner's requested refund of \$7,791.00 to \$7,777.00 because the Division asserted petitioner incorrectly computed her New York State tax.

6. The Division then selected petitioner's 2013 form IT-201 for a desk audit review and sent an audit inquiry letter, form DTF-973.66, for audit case ID number X-485258192 on December 29, 2014, that indicated that the Division needed more information concerning petitioner's 2013 form IT-201. The form DTF-973.66 requested that petitioner provide documentation to support the claimed schedule C business loss, including the documents that were used to calculate the income and expenses reported on the return, and detailed supporting documentation such as sales slips, invoices, bank statements, or receipts.

7. On February 21, 2015, petitioner responded to the Division's form DTF-973.66 regarding her 2013 form IT-201 by correspondence that consisted of a letter dated February 20, 2015, that begins "Dear Secret Tax Agent:" and included an invoice to the Division, but did not include any of the requested documentation. Petitioner's correspondence affirmatively informed the Division that she would not supply the requested supporting documentation relevant to her reported gross receipts and business expenses because she did not ". . . have the time, the health, the financial resources or proven lawful obligation to participate in any more of your harassment and rights violations under the guise of some 'audits'" and because the "Division's request for

PRIVATE documentation of PRIVATE affairs of a PRIVATE Citizen is unconstitutional.”

Petitioner further demanded the Division pay “\$100,000 US for the PRIVATE 2013 documents and records,” and asserted that she can “. . . deny sharing my PRIVATE documentation or any copies of it with anyone as it relates to PRIVATE matters and PRIVACY of a CITIZEN WITH RIGHTS is protected by our great Constitution,” but “if [the Division] still wishes to obtain copies of PRIVATELY owned documents and records for year 2013 . . . pay the [\$100,000.00] amount to Myra Mayo in cash.”

8. The Division reviewed petitioner’s correspondence in response to form DTF-973.66 and found that it did not sufficiently substantiate her claimed 2013 schedule C business loss.

9. On May 5, 2015, the Division issued a form DTF-160 for tax year 2013 related to audit case ID number X-485258192. Form DTF-160 informed petitioner that the Division adjusted her 2013 personal income tax return to disallow the claimed business loss because the documentation provided to support her business income and expenses claimed on schedule C was insufficient and a review of her filing history indicated she did not operate the claimed business activity to make a profit. The notice informed petitioner that she was allowed a refund of \$1,083.85, as a result of the recalculation of her taxable income due to the disallowance of the schedule C business loss.

10. By correspondence dated June 4, 2015, and stamped received by the Division on June 8, 2015, petitioner responded to the Division’s form DTF-160, dated May 5, 2015, for tax year 2013 but still did not include any of the requested documentation. Petitioner’s correspondence again informed the Division that she would not supply the requested supporting documentation relevant to her reported gross receipts and business expenses and stated, “I told you before already — I don’t have time for any of your ‘audits.’” The letter went on to state:

“[y]ou want my records? Then pay for them. I already sent you the invoice,” and “[y]ou don't have any right to audit me at this time.”

11. The Division reviewed petitioner's correspondence in response to the Division's May 5, 2015 form DTF-160 and found that it did not sufficiently substantiate her claimed 2013 schedule C business loss.

12. On July 6, 2015, as no additional documentation was provided by petitioner, the Division issued a notice of disallowance that informed petitioner that the outstanding amount of her 2013 requested refund, \$6,714.00¹, was denied because she failed to provide substantiation to support her reported schedule C business activity and that it did not appear she was engaged in an activity for profit.

13. Petitioner requested a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) for the July 6, 2015 notice of disallowance. By conciliation order dated June 1, 2018 (CMS No. 000275847), the notice of disallowance, dated July 6, 2015, was sustained.

14. On August 24, 2018, petitioner filed a petition challenging CMS No. 000275847 with the Division of Tax Appeals.

15. Petitioner's 2014 form IT-201 reported: (i) wage income of \$74,694.00; (ii) a federal schedule C business loss of \$55,310.00; (iii) a New York State household credit of \$90.00; (iv) a New York City household credit of \$45.00; (v) an Empire State child credit of \$660.00; (vi) a New York State earned income credit of \$1,450.00; (vii) a New York City earned income credit of \$257.00; (viii) a New York City school tax credit of \$63.00; and (ix) combined New York

¹ \$7,777.00 (*see* finding of fact 5) - \$1,083.85 (*see* finding of fact 9) = \$6,693.15; the Division does not attempt to explain this discrepancy. The difference is deemed immaterial.

State/City withholding totaling \$5,620.00, which resulted in a requested refund of overpayment in the amount of \$7,741.00.

16. Petitioner affirmatively requested the 2014 overpayment of \$7,741.00 be refunded by direct deposit to her personal checking account rather than by debit card or paper check.

17. Attached to petitioner's 2014 form IT-201 was petitioner's 2014 form 1040 that included a schedule C, profit or loss from business statement, which reported losses for petitioner as the sole proprietor of a photography products and services business. The reported loss of \$55,310.00 consisted of \$27,440.00 of gross receipts or sales, and the following expenses: (i) legal and professional services in the amount of \$60,650.00; (ii) rent or lease for vehicles, machinery and equipment in the amount of \$1,200.00; and (iii) other expenses in the total amount of \$20,900.00, that petitioner described as \$18,000.00 for selling, general and administrative expenses and \$2,900.00 in photography expense.

18. The Division selected petitioner's 2014 form IT-201 for review and sent a statement of proposed audit changes, form DTF-960-E with assessment ID number L-046166960 on March 30, 2017, that requested petitioner provide documentation to support the claimed schedule C business loss including the documents that were used to calculate the income and expenses reported on the return and detailed documentation such as sales slips, invoices, bank statements, or receipts.

19. Petitioner's 2015 form IT-201 reported: (i) wage income of \$77,761.00; (ii) a federal schedule C business loss of \$57,900.00; (iii) a New York State household credit of \$90.00; (iv) a New York City household credit of \$45.00; (v) an Empire State child credit of \$660.00; (vi) a New York State earned income credit of \$1,453.00; (vii) a New York City earned income credit of \$257.00; (viii) a New York City school tax credit of \$63.00; and (ix) combined New York

State/City withholding totaling \$5,786.00, which resulted in a requested refund of overpayment in the amount of \$7,887.00.

20. Petitioner affirmatively requested the 2015 claimed overpayment of \$7,887.00 be refunded by direct deposit to her personal checking account rather than by debit card or paper check.

21. Attached to petitioner's 2015 form IT-201 was petitioner's 2015 form 1040 that included a schedule C, profit or loss from business statement, which reported losses for petitioner as the sole proprietor of a photography products and services business. The reported loss of \$57,740.00 consisted of \$29,450.00 of gross receipts or sales, and the following expenses: (i) legal and professional services in the amount of \$69,050.00; (ii) rent or lease for vehicles, machinery and equipment in the amount of \$1,100.00; and (iii) other expenses in the total amount of \$17,200.00, that petitioner described as \$13,800.00 for selling, general and administrative expenses and \$3,400.00 in photography expense.

22. The Division selected petitioner's 2015 IT-201 for review and sent a form DTF-960-E with assessment ID number L-046166961 on March 30, 2017, that requested petitioner provide documentation to support the claimed schedule C business loss including the documents that were used to calculate the income and expenses reported on the return and detailed supporting documentation such as sales slips, invoices, bank statements, or receipts.

23. On April 24, 2017, petitioner responded to the Division's forms DTF-960-E for tax years 2014 and 2015 by correspondence that consisted of a letter dated April 24, 2017, that is entitled "FIRST RESPONSE," and begins "Dear Lying Fraudulent Criminals of [the Division]:" and references "Bogus assessment IDs are L-046166960-4 and L-046166961-3," along with an invoice for the Division for 2014 and 2015, but did not include any of the requested

documentation. Petitioner's correspondence affirmatively informed the Division that she would not supply the requested supporting documentation relevant to her reported gross receipts and business expenses for tax years 2014 and 2015 and that the Division should "[g]o bother some grandma who forgot to check off some box on your overly complicated forms, that's all you [sic] good for," and alleges the Division is ". . . unfair criminals, not auditors, and as such I don't have to comply with any demands of yours." Petitioner further insisted the Division pay \$1,000,000.00 to her to provide any documentation for tax years 2014 and 2015.

24. The Division reviewed petitioner's correspondence in response to forms DTF-960-E for tax years 2014 and 2015 and found that it did not sufficiently substantiate her claimed 2014 and 2015 schedule C business losses.

25. On September 11, 2017, the Division issued a notice of deficiency, bearing assessment number L-046166960, that recomputed petitioner's tax liability for tax year 2014 and assessed additional tax due in the amount of \$6,993.00 plus interest and penalties for negligence pursuant to Tax Law § 685 (b) (1) and § 685 (b) (2) and substantial understatement of tax liability pursuant to Tax Law § 685 (p).

26. On September 11, 2017, the Division issued a notice of deficiency, bearing assessment number L-046166961, that recomputed petitioner's tax liability for tax year 2015 and assessed additional tax due in the amount of \$7,264.00 plus interest and penalties for negligence pursuant to Tax Law § 685 (b) (1) and (2) and substantial understatement of tax liability pursuant to Tax Law § 685 (p).

27. Petitioner requested a conciliation conference with BCMS for notices of deficiency bearing assessment numbers L-046166960 and L-046166961. By conciliation order dated June 15, 2018 (CMS No. 000300633), BCMS sustained the notices of deficiency.

28. On August 24, 2018, petitioner filed a petition challenging the conciliation order (CMS No. 000300633) with the Division of Tax Appeals.

29. While the Division's audits/reviews of petitioner's 2013 through 2015 returns were underway, petitioner was actively litigating her 2009, 2010 and 2011 tax liabilities with the State. The earlier years' tax liabilities petitioner was litigating were as follows:

Year	Tax	Interest	Penalty	Balance Due
2009	\$6,200.28	\$1,543.58	\$1,490.30	\$9,234.16
2010	\$7,510.95	\$1,276.57	\$1408.22	\$10,195.74
2011	\$6,238.35	\$425.30	\$623.80	\$7,287.45

30. On November 3, 2022, petitioner sent the Division supporting documentation for the first time, purporting to be substantiation of petitioner's business income and expenses for tax years 2013 through 2015 including: an agreement dated September 12, 2011, between Alex Bass and petitioner (independent sales contractor agreement) whereby Mr. Bass of Bass & Co.² would act as an independent sales contractor of photographs taken or owned by petitioner; a contract agreement dated February 15, 2013, between Mr. Bass and petitioner (tax assistance agreement) whereby Mr. Bass would act as a consultant to petitioner for: "[the Division's] assessments, tax bills for years 2009 and 2010 as well as other related matter;" summary documents purporting to be monthly sales reports for tax year 2013, 2014 and 2015; payment vouchers purporting to show cash payments from Mr. Bass to petitioner; and sets of summary invoices from Mr. Bass to petitioner along with spreadsheets, receipts written in Thai for cash payments between petitioner and Mr. Bass, and partial personal calendars for Mr. Bass for 2013, 2014 and 2015.

² Alex Bass is apparently the sole owner of Bass & Co. The record references Mr. Bass and Bass & Co. interchangeably. This determination will refer to Alex Bass and/or Bass & Co. as "Mr. Bass."

31. The independent sales contractor agreement has a term of 10 years and provides that Mr. Bass was solely responsible for successfully completing all sales, marketing, and advertising work as needed and as determined by Mr. Bass. Under the agreement, Mr. Bass was authorized to “handle sales revenues for each year,” and was “also responsible for sales revenue audits.”

32. As part of petitioner’s submission of the independent sales contractor agreement was a “monthly sales report” for 2013 (2013 sales report) prepared by Mr. Bass. The 2013 sales report consisted of a page that indicated for each of the 12 months of the year 12 separate dollar amounts representing the total sales for each month, a year-to-date total sales column for each month³ and that the products sold for each month were “Photographic Prints.”⁴

33. Attached to the 2013 sales report were six pages of “support.” The support pages were prepared by Mr. Bass. The first support page was a payment voucher filled out by Mr. Bass that reflected a dollar amount that purported to be the total amount of petitioner’s sales for January 2013. The second support page was a payment voucher filled out by Mr. Bass that reflected a dollar amount that was purported to be the total amount of petitioner’s sales for February 2013. The third support page was a payment voucher filled out by Mr. Bass that reflected a dollar amount that was purported to be the total amount of petitioner’s sales for March 2013. The fourth support page was a payment voucher filled out by Mr. Bass that reflected three dollar amounts that were purported to be the total amount of petitioner’s sales for April, May, and June 2013, respectively. The fifth support page was a payment voucher filled out by Mr. Bass that reflected three dollar amounts that were purported to be the total amount of petitioner’s sales for July, August, and September 2013, respectively. The sixth support page

³ The year-to-date sales amounts reflect the total of petitioner’s sales for each month of the year added together (e.g., if total monthly sales for January were \$10.00 and total monthly sales for February were \$12.00, then February’s year-to-date sales would be \$22.00).

⁴ The description “Photographic Prints” was consistently used for all sales.

was a payment voucher filled out by Mr. Bass that reflected three dollar amounts that were purported to be the total amount of petitioner's sales for October, November, and December 2013, respectively. Petitioner submitted similar monthly sales reports and support for 2014 and 2015.

34. Petitioner submitted into the record four billing invoices for 2013. The separate billing invoices were dated January 1, 2013, April 7, 2013, May 5, 2013, and June 5, 2013. All of the billing invoices were prepared by Mr. Bass. The January 1, 2013 billing invoice indicated a charge of \$12,000.00 for a salesperson charge of \$1,000.00 per month for all of 2013; a charge of \$550.00 for professional accounting services for 2013; a charge of \$2,600.00 for the rental of photography equipment for 2013; and a charge of \$8,500.00 for 204, 20 x 24 "premium quality glossy photographs" at \$25.00 each, and 850, 8 x 10 "premium quality glossy photographs" at \$4.00 each. The April 7, 2013 billing invoice included one charge for \$18,225.00 which was for "research, study, analysis, consultation reports, projects & other services" in connection with the tax controversies for 2009 through 2011; the amount was supported by a statement that purported to reflect the hours worked on each of approximately 25 days by Mr. Bass multiplied by the hourly charge of \$75.00. The May 5, 2013 billing invoice had one charge for \$18,225.00 which was for "research, study, analysis, consultation reports, projects & other services" in connection with the tax controversies for 2009 through 2011; the amount was supported by a statement that purported to reflect the hours worked on each of approximately 30 days by Mr. Bass multiplied by the hourly charge of \$75.00. The June 5, 2013 billing invoice had one charge for \$18,750.00 which was for "research, study, analysis, consultation reports, projects & other services" in connection with the tax controversies for 2009 through 2011; the amount was supported by a statement that purported to reflect the hours worked on each of approximately 31 days by Mr.

Bass multiplied by the hourly charge of \$75.00. Submitted with the 2013 billing invoices were copies of nine receipts filled out by hand by Mr. Bass allegedly recognizing cash payments made by petitioner to Mr. Bass during 2013. Also submitted with the 2013 billing invoices was a copy of a small journal filled out by Mr. Bass indicating how many hours he worked on certain days during 2013 for petitioner. Petitioner submitted similar billing invoices and support for 2014 and 2015, although the dollar amounts for each year were slightly different. Petitioner had no material additional costs for her business for 2013, 2014, or 2015 other than those invoiced by Mr. Bass.

35. The tax assistance agreement provided that Mr. Bass was to act as a consultant to petitioner and that he was to work on the New York State tax assessments for 2009 and 2010. The agreement indicates that Mr. Bass would be compensated \$75.00/hour. The agreement noted that Mr. Bass possesses “expertise in areas of finance, accounting, management, audit, tax and possesses [sic] MBA degree with major in Financial Management and minor in International Business with over a decade of such experience.” The tax assistance agreement provided that Mr. Bass could charge an additional fee of up to 25% against any annual amount due from petitioner that was not paid by the end of the billing year. The tax assistance agreement also expressly thanked Mr. Bass for his assistance because others, such as certified public accountants and lawyers, would not provide the assistance sought by petitioner or under the payment terms Mr. Bass was offering. During the hearing, Mr. Bass testified to the same.

36. Included in the documentation provided by petitioner on November 3, 2022, were various miscellaneous items, including emails written by or sent to Mr. Bass; documents related to Mr. Bass’ education; documents related to travel by Mr. Bass; web pages printed from the internet; various sets of photographs including approximately 10 photos taken by petitioner;

certain medical records belonging to petitioner; and documents related to petitioner's prior tax years including 2009, 2010, and 2011.

37. As support for the work performed by Mr. Bass for petitioner, Mr. Bass represented that he read several books in order to provide such support. A partial list of books that Mr. Bass represents to have read as part of his work for petitioner include:⁵ Win Your Case – Gerry Spence; Paralegal Today, 5th Edition – Miller, Urisko; How to Argue and Win Every Time – Gerry Spence; 2013 California Bar Exam Total Preparation Book; The Tax & Legal Playbook – Kohler; Fruit of the Poison Tree, Melvin Stamper; Law for Dummies – 2nd Edition – Ventura; Paralegal Career for Dummies – Hatch & Hatch; Black's Law Dictionary: 1st edition, 3rd edition; revised 4th edition; 5th edition; 6th edition; 9th edition; 10th edition – West Publishing; Torts Personal Injury Litigation – Statsky; Winning at Trial – D. Shane Read; Wiley CPA Excel Exam Review Study Guide 2014 – Wiley; Understanding Torts – Lexus Nexus; IRS, Taxes and the Beast – Daniel J. Pilla; How to Get Tax Amnesty – Daniel J. Pilla; The Fraud of Money and Banking – Jose M. Paulino; and New Views of the Constitution of the United States – John Taylor.

38. The Division reviewed the documentation provided by petitioner and found that it did not sufficiently substantiate her claimed 2013, 2014 and 2015 schedule C business profits or losses.

39. At the hearing held on November 15, 2022 and continued on November 16, 2022, petitioner presented Mr. Bass as a witness where he testified at great length for over two days. Petitioner also submitted a 20-page affidavit from Mr. Bass into the record. Petitioner also testified at the hearing primarily by reading a prepared statement into the record. Mr. Bass'

⁵ The publication titles and authors are as represented by Mr. Bass.

testimony took over 120 transcript pages; petitioner's testimony took approximately 32 transcript pages. During petitioner's testimony, Mr. Bass attempted to provide petitioner notes and guidance to assist her with her responses to questions asked by the Division on cross-examination. Mr. Bass' direct testimony was lengthy and largely unaided as compared to petitioner's prepared direct testimony which was primarily read from a statement. Mr. Bass' testimony discussed in detail the business operations of petitioner.

40. Mr. Bass testified that the manner in which he kept petitioner's business books and records was how such records are normally maintained in Thailand. Mr. Bass testified that before petitioner started her business, the Division should have contacted her to explain how records should be kept.

41. Petitioner's business only sells photos in Thailand. Mr. Bass goes to Thailand approximately two times each year and can spend up to a month on each visit. Mr. Bass also sells his own photographs in Thailand. Petitioner has never gone to Thailand for the business.

42. Petitioner testified that she does not operate in the "granular" data of her business, but rather just the "big picture" aspects of the business. Petitioner does not appear to have examined any of the particular sales receipts or invoices for the sales or expenses associated with her business other than Mr. Bass' own invoices and receipts. Mr. Bass determines the price at which petitioner's photos are sold, although Mr. Bass testified that he consults with petitioner regarding any decision that he makes on pricing.

43. Petitioner testified that she worked a minimum of 15 to 20 hours a week on her photography business.

44. Petitioner started the subject business in 2005. According to petitioner, the business has never been profitable; however, in 2013, 2014, and 2015, the business would have earned a

profit except for the fact that the business had to incur costs associated with challenging the Division's tax assessments for 2009, 2010, and 2011.

45. In addition to petitioner's photography business, during the years at issue, petitioner also had a full-time executive management job. Mr. Bass testified that petitioner had excellent management skills and would be a chief operating officer soon.

46. Mr. Bass testified that he rents petitioner most of her photography gear (e.g., cameras, etc.). Mr. Bass testified that he is more of an expert than petitioner with respect to camera equipment. In his testimony, Mr. Bass also critiqued petitioner's photography skills but noted that she was improving in his opinion.

47. The Division offered the testimony of Kathleen Loos who was the assistant manager of the Division's audit group 1. The Division's audits of petitioner's 2013, 2014, and 2015 forms IT-201 were conducted by audit group 1 and Ms. Loos was familiar with those audits.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began his determination by observing that a presumption of correctness attaches to a properly issued notice of deficiency and petitioner bears the burden of proving by clear and convincing evidence that a deficiency is erroneous (*see Matter of Mayo*, Tax Appeals Tribunal, March 9, 2017, *confirmed* 172 AD3d 1554 [3d Dept 2019], *lv denied* 34 NY3d 1140 [2020], *rearg denied* 35 NY3d 1005 [2020]; *see Matter of Gilmartin v Tax Appeals Trib.*, 31 AD3d 1008 [3d Dept 2006]; Tax Law § 689 [e]; 20 NYCRR 3000.15 [d] [5]; *see also Matter of Leogrande v Tax Appeals Trib.*, 187 AD2d 768, 769 [3d Dept 1992], *lv denied* 81 NY2d 704 [1993]). The Administrative Law Judge next stated that pursuant to Internal Revenue Code (IRC) [26 USC] § 162 [a], among the deductions permitted in calculating an individual's adjusted gross income are "ordinary and necessary" expenses for the production of income in

carrying on a trade or business. The Administrative Law Judge determined that petitioner did not meet her burden of proof to establish that the activities related to her reported schedule C business during the years in question were carried on with an actual and honest objective of making a profit.

The Administrative Law Judge conducted a detailed analysis of the factors set forth in the regulations and determined that the factors weighed heavily against petitioner (*see* Treas Reg [26 CFR] § 1.183-2 [b]). Citing Treasury Regulation [26 CFR] § 1.183-2 [b] [8], the Administrative Law Judge observed that petitioner had substantial income from her full-time employment unrelated to her schedule C business and used her claimed business losses to claim a deduction against that income.

Although the Administrative Law Judge found that petitioner failed to show the requisite profit motive for the activities related to the schedule C business, for the purposes of a complete determination of the issues presented, he addressed petitioner's gross receipts and substantiation of her business expenses and found that petitioner failed to substantiate any of her claimed expenses.

The Administrative Law Judge determined that the Division's issuance of a notice of deficiency did not violate petitioner's rights to due process. According to the Administrative Law Judge, Tax Law § 681 (a) does not require the Division to commence an income tax audit with an inquiry letter or to request and examine a taxpayer's books and records before issuing a notice of deficiency. The Administrative Law Judge determined that the records petitioner provided in this case did not offer any objective evidence of the transactions at issue, and thus petitioner failed to bear her burden of proof in establishing entitlement to the deductions claimed.

Lastly, the Administrative Law Judge found that the Division properly imposed penalties pursuant to Tax Law §§ 685 (b) (1), (b) (2) and 685 (p) as petitioner has failed to meet her burden of proof to show that the deficiencies asserted did not result from negligence or an intentional disregard of the Tax Law or that the substantial understatement of tax was due to reasonable cause and not willful neglect.

ARGUMENTS ON EXCEPTION

On exception, petitioner makes the same arguments as below. In her brief, petitioner alleges that as the Administrative Law Judge's determination was published online, it caused a great deal of damage to petitioner and Bass & Co. In her brief, petitioner indulges in name-calling of both the Division and the Administrative Law Judge, specifically stating, in part, that the Division's employees "are aggressive liars and criminals with self-serving agenda;" that the "ALJs are fully trained and experienced in tax law, but are simply corrupt, biased, in favor of Division at all times, not fair, and are working together to rule against taxpayers . . .". Petitioner argues that her reliance on Mr. Bass's assistance is well founded as he is a professional with an MBA from Wharton and "top grades." Petitioner takes issue with the format of the Division of Tax Appeals hearings, particularly the absence of a jury. Additionally, petitioner claims that the "dishonest" tax system, coupled with no recourse to "redress real grievances against [a] corrupt government agency," is in violation of petitioner's Constitutional rights.

Petitioner contends that she is being falsely accused of intentionally disregarding the Tax Law. Petitioner states that the documentation provided by her is legitimate and properly substantiates petitioner's claimed business losses. Petitioner argues that if she was not involved in the tax audit with the Division, petitioner would not have incurred the losses, and petitioner's business would have realized a profit for the years at issue. We note that petitioner makes the

same allegations in her present petition and exception as she did in the protest of the prior tax period: to wit, petitioner alleges bad faith, corruption, and conspiracy on the part of all individuals involved in this matter with an intent to deprive her of her rights (*see Matter of Mayo*).

The Division argues that that the Administrative Law Judge properly concluded that petitioner did not meet her burden of proof in establishing that the activities related to her claimed schedule C business during the years in question were carried on with an actual and honest objective of making a profit. Further, the Division argues that the Administrative Law Judge correctly determined that petitioner failed to substantiate the claimed business losses and did not come forward with sufficient proof of the business purpose and amount of each of the claimed expenses. The Division asserts that petitioner did not present any new arguments on exception, and continued *ad hominem* attacks against Division employees and the Administrative Law Judge.

OPINION

A presumption of correctness attaches to a notice of deficiency upon issuance and petitioner bears the burden of proving, by clear and convincing evidence, that the deficiency is erroneous (*see Matter of Mayo*; *see Matter of Gilmartin*; Tax Law § 689 [e]; 20 NYCRR 3000.15 [d] [5]; *see also Matter of Leogrande*).

The adjusted gross income of a New York resident starts with federal adjusted gross income, with certain modifications not applicable in this case (Tax Law § 612 [a]; *see Matter of Rizzo*, Tax Appeals Tribunal, June 3, 1993, *confirmed* 210 AD2d 748 [3d Dept 1994]). Because the starting point for determining New York personal income tax liability is the taxpayer's federal adjusted gross income, reference to the corresponding section of the IRC is warranted

(see *Matter of Kirkpatrick*, Tax Appeals Tribunal, May 2, 2024). IRC [26 USC] § 62 (a) (1) defines adjusted gross income as an individual's gross income minus certain deductions. Among the deductions permitted are expenses that are "ordinary and necessary" for the production of income in carrying on a trade or business (IRC [26 USC] § 162 [a]). An ordinary expense is one that is common and acceptable (see *Welch v Helvering*, 290 US 111, 114 [1933]). A necessary expense is considered to be one that is appropriate and helpful in conducting a trade or business (see *Heineman v Commr*, 82 TC 538, 543 [1984]).

In order to claim deductions for the business expenses, petitioner has the dual burden of (1) demonstrating entitlement to the deductions and (2) substantiating the amounts of the deductions (see Tax Law §§ 658 [a]; 689 [e]; 20 NYCRR 158.1; see *Matter of Macaluso*, Tax Appeals Tribunal, September 22, 1997, *confirmed* 259 AD2d 795 [3d Dept 1999]). Additionally, to be entitled to a deduction claimed under IRC (26 USC) § 162 (a), "the taxpayer must show that she engaged in the activity with an actual and honest objective of making a profit" (*Crile v Commr*, TC Memo 2014-202).

The primary issue before us is whether petitioner has proven entitlement to the claimed business expense deductions and substantiated those deductions. In order to determine whether petitioner is entitled to the claimed schedule C deductions, we must first determine whether petitioner engaged in the activity with the objective of making a profit.

The factors to help determine whether a taxpayer has engaged in an activity for profit include (1) the manner in which the taxpayer carries on the activity; (2) the expertise of the taxpayer or his advisors; (3) the time and effort expended by the taxpayer in carrying on the activity; (4) expectation that assets used in the activity may appreciate in value; (5) the success of the taxpayer in carrying on other similar or dissimilar activities; (6) the taxpayer's history of

income or losses with respect to the activity; (7) the amount of occasional profits, if any, that are earned; (8) the financial status of the taxpayer; and (9) elements of personal pleasure or recreation (Treas Reg [26 CFR] § 1.183-2 [b]; *see Matter of Horn*, Tax Appeals Tribunal, April 20, 2017). No single factor or combination of factors is conclusive in indicating a profit objective (*see Ranciato v Commr*, 52 F3d 23 [2d Cir 1995]; *see also Keating v Commr*, 544 F3d 900, 904 [8th Cir 2008], *affg* TC Memo 2007-309). We will consider each of the factors in the space below.

1. *Manner in Which Activity is Conducted*

The taxpayer must conduct the activity in a businesslike manner which can be shown by maintaining complete and accurate books and records (Treas Reg [26 CFR] § 1.183-2 [b] [1]). “Perhaps the most important indication of whether or not an activity is being performed in a businesslike manner is whether or not the taxpayer implements some methods of controlling losses” (*Nix v Commr*, TC Memo 2018-116, *citing Dodge v Commr*, TC Memo 1998-89, 75 TCM [CCH] 1914, 1917 *affd without published opinion*, 188 F3d 507 [6th Cir 1999]).

According to the record, the Division requested detailed books and records from petitioner several years before the hearing. However, it was only days before the hearing that petitioner first provided any books and records for her business. The records provided were from only one source, Mr. Bass. There was no corroborating documentary evidence provided to establish the accuracy of the books and records, such as bank records or statements. Petitioner claims that she conducted all her business using only cash. Further, allegedly all the supporting sales invoices were lost by Mr. Bass. We find that petitioner’s actions do not support her claim that petitioner’s business was a bona fide business (*see Stettner v Commr*, TC Memo 2017-113 [where the Court found that failure to keep adequate books and records and the lack of a written

business plan indicated that the activity was not conducted in a businesslike manner]).

Therefore, the first factor weighs strongly against petitioner.

2. Expertise of the taxpayer or advisers

The expertise of a taxpayer or advisers “by extensive study of its accepted business, economic, and scientific practices, may be indicative of a profit motive (Treas Reg [26 CFR] § 1.183-2 [b] [2]; *see Nix v Commr*). In the brief, petitioner cites to many similarities between the present instance and *Crile* (*see Crile v Commr*). In *Crile*, the Court found that petitioner “has significant expertise as an artist” (*id.*). In determining so, the Court considered that petitioner’s principal advisers were five New York galleries that exhibited her work, arranged openings, and marketed her work to collectors (*id.*). Notwithstanding the fact that in the present case petitioner did not sell her photographs within the United States or contracted with galleries to market her photographs, we agree with the Administrative Law Judge that petitioner’s adviser, Mr. Bass, had training and expertise in photography and photography equipment and was himself a professional photographer who also sold his work. The second factor weighs in favor of petitioner.

3. Taxpayer’s time and effort

Petitioner spent 15 to 20 hours per week on her photography business and claims that she hired Mr. Bass to carry on all the activities on her behalf. However, petitioner fails to substantiate any of her claims with documentation such as a time log, catalog, or a business plan (*see Crile* [petitioner kept detailed and accurate records, going back to 1971, of sales of her artwork, including the price and the identity of the buyer]). Accordingly, the third factor weighs against petitioner.

4. Expectation of Appreciation in Value

We agree with the Administrative Law Judge that there is no evidence in the record with regard to the fourth factor, the expectation that assets used in the activity may appreciate in value, and so the factor weighs neutrally.

5. Taxpayer's success in other activities

The Administrative Law Judge correctly noted that the record contains no evidence with regards to petitioner's success in other activities. Although petitioner claims that she is successful and a well-established CEO of a non-profit organization, that job had "no relationship or synergy" with her photography business (*see Nix* [petitioner's business activity had no relationship to her salaried position as a project manager, suggesting that it was unlikely that she would convert her reported losses into future profits]). We find that this factor weights against petitioner.

6. History of losses and occasional profits

We agree with the Administrative Law Judge that petitioner's history of losses weighs against her. Petitioner relies on *Crile* and states that continuous losses do not negate a profit intent. However, in *Crile*, the Court found that a large portion of petitioner's schedule C expenses were personal in nature. Additionally, the Court noted that petitioner's economic and tax losses actually weighed against her, acknowledging that "no one factor is determinative of a taxpayer's profit motive" (*see Crile* citing *Engdahl v Commr*, 72 TC Memo at 666).

In this case, petitioner argues that the business would have operated at a profit in 2013, 2014, and 2015 except for the fact that petitioner was required to incur significant expenses in professional fees litigating the State tax assessments from 2009, 2010, and 2011. As the Administrative Law Judge noted, expenditure of funds to challenge tax assessments are clearly

appropriate business expenses (*see Rogers v Commr*, TC Memo 2019-90). However, in this case, the litigation expenses far exceeded the tax liabilities at issue. All the expenses related to petitioner's tax litigation were paid to Mr. Bass. Additionally, petitioner was unable to substantiate the expenses by providing any corroborating documentary evidence for the amounts paid to Mr. Bass. Accordingly, the sixth factor weighs against petitioner.

7. Amount of Occasional Profits

The Administrative Law Judge correctly noted that business had been unprofitable since 2005; even if petitioner had earned profits in 2013 through 2015 sans the litigation expenses, such limited profit would not overcome the economic reality of years of sustained losses. Therefore, the seventh factor weighs against petitioner.

8. Financial Status of the Taxpayer

The Treasury Regulations provide that "substantial income from sources other than the activity (particularly if the losses from the activity generate substantial tax benefits) may indicate that the activity is not engaged in for profit" (*see Nix; see also* Treas Reg [26 CFR] § 1.183-2 [b] [8]).

Petitioner has substantial income from her full-time job unrelated to her photography business, and she used her schedule C losses to claim a deduction against the income stemming from her wages. Petitioner's consistent seeking to derive tax benefits from her photography business are suggestive of absence of a true profit motive (*id.*).

9. Elements of Personal Pleasure or Recreation

As the Administrative Law Judge noted, petitioner's involvement in her photography business did not focus on any actual business aspect. She outsourced all her actual business-related work to Mr. Bass. Petitioner's sole contribution to the business was taking the

photographs. Further, petitioner's continuing the business for years at loss is also indicative of her pursuit of the activity for personal pleasure rather than profit (*see Wilmot v Commr*, TC Memo 2011-293). Therefore, the ninth factor weighs against petitioner.

The above analysis indicates that the factors showing profit motive weigh heavily against petitioner. Accordingly, we conclude that petitioner failed to sustain her burden to prove that she operated the business with the goal of generating a profit.

Petitioner bears the burden to show entitlement to the claimed expenses and deductions on the tax returns and to substantiate those deductions (*see Matter of Geringer*, Tax Appeals Tribunal, June 2, 2016; *see also Matter of Goode*, Tax Appeals Tribunal, October 17, 2013; *see also* Tax Law §§ 658 [a], 689 [e]; 20 NYCRR 158.1). Tax Law § 658 (a) requires petitioner to maintain adequate records of claimed expenses and deductions (*id.*). Here, the Division sent numerous forms requesting information from petitioner, as petitioner claimed significant losses with respect to her schedule C business for each of the years here at issue. Petitioner did not send any supporting documentation in response to the forms DTF-973.66, DTF-160 or DTF-960-E, instead insisting that the Division pay substantial amounts of money to her as compensation to provide the requested supporting documents. We agree with the Administrative Law Judge that petitioner failed to meet the burden to show entitlement to the claimed schedule C expenses and deductions.

The Division imposed penalties pursuant to Tax Law §§ 685 (b) (1), (b) (2), and 685 (p). Petitioner has the burden of proof to show that the deficiencies under Tax Law §§ 685 (b) (1) and (b) (2) did not result from negligence or an intentional disregard of the Tax Law or that the substantial understatement of tax was due to reasonable cause and not willful neglect under Tax Law § 685 [p] (*see* Tax Law § 689 [e]; 20 NYCRR 2392.1 [g] [1]; *see also Matter of Schneier*,

Tax Appeals Tribunal, November 9, 1989). Here, petitioner's failure to produce documentation to substantiate her claimed schedule C income and expenses supports the imposition of negligence penalties (*see Matter of Mayo; see also Matter of Eisner*, Tax Appeals Tribunal, March 22, 1990). On exception, petitioner advances the same arguments as below. We agree with the Administrative Law Judge that the Division's imposition of penalties under Tax Law §§ 685 (b) (1), (b) (2), and 685 (p) was proper.

Lastly, we are imposing a penalty for filing a frivolous petition in this matter. The regulation provides the following, in relevant part (emphasis added):

“If a petitioner commences or maintains a proceeding primarily for delay, or if the petitioner's position in a proceeding is frivolous, the tribunal may, *on its own motion* or on the motion of office of counsel, impose a penalty against such petitioner of not more than \$500” (20 NYCRR 3000.21; *see also Matter of McQuay D/B/A New Orleans LA Waterfront BBQ*, Tax Appeals Tribunal, June 13, 2013).

We do not come to this decision lightly, but petitioner's inability to substantiate her claimed schedule C losses and petitioner's contention that the Division employees and the Administrative Law Judge acted in bad faith by conspiring to deprive her of her rights, seems to us to be done merely for the purpose of delay. As she has continued to carry on her business in the same manner as before, we see no reason to come to a different conclusion here.

We find that the Administrative Law Judge accurately and adequately addressed all the issues raised below. Therefore, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Myra Mayo is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Myra Mayo is denied; and

4. The notice of disallowance dated July 6, 2015, for tax year 2013 and the notices of deficiency, dated September 11, 2017 for tax years 2014 and 2015 are sustained. The Division of Taxation is further directed to impose a \$500.00 frivolous petition penalty against petitioner.

DATED: Albany, New York
September 12, 2024

/s/ Jonathan S. Kaiman
Jonathan S. Kaiman
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner