

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ERIK AND KATHRYN BRANDVOLD : DETERMINATION
 : DTA NO. 825578
for Redetermination of a Deficiency or for Refund of :
New York State Personal Income Tax under Article 22 :
of the Tax Law for the Years 2008 through 2010. :

Petitioners, Erik and Kathryn Brandvold, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 2008, 2009 and 2010.

On April 30, 2014 and May 6, 2014, respectively, petitioners, appearing by Ballon, Stoll, Bader & Nadler, P.C. (Norman R. Berkowitz, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Alejandro Taylor, Esq., of counsel on the submission and Kent J. Gebert, Esq., of counsel on the brief), waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by September 25, 2014, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). After due consideration of the documents and arguments submitted, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly disallowed Schedule E losses from certain rental property.

FINDINGS OF FACT

1. Petitioners filed joint New York State resident income tax returns, Form IT-201, for the years 2008 through 2010. On each return, petitioners reported real estate losses arising from property owned by Kathryn Brandvold that was situated at 8 Dunwood Road, Port Washington, New York. The amounts of real estate losses claimed were as follows: \$27,853.00 for 2008, \$25,174.00 for 2009 and \$20,121.00 and 2010.

2. Following a review of petitioner's income tax return for the year 2008, the Division of Taxation (Division) issued to petitioners a Statement of Proposed Audit Changes, dated November 22, 2011, which explained, among other things, that petitioners were not permitted to utilize the rental real estate losses to offset other nonpassive income and, as a result, it disallowed the rental loss. The Statement of Audit Changes included a paragraph that stated:

“Your response to our inquiry letter indicates that Kathryn Brandvold qualifies as a real estate professional meeting the above requirements. The information indicates that Kathryn was employed by Zeckendorf Development, LLC, a real estate development company.”

3. The audit of the return for 2008, prompted the Division to conduct an audit of petitioners' returns for the years 2009 and 2010. On or about May 16, 2012, the Division issued statements of proposed audit changes for the years 2009 and 2010 that explained that the Division reached the same conclusion with respect to the denial of the rental losses for the years 2008 and 2009.

4. On the basis of the statements of audit changes, the Division issued to petitioners a series of notices of deficiencies for the years 2008 through 2010 that asserted deficiencies of tax plus interest as follows:

Date of Notice	Tax Year	Tax	Interest	Balance Due
January 13, 2012	2008	\$1,907.93	\$436.62	\$2,344.55
July 2, 2012	2009	2,432.93	439.35	2,872.28
July 2, 2012	2010	4,341.42	410.76	4,752.18

5. Ms. Kathryn Brandvold is an officer of Zeckendorf Development LLC, a real estate development company that is located in New York City. Her compensation from this firm depends, in part, on the profits from the company. However, she does not have an ownership interest in the company. In 2008, Ms. Brandvold was also employed as a consultant to a New York City real estate partnership.

6. Ms. Brandvold owns a two-family residential rental property at 8 Dunwood Road, Port Washington, New York, and is the only person involved in the management of the property. Her real estate activities include entering into leases, interviewing prospective tenants, collecting rents, paying real estate expenses and, when necessary, arranging for repairs of the property.

CONCLUSIONS OF LAW

A. Section 469(a) of the IRC generally disallows any passive activity loss, defined as the excess of aggregate losses from all passive activities for the taxable year over the aggregate income from all passive activities for that year (*see* IRC § 469[d][1]). Rental activity is usually treated as a per se passive activity regardless of whether the taxpayer materially participates (IRC § 469[c][2],[4]).

B. On the basis that Ms. Brandvold is a “real estate professional,” petitioners claim that they are entitled to an application of an exception to this rule and be permitted to offset the losses from the real estate activity against other nonpassive income. In order to be considered a real estate professional, more than one-half of the personal services performed by the taxpayer in all

trades or businesses must be done by the taxpayer in real property trades or businesses in which he or she materially participated (IRC § 469[c][7][B][i]). In addition, a taxpayer must spend at least 750 hours in each year in real estate trades or businesses in which he or she materially participated (IRC § 469[c][7][B][ii]). In the case of a joint return, either spouse may separately satisfy both requirements (IRC § 469[c][7][B]). Personal services for an employer do not qualify unless the taxpayer is at least a five percent owner of the business (IRC § 416[i][1][B][i]).

C. In this instance, Ms. Brandvold claims to be a real estate professional. However, since she has no interest in the real estate business of her employer, her services as an employee do not count toward the 750 hour requirement (IRC § 416[i][1][B]). Similarly, petitioners may not rely upon Ms. Brandvold's services pertaining to the property in Port Washington, New York, in order to meet this requirement because there is no proof that Ms. Brandvold spent the requisite 750 hours in real estate trades or businesses in which she materially participated. In view of the lack of proof on this issue, Ms. Brandvold's activity in this area does not warrant granting relief to petitioners.

D. Petitioners submit that the Division conceded that petitioner was a real estate professional by referring to a comment in the Statement of Audit Changes for 2008, which pointed out that petitioners' response indicates that Kathryn Brandvold qualifies as a real estate professional. This argument is without merit because the statement relied upon was obviously an acknowledgment of petitioners' contention that Ms. Brandvold was a real estate professional and not an acceptance of petitioners' position.

E. Petitioners also contend that Ms. Brandvold was a real estate professional "by any real world definition." This argument is rejected because the Division of Tax Appeals is not at liberty

to ignore the provisions of the Internal Revenue Code and adopt its own definitions (*see Matter of Golub*, Tax Appeals Tribunal, May 31, 2012, *confirmed* 116 AD3d 1261 [3d Dept 2014]).

F. The petition of Erik and Kathryn Brandvold is denied and the notices of deficiency, dated January 13, 2012 and July 2, 2012 are sustained, together with such interest as may be lawfully due.

DATED: Albany, New York
March 19, 2015

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE