STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **DANE CLAYTON** for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Year 2013.	DETERMINATION DTA NO. 826568

Petitioner, Dane Clayton, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 2013.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, in New York, New York, on November 4, 2015, with all briefs due by March 31, 2016, which date began the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Alejandro Taylor, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation erroneously disallowed a portion of the business expenses claimed by petitioner in connection with his two separate businesses of driving a taxicab and of silk screen T-shirt printing.

II. Whether the Division of Taxation properly increased petitioner's reported income by adding thereto an imputed amount equal to 18 percent of the cash fares petitioner received from his taxicab cab driving business, denominating such amount as unreported cash tip income.

FINDINGS OF FACT

1. Petitioner, Dane Clayton, together with his spouse, Deborah Francis Clayton, timely filed a New York State, New York City and Yonkers Resident Income Tax Return (Form IT-201) for the year 2013.[1] A refund of $862.00 was claimed with the filing of this return.

2. Attached to the foregoing return was a separate federal Form 1040, Schedule C (Profit or Loss From Business), for each of two different businesses operated by petitioner as sole proprietorships. One such Schedule C, pertaining to petitioner's activities as a taxicab driver, reported a net profit in the amount of $5,547.00, while the other Schedule C, pertaining to petitioner's operation of a T-shirt silk screen printing business, reported a net loss in the amount of $4,549.00. Each Schedule C is discussed individually in more detail below.

Taxicab Operation

3. On the Schedule C pertaining to the taxicab operation, petitioner reported gross income of $87,504.00 Petitioner reduced such amount by claimed business expenses in the aggregate amount of $81,957.00, resulting in a net profit of $5,547.00, as follows:

Gross Income.....$ 87,504.00

Expenses and cost of goods sold:

-Advertising.....$124.00
-Commissions & fees.....35,880.00
-Legal and professional.....1,321.00
-Repairs and maintenance.....3,143.00
-Fuel.....29,460.00
-Car wash.....1,664.00
-Tolls.....3,225.00
-State surcharge.....2,273.00

[1] Deborah Francis Clayton's name appears herein only by virtue of the fact that the tax return at issue was filed under Filing Status 2 (Married filing joint return). Only petitioner, Dane Clayton, filed a petition.

-Phone.....2,514.00
-Meter.....315.00
-Postage.....1,009.00
-Air freshener.....720.00
-Legal book.....209.00
-GPS.....100.00

Total expenses.....($81,957.00)

Net Profit (or Loss).....$5,547.00

T-Shirt Printing

4. On the Schedule C pertaining to the T-shirt business, petitioner reported gross income of $325.00. Petitioner reduced such amount by claimed business expenses in the aggregate amount of $4,874.00, resulting in a net loss of $4,549.00, as follows:

Gross Income.....$ 325.00

Expenses:
-Taxes and licenses.....$ 174.00
-Travel..... 54.00
-D & B Credibility..... 900.00
-Designs..... 614.00
-Storage..... 1,244.00
-Postage..... 1,851.00
-Café press..... 57.00

Total expenses.....($4,874.00)

Net Profit (or Loss).....($4,549.00)

5. On February 10, 2014, the Division of Taxation (Division) issued to petitioner an Account Adjustment Notice–Personal Income Tax, advising that petitioner's claimed $862.00 refund (***see*** Finding of Fact 1) had been applied as an offset against an unpaid debt owed to another governmental agency (New York State Department of Labor).

6. On July 14, 2014, the Division sent an inquiry letter to petitioner requesting

information as follows: a) substantiation of the various amounts claimed as business expenses on the foregoing Schedule C forms, and b) verification of the amount of income derived from petitioner's activities as a taxicab driver.

7. Petitioner responded to the foregoing inquiry by providing receipts for some of the claimed expenses detailed above. The Division's review verified that in 2013 petitioner worked as a Yellow Cab taxi driver and leased a taxi medallion and vehicle from Medallion Maintenance, Inc. The Division allowed some of the expenses claimed on petitioner's schedules C, based on the receipts and other information provided, as follows:

> Taxicab Business:
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> a) The Division reviewed petitioner's Driver Year to Date Summary Report from Creative Mobile Technologies (CMT) for 2013 (CMT Report). The CMT Report is generated based on the meter readings from the taxicab, and provides separate monthly and annual totals for trips (fares) paid by cash and by credit, as well as toll expenses and state surcharge expenses. The CMT Report for petitioner for 2013 provided the following annual information in verification of the income, tolls and state surcharge amounts reported by petitioner:
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> Cash fares for 2,251 trips.....$32,512.97
> Credit Card fares for 2,304 trips.....$54,991.33[2]
> Total Tolls.....$3,224.61
> Total State surcharge.....$2,273.50
>
> b) Although petitioner did not provide a copy of his taxi medallion and vehicle lease agreement, the Division accepted and allowed the claimed $35,880.00 lease expense deduction as consistent with Taxi and Limousine Commission (TLC) lease cap amounts. The Division also accepted and allowed the claimed $3,225.00 tolls expense and the $2,273.00 state surcharge amount.

[2] The record reveals that the total amount shown on the CMT Report for Credit Card fares includes, but does not separately identify or state, the monthly and annual amounts of any tips added by customers to the basic fare amounts that are paid by credit card.

c) The Division accepted and allowed a portion of petitioner's additional claimed expenses, but only to the extent that petitioner furnished receipts in substantiation of such claimed expenses. Thus, the Division allowed repair and maintenance costs of $655.00, gasoline costs of $13,620.00 and car wash costs of $312.00. The Division disallowed the balance of expenses claimed for the foregoing items, as well as all of the claimed expenses for advertising ($124.00), legal and professional ($1,321.00), phone ($2,514.00), meter ($315.00), postage ($1,009.00), air freshener ($720.00), legal book ($209.00) and GPS ($100.00).

Tee-Shirt Business

d) The Division disallowed all claimed expenses for this business since petitioner failed to provide receipts in substantiation of the same.

8. For clarity, the foregoing is shown in table format, as follows:

Taxicab Operation

Expense Item	Amount Claimed	Amount Allowed	Amount Disallowed
Advertising	$124.00	$0.00	$124.00
Commissions & Fees	$35,880.00	$35,880.00	$0.00
Legal & Professional	$1,321.00	$0.00	$1,321.00
Repairs & Maintenance	$3,143.00	$655.00	$2,488.00
Fuel	$29,460.00	$13,620.00	$15,840.00
Car Wash	$1,664.00	$312.00	$1,352.00
Tolls	$3,225.00	$3,225.00	$0.00
State Surcharge	$2,273.00	$2,273.00	$0.00
Phone	$2,514.00	$0.00	$0.00
Meter	$315.00	$0.00	$315.00
Postage	$1,009.00	$0.00	$1,009.00
Air Freshener	$720.00	$0.00	$720.00
Legal Book	$209.00	$0.00	$209.00
GPS	$100.00	$0.00	$100.00
Total	$81,957.00	$55,965.00	$25,992.00

T-Shirt Business

Expense Item	Amount Claimed	Amount Allowed	Amount Disallowed
Taxes & Licenses	$174.00	$0.00	$174.00
Travel	$54.00	$0.00	$154.00
D & B Credibility	$900.00	$0.00	$900.00
Designs	$614.00	$0.00	$614.00
Storage	$1,224.00	$0.00	$1,224.00
Postage	$1,851.00	$0.00	$1,851.00
Café Press	$57.00	$0.00	$57.00
Total	$4,874.00	$0.00	$4,874.00

9. In addition to disallowing certain claimed expenses concerning petitioner's taxicab driving business, as above, the Division also concluded that petitioner had failed to report income from cash tips. The Division calculated and imputed additional cash tip income in the amount of $5,852.00, representing 18% of petitioner's cash fares ($32,512.97) reported on petitioner's CMT Report for the year 2013. This imputing of additional income is based on the Division's "experience with other reports" allegedly showing that credit card tips represent 18% to 20% of credit card fares. The Division notes that it is "standard audit practice" to impute additional income equal to 18% of cash fares where only cash income from such fares is reported, per a taxi driver's CMT Reports, with no additional cash tip income being reported on Schedule C by the taxi driver.

10. In support of its imputation of cash tip income, as noted above, the Division provided a one-page VeriFone Transportation Systems Driver Total Report (VeriFone Report) for the year 2013. The VeriFone Report offered by the Division does not pertain to petitioner or reflect amounts received by petitioner during the year 2013, and the driver's name and license

identification information on this Verifone Report has been redacted. A VeriFone Report, like a CMT Report, is generated based on the meter readings from the taxi cab, and identifies and states monthly and annual totals for trips (fares) paid for in cash and by credit cards, as well as toll expenses and state surcharge expenses.[3] Unlike the CMT Report, the VeriFone Report also separately records, identifies and states monthly and annual tip amounts added to such credit card fares, though (like the CMT Report) it does not record, identify or state the amount of tips added to cash fares.[4]

11. The VeriFone Report reflects annual total credit card fares of $22,460.50, total credit card tips of $4,252.61, total cash fares of $46,256.50 and total cash tips of $0.00. From a review of this VeriFone Report information, the following may be discerned:

a) credit card fares without tips ($22,460.50) constituted less than half (48.56%), of cash fares without tips ($46,256.50).

b) credit card fares including tips ($26,713.11) constituted slightly more than half (57.75%), of cash fares without tips ($46,256.50).

c) credit card fares ($22,460.50) as increased by credit card tips ($4,252.61), reflects a credit card tip rate of approximately 18.93%.

d) credit card fares including tips ($26,713.11) constituted 36.61% of total fares including reported tips ($72,969.61--consisting of $22,460.50 [credit card fares without tips], plus $4,252.61 [credit card tips] plus $46,256.50 [cash fares without tips]).

In contrast, from a review of the CMT Report information for petitioner, the following may be discerned:

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[3] The VeriFone Report includes an additional column titled "Extras." No explanation was furnished with respect to this column, or the relatively minor amounts shown therein.

[4] If the choice of payment by credit card versus cash is not entered by the customer, both the CMT system and the VeriFone system default (after a period of time) and record the amount of the fare as a paid cash fare, so as to record the trip and clear (or reset) the meter to allow for the next fare.

a) credit card fares including tips ($54,991.33) were far greater (1.69%) than cash fares without tips ($32,512.97).

b) credit card fares including tips ($54,991.33) constituted 62.84% of total fares including reported tips ($87,504.30–consisting of $54,991.33 [credit card fares including tips], plus $32,512.97 [cash fares without tips]).

12. On September 19, 2014, the Division issued to petitioner and his wife a Statement of Proposed Audit Change, detailing changes to petitioner's 2013 return based upon addition of the imputed cash tip income and the disallowance of claimed Schedule C expenses for lack of substantiation as detailed in Findings of Fact 7[c], [d], 8, 9. These changes resulted in net business income being adjusted (increased) to $37,391.00, an accompanying adjustment to the 50% deduction for self-employment tax, and disqualification from entitlement to the earned income credit. Petitioner's tax liability was recalculated to be $4,054.00 ($2,474.00 [New York State] plus $1,580.00 [New York City]). Petitioner's liability was reduced by $1,197.00 (New York City school tax credit [$125.00] and New York State tax withheld [$1,072.00]) to $2,857.00, and was increased thereafter to $3,719.00 (to account for the initially claimed $862.00 refund that had been applied to another governmental agency debt [***see*** Finding of Fact 5]).

13. On November 5, 2014, the Division issued to petitioner and his wife a Notice of Deficiency asserting additional New York State and New York City personal income taxes due in the amount of $3,719.00, plus interest and a penalty for late payment of tax due.

14. As described, the Division allowed claimed expense deductions for the lease of the taxicab medallion and vehicle, the tolls and surcharges shown on the CMT Report, and to the extent petitioner provided receipts substantiating the payment of his additional claimed expenses for his taxicab business (***see*** Findings of Fact 7[b], [c], [d], 8), and disallowed all claimed expenses concerning the T-shirt printing business. At hearing petitioner provided testimony

concerning the manner in which he conducted both his taxicab business and his T-shirt printing business. He also furnished a receipt for $69.00, dated December 16, 2011, from Dun & Bradstreet concerning his "CreditBuilder" purchase. Petitioner also submitted two emails, post hearing, dated April 9 and April 10, 2014, from Moishe's Moving and Storage (Moishe's) concerning petitioner's lease of storage space. These emails indicate that petitioner's rental charges were several months delinquent and that his storage units at Moishe's had been sold at auction (***see*** Finding of Fact 16-s).

15. Petitioner explained that he drives the taxi during the 12-hour shift spanning 2:00 a.m. to 2:00 p.m., after which another individual, with whom petitioner partners in sharing the taxicab, drives for the next 12-hour shift. Petitioner pointed out that under TLC rules, taxicabs must be kept clean, inside and out, when they are in service, thus necessitating exterior car washes and interior cleaning and odor sanitizing. Petitioner noted that he and his taxi driving partner are individually responsible for the costs of relatively minor maintenance and repair items and for cleaning expenses incurred during their respective driving shifts, and that they share the costs of certain common or "wear and tear" maintenance and repair costs, such as replacement tires and the like, as well as other larger repair costs.

16. As to the particular expenses claimed by petitioner, the following was provided, largely through testimony at hearing.

Taxicab Operation

a) Advertising ($124.00): No information was provided regarding this claimed expense.

b) Commissions and Fees ($35,880.00): this amount was accepted and allowed by the Division.

c) Legal and Professional ($1,321.00): petitioner stated that he incurred a few tickets and that he obtained legal representation concerning the same. No copies of the tickets or of any bills for legal fees were provided.

d) Repairs and Maintenance ($3,143.00): Petitioner generically asserted a number of repair items for which he (and presumably his driving partner) allegedly incurred expenses, including catalytic converter replacement, muffler replacement, brake replacement, tire repairs and replacements, and oil changes estimated by petitioner to have been performed on a weekly basis. The Division allowed claimed repair and maintenance expenses to the extent receipts were provided ($655.00), but denied the balance of claimed expenses. No additional receipts were furnished post-hearing.

e) Fuel ($29,460.00): Petitioner provided receipts for fuel (gasoline) purchases totaling $13,620.00, and the Division allowed an expense deduction for such amount. No receipts were provided for the additional $15,840.00 amount of claimed but disallowed fuel purchases. Petitioner maintained, with regard to the absence of receipts, that in some instances the gasoline pumps were out of paper on which receipts would have been printed.

f) Car Washes ($1,664.00): Petitioner provided receipts for car wash purchases totaling $312.00, and the Division allowed an expense deduction for such amount. The cost per wash, per receipts, was almost always $8.00. No receipts were provided for the $1,352.00 amount of claimed but disallowed car wash purchases. Petitioner maintained that he is obligated, per TLC rules, to maintain his taxi in a clean condition at all times. He stated that he washes the vehicle frequently, and in some instances, performs interior cleaning when passengers become ill in the taxi.

g) Tolls ($3,225.00): This amount was accepted and allowed by the Division.

h) State Surcharge ($2,273.00): This amount was accepted and allowed by the Division.

i) Phone ($2,514.00): Petitioner stated that he used his personal cellular telephone to contact his taxi driving partner at the end of a driving shift to tell him where the vehicle was parked, and to contact the manager/broker through whom petitioner obtained his medallion and vehicle lease. Petitioner provided no breakdown between his business use versus his admitted personal use of his phone.

j) Meter ($315.00): Petitioner supplied receipts for parking charges of $24.75 incurred when he was unable to locate a free parking space for the taxi. The Division raised no objection at hearing to the allowance of this amount as a business expense. No receipts were provided for the balance of the amount claimed by petitioner.

k) Postage ($1,009.00): Petitioner stated that this expense represents the costs of document copying and postage incurred in connection with this matter as well as a lawsuit he initiated against the TLC.

l) Air Freshener ($720.00): Petitioner stated that he was required to maintain the interior of his taxicab in a clean, fresh smelling and appealing condition, in keeping with TLC rules. Petitioner noted that he does not use alcohol-based air fresheners because they dry out quickly and are ineffective. Rather, he purchases an oil product, by the pound, that he pours into a spray bottle for use in the taxi, noting that this oil "lasts a long time." Petitioner produced one receipt for $32.66 for one purchase of this oil.

m) Legal Book ($209.00): Petitioner purchased the well-known civil legal procedure treatise "New York Practice," authored by David Siegel, and stated that he did so to familiarize and educate himself concerning legal proceedings, including how to bring a lawsuit. Petitioner did not submit a receipt for this purchase.

n) GPS ($100.00): Under TLC rules, as a Yellow Cab taxi driver, petitioner is required, during the first eight hours of his driving shift, to accept and convey passengers to any destination within the five boroughs of New York, as well as Westchester and Nassau counties and Newark International Airport.[5] Petitioner purchased a "Tom Tom" brand GPS for use in obtaining directions and routes with respect to the destinations to which he conveyed his passengers. Petitioner did not submit a receipt for this purchase.

T-Shirt Business

o) Taxes and Licenses ($174.00): Petitioner started his T-shirt silk screen printing business in May 2001. He described this expense as a filing fee with the New York County Clerk. No receipts or further details were furnished.

[5] For the balance of a driving shift after eight hours, a driver has the discretion to accept or not accept a passenger in consideration of the passenger's desired destination within the noted jurisdictions.

p) Travel ($54.00): This expense was described as pertaining to local travel costs to deliver T-shirts to prospective sellers. No receipts were provided for this claimed expense.

q) D & B Credibility ($900.00): Petitioner submitted an invoice for Dun & Bradstreet's "CreditBuilder" product. This $69.00 invoice is dated December 16, 2011. No other receipts or invoices were provided with respect to Dun and Bradstreet products or services.

r) Designs ($614.00): Petitioner described the cost of various T-Shirt designs as approximately $35.00 to $40.00 each. The record is unclear as to whether these were designs created by petitioner or were designs created by others and purchased by petitioner. No receipts or further details were provided.

s) Storage ($1,224.00): Petitioner produced one invoice in the amount of $102.00 for Moishe's, dated July 1, 2013. Subsequent to the hearing, petitioner provided an April 10, 2014 email from Moishe's indicating that as of that date, the contents of petitioner's storage unit were auctioned against an outstanding then-due bill in the amount of $603.00.[6] Petitioner described the storage space as necessary to house the T-shirts he purchased in connection with his business. No other receipts were furnished concerning the storage space, including specifically for the year at issue (2013). Petitioner claimed first, in testimony, that his receipts were kept in a box at home and that, while he believed he had them, it was possible that the box was inadvertently thrown away by his wife. Subsequently, petitioner claimed that his receipts were kept at his storage unit at Moishe's, that he was unable to retrieve the contents of the unit prior to the auction, and that the receipts (including his receipts showing payment on the storage unit itself) were lost as a result.

t) Postage ($1,851.00): Petitioner described this claimed expense as the cost incurred to ship his designed and printed T-shirts to prospective sellers via UPS, Federal Express and the United States Postal Service. No receipts were furnished for this claimed expense.

u) Café Press ($57.00): Petitioner described Café Press as an online presentation service where, for a fee, petitioner could upload his T-shirt designs onto Café Press's website. No receipts were provided concerning this claimed expense.

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[6] The contents auction recovered $200.00, leaving a balance due of $403.00.

17. In addition to the disallowance of a portion of petitioner's claimed expense deductions, the Division also increased petitioner's income from his taxi driving business by imputing tip income equal to 18% of petitioner's cash fares reported on his CMT Report for the year at issue. Petitioner explained that he is not allowed to suggest or intimate to a customer that a tip or other amount may be paid in addition to the stated metered fare, because his action in doing so would constitute overcharging per TLC rules, thereby subjecting him to fines. He testified that he is fearful of undercover investigators who he believes may be targeting him in retaliation for his prior lawsuit against the TLC, stating that to avoid any possibility of such problems, he returns all the change due to a customer in instances where a fare is paid in cash. On this basis, petitioner maintains that he accepted no tips on fares paid by cash during the year at issue, and thus correctly reported no tip income on cash fares on his tax return.

SUMMARY OF THE PARTIES' POSITIONS

18. Petitioner claims broadly that all of his reported expenses were in fact incurred, were valid business expenses, and thus should be allowed in full. As to cash tips, petitioner contends that he simply did not accept any tips on cash fares for fear of fines or other reprisals for doing so.

19. The Division points out that petitioner failed to introduce a lease stating that items such as car washes, oil changes, and flat tires were his responsibility. The Division notes, in addition, that the remaining disallowed deductions for business expenses were not supported by documentation (receipts), as required. The Division argues that without accurate supporting documentation, such amounts have not been substantiated and could, even if incurred, represent personal expenses and not deductible business expenses. Accordingly, the Division argues that it

properly disallowed the claimed expenses that were not supported by receipts. Finally, the Division relied upon the described VeriFone Report (***see*** Finding of Fact 10), together with its office experience in auditing taxi cab drivers (***see*** Finding of Fact 9), as support for the determination that it was proper to impute additional cash tip income, calculated as 18% of petitioner's reported cash fares, since the same allegedly reflects the norm in the industry.

CONCLUSIONS OF LAW

A. This matter presents two separate issues. The first is whether the Division improperly disallowed petitioner's claimed business expenses in recalculating his adjusted gross income. The second is whether the Division erroneously adjusted petitioner's gross income from his taxi business by imputing cash tip income equal to 18% of his recorded and reported cash fares. Each issue shall be addressed separately.

Disallowed Business Expenses

B. Tax Law § 612 (a) provides that New York adjusted gross income of an individual, the starting point for determining New York taxable income, is equal to federal adjusted gross income (with certain modifications not relevant in this matter). Pursuant to Internal Revenue Code (IRC) §§ 62 (a) (1) and 162 (a), in arriving at federal adjusted gross income, a taxpayer may deduct "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . ."

C. The Division has not claimed that petitioner's two businesses, taxi cab driving and tee-shirt printing, are not legitimate business activities, i.e., activities engaged in with the intent and reasonable expectation of realizing a profit as opposed to mere hobby activities. Thus, petitioner may be entitled to deductions for his business expenses, to the extent their payment has

been substantiated, and insofar as the same are ordinary and necessary to the conduct of his businesses and are reasonable in amount.

D. It is petitioner's burden to show entitlement to all expenses and deductions claimed on his returns and to substantiate the amount of such expenses and deductions (Tax Law §§ 689 [e]; 658 [a]; 20 NYCRR 158.1); ***see Matter of Goode***, Tax Appeals Tribunal, October 17, 2013). In this regard, petitioner was required under the Tax Law to maintain adequate records of all of his claimed items of expense and deduction for the year in issue (***see*** 20 NYCRR 158.1 [a]).

E. Petitioner's position concerning the deductibility of expenses in this case is significantly hampered by the very limited amount of substantiating receipts he furnished in support of his claimed expenses. At the same time, and under ***Cohan v. Commissioner*** (39 F2d 540, 544 [2d Cir 1930]), the courts are permitted to estimate expenses, and may make an approximation of an allowable expense deduction amount, when the taxpayer establishes he is reasonably entitled to a deduction but the full amount deducted cannot be adequately substantiated by documentation (***see also Lerch v. Commissioner***, 877 F2d 624 [7th Cir 1989]; ***Bauer v. Commr.***, TC Memo 2012-156 [2012]). This so-called "Cohan Rule" is limited, however, by ***Pfluger v. Commissioner*** (840 F2d 1379 [7th Cir 1988], ***cert denied*** 487 US 1237 [1988]; ***see*** Internal Revenue Code [IRC] § 274 [d]; ***Sanford v. Commissioner***, 50 TC 823, 827 [1968]). In this respect, IRC § 274 (d) applies a more strict substantiation requirement for certain business expenses, including, among other things, expenses for travel, tolls, and cellular telephone expenses (IRC §§ 274 [d] [4]; 280F [d] [4] [A]). As stated by the U.S. Tax Court in ***Ong v. Commissioner*** (TC Memo 2012-114 [4-19-2012]):

> "To substantiate a deduction attributable to such expenses, a taxpayer must maintain adequate records or present corroborative evidence to show the

> following: (1) the amount of the expense; (2) the amount of each business use and total use (e.g., mileage for automobiles and time for other listed property); (3) the time (i.e., date of the expenditure or use); and (4) the business purpose of the expense or use. Sec. 274(d); sec. 1.274-5T(b)(6), Temporary Income Tax Regs., 50 Fed. Reg. 46016 (Nov. 6, 1985). In the absence of evidence establishing the elements of the expenditure or use, deductions are to be disallowed entirely. Sec. 274(d); Sanford v. Commissioner, 50 T.C. 823, 827 (1968), aff'd per curiam, 412 F.2d 201 (2d Cir. 1969); see also sec. 1.274-5T(a), Temporary Income Tax Regs., supra."

The specific intent of IRC § 274 (d) and the regulations is to limit the application of the ***Cohan*** rule (***Sanford***, 50 TC at 827; ***Rodriguez v. Commissioner***, TC Memo. 2009-22 [2009]). Ultimately, as discussed by the Tax Appeals Tribunal in ***Matter of Hamsho*** (Tax Appeals Tribunal, October 25, 1990), the ***Cohan*** rule is not obligatory, and deductions may be completely disallowed where the taxpayer has provided no basis to make a reasonable estimation (***Pfluger v. Commissioner***; ***Ong v. Commissioner***).

F. Petitioner argues that he has established entitlement to all of his claimed deductions for his business expenses. Petitioner did provide some receipts for expenses, as detailed, and he offered testimony at hearing in support of many of his claimed expenses. In contrast, the Division correctly points out the overall paucity of substantiating documentation provided in this matter. In light of the foregoing legal framework, and the parties' respective arguments, petitioner's claimed deductions for the various business expenses are addressed as follows:

Taxicab Operation

a) Advertising ($124.00): No receipts or explanations were provided regarding this claimed expense and the same is denied.

b) Commissions and Fees ($35,880.00): This amount was accepted and allowed by the Division.

c) Legal and Professional ($1,321.00): petitioner's testimony was vague and general, and no supporting bills for legal services were provided.

Further, no statement (affidavit or affirmation) from the attorney who allegedly represented petitioner was provided, despite the period of time, post-hearing, during which petitioner could have attempted to obtain such information. This claimed expense is therefore properly denied.

d) Repairs and Maintenance ($3,143.00): No receipts in addition to those for which the Division previously allowed credit ($655.00) were furnished post-hearing. In this regard, no statement (affidavit) was supplied from the person with whom petitioner partnered in leasing and driving the taxicab concerning any shared expenses incurred and claimed as deductions against income. Accordingly, no further allowance for repairs and maintenance is warranted.

e) Fuel ($29,460.00): No receipts in addition to those for which the Division previously allowed credit ($13,620.00) were furnished post-hearing. Petitioner's claim that the gas pumps lacked paper on which a receipt could have been printed, while possible in some instances, is simply insufficient to support allowance of the balance of the claimed fuel expense, given the amount of the balance, the fact that the same represents more than 50 percent of petitioner's claimed fuel purchases, and that receipts in such circumstances might reasonably have been obtained from the service station attendant. No further allowance is merited.

f) Car Washes ($1,664.00): Petitioner provided receipts for car wash purchases totaling $312.00, and the Division allowed the same. The cost per wash, per receipts, was almost always $8.00, thus resulting in an allowance of 39 car washes over the course of the year. There is no dispute that petitioner is obligated, per TLC rules, to maintain his taxi cab in a clean condition, inside and out, at all times. He stated that he washes the vehicle frequently, and in some instances, performs interior cleaning when passengers become ill in the taxi. Given the variable seasonal weather conditions in the Northeast, and noting specifically winter driving conditions, but at the same time recognizing that cleaning would have been undertaken by petitioner's driving partner as well as by petitioner, a reasonable allowance, without additional substantiating receipts, would be two car wash purchases per week for petitioner. At $8.00 per wash, an expense deduction totaling $832.00 ($8.00 per car wash times two car washes by petitioner per week times 52 weeks) is allowed.[7]

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[7] It is noted, in passing, that while this allowance is deemed reasonable on the basis described, the same mathematically equals exactly 50% of the amount of expense claimed by petitioner. This lends some substance to the possibility that petitioner's claimed amount for car washes represented simply an estimate by petitioner, at the time of filing his return, that he washed the taxicab four times per week.

g) Tolls ($3,225.00): This amount was accepted and allowed by the Division.

h) State Surcharge ($2,273.00): This amount was accepted and allowed by the Division.

I) Phone ($2,514.00): Petitioner stated that he used his personal cellular telephone to contact his taxi driving partner at the end of a driving shift to tell him where the vehicle was parked, and to contact the manager/broker through whom petitioner obtained his medallion and vehicle lease. Petitioner provided no breakdown between his business use versus his admitted personal use of his phone. As outlined in Conclusion of Law E, stricter rules apply concerning the requisite level of substantiation necessary with respect to this type of expense. Given that no such substantiation has been provided, no allowance may be made.

j) Meter ($315.00): The Division consented, at hearing, to an allowance of $24.75 based on receipts provided in conjunction with petitioner's testimony.

k) Postage ($1,009.00): This claimed expense, for which only a very general explanation and essentially no substantiation was provided, was properly disallowed.

i) Air Freshener ($720.00): Petitioner produced one receipt for $32.66 for one purchase of the oil he uses, in lieu of alcohol based products, as an air freshener in his taxicab, and the same is allowed. Petitioner's testimony that the oil used in this fashion "lasts for a long period of time" as compared to alcohol based air fresheners is credible. At the same time, dividing the claimed expense ($720.00) by the cost per bottle ($32.66) results in the purchase of over 22 bottles per year of this "long-lasting" oil. On balance, and without receipts, it is appropriate to allow the cost of two bottles of oil per quarter as a reasonable expense amount. Accordingly, an expense deduction totaling $261.28 ($32.66 per bottle times two bottles per quarter times four quarters per year) is reasonable and is allowed.

m) Legal Book ($209.00): Petitioner's purchase of the well-known civil legal procedure treatise "New York Practice," authored by David Siegel, and his statement that he did so to familiarize and educate himself concerning legal proceedings, while perhaps laudable, does not convert such expense into a deductible expense incurred in the operation of his primary business of driving a taxicab, and the same is not allowable.

n) GPS ($100.00): Petitioner's purchase of a Tom Tom brand GPS for use in obtaining directions and routes with respect to the destinations to which he conveyed his passengers, although not supported by a receipt, is clearly, in cost and purpose, an ordinary, necessary and reasonable expense incurred in his business and the same is therefore allowed.

T-Shirt Business

o) Taxes and Licenses ($174.00): No receipts were initially furnished or were provided thereafter during the post-hearing period allowed for the submission of receipts or substantiation, notwithstanding that information and receipts for amounts paid for taxes and licenses, as well as the licenses themselves, would appear to be the types of items maintained on file as official records and obtainable upon request from the licensing authority. Accordingly, this claimed expense amount is properly disallowed.

p) Travel ($54.00): No receipts were provided for this claimed expense and the same is properly denied.

q) D & B Credibility ($900.00): The $69.00 receipt or invoice for Dun & Bradstreets' "CreditBuilder" product is dated December 16, 2011. No other receipts or invoices were provided with respect to any Dun and Bradstreet products or services purchased during the year in issue and no allowance may be made for this claimed expense.

r) Designs ($614.00): No receipts were provided to substantiate this claimed expense, and no allowance for the same may be granted.

s) Storage ($1,224.00): Petitioner produced only one invoice in the amount of $102.00 for Moishe's, dated July 1, 2013. The evidence provided subsequent to the hearing, as detailed in Finding of Fact 16-s, does not establish that any other payments on the storage unit at Moishe's were made, or specify any months during which payments were clearly not made. As with a number of the other expenses claimed by petitioner, his evidentiary problem is exacerbated by the lack of any information that might have been reasonably secured by petitioner during the post-hearing period allowed for obtaining substantiation (e.g., affidavits from Moishe's personnel or copies of its relevant business records) that might have provided greater detail concerning his claimed payments. Accordingly, allowance is made only for the one payment of $102.00 substantiated by the noted July 1, 2013 receipt.

t) Postage ($1,851.00): No receipts were furnished for this claimed

expense and the same was properly disallowed.

u) Café Press ($57.00): No receipts were provided concerning this claimed expense, including information from the website operator, that might have reasonably been obtained by petitioner during the post-hearing period allowed for that purpose. Accordingly, this expense was properly disallowed.

G. In summary, with respect to his taxi driving business, petitioner claimed expenses totaling $81,957.00, and the Division allowed $55,965.00 and disallowed $25,992.00 thereof. With respect to his T-Shirt printing business, petitioner claimed expenses totaling $4,874.00 and the Division disallowed all of such expenses (***see*** Findings of Fact 7, 8). As specified above, with respect to his taxi cab driving business, petitioner is entitled to an additional allowance for expenses totaling $906.03 (car washes [$520.00], meter [$24.75], air freshener [$261.28] and GPS [$100.00]), such that his allowable business expenses total $56,871.03 (***see*** Conclusion of Law F-f, j, l, n). With respect to his T-shirt printing business, petitioner is entitled to an additional allowance for expenses totaling $102.00 (storage [$102.00]), such that his allowable business expenses total $102.00 (***see*** Conclusion of Law F-s).

Imputed Cash Tip Income

H. On this issue, petitioner's steadfast claim is that he simply did not accept any cash tips in 2013. His testimony on how typical it is for a customer to offer a tip is that the practice "varies," "sometimes," and that tips are "less frequent" on cash fares. This essentially ambiguous testimony adds no strength to petitioner's position that he did not receive a single tip on a cash fare in 2013. Further, petitioner's claim that he would not accept cash tips for fear of being accused of "overcharging" is belied by the fact that he did, in fact, accept tips on credit card fares as established by the CMT Report pertaining to petitioner (***see*** Findings of Fact 7 n 2,

10, 11). In this regard, a driver's suggestion or intimation that a tip or other amount in addition to the metered fare amount is required, a violation of TLC rules for which a fine may be imposed, is clearly different from accepting a tip or gratuity in addition to the metered fare amount, when freely offered to a driver by a passenger. Petitioner's argument, however, essentially conflates the two. It is also noteworthy that cash fares, credit card fares and, importantly, credit card tips are recorded on the taxicab meters and appear on the CMT and VeriFone reports, while cash tips are not so recorded or reported on either. Petitioner reported only those amounts that were so recorded on the meter and appeared on his CMT Report, but reported not a single cash tip (the only item not meter recorded and CMT reported) for the year in issue, upon the alleged basis that he simply did not accept any cash tips. Given the foregoing, it is difficult to accept petitioner's claim that he never accepted a cash tip from a customer.

I. While Tax Law § 689 (e) places the burden upon taxpayers to establish error, a tax determination must have a rational basis in order to survive review (***Matter of Abbasi***, Tax Appeals Tribunal, June 12, 2008; ***see also Matter of Atlantic & Hudson Ltd. Partnership.***, Tax Appeals Tribunal, January 30, 1992). The Division premises its 18% imputed amount upon its own, unspecified, "experience with other reports," its undescribed "standard audit practice" based upon its audits of others in the taxicab driving business, and upon the specific calculation showing that tips on credit card fares were, on one VeriFone Report, 18.93% of such credit card fares (***see*** Findings of Fact 10, 11 [c]). The CMT Report in evidence pertains directly to petitioner and shows only that tips were included in the credit card fares petitioner received. In contrast, the VeriFone Report in evidence, upon which the Division relies, does not pertain to petitioner, but rather is simply one isolated meter report pertaining to some other, unidentified,

individual. Moreover, the two reports differ in that the CMT Report shows only the combined total of credit card fares and credit card tips, whereas the VeriFone Report segregates and reports the two items as individual amounts (***see*** Finding of Fact 10). While the VeriFone Report (unlike the CMT Report) allows for computation of the noted 18.93% tip rate on credit card fares (***see*** Finding of Fact 11 [c]), it does not represent an "industry study" or provide anything beyond a snapshot of the credit card tip rate for one particular unidentified driver. Noting the distinction between the two reports, it cannot be concluded that the same are comparable, at least for purposes of establishing an average cash tip rate, or that they provide a basis for imputing the 18% rate in question to petitioner. Similarly, the Division's generic claims of office experience and standard audit practice do not constitute industry studies or standards and do not serve to buttress the Division's position. In fact, the record includes no reference to any studies, either independently conducted, published and widely accepted (not to mention open to review and subject to examination by a taxpayer), nor is there even any study or report reflecting relevant data collected and compiled by the governmental agency (the TLC) charged with the responsibility of licensing and overseeing the taxicab industry. A stronger case for accepting the imputed income at issue might be made by the presentation of evidence (e.g., a VeriFone Report) specific to petitioner and establishing that he accepted tips on credit card fares at a percentage rate that closely matched the percentage rate at which tips on cash fares were being imputed to him. The record includes no such evidence.[8]

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[8] This conclusion is made giving full recognition to the fact that all of the fare and tip receipts from the CMT Report specific to petitioner, i.e., all of his cash fares (albeit without tips) and all of his credit card fares, including tips, that are so recorded and are thus easily tracked for reporting purposes, appear on petitioner's Schedule C and are thus reported for tax purposes. In contrast, tip receipts from cash fares are not so recorded and consequently are not so easily tracked for reporting purposes. Thus, the absence of any tip income from cash fares rests, as observed, solely upon the credibility of petitioner's testimony that he never accepts a cash tip on any fare

J. Given the foregoing, the Division's adjustment increasing petitioner's income by imputing cash tip income equal to 18% of cash fares cannot survive review because it lacks a rational basis. The Division offered no proof supporting its assertion that 18% is an acceptable or usual industry standard for cash tips. The audit file contains no documentation, such as industry reports or studies, proving that percentage to be correct. Absent such evidence, the 18% rate appears to be anecdotally generated from office experience and denominated standard audit practice and, as such, does not meet the required rational basis necessary to sustain such an adjustment (***see e.g. Matter of Abbasi*** [audit utilizing a rent factor generated from "office experience" lacked a rational basis]; ***compare Matter of A & J Gifts Shop v Chu***, 145 AD2d 877, 878 [1988], ***lv denied*** 74 NY2d 603 [1989] [upholding specifically developed external index that was further adjusted downward to comport with Division's actual experience]). In sum, and based solely upon the evidence presented in this case, the Division has not established that it was entitled to increase petitioner's gross income from his taxi cab driving business by imputing an additional amount of income thereto equal to 18% of petitioner's reported fares paid in cash.

K. In light of the foregoing, the Division is directed to:

> a) recalculate petitioner's income derived from his taxicab driving business by increasing the amount of allowable business expense deductions ($906.03), as summarized in Conclusion of Law G, and by eliminating the amount of additional cash tip income it included therein by imputation ($5,852.00).
>
> b) recalculate petitioner's income (net loss) derived from his silk-screen T-shirt printing business by increasing the amount of allowable business expense deductions ($102.00), as summarized in Conclusion of Law G.

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under any circumstances. The plausibility of such testimony is, as observed, questionable at best (***see*** Conclusion of Law H).

L. The petition of Dane Clayton is granted to the extent provided above and summarized in Conclusion of Law K, but is otherwise denied, and the Notice of Deficiency dated November 5, 2014, as modified by the foregoing, is sustained.

DATED: Albany, New York
October 6, 2016

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE