

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
STELLA JACKSON : DETERMINATION
DTA NO. 827709
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 2014. :

Petitioner, Stella Jackson, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2014.

On February 6, 2018 and February 10, 2018, respectively, the Division of Taxation, appearing by Amanda Hiller, Esq. (Charles Fishbaum, Esq., of counsel), and petitioner, appearing by American Tax Consultant Group, LLP (Larry Johnson, EA), waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by July 9, 2018, which date commenced the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Barbara J. Russo, Administrative Law Judge, renders the following determination.

ISSUES

- I. Whether petitioner has established entitlement to Schedule A itemized deductions for job expenses.
- II. Whether the Division of Taxation properly disallowed claimed Schedule E losses.

FINDINGS OF FACT

1. Petitioner, Stella Jackson, filed a New York State personal income tax return for tax year 2014 on June 8, 2015. On the return, petitioner reported wage income of \$107,462.00 from New York and Presbyterian Hospital, a capital loss of \$3,000.00, and a rental real estate loss of \$22,769.00, resulting in New York adjusted gross income of \$81,693.00. From this amount, petitioner deducted claimed itemized deductions in the amount of \$60,399.00, and reported New York taxable income of \$21,294.00. Petitioner reported New York tax in the amount of \$1,042.00, less taxes withheld in the amount of \$9,705.00, and requested a refund of overpayment in the amount of \$8,663.00.

2. Attached to petitioner's return was form IT-201-D, Resident Itemized Deduction Schedule, reporting total itemized deductions of \$60,399.00, including, among other items, job expenses/miscellaneous deductions in the amount of \$40,061.00.

3. Also attached to petitioner's return was a schedule E, Supplemental Income and Loss, reporting rental income and losses for property located at 3235 Wilson Avenue, Bronx, New York. On the schedule E, petitioner reported rents received in the amount of \$10,800.00 and a real estate loss of \$22,769.00, consisting of the following expenses:

Expense	Amount
Auto and travel	\$2,840.00
Insurance	\$1,728.00
Legal and other professional fees	\$1,000.00
Repairs	\$9,603.00
Supplies	\$300.00
Taxes	\$3,853.00
Utilities	\$3,467.00

Other -Water	\$461.00
Flood Insurance	\$125.00
Paints and Labor	\$500.00
Mortgage/Home Equity Loan Payment	\$26,000.00
ADT	\$609.00
TOTAL EXPENSES	\$50,486.00

4. The Division of Taxation (Division) selected petitioner's return for review. Based on available information, the Division recomputed petitioner's return and issued an adjusted refund to petitioner on July 13, 2015, in the amount of \$5,075.23.

5. On July 20, 2015, the Division sent a request for additional information to petitioner, requesting that petitioner provide documentation supporting the claimed itemized deductions and rental loss.

6. Petitioner did not provide sufficient documentation supporting the claimed job expenses and rental loss, and on November 30, 2015, the Division issued a statement of proposed audit change (Statement), stating, in part, the following:

“Thank you for your correspondence in reply to our request for additional information regarding your 2014 return. Based on this information, your New York tax liability has been computed as shown.

After review of your information, you have been allowed a total of \$20,338 as your New York State itemized deduction. The amounts claimed as medical/dental expenses (Sched A-line 4), taxes paid (Sched A-line 9), interest paid (Sched A-line 15), and gifts to charity (Sched A-line 19) have been allowed in full.

The amount claimed as job expenses/other misc deductions (Sched A-line 27) has been disallowed due to lack of acceptable verification as outlined in our information request letter. Amounts claimed as job expenses require 1) a letter from the employer stating that those expenses are required for that position and explaining any reimbursement policy for the expenses being claimed and 2) proof of payment; canceled checks, payment receipts, etc. (Car expenses usually require mileage logs showing to/from destination points. Expenses related to normal commuting are not deductible).

In the course of our review, records indicate you have decalred (sic) excessive

losses as rental; S-corp; partnership income/loss (IT201 - line 11) in excess of two years out of five year period. In this case, the ventures are deemed not for profit and expenses are allowed only up to the amount of income. Therefore, the rental loss declared in 2014 has been adjusted to zero, pending submission of required documentation to verify such loss(es).

Required information for Rent Income/Loss:

1) Rent income; a copy of Schedule E, from your federal income tax return, a copy of any lease and rental agreement for the tax year above showing the total rent you collected each month, the full name and current address of all your tenants for the year above; description of the relationship (if any) that the tenants have to you and your spouse (if you receive all or part of your rent through a public rental assistance program, such as from Section 8, then please send us documentation to show the portion you received through public assistance and the portion from the tenant).

2) Rent expenses; copies of any 1098 forms issued by your lender showing the mortgage interest you paid, copies of tax receipts and canceled checks showing the taxes you paid (if not shown on the 1098 form) copies of receipts and canceled checks showing the amount paid and period covered, utilities (if you also reside at the rental property, document the utilities you paid for yourself, and those you paid for your tenant) and repairs - receipts and canceled checks showing the cost related to the rental property. For all rental expenses, credit card statements or canceled checks without receipts that identify the items or services that you purchase are unacceptable.”

The Division recomputed petitioner’s return and determined tax due in the amount of \$508.04, plus interest and penalty.

7. The Division issued to petitioner a notice of deficiency, dated January 19, 2016, asserting tax due in the amount of \$508.04, plus interest and penalty for the year 2014.

8. Petitioner failed to file any documents or brief in accordance with the submission schedule established for this matter.

CONCLUSIONS OF LAW

A. Petitioner has the burden in this proceeding to show entitlement to all expenses and deductions claimed on her return and to substantiate the amount of the expenses and deductions (*see* Tax Law §§ 658 [a]; 689 [e]; 20 NYCRR 158.1; *Matter of Macaluso*, Tax Appeals

Tribunal, September 22, 1997, *confirmed* 259 AD2d 795 [3d Dept 1999]). Petitioner was required under the Tax Law to maintain adequate records of her items of expenses and deductions for the year in issue (Tax Law § 658 [a]; 20 NYCRR 158.1 [a]).

B. Internal Revenue Code (IRC) (26 USCA) § 162 (a) permits deductions for “ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.” An ordinary expense is one that is “common and accepted,” although not necessarily “habitual” (*Welch v Helvering*, 290 US 111, 114 [1933]). A necessary expense is one that is “appropriate and helpful in carrying on the trade or business” (*Heineman v Commr.*, 82 TC 538, 543 [1984]). The performance of services as an employee is considered a trade or business (*O’Malley v Commr.*, 91 TC 352, 363-364 [1988]). Certain deductions from adjusted gross income, such as the claimed unreimbursed employee business expenses at issue, are considered miscellaneous itemized deductions and are allowed only to the extent that the aggregate of such deductions exceeds 2% of the taxpayer’s adjusted gross income (IRC [26 USC] § 67 [a]).¹

Despite consenting to have this matter heard by submission rather than a hearing, petitioner failed to submit any evidence or arguments in accordance with the submission schedule. The record is devoid of evidence showing the business purpose or supporting the amounts claimed as business expenses. As such, petitioner has failed to meet her burden of proving entitlement to schedule A itemized deductions claimed for job expenses.

C. Petitioner has also failed to submit any evidence in support of claimed schedule E real estate losses. As noted above, taxpayers are allowed deductions for certain business and investment expenses under IRC (26 USC) §§ 162 and 212. Section 469 (a) of the IRC generally

¹ Federal income tax law is determinative in the present matter because federal adjusted gross income is the starting point in determining an individual’s New York adjusted gross income and federal itemized deductions provide the starting point for the calculation of New York itemized deductions (*see* Tax Law §§ 612, 615 [a]).

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 the year (*see* IRC [26 USC] § 469 [d] [1]). A passive activity is any trade or business in which the taxpayer does not materially participate (IRC [26 USC] § 469 [c] [1]). For the purposes of section 469 and to the extent provided in regulations, a trade or business includes any activity with respect to which expenses are allowable as a deduction under section 212 (IRC [26 USC] § 469 [c] [6] [B]). Rental activity is usually treated as a per se passive activity regardless of whether the taxpayer materially participates (IRC [26 USC] § 469 [c] [2], [4]). Material participation is defined as involvement in the operations of the activity that is regular, continuous, and substantial (IRC [26 USC] § 469 [h] [1]).

An exception to the rule that a rental activity is per se passive is found in IRC (26 USC) § 469 (c) (7). If the taxpayer qualifies as a real estate professional, the taxpayer's rental real estate activity is treated as a trade or business subject to the material participation requirements of section 469 (c) (1) (*see* Treas Reg § 1.469 [e] [1]). A taxpayer may qualify as a real estate professional if:

“(i) more than one-half of the personal services performed in trades or businesses by the taxpayer during such taxable year are performed in real property trades or businesses in which the taxpayer materially participates, and

(ii) such taxpayer performs more than 750 hours of services during the taxable year in real property trades or businesses in which the taxpayer materially participates” (IRC [26 USC] § 469 [c] [7] [B]).

Only time spent in those businesses in which the taxpayer materially participates count toward the requisite 750 hours. A taxpayer materially participates in an activity if he or she works on a regular, continuous and substantial basis in operations (IRC [26 USC] § 469 [h] [1] [A] - [C]).

The regulation at 26 CFR § 1.469-5T (f) (4) provides the types of proof to be used in determining the extent of an individual's participation in an activity as follows:

“The extent of an individual's participation in an activity may be established by any reasonable means. Contemporaneous daily time reports, logs, or similar documents are not required if the extent of such participation may be established by other reasonable means. Reasonable means for purposes of this paragraph may include but are not limited to the identification of services performed over a period of time and the approximate number of hours spent performing such services during such period, based on appointment books, calendars, or narrative summaries.”

D. As set forth above, in order to determine whether a taxpayer qualifies as a real estate professional, the inquiry begins with a description of a taxpayer's occupation that is not related to the real estate activities. This analysis allows the Division to understand what a taxpayer's primary employment involves on a day-to-day basis and, then, to view the claimed real estate tasks and duties, in an effort to view a full picture of both income producing activities and determine if more than one-half of the personal services performed by the taxpayer are performed in real property trades or businesses. Here, petitioner was employed by New York and Presbyterian Hospital in 2014 and reported wage income of \$107,462.00. Petitioner has presented no evidence regarding the number of hours she worked for New York and Presbyterian Hospital and no evidence as to the number of hours spent on real estate activities. As such, petitioner has failed to meet her burden of proving that more than one-half of the personal services performed by her were performed in real property trades or businesses and has failed to establish that she performed more than 750 hours of services in real property trades or businesses in which she materially participated.

E. In addition to failing to satisfy the requirements to qualify as a real estate professional, petitioner failed to substantiate the expenses claimed for the rental property. Petitioner did not

submit documentary evidence supporting any of the claimed expenses. As such, the Division properly disallowed the claimed schedule E real estate losses.

F. The petition of Stella Jackson is denied and the notice of deficiency, dated January 19, 2016, is sustained.

DATED: Albany, New York
January 03, 2019

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE