

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ABBA BRAHIM</b>	:	DETERMINATION
<b>AND</b>	:	DTA NO. 827815
<b>AICHA TALEBOUSMAN</b>	:	
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 2014.	:	

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Petitioners, Abba Brahim and Aicha Talebousman, 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 2014.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, in New York, New York, on July 26, 2018, with all briefs due by November 15, 2018, which date began the six-month period for issuance of this determination. Petitioner Abba Brahim appeared pro se and on behalf of petitioner Aicha Talebousman. The Division of Taxation appeared by Amanda Hiller, Esq. (Linda A. Farrington, Esq., of counsel).

***ISSUE***

Whether the Division of Taxation properly disallowed a portion of petitioners' claimed business expenses, thereby resulting in the disallowance of petitioners' claimed refund and the assertion of tax due for the year 2014.

***FINDINGS OF FACT***

1. Petitioners, Abba Brahim and Aicha Talebousman, timely filed a New York State, New York City and Yonkers resident income tax return (form IT-201) for the year 2014. On this return, petitioners claimed one dependent. Petitioners calculated and reported total New York State, New York City and Yonkers taxes due in the amount of \$209.00, versus payments and refundable credits in the amount of \$1,202.00, thus resulting in an overpayment in the amount of \$993.00 that was claimed as a refund with the filing of their return.<sup>1</sup>

2. Attached to the foregoing return was a federal form 1040 schedule C (Profit or Loss From Business). On Part I of such schedule C, petitioner Abba Brahim, as proprietor, reported gross receipts of \$83,861.00 from Unter LLC, for providing a “taxi and limousine service.” On Part II (Expenses) and Part V (Other Expenses) of such schedule C, Mr. Brahim reported total expenses of \$60,956.00, leaving a reported net profit of \$22,905.00, which was carried to and reported as business income on line 6 of petitioners’ form IT-201.

3. By a letter dated March 2, 2015, the Division of Taxation (Division) requested substantiation in support of petitioners’ claimed dependent exemption, and their reported income and expenses.

4. To substantiate the \$83,861.00 amount of income (gross receipts) reported on Schedule C, petitioners provided form 1099-K (Payment Card and Third Party Network Transactions), issued by Unter LLC to Mr. Brahim, reporting such amount.

5. To substantiate the \$60,956.00 of total expenses reported on schedule C, petitioners

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<sup>1</sup> The \$1,202.00 overpayment amount consisted of a New York State earned income credit (\$912.00), a New York City school tax credit (\$125.00), and a New York City earned income credit (\$165.00).

provided to the Division a 2014 Tax Summary, issued to Mr. Brahim by Uber, as well as petitioners' credit card statements and bank account statements issued by Bank of America.

6. Petitioners were advised, by a letter from the division dated August 3, 2015, that the documents they provided concerning the amounts of income and expenses set forth on schedule C was insufficient to substantiate such amounts so as to allow petitioners' \$993.00 claimed refund.<sup>2</sup>

7. On February 1, 2016, the Division issued to petitioners a notice of disallowance (Notice No. X-650761335), disallowing the claimed \$993.00 refund based upon petitioners' failure to have submitted proof substantiating the amounts of earned income and expenses reported on their return.

8. Petitioners requested a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). Following a conciliation conference, Conciliation Order No. 269614, dated July 22, 2016, was issued to petitioners sustaining the February 1, 2016 notice of disallowance.

9. Petitioners continued their challenge by filing a petition with the Division of Tax Appeals. The Division answered the petition on November 9, 2016. Thereafter, the Division requested and was granted permission to file an amended answer, and did so on January 3, 2018. The Division's amended answer affirmatively asserts that petitioners' substantiation in support of claimed, but disallowed, business expenses was not only insufficient to support such expenses and the claimed refund, but in fact results in a deficiency and balance of tax due in the amount of

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<sup>2</sup> The Division accepted petitioners' claim of one dependent exemption, set forth on their return, and that claim is not at issue herein.

\$2,466.00.<sup>3</sup>

10. After further review of the documents previously submitted, together with review and consideration of additional information provided by Mr. Brahim at hearing, the Division accepted petitioners' reported gross receipts, as reported, and made certain adjustments to some of the expenses claimed by petitioners, as set forth hereinafter:

<b>Item Description</b>	<b>As Claimed On Schedule C</b>	<b>As Adjusted Per Documentation</b>	<b>Difference--Increase or (Decrease)</b>
Gross Receipts	\$83,361.00	\$83,361.00	\$0.00
Less: Expenses:	-----	-----	-----
Commissions/Fees	\$25,158.00	\$16,636.00	(\$8,522.00)
Black Car Fund	\$0.00	\$1,886.00	\$1,886.00
Insurance	\$4,500.00	\$3,797.00	(\$703.00)
Repairs & Maintenance	\$1,165.00	\$0.00	(\$1,165.00)
Supplies	\$225.00	\$0.00	(\$225.00)
Taxes & Licenses	\$948.00	\$6,124.00 (sales tax)	\$5,176.00
Meals & Entertainment	\$2,880.00	\$0.00	(\$2,880.00)
Phone/Device Subscription	\$480.00	\$460.00	(\$20.00)
Car Payment	\$8,880.00	\$0.00	(\$8,880.00)
Tolls	\$2,280.00	\$3,341.00	\$1,061.00
Gas	\$14,440.00	\$3,191.00	(\$11,249.00)
Safe Ride Fee	\$0.00	\$8.00	\$8.00
Split Ride Fee	\$0.00	\$13.00	\$13.00
Drug Test	\$0.00	\$26.00	\$26.00
Car Wash	\$0.00	\$106.00	\$106.00

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<sup>3</sup> The amount of the asserted deficiency was reduced to \$1,970.00, based upon review of additional documentation submitted by petitioners after the Division's amended answer was filed.

Total Expenses	(\$60,956.00)	(\$35,588.00)	(\$25,368.00)
Net Profit	\$22,905.00	\$48,273.00	\$25,368.00

11. As shown above, the Division's adjustments to claimed expenses included both increases and decreases thereto, the net impact of which was a net \$25,368.00 decrease (disallowance) of claimed expenses, resulting in a like net business profit increase amount of \$25,368.00. Review of the 2014 Tax Summary, provided by Uber to Mr. Brahim, reflects a number of expense amounts, including tolls (\$3,340.88), sales tax (\$6,124.37), black car fund (\$1,885.89), split fare fee (\$12.50), safe rides fee (\$8.00), device subscription (\$460.00), Uber fee (\$16,635.81) and on-trip mileage (13,949.4 miles).<sup>4</sup> The Division accepted and allowed all of the amounts set forth on the Tax Summary, including the resulting increases to the amounts claimed on schedule C for taxes and licenses, and for tolls, as well as the amounts for black car fund, split fare fee, and safe rides fee, notwithstanding that such latter amounts were not claimed on schedule C. These increases were not disputed by petitioners. Likewise, the resulting decreases to the amounts claimed on schedule C for phone/device subscription and commissions and fees, based upon the amounts set forth on the Tax Summary, were conceded by petitioners at hearing.<sup>5</sup>

12. The balance of expenses claimed on schedule C, but not set forth on the Tax Summary, were addressed by the Division, as follows:

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<sup>4</sup> This final item was listed as miles, but was not otherwise set forth, on the Tax Summary or elsewhere, in terms of a total dollar-value expense amount. Petitioners claimed the actual vehicle expenses allegedly incurred (consisting of a number of individual expense items and amounts), rather than a single mileage-based vehicle expense amount.

<sup>5</sup> The \$20.00 decrease for phone/device subscription appears likely reflective of a simple error in inputting the amount of such expense when petitioners' return was prepared.

a) insurance: the expense amount claimed on schedule C for insurance was decreased, so as to be based upon documents provided at hearing by petitioners. This decrease was conceded by petitioners.

b) supplies: Mr. Brahim testified that this expense represents various miscellaneous supplies he was required, by Uber, to provide to passengers, including water and paper towels. The Division disallowed this claimed expense in full based on the lack of any records documenting a requirement to provide such items or substantiating the cost of the same.

c) meals and entertainment: Mr. Brahim testified that this claimed expense represented the cost of his lunches and dinners while working. The Division disallowed the full amount claimed as constituting personal expenses rather than ordinary and necessary expenses in Mr. Brahim's business, as well as for a lack of any substantiating documents showing the dollar amounts, time and place, business purpose, and relationship of the claimed expenses to the persons entertained, if any.

d) vehicle repairs and maintenance: Mr. Brahim testified that he only owns one vehicle and uses the same in both his business as an Uber driver and for personal matters. Petitioners did not provide any documents or testimony concerning the percentage of time the vehicle was used for personal versus business purposes. Mr. Brahim described the claimed expense for vehicle repairs and maintenance as expenses for general car maintenance and repairs. A period of time was requested, and afforded, post hearing, for petitioners to obtain and submit receipts in support of the claimed items of repair and maintenance expense. No such receipts were submitted, and the Division disallowed the amount of the claimed expense in full.

e) car payments: petitioners did not supply any documents or testimony to establish whether the portion of any car payments made represented interest amounts, nor did petitioners provide any sales contract or other information to show the purchase price of the vehicle or amounts of depreciation, if any, previously deducted with respect thereto, from which any additional depreciation might have been calculated and allowed as a deductible expense. The Division disallowed this expense in full.

f) car washes: petitioners did not claim any expense for car washes on schedule C, and did not supply any documents regarding the cost of any car washes. Mr. Brahim testified at hearing that the total cost of car washes was "over two or three thousand [dollars]," and that he used other forms of payment for car washes for which documentation was not available or provided at the time of the wash. Based on information gleaned from its review of petitioners' bank statements, the Division allowed an expense of \$106.00 for car washes.

g) gas: based on information in petitioners' bank and credit card statements, the Division reduced the claimed expense for gas from \$14,440.00 to \$3,191.00. Petitioners argued that this result fails to reflect any estimation for purchases of gas paid for in cash, and that common sense

requires a higher allowable expense amount.<sup>6</sup>

13. Based on the foregoing review and adjustments, the Division concluded that petitioners were not entitled to a refund, as claimed, but rather owed additional tax, calculated as follows:

Business Income (Net Profit) .....	\$48,273.00
Federal Adjustments to Income (½ self-employment tax) ...	<u>(\$3,412.00)</u>
Federal Adjusted Gross Income .....	\$44,861.00
Standard Deduction .....	<u>(\$15,650.00)</u>
Dependent Exemption .....	<u>(\$1,000.00)</u>
New York State Taxable Income .....	<u>\$28,211.00</u>
New York State Tax .....	\$1,233.00
New York City Tax .....	<u>\$862.00</u>
Total Tax .....	\$2,095.00
New York State Earned Income Credit .....	\$0.00
New York City Earned Income Credit .....	\$0.00
New York City School Tax Credit .....	<u>\$125.00</u>
Net Tax Due .....	<u>\$1,970.00</u>

### ***CONCLUSIONS OF LAW***

A. 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

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<sup>6</sup> To support the Division’s gas expense allowance, the auditor utilized the 13,949 “on trip” miles set forth on the Uber Tax Summary (*see* findings of fact 5 and 11), doubled such mileage (to 28,000) in recognition that Uber drivers often drive around before picking up a fare, or on the return trip from a fare, and computed an estimated gas expense, using \$2.50 as an average price per gallon for gas, in the amount of \$3,700.00. The auditor noted that this calculation made no adjustment for nondeductible gasoline consumed in personal use of the vehicle, and further concluded that even if gas purchases had been paid for in cash or otherwise by means outside of petitioners’ credit card, the gas expense amount claimed on schedule C was clearly unreasonably overstated and excessive.

carrying on any trade or business. . . .”

B. It is petitioners’ burden to establish entitlement to all expenses and deductions claimed on their returns, and to substantiate the amount of such expenses and deductions (*see* Tax Law §§ 689 [e]; 658 [a]; 20 NYCRR 3000.15 [d] [5]); *see also Matter of Goode*, Tax Appeals Tribunal, October 17, 2013). In this regard, petitioners were required, under the Tax Law, to maintain adequate records of all claimed items of expense and deduction for the year in issue, and to provide the same to the Division, upon request, for review (*see* 20 NYCRR 158.1 [a]).

\_\_\_\_\_C. In this case, the Division requested substantiation in support of the business expenses claimed by petitioners. The Division’s review of petitioners’ submissions in substantiation, and its recalculations based thereon, resulted in the disallowance a portion of such claimed expenses, and a consequent denial of the credits and resulting refund claimed by petitioners on their 2014 tax return. The Division notified petitioners of the disallowance of their claimed refund (*see* finding of fact 7). Petitioners challenged such disallowance by filing a petition with the Division of Tax Appeals, and thereafter provided some additional documents in support of their claimed expenses. The Division’s review of these additional documents revealed the same to be insufficient to support the claimed expenses, either in part, or in some instances, in full. The Division’s consequent denial of all or a portion of the amounts of claimed expenses, as specifically detailed in findings of fact 10 through 13, resulted in the calculation of an increase to petitioners’ tax liability for 2014, ineligibility for the credits claimed on petitioners’ return, and ultimately resulted in the assertion of an amount of tax due that was greater than that set forth on petitioners’ return.

D. As to the Division's disallowance of petitioners' claimed refund, and its subsequent assertion of a deficiency in this matter, Tax Law § 689 (d) (2) (A) provides as follows:

“(d) Assertion of deficiency after filing petition.—

(2) Petition for refund.— If the taxpayer files with the tax commission a petition for credit or refund for a taxable year, the tax commission may

(A) determine a deficiency for such year as to any amount of deficiency asserted at or before the hearing under rules of the tax commission, and within the period in which an assessment would be timely under section six hundred eighty-three...,”

E. Tax Law § 683 permits the Division to assess a deficiency within three years from the date on which a return is filed (*see* Tax Law § 683 [a]; [b] [1]). Petitioners' return for the year 2014 was due on or before April 15, 2015, and the time within which the Division was authorized to assess a deficiency with respect thereto did not expire until April 15, 2018 (*id*). Accordingly, the Division's assertion of the deficiency at issue here, subsequent to the filing of the petition and via its amended answer, on January 3, 2018, was timely and proper. Accordingly the Division of Tax Appeals has jurisdiction to address such deficiency.

F. Tax Law § 689 (e) places the burden of proof upon taxpayers, with certain limited exceptions where the burden of proof is transferred to the Division, as set forth at Tax Law § 689 (e) (1 - 4). The Division states that the only such exception that could be applicable here is Tax Law § 689 (e) (3), which allocates the burden of proof to the Division to establish “whether the petitioner is liable for any increase in a deficiency where such increase is asserted initially after the mailing of a notice of deficiency and a petition filed” (*Id.*; *see also* New York City Administrative Code § 11-1789 [e] [3]). The Division maintains that petitioners properly bear the burden of proof in this matter, and further argues, in the alternative, that even if the deficiency here is viewed as the assertion of a greater deficiency, per Tax Law § 689 (e) (3), with

respect to which the Division would bear the burden of proof, it has nonetheless met that burden.

G. The exception set forth at Tax Law § 689 (e) (3) is, by its terms, applicable only where there is an increase in a deficiency, and that increase is asserted initially after a notice of deficiency has been mailed and a petition has been filed. In this matter, since no notice of deficiency was mailed to the petitioners, Tax Law § 689 (e) (3) does not apply, and the burden of proof to overcome the asserted deficiency, by providing evidence sufficient to establish that the expenses in question were properly deductible as necessary and reasonable business expenses, remains upon petitioners.

H. Petitioners' position concerning the deductibility of expenses in this case is significantly hampered by the very limited amount of substantiating receipts furnished in support of the claimed but disallowed expenses. Petitioners argue that common sense requires a conclusion that automobile expenses incurred in the operation of a ride service, such as Uber, including gasoline, vehicle maintenance, car washes, and the like, are necessarily incurred and must be allowed as deductible expenses. Petitioners also claim that other expenses, for supplies and for meals and entertainment, were in fact incurred and are properly deductible as necessary for the operation of the Uber service. Under *Cohan v Commr.*, (39 F2d 540 [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 Commr.*, 877 F2d 624 [7th Cir 1989]; *Bauer v Commr.*, TC Memo 2012-156). This so-called "*Cohan* Rule" is specifically limited, however, by *Pflugger v Commr.*, (840 F2d 1379 [7th Cir 1988], *cert denied* 487 US 1237 [1988]; *see* IRC § 274 [d]; *Sanford v Commr.*, 50 TC

823, [1968]). In this respect, IRC § 274 (d) applies a more strict substantiation requirement for certain business expenses, including, among other things, expenses for vehicle and travel expenses, such as gasoline, tolls, repairs and maintenance, car payments and car washes, as well as cellular telephone expenses, meals and entertainment, (IRC §§ 274 [d] [4]; 280F [d] [4] [A]).

As stated by the U.S. Tax Court in *Ong v Commr.*, (TC Memo 2012-114):

“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*.”

I. 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 Commr.*, TC Memo. 2009-22). 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 Commr.*; *Ong v Commr.*).

J. Petitioners opted to claim their actual vehicle expenses, and several of such expenses were allowed by the Division based upon the Uber tax summary submitted in support (*see* finding of fact 5). However, a number of such claimed expenses remain in dispute. In calculating expenses related to a vehicle, taxpayers are entitled to take either the standard mileage rate or their actual vehicle expenses (Treas. Reg. § 1.274-5 [j] [2]); *see Smith v Commr.*,

T.C. Memo 2011-82). Taxpayers are required to keep detailed records substantiating their use of automobiles for business purposes (IRC § 274 [d] [4], as amended by Pub L 98-369 § 179 [b] [1]). Specifically, a log reporting total mileage, business mileage, commuting mileage and other personal mileage driven is required (Treas Reg § 1.274-5T). Here, petitioners' documentation does not include the required log, or any detail whatsoever, in support of the claimed expenses, and the Division's adjustments disallowing such claimed expenses, as detailed, were proper.

K. Petitioners argue that they have established entitlement to all of their claimed business expenses. Mr. Brahim did provide some receipts for expenses, as detailed. He also offered testimony at hearing in support of many of his claimed expenses. Mr. Brahim was afforded a period of time, post-hearing, to obtain substantiating documents in support of certain specific claimed expenses, including Taxi and Limousine Commission "Diamond Emission" vehicle inspection fee, vehicle registration cost, additional receipts for gasoline purchases and car washes, vehicle purchase price and vehicle payments made (including interest payments and depreciation information). No additional documents in support of any further claimed business expenses, in addition to those allowed, as above, by the Division, were provided. In light of the foregoing legal framework, including specifically the heightened substantiation requirements under IRC § 274, petitioners' claimed deductions for the various business expenses remaining in issue are addressed as follow:

- a) Repairs and Maintenance (\$1,165.00 claimed): No receipts in support of the claimed expenses were provided, and thus no allowance for repairs and maintenance is warranted.
- b) Gasoline (\$14,440.00 claimed): No receipts in addition to those for which the Division previously allowed credit (\$3,191.00), based upon bank and credit card statements, were furnished post-hearing. Petitioners' claim that some gas was paid for in cash or by other (unspecified) credit cards, without any receipts in support, is simply insufficient to support allowance of the balance of the claimed gas expense. The Division's disallowance of a

portion of petitioners' claimed gas expense is sustained, and no further allowance is merited (*see* finding of fact 12 [e], n 6).

c) Car Washes (\$0.00 claimed): Petitioners provided receipts for car wash purchases totaling \$106.00, and the Division allowed the same. No further basis has been provided in support of any additional allowance for car washes, estimated in Mr. Brahim's testimony to have totaled "over two or three thousand [dollars]."

d) Meals and Entertainment (\$2,880.00 claimed): Petitioners provided no receipts for this claimed expense and no basis to conclude that the same was necessarily incurred in carrying out the purposes of the business. In fact, Mr. Brahim admitted that such estimated expense amount represented the costs he incurred for meals (lunches and dinners) while he was working. The cost of personal meals while working is simply not allowable as a business expense deduction, and the Division's disallowance of the same is sustained.

e) Car Payments (\$8,880.00 claimed): The Division conceded that interest on a business vehicle loan may be deductible, but that payments of principal and other fees are not deductible. The Division conceded that an annual depreciation deduction to the extent that a vehicle is used in a business may be allowable, based upon establishing the extent of the business use of the vehicle, the purchase price of the vehicle, and any depreciation deduction amounts taken for previous years. The record was left open for a period of time, post-hearing, for the specific purpose of permitting petitioners to obtain and submit such information. However, no such substantiating documentation was provided and the Division's disallowance of petitioners' claim for car payment expense is sustained.

f) Supplies (\$225.00 claimed): Petitioners produced no receipts for this claimed expense, nor any information supporting the claim that Uber required such items as water and paper towels to be available for passengers. Accordingly, the Division's disallowance of this claimed expense is sustained.

L. The petition of Abba Brahim and Aicha Talebousman is hereby denied; the Division's notice of disallowance dated February 1, 2016 is sustained; and the deficiency of tax asserted by the Division on January 3, 2018, in the amount of \$1,970.00 (*see* findings of fact 9, n. 3 and 13), together with such interest as is due thereon, is sustained.

DATED: Albany, New York  
May 9, 2019

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE