

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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|--|---|---------------------------------|
| In the Matter of the Petition  | : |                                 |
| of   | : |                                 |
| <b>EDDIE AND DELBRA BROWN</b>  | : |                                 |
| for Redetermination of a Deficiency or for Refund of<br>New York State Personal Income Tax under Article 22 of<br>the Tax Law for the Year 2014. | : | DETERMINATION<br>DTA NO. 827952 |

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Petitioners, Eddie and Delbra Brown, 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 year 2014.

A hearing was held before Barbara J. Russo, Administrative Law Judge, in Rochester, New York, on October 24, 2018, with all briefs to be submitted by February 5, 2019, which date began the six-month period for the issuance of this determination. Petitioners appeared by Conlon & Company, PLLC (Kevin G. Conlon, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Linda A. Farrington, Esq., of counsel).

***ISSUE***

Whether the Division of Taxation properly disallowed petitioners' claimed business losses for the year 2014.

***FINDINGS OF FACT***

1. Petitioners jointly filed a New York State resident income tax return for the year 2014. Petitioners reported wage income in the amount of \$120,957.00, taxable interest income of

\$35.00, unemployment compensation of \$41,417.00, business losses of \$38,265.00, and other losses in the amount of \$2,470.00, resulting in total federal adjusted gross income of \$81,674.00.

2. Attached to petitioners' 2014 return were two federal schedules C, profit or loss from business. The first schedule C listed a sole proprietorship for Delbra Brown, stated that the principal business was "online advertising medium," did not list a business name, reported no gross receipts, and reported losses in the amount of \$36,438.00. The claimed business expenses were as follows:

| Expense Description             | Amount      |
|---------------------------------|-------------|
| Advertising                     | \$10,527.00 |
| Car and Truck                   | \$ 3,105.00 |
| Legal and Professional Services | \$ 2,181.00 |
| Repairs and Maintenance         | \$ 97.00    |
| Supplies                        | \$ 4,570.00 |
| Taxes and Licenses              | \$ 92.00    |
| Travel                          | \$ 3,561.00 |
| Meals and Entertainment         | \$ 1,477.00 |
| Utilities                       | \$ 860.00   |
| Other Expenses: Developer Fees  | \$ 9,512.00 |
| Startup Costs                   | \$ 125.00   |
| Business Checks                 | \$ 56.00    |
| Shipping Fees                   | \$ 275.00   |
| Total Expenses                  | \$36,438.00 |

The second schedule C listed a sole proprietorship for Delbra Brown, stated that the principal business was "relationship coach," listed the business name as "CakeChronicles," reported no gross receipts, and reported losses in the amount of \$1,827.00, as follows:

| Expense Description      | Amount     |
|--------------------------|------------|
| Advertising              | \$184.00   |
| Car & Truck              | \$1,439.00 |
| Supplies                 | \$158.00   |
| Other - Shipping/Postage | \$46.00    |
| Total Expenses           | \$1,827.00 |

The copy of petitioners' original 2014 return submitted into the record does not include a schedule for petitioners' other claimed losses of \$2,470.00. It is unclear from the record whether petitioners initially filed such schedule.

3. The Division of Taxation (Division) selected petitioners' 2014 income tax return for review and by letter dated June 10, 2015, requested that petitioners provide, in part, the following:

“Please submit a copy of each Federal Schedule C, Profit or Loss from Business.

- Copies of the summary documents that you used to calculate the income and expenses that you reported on your tax return - These documents must cover the entire year.

- Expenses claimed on lines 8 through 27 must be documented with appropriate receipts, canceled checks, copies of bills, any forms, 1098s, contracts, and lease/rental agreements. If you paid wages (line 26), please provide employee names, addresses, amount of wages paid. If any withholding taxes were withheld, indicate the amounts and identify the state(s). Include copies of all federal forms completed while preparing your return.

Please provide documentation to verify your profit motive. See federal publication 535 for additional information. Some factors that are considered in determining whether or not an activity has a profit motive include:

- - - You carry on the activity in a businesslike manner,
- - - The time and effort you put into the activity indicate you intend to make it profitable,
- - - You depend on the income for your livelihood,

- - - Your losses are due to circumstances beyond your control (or are normal in the start-up phase of your type of business),
- - - You change your methods of operation in an attempt to improve profitability,
- - - You (or your advisors) have the knowledge needed to carry on the activity as a successful business,
- - - You were successful in making a profit in similar activities in the past,
- - - The activity makes a profit in some years, and
- - - You can expect to make a future profit from the appreciation of the assets used in the activity.

#### SALE OF BUSINESS PROPERTY

Please provide documents regarding the Dodge Durango reported on federal form 4797. Include your purchase records from July 1, 2012 and sale/disposal records from July 1, 2014. Please include the vehicle identification number (VIN) in your response.”

4. Petitioners did not respond to the Division’s initial inquiry, and on November 10, 2015 the Division issued a statement of proposed audit changes (statement). The statement informed petitioners that the Division disallowed the claimed business loss and other loss and recalculated the tax due for 2014 in the amount of \$2,862.35 plus interest.

5. On December 29, 2015, the Division issued a notice of deficiency to petitioners for the year 2014. The notice assessed tax in the amount of \$2,862.35 plus interest.

6. On or about January 15, 2016, petitioners filed an amended resident income tax return for the year 2014. The stated reason for filing the amended return was “state audit.” On the amended return, petitioners reduced the claimed business loss from \$38,285.00, as originally reported, to \$37,902.00. Attached to the amended return were amended schedules C for “CakeChronicles” and “Online Advertising Medium.” The amended schedule C for

CakeChronicles reported no gross receipts and reported losses in the amount of \$1,693.00, as follows:

| Expense Description      | Amount     |
|--------------------------|------------|
| Advertising              | \$208.00   |
| Car & Truck              | \$1,439.00 |
| Other - Shipping/Postage | \$46.00    |
| Total Expenses           | \$1,693.00 |

The amended schedule C for Online Advertising Medium reported no gross receipts and reported losses in the amount of \$36,209.00, as follows:

| Expense Description             | Amount      |
|---------------------------------|-------------|
| Advertising                     | \$11,458.00 |
| Car and Truck                   | \$3,105.00  |
| Legal and Professional Services | \$1,575.00  |
| Repairs and Maintenance         | \$97.00     |
| Supplies                        | \$4,673.00  |
| Taxes and Licenses              | \$94.00     |
| Travel                          | \$1,552.00  |
| Meals and Entertainment         | \$1,604.00  |
| Utilities                       | \$900.00    |
| Other Expenses: Developer Fees  | \$9,727.00  |
| Business Checks                 | \$51.00     |
| Interest                        | \$429.00    |
| Bank Fees                       | \$944.00    |
| Total Expenses                  | \$36,209.00 |

Also attached to the amended return was form 4797, sale of business property, which reported the sale of a Dodge Durango acquired on July 1, 2012 and sold on July 1, 2014, with a

gross sales price of \$0.00, allowable depreciation of \$1,835.00, and cost basis of \$4,305.00.

Petitioners reported a loss from the sale of \$2,470.00.

7. During the hearing, petitioners entered an Internal Revenue Service transcript of their 2014 federal income tax return (federal transcript) into the record. The federal transcript shows a request date of October 10, 2018 and reports claimed business losses of \$38,265.00, consisting of losses in the amount of \$36,438.00 for Online Advertising Medium and \$1,827.00 for CakeChronicles. The amount of losses reported on the federal transcript are the same as those reported on petitioners' original 2014 New York State return (*see* finding of fact 2) and there is no evidence in the record that petitioners filed an amended federal return consistent with the amounts reported on their amended New York State return for 2014.

8. Petitioner Delbra Brown began development of the schedule C business listed as "online advertising medium" in June 2014, under the name Hoosevents. Ms. Brown described Hoosevents as "an online social media presence with the overall goal to provide 24/7 access to community level events and a business directory." Ms. Brown intended to start the website's business directory and events listings locally with Rochester, New York, with a goal to eventually expand on a national level. Customers of Hoosevents would generally be charged \$50.00 annually to be listed on the business directory, \$50.00 a year for promotions and discounts, \$50.00 a year to promote events, \$25.00 a year for flyer or menu downloads, \$100.00 a year for account management services, \$50.00 a month for a featured business listing, and \$50.00 for a featured event listing. Ms. Brown testified that she may offer discounts to encourage customers to sign up.

9. Ms. Brown entered into a nondisclosure agreement on June 19, 2014 with Thomas Woodfin, a web developer with Triple Bottom Line, to develop a website for Hoosevents. She

sent Mr. Woodfin a statement of work, describing the items she wanted the website to contain, including screenshots of how she wanted the website to look, and told the developer she wanted the website ready to launch by September 2014. Ms. Brown communicated frequently with Mr. Woodfin by email regarding the costs and development of the web site. Ms. Brown eventually had concerns working with Triple Bottom Line, as the company changed developers and costs increased. In September 2014, Ms. Brown consulted with Landon Fears, another developer she had used previously, to discuss changing the business practice to become profitable. Mr. Fears referred her to elance.com and freelance.com to find other on-line web developers. Ms. Brown subsequently hired a new developer, SynRam Consultancy, to finish developing the Hoosevents web site.

10. Although Ms. Brown testified that the Hoosevents website became active some time in September 2014, emails between Ms. Brown and various developers submitted into the record by petitioners show that the site was still being developed through at least December 2014. An email from Mr. Fears to Ms. Brown dated October 23, 2014 states that, “Most developers also have their own server space . . . where they can host files *until the site goes live*” (emphasis added). Ms. Brown responded by email to Mr. Fears on October 24, 2014 and stated that, “I had to move the site [from the earlier developers] before Monday. . . . I purchased my own hosting plan and found a developer on elance so that’s why the site is up and working right now.”

11. Ms. Brown paid Jason Harvey, a graphic designer, to create banners, headers, and logos for Hoosevents and for Facebook and Twitter development in 2014.

12. Ms. Brown testified that she spent approximately four to six hours a day, seven days a week from June through December 2014 working on Hoosevents.

13. Hoosevents was registered with the New York Department of State as a domestic limited liability company on August 13, 2015.

14. Ms. Brown stated in the petition filed for this matter on November 25, 2016 that, “It was not possible for this business to incur income as I am still completing NY State forms to qualify this business as a minority and woman owned business.”

15. Ms. Brown described the other schedule C business reported on petitioners’ 2014 return, CakeChronicles, as a relationship coaching provider. Ms. Brown testified that she would provide consultations for a fee, but did not state the amount charged for a consultation. Ms. Brown testified that she started the “conversation and vision” for CakeChronicles in 2013, and worked on it from January to June 2014 for approximately four to six hours a day.

16. In 2014, Ms. Brown also worked full time as a wage employee for a business unrelated to Hoosevents or CakeChronicles, and attended school.

17. Petitioners had unreported revenue from either or both CakeChronicles or Hoosevents in 2014. The record is unclear and the testimony is inconsistent as to the actual amount of unreported receipts and from which schedule C business the receipts were derived. Petitioners’ witness, Simon Parker, CPA, testified that Ms. Brown, had “about \$207.00 in PayPal receipts for revenue that was generated I believe from Hoosevents” that was not reported on petitioners’ 2014 return. Ms. Brown testified that,

“Some business did pay me to be on Hoosevents. . . Those were some of the PayPal receipts . . . I realized I didn’t report income because I had an extensive amount of expenses . . . I may have only earned \$270.00, \$300.00, \$500.00, but I spent thousands on the web site. I’m pretty sure the thousands trump the hundred. So I didn’t, mistakenly, report the income and that was my error.”



In contrast, Ms. Brown later testified that the revenue receipts were for CakeChronicles rather than Hoosevents, and that Hoosevents had no receipts in 2014. Ms. Brown further testified that she may have had income for Hoosevents in 2015 that she did not report.

18. Petitioners entered into the record copies of seven emails from PayPal to Delbra Brown showing payments received by petitioners' businesses. An email dated October 17, 2014 states that Hoosevents received a payment from Tonette Graham in the amount of \$20.00. The other six emails show payments received by Detaj Enterprises from April 26, 2014 through September 4, 2014, totaling \$158.00.<sup>1</sup> Petitioners did not provide PayPal account statements showing their transactions in 2014. As such, it is impossible to determine whether petitioners provided all PayPal payment receipts from 2014.

19. Petitioners submitted statements from Advantage Federal Credit Union (Advantage) for a checking account in the name of Delbra Brown for 2014. In addition to a number of debits which appear personal in nature, the Advantage bank statements show a number of transfers and deposits, to and from other accounts, the statements for which were not submitted into the record. The Advantage statements include, in part, the following unexplained deposits and debits:

| Date         | Description            | Amount   |
|--------------|------------------------|----------|
| July 3, 2014 | Transfer from *****7S1 | \$300.00 |
| July 3, 2014 | Transfer from *****7S8 | \$500.00 |

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<sup>1</sup> Detaj Enterprises was a separate business operated by Delbra Brown, unrelated to Hoosevents or CakeChronicles. Petitioners did not file a schedule C for Detaj Enterprises with their 2014 return and did not report the receipts. Ms. Brown testified that she had created her PayPal account under the name Detaj Enterprises and did not change the name on the account for Hoosevents in 2014. However, as noted above, the email from PayPal dated October 17, 2014, indicates a payment received in the account of Hoosevents. Other documents submitted by petitioners show that Hoosevents had a PayPal account at some point in 2014. There was no explanation for the discrepancy.

|                   |   |              |
|-------------------|---|--------------|
| July 3, 2014      | Transfer to *****7S99                   | (\$500.00)   |
| July 25, 2014     | Transfer from *****7S                   | \$150.00     |
| July 25, 2014     | Transfer to *****7S1                    | (\$150.00)   |
| July 26, 2014     | Deposit Tr #160                         | \$150.00     |
| July 26, 2014     | Deposit Tr #160                         | \$50.00      |
| July 31, 2014     | Transfer to *****7S8                    | (\$300.00)   |
| August 1, 2014    | Transfer from *****7S8                  | \$300.00     |
| August 8, 2014    | Transfer from *****7S8                  | \$2,500.00   |
| August 8, 2014    | Deposit TR #145                         | \$3,000.00   |
| August 8, 2014    | Transfer to *****7S1                    | (\$2,500.00) |
| August 16, 2014   | “Hoosevents” transfer to *****7S8       | (\$500.00)   |
| August 16, 2014   | “Hoosevents” transfer from *****7S1     | \$500.00     |
| August 22, 2014   | “For Hoosevents” transfer to *****7S8   | (\$500.00)   |
| August 22, 2014   | “For Hoosevents” transfer from *****7S1 | \$500.00     |
| August 22, 2014   | Transfer to *****7S99                   | (\$200.00)   |
| August 22, 2014   | Transfer from *****7S8                  | \$200.00     |
| August 25, 2014   | “For Hoosevents” transfer to *****7S8   | (\$500.00)   |
| August 25, 2014   | “For Hoosevents” transfer from *****7S1 | \$500.00     |
| September 6, 2014 | “For Hoosevents” transfer to *****7S8   | (\$1,000.00) |
| September 6, 2014 | “For Hoosevents” transfer from *****7S1 | \$1,000.00   |
| September 8, 2014 | “For Hoosevents” transfer to *****7S8   | (\$250.00)   |
| September 8, 2014 | Transfer from *****7S8                  | \$250.00     |

|                   |                                       |            |
|-------------------|---------------------------------------|------------|
| October 11, 2014  | Deposit TR #25                        | \$250.00   |
| October 13, 2014  | Transfer to *****7S99                 | (\$250.00) |
| October 13, 2014  | “Hoosevents” transfer to *****7S8     | (\$250.00) |
| October 13, 2014  | Transfer from *****7S8                | \$250.00   |
| October 24, 2014  | Transfer from *****7S8                | \$500.00   |
| October 24, 2014  | Transfer to *****7S1                  | (\$500.00) |
| October 24, 2014  | “Hoosevents” transfer to *****7S8     | (\$250.00) |
| October 31, 2014  | Transfer from *****7S1                | \$150.00   |
| November 7, 2014  | “Hoosevents” transfer to *****7S8     | (\$250.00) |
| November 21, 2014 | Transfer from *****7S8                | \$250.00   |
| December 5, 2014  | “For Hoosevents” transfer to *****7S8 | (\$500.00) |
| December 19, 2014 | Transfer from *****7S8                | \$250.00   |

There was no testimony or other evidence regarding the deposits and debits “for Hoosevents” or the others listed. Ms. Brown admitted that she commingled business and personal expenses.

20. Petitioners also submitted into the record Bank of America Visa (Visa) statements for Delbra Brown from October 8, 2014 through December 5, 2014, Bank of America (BOA) checking account statements for Eddie Brown from December 27, 2013 through October 28, 2014 and November 25, 2014 through December 26, 2014, and partial BOA checking account statements for “Delbra Brown Sole Prop DBA Hoosevents” from September 5, 2014 through December 31, 2014. The Hoosevents BOA statements show deposits totaling \$502.50 and debits or withdrawals of \$78.54.

21. Petitioners concede to overclaimed business losses in the amount of \$6,815.34, including unsubstantiated deductions for meals and entertainment, as well as unreported revenue. At the hearing, petitioners reduced their claimed expenses to \$31,656.66, and submitted a table and spreadsheets, created by Mr. Parker, with purported expenses attributable to Hoosevents in the amount of \$31,233.66, and to “Cookie”<sup>2</sup> in the amount of \$423.00. Mr. Parker’s table and spreadsheets with a category breakdown of the revised expenses indicated the following:

| Expense Type            | Amount                     | Purported Breakdown Between Schedule C Businesses           |
|-------------------------|----------------------------|---|
| Hosting Fees            | \$623.40                   | CakeChronicles \$154.05 <sup>3</sup><br>Hoosevents \$469.38 |
| Advertising/Mailing     | \$10,906.00                | Hoosevents \$10,906.00                                      |
| Hotel and Airfare       | \$1,552.00                 | No Breakdown Provided                                       |
| Cellphone               | \$860.00                   | No Breakdown Provided                                       |
| Trademarks/Copyrights   | \$1435.00                  | No Breakdown Provided                                       |
| Networking              | \$140.00                   | No Breakdown Provided                                       |
| Meals and Entertainment | \$1848.00 x 50% = \$924.00 | No Breakdown Provided                                       |
| Security                | \$97.00                    | No Breakdown Provided                                       |
| Office Supplies         | \$3,705.00                 | No Breakdown Provided                                       |
| License/Fees            | \$93.70                    | No Breakdown Provided                                       |
| Developer Costs         | \$9,848.00                 | No Breakdown Provided                                       |
| Business Checks         | \$51.00                    | No Breakdown Provided                                       |
| Mileage                 | \$1,421.56                 | No Breakdown Provided <sup>4</sup>                          |

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<sup>2</sup> The table and spreadsheet created by Mr. Parker list the business as “Cookie,” which is presumed to be a misnomer referring to CakeChronicles.

<sup>3</sup> The Hosting Fees were listed for “Cookie.” *See* footnote 2.

<sup>4</sup> The table and spreadsheets created by Mr. Parker do not distinguish mileage between Hoosevents and CakeChronicles. However, a mileage log was also entered into the record, which contained 95 entries. 14 of the entries indicated they were related to Hoosevents, 12 entries indicated they were related to CakeChronicles, 2 entries

The majority of the records submitted by petitioners in support of the expenses claimed on Mr. Parker's table and spreadsheet were in disarray, with no coherent order, missing pages from bank statements and calendars, and missing invoices or receipts. Petitioners submitted email invoices from PayPal showing purchases made, but a number of the invoices reveal that the expenses were charged to Detaj Enterprises, rather than the schedule C businesses at issue (*see* footnote 1). Additionally, on a number of the PayPal emails, petitioners indicated an expense category designation that differed from the category the expense was listed under in Mr. Parker's table and spreadsheet. A number of expenses listed on the spreadsheets did not have supporting invoices, some invoices were duplicates, duplicate expenses were claimed for the same expenses in different expense categories on the spreadsheet, and some of the PayPal email invoices provided were not included as expenses in the table or spreadsheets so it is unclear whether they were claimed expenses.<sup>5</sup> When questioned about some of the expenses listed on the spreadsheet, Mr. Parker testified,

“Now, whether or not they're legitimate expenses that New York State has an argument with, some of them such as meals and entertainment perhaps, you know, I can't – I do not have enough time in the day to go through every single circle here and take a look and say, yes, this is definitely a legitimate business expense. No, this is not a legitimate business expense.”

22. Petitioners provided testimony and/or documents at the hearing as to some of the expenses claimed, as follows:

a) Hosting Fees - CakeChronicles: Petitioners provided testimony that hosting fees were incurred by CakeChronicles for charges from WIX, a web development platform, for

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indicated they were related to both Hoosevents and CakeChronicles, and the remainder did not indicate any business name.

<sup>5</sup> It is not appropriate for this determination to speculate as to the unclaimed expenses when there is no testimony explaining them and no indication that they were included in the expenses claimed.

website hosting. Petitioners provided Advantage checking statements from the personal account of Delbra Brown showing payments to WIX totaling \$154.05.

Hoosevents: Petitioners provided four PayPal email invoices showing charges of \$19.99 each to Hoosevents from 1&1 Internet, Inc., totaling \$79.96.

Petitioners provided eight PayPal email invoices showing charges of \$19.99 each to Detaj Enterprises from 1&1 Internet, Inc., totaling \$159.92. No testimony or other documentation was provided showing that these charges were related to Hoosevents or CakeChronicles.

Petitioners provided Advantage checking statements from the personal account of Delbra Brown showing ten payments to Earthlink.net, totaling \$229.50. No testimony or other documentation was provided showing a business purpose or that these charges were related to Hoosevents or CakeChronicles.

b) Advertising/Mailing - Petitioners provided Ms. Brown's personal Advantage checking statements showing payments to City of Rochester Internet in the amount of \$51.00, and to Time Warner Cable in the amounts of \$250.00 and \$300.00. Petitioners provided no testimony or other documentation showing a business purpose or relation to Hoosevents or CakeChronicles for these charges.

Hoosevents: Petitioners provided testimony regarding charges incurred by Hoosevents from BuildASign for banners. Petitioners provided Ms. Brown's Advantage checking statement and a PayPal email invoice to Hoosevents showing payments to BuildASign for \$174.13 and \$88.41, respectively.

Petitioners provided testimony regarding charges from Getty Images for the purchase of licensed images to put on the Hoosevents website. Petitioners provided Ms. Brown's

Advantage checking statements showing two charges dated June 10, 2014 from Getty Images in the amount \$49.00, totaling \$98.00.

Petitioners provided the following PayPal email invoices showing charges to Hoosevents: Vistaprint totaling \$767.67; GoDaddy.com totaling \$54.73; Jason Harvey for graphics and commercial videos totaling \$941.20; and Arvix Web Solutions for Hoosevents' web hosting/domain totaling \$48.00.

The remaining claimed expenses for advertising/ mailing lacked evidentiary support. For a number of the claimed expenses there were no invoices or receipts or no explanation of a business purpose, and for some of the claimed expenses the PayPal email invoices showed that the charges were to Detaj Enterprises rather than Hoosevents. Ms. Brown admitted that the claimed expenses from Ancestry.com were not related to Hoosevents or CakeChronicles.

Expenses claimed for R&R Merchandise dated December 27, 2014 and Conserve dated December 12, 2014, for which the spreadsheet alleges were supported by the Bank of America statements, did not, in fact, appear on the provided statements and no other receipts or invoices were provided. The remaining expenses for which petitioners claimed to be supported by the Bank of America statements were duplicates of the same expenses claimed with the PayPal email invoices. The claimed expenses for "Checkcard" had no supporting invoices or receipts, did not appear on the Bank of America statements as claimed on the spreadsheet and had no other evidentiary support.

c) Hotel and Airfare - Petitioners claimed an expense for charges from Holiday Inn Express on December 22, 2014 totaling \$80.00 but provided no invoice or receipt, no evidence of business purpose, and no record of payment on provided bank statements. The remaining claimed expenses appeared on petitioners' personal bank or credit card statements for charges to

“Festival of Praise,” “Maze with Frankie,” Clarion Inn and Suites in Syracuse, New York, Splash Lagoon in Pennsylvania, and United Airlines. Petitioners provided no further information or credible explanation of a business purpose for these charges in relation to Hoosevents or CakeChronicles.

d) Trademarks - The PayPal email invoices provided show that the expenses claimed were charged to Detaj Enterprises rather than Hoosevents or CakeChronicles.

e) Meals and Entertainment - Petitioners listed 73 charges from various restaurants totaling \$1,848.21. The expenses were charged to petitioners’ personal bank and credit card accounts. Of the 73 charges for restaurant meals, 58 appear on Ms. Brown’s travel log submitted into the record. A number of claimed meals are reflected in the travel log merely as “dining.” Ms. Brown testified that such entries were merely her “eating out.” Other travel log entries for the dates of claimed meal expenses merely state the purpose as “meeting” or “dining with clients” and do not list the names of attendees. No proof of a business purpose was provided for any of the claimed expenses.

f) Security - A charge to Monitronic Security in the amount of \$96.91 appears on petitioners’ personal bank statement. Petitioners provided no evidence indicating that this claimed expense was related to Hoosevents or CakeChronicles and provided no explanation of a business purposes.

g) Office Supplies - Petitioners provided an Advantage bank statement showing two charges to Getty Images dated August 21, 2014 for \$49.00 each and provided testimony that the charges were for the purchase of licensed images to put on the Hoosevents website. Petitioners provided a PayPal email invoice, dated November 18, 2014, showing charges to Hoosevents in the amount of \$80.92 from 4Inkjets for inkjet printer cartridges.



The remaining claimed charges appear personal in nature, such as charges for “Sensuous Satiabels,” Five Below, Home Depot, BJ’s Wholesale, Amazon Kindle, Amvets, Scott’s Hallmake, Joann Stores, Dan’s Crafts & Things, and “The Soul Care Bible Experiencing,” to name but a few. For the charges listed as appearing on petitioners’ personal bank statements, no business purpose or relation to Hoosevents or CakeChronicles was provided. A number of the PayPal email invoices show that the charges were to Detaj Enterprises and no business purpose or explanation of the charges in relation to Hoosevents or CakeChronicles was provided. The charges appearing on petitioners’ Amazon account appear personal in nature and no business purpose or explanation of the charges in relation to Hoosevents or CakeChronicles was provided.

h) License/Fees - Petitioners provided a personal bank statement showing a charge of \$93.70 from “Legal Shield.” No evidence was provided showing a business purpose or explanation of the charges in relation to Hoosevents or CakeChronicles.

i) Developer Costs - Petitioners provided personal bank statements from Advantage checking showing the following expenses: \$20.00 on October 22, 2014 for Envato Pty Ltd.; \$59.00 on September 29, 2014 for Karim Rahimpur; \$79.00 on September 29, 2014 for Ruchir Dineshchandra; and \$29.00 on September 26, 2014 for Ruchir Dineshchandra. No testimony or documentary evidence was provided explaining these charges or their business purposes and relation to Hoosevents or CakeChronicles.

Petitioners provided testimony regarding developer costs together with the following PayPal email invoices showing charges to Hoosevents: Elance totaling \$435.00; Synram

Consultancy Services totaling \$1,236.00;<sup>6</sup> ItThinx Ltd totaling \$19.00; Avangate BV totaling \$79.00; Jason Gripe for software totaling \$49.97; and Triple Bottom Line for website development totaling \$3,770.00. There were no invoices or receipts provided for the remaining claimed expenses and no evidence as to a business purposes. Some of the claimed expenses were clearly personal, such as “womens clogs shoes” from Carla D. Hairston and “women’s size 10 black Loreli” from Vanessa Cohen. The expenses listed on the spreadsheet claiming to be supported by Bank of America statements were duplicates of the charges on the PayPal email invoices.

j) Business checks - The only support provided for this claimed expense was petitioners’ personal banking statement showing a charge of \$51.00 for City of Rochester Internet. There is no explanation in the record as to why this expense was categorized as “business checks” or showing any business purpose or relation to Hoosevents or CakeChronicles.

k) Mileage - Petitioners submitted a mileage log which does not contain starting or ending odometer readings. The locations of travel do not include addresses. The entries designated as meetings and dining do not list the names of attendees. A number of entries merely list the purpose as “dining.” Ms. Brown testified that mileage entries listed as “dining” were “just me eating out.”

23. Regarding the claimed sale of business property, for which petitioners reported a loss of \$2,470.00 on form 4797, Ms. Brown testified that she gave the reported vehicle to her daughter. Ms. Brown admitted that the vehicle was used for both business and personal purposes.

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<sup>6</sup> Other PayPal emails dated November 15, 2014 and October 31, 2014 for Hoosevents from Synram Consultancy did not state the amount of the charge.

### **CONCLUSIONS OF LAW**

A. The adjusted gross income of a New York resident is federal adjusted gross income, with certain modifications not applicable in this case (*see* Tax Law § 612 [a]). Section 62 (a) (1) of the Internal Revenue Code (IRC) defines the adjusted gross income as an individual's gross income minus certain deductions. Among the deductions permitted are expenses that are "ordinary and necessary" for the production of income in carrying on a trade or business (IRC § 162 [a]). An ordinary expense is one that is common and acceptable (*Welch v Helvering*, 290 US 111, 114 [1933]). A necessary expense is considered to be one that is appropriate and helpful in conducting a trade or business (*Heineman v Commr.*, 82 TC 538, 543 [1984]). Deductions are also allowed pursuant to IRC § 212 for expenses incurred "for the management, conservation, or maintenance of property held for the production of income." The test as to whether property is held for the "production of income" within the meaning of IRC § 212 is whether the taxpayer's primary, good faith purpose and intention in engaging in the activity was to make a profit (*Zell v Commr.*, 763 F.2d 1139, 1142 n.2 [10<sup>th</sup> Cir 1985]; *Snyder v United States*, 674 F2d 1359, 1364 [10<sup>th</sup> Cir 1982]; *Lowry v United States*, 384 FSupp 257, 261 [1974]).

As noted, petitioners reported losses from the schedule C businesses described as Hoosevents and CakeChronicles, and deducted those losses from their gross income. In order to maintain the deductions for the business expenses, petitioners have the double burden of (1) demonstrating entitlement to the deductions and (2) substantiating the amounts of the deductions (*see* Tax Law § 658 [a]; § 689 [e]; 20 NYCRR 158.1; *Matter of Macaluso*, Tax Appeals Tribunal, September 22, 1997, *confirmed* 259 AD2d 795 [1999]).

B. To be entitled to a deduction for substantiated ordinary and necessary expenses petitioners must show that they engaged in the business activities for Hoosevents and CakeChronicles with an actual and honest objective of making a profit (*see Annuzzi v Commr.*, TC Memo 2014-233 [2014]). If an activity is “not engaged in for profit,” deductions are allowable only to the extent of income from such activity (IRC § 183 [b] [2]; *Matter of Temple*, Tax Appeals Tribunal, July 8, 2004). Resolution of the issue of whether petitioners’ activities were engaged in for profit is properly determined based on a review of all of the surrounding facts and circumstances and in consideration of the nine factors set forth in Treas Reg § 1.183-2 [b] (*see Hoag v Commr.*, TC Memo 1993-348 [1993]). In resolving the factual question, greater weight is given to the objective facts than to the taxpayer’s statements of intention (*id.*).

The nine factors listed in the regulations to help determine whether a taxpayer has engaged in an activity for profit are as follows: (1) the manner in which the taxpayer carries on the activity, (2) the expertise of the taxpayer or his advisors, (3) the time and effort expended by the taxpayer in carrying on the activity, (4) expectation that assets used in the activity may appreciate in value, (5) the success of the taxpayer in carrying on other similar or dissimilar activities, (6) the taxpayer's history of income or losses with respect to the activity, (7) the amount of occasional profits, if any, that are earned, (8) the financial status of the taxpayer, and (9) elements of personal pleasure or recreation (Treas Reg § 1.183-2 [b]). The factors listed above are intended as guidelines and are nonexclusive. Accordingly, no single factor or combination of factors is conclusive in indicating a profit objective (*see Ranciato v Commr.*, 52 F3d 23 [2d Cir 1995]). Additionally, as stated by the court in *Metz v Commr.*, “[w]hile we organize our analysis by the nine factors listed in the regulation [citation omitted] we don’t use a reasonable-person standard or substitute our own business judgment for what the [taxpayers]

could have done better. Our focus is instead on the [taxpayers'] subjective intent and we use the factors to establish that intent" (*Metz v Commr.*, TC Memo 2015-54 [2015], citing *Wolf v Commr.*, 4 F3d 709 [9th Cir 1993]).

C. After carefully considering the entire record, focusing on the nine factors noted above, I conclude that petitioners have met their burden of proof to establish that the activities related to Hoosevents during the year in question were carried on with an actual and honest objective of making a profit. Some of the factors are not relevant to the facts of this case and others, while pertinent, do not weigh significantly either for or against a characterization of petitioners' activities as constituting a bona fide trade or business engaged in with the required profit motive.

Most significant in determining that the activities for Hoosevents were conducted to make a profit was Ms. Brown's use of developers with expertise in designing the website, and the significant investment made in the website's development. Ms. Brown entered into a nondisclosure agreement with the web developer and provided him with a statement of work, detailing the items she wanted the website to contain and a desired launch date of September 2014. When the development of the website did not progress as expected and costs continued to grow, Ms. Brown sought the expertise of other web developers. Ms. Brown spent significant time and effort discussing the details of the website with various developers. Additionally, although petitioners did not specifically have a written business plan for Hoosevents, Ms. Brown's plan was evidenced by the written statement of work she provided to Mr. Woodfin and her communications with various other developers (*see Annuzzi v Commr.*; *Dishal v Commr.*, TC Memo 1998-397 [1998]; *Estate of Brockenbrough v Commr.*, TC Memo 1998-454 (1998);

*Phillips v Commr.*, TC Memo 1997-128 [1997]). Ms. Brown also hired professional graphic designers to create logos, brochures and advertisements for Hoosevents.

While petitioners exhibited poor record keeping and admitted to commingling funds, in September of 2014 they opened a separate bank account for Hoosevents under the name, “Delbra Brown Sole Prop DBA Hoosevents.” Likewise, the PayPal email invoices indicate that at some point in 2014 petitioners established an account for Hoosevents.

Additionally, although petitioners have shown a history of business losses during prior years, such losses were from unrelated businesses. In 2014, Ms. Brown focused on Hoosevents and expended her time and effort on its development. Considering the nascent stage of petitioners’ on-line activities and the extended time period needed to develop the website, it is not unexpected to see losses for the first year. The very nature of petitioners’ on-line activities would not produce a profit until the website was completed, at which time they hoped to develop a customer base. During the year at issue, Hoosevents was, in essence, a work in progress, with the financial reward, if any, coming only upon the launch of the website. Notwithstanding a history of business losses, petitioners have shown that they had an actual and honest objective of making a profit with Hoosevents.

D. In contrast, petitioners have not met their burden of proving a profit motive for CakeChronicles. The record is devoid of evidence supporting any of the nine factors listed in Treas Reg § 1.183-2 [b] to help determine whether petitioners engaged in the activities for CakeChronicles for profit. Unlike the evidence presented for Hoosevents, there is no evidence that petitioners sought the expertise of professionals in developing the business, had a specific business plan, or spent a significant amount of time or effort on the activities. Indeed, Ms. Brown testified that by June of 2014 she shifted her focus from CakeChronicles to Hoosevents.

There is no evidence that petitioners maintained a separate bank account or PayPal account for CakeChronicles and admit that they commingled funds. Petitioners have simply failed to meet their burden of proof to show that they intended to make a profit from CakeChronicles. As such, the Division properly denied a deduction for the claimed business losses.

E. While petitioners have shown the requisite profit motive for their activities with Hoosevents, the inquiry does not end there. Rather, petitioners have the further burden of proving entitlement to the claimed deductions in excess of revenue and substantiation of the business losses, including the business purpose and amount of each of the claimed expenses.

The starting point for determining a profit or loss from a schedule C business is gross receipts. From that amount allowable expenses are subtracted to determine the net profit or loss. In this case, petitioners admittedly failed to report gross receipts for one or both of the schedule C businesses for 2014. Petitioners further failed to provide complete records, such as PayPal account statements and bank statements from all accounts for 2014 in order to determine the actual amount of receipts. Petitioners' poor record keeping and failure to report any receipts weighs heavily against them. The testimony from Ms. Brown and Mr. Parker was vague and contradictory regarding the business revenue, and was not supported by the documentary evidence. As such, it is impossible from the record to determine the actual amount of gross receipts of either of the schedule C businesses for which petitioners claimed losses, and thus impossible to determine if the expenses outweigh the revenue. Petitioners have thus failed to meet their burden of proving the net profit or loss for Hoosevents and CakeChronicles and the Division properly disallowed the claimed business losses in their entirety.

F. Had petitioners been forthcoming and credible about the business revenue and presented evidence in support, they would then have been entitled to deduct substantiated

ordinary and necessary business expenses for Hoosevents. As noted above, however, because petitioners failed to substantiate their business revenue, it is impossible to determine the amount of gross revenue less legitimate expenses and is thus, in turn, impossible to determine the amount of net loss to be deducted from other income. As such, the Division properly disallowed all of petitioners' claimed expenses. While it is determined that the Division properly disallowed all of petitioners' claimed business losses, nevertheless, for purposes of a complete review of all issues, this determination will next address whether the expenses claimed for Hoosevents were substantiated in amount and business purposes. After painstaking review of petitioners' disorganized and incomplete records, it is determined that petitioners have met their burden of proving the business purpose and amount of the following expenses for Hoosevents:<sup>7</sup>

a) Hosting Fees - petitioners have provided evidence supporting claimed expenses to 1&1 Internet, Inc., in the amount of \$79.96. The remaining claimed expenses were charged to petitioners' personal account or the account of the unrelated entity, Detaj Enterprises, and lacked evidence as to a business purpose or relation to Hoosevents (*see* finding of fact 22.a).

b) Advertising/Mailing - petitioners have provided evidence supporting claimed expenses for the following: BuildASign totaling \$262.54; Getty Images totaling \$98.00; Vistaprint totaling \$767.67; GoDaddy.com totaling \$54.73; Jason Harvey for graphics and commercial videos totaling \$941.20; and Arvix Web Solutions for Hoosevents' web hosting/domain totaling \$48.00. The remaining claimed expenses for advertising/ mailing lacked evidentiary support (*see* finding of fact 22.b).

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<sup>7</sup> Whether the expenses claimed for CakeChronicles have been substantiated will not be addressed, as it has been determined that petitioners have not shown a profit motive for those activities.



c) Hotel and Airfare -Pursuant to IRC § 274, no deduction shall be allowed for any traveling expense (including meals and lodging while away from home):

“unless the taxpayer substantiates by adequate records or by sufficient evidence corroborating the taxpayer's own statement (A) the amount of such expense or other item, (B) the time and place of the travel or the date and description of the gift, (C) the business purpose of the expense or other item, and (D) the business relationship to the taxpayer of the person receiving the benefit.”

Petitioners claimed an expense for charges from Holiday Inn Express on December 22, 2014 totaling \$80.00 but provided no invoice or receipt, no record of payment on the provided bank statements, and no evidence of a business purpose. The remaining claimed expenses appeared on petitioners' personal bank and credit card statements and there was no credible explanation of a business purpose in relation to Hoosevents or CakeChronicles. Other than Ms. Brown's generalized statement that expenses of traveling to Splash Lagoon water park were to “connect with them and to try to promote them to become a customer,” petitioners did not present any evidence corroborating her statement. Accordingly, petitioners are not entitled to a deduction for the claimed travel expenses (*see Obayagbona v Commr. of Internal Revenue*, 14856-13S, 2016 WL 6520220, at \*6 [TC Nov. 3, 2016]).

d) Trademarks - Petitioners failed to establish that the claimed expenses were incurred by Hoosevents. The PayPal email invoices provided show that the charges were to Detaj Enterprises, which Ms. Brown admitted was unrelated to Hoosevents.

e) Meals and Entertainment - Daily meals are an inherently personal expense, and a taxpayer bears a heavy burden in proving that they are deductible (*Moss v Commr.*, 80 TC 1073 [1983], *affd* 758 F2d 211 [1985]). Although taxpayers may find it necessary to eat meals away from their personal residences because of the demands of their businesses, this circumstance, alone, will not ordinarily provide a basis for the deduction of the cost of these meals (*Coombs v*

*Commr.*, 67 TC 426 [1977], *affd* 608 F2d 1269 [1979]). IRC § 274 imposes heightened substantiation requirements with respect to deductions for meals and entertainment expenses. No deduction is allowed for meals and entertainment expenses, unless the taxpayer establishes with adequate records or other credible evidence: (1) the amount of the expense; (2) the time and place of the expense, including address or location; (3) the business purpose of the expense; and (4) the business relationship of the taxpayer to the persons receiving the benefit, including the name, title, or other designation sufficient to establish the business relationship to the taxpayer (*see* IRC § 274 [d]; sec. 1.274-5T [b] [3], Temporary Income Tax Regs., 50 Fed. Reg. 46015 [Nov. 6, 1985]).

The expenses for 73 charges from various restaurants were paid through petitioners' personal account. Petitioners provided Ms. Brown's travel log indicating travel dates for some of the claimed meals, many of which were merely listed as "dining," with no address, names of attendees or stated business purpose. Ms. Brown's admission that "dining" was just her eating out is telling. Petitioners' attempted write-off of personal meals is egregious as it is not the responsibility of the government and other taxpayers to subsidize the cost of petitioners' personal dining. Petitioners have failed to satisfy their burden of proof of establishing that the meals and entertainment claimed were in any way related to the claimed business.

f) Security - A charge to Monitronic Security in the amount of \$96.91 appears on petitioners' personal bank statement. Petitioners failed to meet their burden of proving that the claimed expense had any business purpose in relation to Hoosevents.

g) Office Supplies - Petitioners have provided evidence supporting claimed expenses for the following: Getty Images in the amount of \$98.00 and 4Inkjets in the amount of \$80.92.

The remaining claimed expenses appear personal in nature and petitioners have failed to establish a business purpose with relation to Hoosevents.

h) License/Fees - No evidence was provided showing a business purpose of this charge in relation to Hoosevents.

i) Developer Costs - Petitioners have provided evidence supporting claimed expenses for the following: Elance totaling \$435.00; Synram Consultancy Services totaling \$1,236.00; ItThinx Ltd totaling \$19.00; Avangate BV totaling \$79.00; Jason Gripe for software totaling \$49.97; and Triple Bottom Line for website development totaling \$3,770.00.

Petitioner provided no evidence as to a business purposes of the other claimed expenses, including some that were clearly personal on their face, such as “womens clogs shoes” and “women’s size 10 black Loreli” (*see* finding of fact 22.i). As such, petitioners did not meet their burden of proving the remaining claimed expenses for alleged developer costs.

j) Business Checks - No information was provided for this claimed expense other than petitioners’ personal bank statement showing a charge for City of Rochester Internet. Petitioners have failed to prove any business purpose for this expense in relation to Hoosevents.

k) Mileage - To deduct expenses for mileage the taxpayer must substantiate by adequate records or evidence sufficient to corroborate the taxpayer’s own testimony: (1) the amount of the expenditure or use, which includes mileage in the case of automobiles; (2) the time and place of the travel; (3) its business purpose; and (4) the business relationship to the taxpayer of each expenditure or use (*see* IRC §274 [d]). Petitioners have failed to meet this heavy burden. The mileage log submitted does not include beginning or ending odometer readings, the address of the locations allegedly traveled to, the names and titles of the parties allegedly met with, or a credible description of a business purpose. A number of entries merely state “dining,” which Ms.

Brown admitted was for her “eating out.” Accordingly, petitioners have failed to meet their burden of proof for any of the claimed mileage expenses.

G. As noted in conclusion of law F, petitioners have substantiated expenses for Hoosevents totaling \$7,841.07, but as determined in conclusion of law E, they are not entitled to a deduction for any of the expenses, because they have failed to meet their burden of proving the amount of revenue earned by each schedule C business. Additionally, the Division is correct in arguing that, even if petitioners were allowed a deduction for business expenses, such amount is limited where the expenses incurred are for start-up costs (IRC § 195).

Pursuant to IRC § 195, no deduction shall be allowed for start-up expenditures unless the taxpayer elects the application of subsection (b) of that section. If a taxpayer makes such election, the taxpayer shall be allowed a deduction for the taxable year in which the active trade or business begins in an amount equal to the lesser of (i) the amount of start-up expenditures with respect to the active trade or business or (ii) \$10,000.00 reduced (but not below zero) by the amount by which such start-up expenditures exceed \$60,000.00 (IRC § 195 [b] [1] [A], [3]).<sup>8</sup>

“Start-up expenditures” are defined as any amount:

“A) paid or incurred in connection with –

(i) investigating the creation or acquisition of an active trade or business, or

(ii) creating an active trade or business, or

(iii) any activity engaged in for profit and for the production of income before the day on which the active trade or business begins, in anticipation of such activity becoming an active trade or business, and

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<sup>8</sup> The Division incorrectly argues that the amount of start-up costs would be limited to \$5,000.00. However, IRC § 195 was amended for taxable years beginning in 2010 by increasing the amount from \$5,000.00 to \$10,000.00 (*see* IRC § 195 [b] [3]).

B) which, if paid or incurred in connection with the operation of an existing active trade or business (in the same field as the trade or business referred to in subparagraph (A)), would be allowable as a deduction for the taxable year in which paid or incurred” (IRC § 195 [c]).

While taxpayers may deduct ordinary and necessary expenses paid or incurred during the taxable year in carrying on a trade or business (*see* IRC § 162 [a]), taxpayers are not entitled to deduct expenses incurred before actual business operations commence and the activities for which the trade or business was formed are performed (*Johnsen v Commr.*, 83 T.C. 103, 114 (1984), *revd.* 794 F.2d 1157 (6th Cir.1986); *Richmond Television Corp. v United States*, 345 F.2d 901, 907 (4th Cir. 1965), *vacated and remanded on other grounds*, 382 U.S. 68, 86 S.Ct. 233, 15 L.Ed.2d 143 [1965]; *see also Glotov v Commr.*, T.C. Memo. 2007-147). Whether the taxpayer is actively carrying on a trade or business depends on the facts and circumstances of the case (*Commr. v Groetzinger*, 480 U.S. 23, 36 [1987]). A taxpayer is not engaged in a trade or business even if he has made a firm decision to enter into business and over a considerable period of time spent money in preparing to enter that business (*Richmond Television Corp. v United States*, 345 F.2d at 907). The taxpayer is not engaged in any trade or business until the business has begun to function as a going concern and has performed the activities for which it was organized (*Id.* at 907). Start-up expenses, although not deductible during the pre-opening phase, may generally be deducted or capitalized and deducted over time upon a taxpayer's becoming actively engaged in business pursuant to IRC § 195 (Sec. 1.195-1T, Temporary Income Tax Regs., 73 Fed. Reg. 38910 [July 8, 2008]).

The expenses claimed by petitioners for Hoosevents in 2014 fall within the definition of start-up expenditures. Ms. Brown first started working on the development of Hoosevents in June 2014, and the web site did not become active until October 2014, at the earliest. Ms. Brown's testimony, although inconsistent and contradicted by Mr. Parker and the documentary

evidence, claims that Hoosevents had no payments from customers in 2014. Further, Ms. Brown alleged in the petition that it was not possible for the business to incur income in 2014 “as I am still completing NY State forms” as of 2016. As such, petitioners have failed to show that the expenses incurred were not start-up expenditures under IRC § 195. Accordingly, if petitioners were entitled to any deduction for the expenses, such expense would be limited to the lesser of the amount of start-up expenditures with respect to Hoosevents or \$10,000.00 (*see* IRC § 195). In this case, petitioners have only substantiated expenses in the amount of \$7,841.07, which would be the lesser amount under IRC § 195. Regardless, petitioners are not entitled to any such deduction, as determined in conclusion of law E.

H. Finally, it is determined that petitioners are not allowed a deduction for their claimed sale of business property, for which petitioners reported a loss of \$2,470.00 on form 4797. Petitioners reported on form 4797 that the vehicle was acquired on July 1, 2012 and sold on July 1, 2014. However, petitioners have presented no evidence that the vehicle was used for business purposes. As found above, Hoosevents was not active until October 2014 at the earliest, and CakeChronicles was not conducted for profit. Furthermore, Ms. Brown admitted that she gave the reported vehicle to her daughter. As petitioners have failed to show that the vehicle was used for business purposes and the transfer was a gift to their daughter, rather than a legitimate arms-length sale, petitioners are not entitled to a deduction (*see Heinbockel v C.I.R.*, 105 TCM (CCH) 1733 [TC 2013]).

I. The petition of Eddie and Delbra Brown is denied, and the notice of deficiency, dated December 29, 2015, is sustained.

DATED: Albany, New York  
August 1, 2019

/s/ Barbara J. Russo  
ADMINISTRATIVE LAW JUDGE