STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **BORIS MINEVICH** for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Personal Income Tax Pursuant to the Administrative Code of the City of New York for the Year 2015.	DETERMINATION DTA NO. 828025

Petitioner, Boris Minevich, 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 and New York City personal income tax pursuant to the Administrative Code of the City of New York for the year 2015.

A hearing was held before Barbara J. Russo, Administrative Law Judge, in New York, New York, on August 2, 2018, with all briefs to be submitted by November 1, 2018, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Colleen M. McMahon, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly disallowed petitioner's claimed itemized deductions for unreimbursed job expenses and charitable gifts.

FINDINGS OF FACT

1. Petitioner, Boris Minevich, timely filed his 2015 New York State personal income tax return, which reported no tax due and requested a refund of $1,658.00. The return reported, among other items not relevant here, wages of $64,395.00 and New York itemized deductions of $29,946.00. Of the itemized deductions claimed, as reported on petitioner's form IT-201-D, resident itemized deduction schedule, $20,887.00 represented unreimbursed employee expenses alleged to have been incurred while employed as a payroll auditor for Wagner & Zwerman, LLP,[1] and $7,100.00 represented gifts to charity.

2. Petitioner's 2015 federal form 2106, employee business expenses, reports the following amounts:

Description	Amount
Vehicle Expense	$18,045.80
Parking Fees, Tolls, and Transportation	$1,590.00
Home Office Computer, Telephone, Internet	$8,170.00[2]
TOTAL EXPENSES	$27,805.80
Reimbursements Received From Employer	$5,528.40
Total Unreimbursed Expenses	$22,277.40

On page 2 of form 2106, in the section for vehicle expenses, petitioner reported the following:

[1] Petitioner reported total unreimbursed employee expenses of $22,277.40, subject to the 2% limitation, resulting in the amount claimed of $20,887.00.

[2] Petitioner concedes that he is not entitled to a deduction for these expenses and the Division's denial of such amounts was proper. As such, these claimed expenses are not at issue.

Date Vehicle Was Placed in Service	January 1, 2015
Total Miles Vehicle Was Driven in 2015	9,230
Business Miles	8,906
Percent of Business Use	96.5
Other Miles	324

Petitioner reported that the vehicle was available for personal use during off-duty hours and that he did not have another vehicle available for personal use.

Petitioner reported the following amounts in section C, "actual expenses," on form 2106:

Expense	Amount
Gas, oil, repairs, insurance, etc.	$5,090.32
Vehicle rentals	$4,900.00
Total	$9,990.32
Multiply by Business Use Percent	$9,640.65
Depreciation	$8,405.15
Total	$18,045.80

3. By letter dated April 25, 2016, the Division of Taxation (Division) requested documentation to substantiate the itemized deductions claimed on petitioner's return.

4. On May 12, 2016, petitioner responded to the Division's April 25, 2016 letter. Included with petitioner's response were the following documents:

- federal form 2106 (***see*** finding of fact 2);
- federal schedule A, itemized deductions, wherein petitioner reported taxes paid in the amount of $5,974.31, interest paid in the amount of $1,128.42, gifts to charity of $7,100.00, and job expenses and miscellaneous deductions of $20,887.05;
- an email from Wagner & Zwerman, LLP, dated November 3, 2008, stating that the

employer would reimburse petitioner at the Internal Revenue Service (IRS) rate plus the cost of tolls and parking for traveling to audits;

- form 4562, depreciation and amortization schedule, listing an expense deduction for a computer in the amount of $2,660.00;

- page one, section A, of form 8283, noncash charitable contributions totaling $7,100.00, listing bags of clothing donated to the Salvation Army and receipts from the Salvation Army indicating that petitioner donated 11 bags of clothing in 2015;[3]

- a receipt from Geico Insurance for an automobile policy effective January 22, 2016 to July 22, 2016;

- receipts, dated November 1 and December 1, 2015, in the amount of $72.86 each, for residential parking;

- form DTF-802, Statement of Transaction - Sale or Gift of Motor Vehicle, dated October 30, 2015, indicating that petitioner purchased a Honda Pilot for a purchase price of $8,000.00, and a receipt for payment of sales tax on the vehicle in the amount of $770.75;

- monthly receipts from January 1, 2015 through October 1, 2015 in the amount of $490.00 each for a vehicle rental by petitioner from Vyachesiav Bokser;

- E-ZPass statements from June 9, 2015 through August 9, 2015 and October 9, 2015 through February 9, 2016;

- a receipt for a computer in the amount of $2,799.00;

- time and expense reports for petitioner's travel for Wagner & Zwerman, LLP, in 2015;

- earnings statements from Wagner & Zwerman, LLP, showing travel reimbursement paid to petitioner in the amount of $5,528.40; and

- Optimum account statements showing television, internet, and telephone charges for June and December, 2015.

5. Petitioner's time and expense reports list the date, the company name (but no address), work description (i.e. office work or field work), hours allocated, auto miles, mileage rate

[3] Petitioner did not include section B of form 8283, donated property over $5,000.00, as explicitly required by the form and instructions. The receipts from the Salvation Army indicate only the dates and number of bags of clothing. The form 8283 was not executed by a Salvation Army official.

($.0575), parking and tolls. On days where the work description is "office work," no amount is indicated for auto miles, parking or tolls.

6. A comparison of petitioner's time and expense reports with the E-ZPass statements shows E-ZPass transactions for petitioner on a number of non-working days and days that he designated as "office work" with no work miles traveled. Specifically, the E-ZPass statements in the record for the period June 9, 2015 through August 9, 2015 and October 9, 2015 through December 31, 2015 show transactions on 47 days, including weekends, when petitioner was not traveling for work, while petitioner's time and expense reports for the same period report 59 days that petitioner traveled for work.[4]

7. On September 16, 2016 the Division issued a statement of proposed audit change (statement) to petitioner, stating, in part:

> "In a letter we sent to you dated April 25, 2016 we requested documentation to verify the itemized deductions claimed for gifts to charity and job expenses and miscellaneous deductions. We also requested for any federal adjustments to income claimed to send us copies of any documentation that support the amounts claimed.
>
> For noncash contributions to The Salvation Army you provided five receipts. You didn't provide as required a detailed description of all donated items (acknowledged by the charitable organization), including their fair market value at the time of the donation. Without a detailed description of all donated items, we are unable to determine how the fair market value of each item was computed. After a revaluation we were able to allow $550.00 of the noncash donations claimed.
>
> The e-mail from your employer dated November 3, 2008 is insufficient to verify all expenses claimed are required and necessary for your employment. You must

[4] A review of petitioner's E-ZPass usage based on the records provided for the period June 9, 2015 through August 9, 2015 and October 9, 2015 through December 31, 2015 shows that petitioner used the vehicle's E-ZPass 44.34% for non-business purposes and 55.66% for business purposes, in contrast with petitioner's claimed vehicle usage of 96.5% for business (***see*** finding of fact 2).

provide an employer letter on company letterhead indicating the expenses were necessary for your employment as well as a statement on their reimbursement policy and whether or not you were reimbursed. The employer letter must state that a home office is necessary for your employment and for the convenience of the employer.

For the car expenses claimed, upon review we have determined that the $5,528.00 reimbursement you received from your employer covered the expenses claimed in full.

Since no employer letter was provided to substantiate that the home office is necessary for your employment and for the convenience of the employer we disallowed the amounts claimed for unreimbursed employee expenses and miscellaneous deductions.

The allowable itemized deductions are $2,509. You have been allowed the itemized deductions as claimed for taxes paid ($5,974) less state and local income taxes ($5,143), interest paid ($1,128), and gifts to charity ($550).

Your allowable itemized deductions are less than your allowable standard deduction. Therefore, we used the New York standard deduction in our computation.

It appears from our review that no documentation was provided in your response to substantiate the $3,350 claimed as a federal adjustment to income for HSA deduction. Therefore, the amount claimed as a federal adjustment to income has been disallowed. For all federal adjustments to income claimed you must send us copies of any documentation to support the amounts claimed.

We recomputed your federal adjusted gross income, taxable income, NYS tax, and NYC resident tax since we allowed the appropriate standard deduction and federal adjustments to income claimed have been disallowed.

Based on the adjustments made to your return, there is no overpayment to be refunded.

The adjustments we made to your return result in a balance due."

The statement asserted additional tax due of $902.00 plus interest.

8. Petitioner responded and disagreed with the statement by letter dated October 4, 2016.

Petitioner provided additional documents including form 1095-B, indicating health coverage

from Oxford Health Insurance, Inc.; form 5498-SA from Saturna Trust Company indicating that petitioner contributed $3,350.00 to a health savings account (HSA) in 2015 and an account summary from United Healthcare showing that petitioner's policy had a $5,000.00 deductible in 2015; correspondence dated September 22, 2016 from petitioner's employer stating that a car was a necessary part of petitioner's employment, was used to attend audit appointments, that Wagner & Zwerman LLP reimbursed petitioner both for mileage and toll expenses on a monthly basis, and that "[a]s part of your employment with Wagner & Zwerman LLP you were required to be in our office located at 450 Wireless Blvd, Hauppauge, NY 11788, one day a week to attend department meetings and hand in completed assignments. On workdays that you had a scheduled audit, you were required to report to the location designated for the audit. If the audit finished early or if no audit was scheduled, Wagner & Zwerman LLP allowed the payroll compliance auditors to work from their homes." Petitioner also provided lists of items donated to the Salvation Army, wherein he listed the claimed cost and fair market value for each item to support his claimed charitable deduction for 2015. The lists of donated items are not stamped or acknowledged by a Salvation Army official.

9. The Division issued a notice of adjustment (adjustment), dated November 25, 2016, allowing $3,350.00 as a federal adjustment to income for an HSA deduction and $2,150.00 for non-cash donations. The Division disallowed the expenses petitioner claimed for business use of his home and car expenses. Based on the adjustments, the amount of itemized deductions allowed by the Division totaled $4,659.00, which was less than the standard deduction. The Division allowed the standard deduction of $7,900.00 and determined that petitioner owed tax in the amount of $564.00 plus interest.

10. The Division issued a notice of disallowance, dated December 20, 2016, disallowing petitioner's claim for refund in the amount of $1,658.00 for 2015.

11. The Division issued a notice of deficiency, dated January 3, 2017, asserting tax due in the amount of $564.00 plus interest for tax year 2015.

SUMMARY OF THE PARTIES' POSITIONS

12. Petitioner argues that he is entitled to deduct transportation expenses related to traveling between his home and temporary work locations for field audits, which were at locations away from his regular job in Hauppauge. Petitioner contends that Internal Revenue Service publication 463 provides that travel between home and a temporary work location is deductable when the taxpayer's regular job is at another location. Petitioner further contends that, because his actual travel expenses were larger than the reimbursements received from his employer, he is allowed to deduct the excess unreimbursed expenses.

Regarding deductions claimed for charitable donations, petitioner argues that the Division incorrectly deflated the value of the donated items, and that his description of the items donated and their fair market value properly reflected the items donated to the Salvation Army.

13. The Division argues that it properly disallowed petitioner's claimed transportation expenses on the basis that petitioner failed to fully substantiate the expenses claimed and that such expenses were nondeductible commuting expenses for travel to locations within petitioner's metropolitan area. The Division further argues that petitioner valued the items donated to the Salvation Army in excess of their fair market value.

CONCLUSIONS OF LAW

A. Petitioner has the burden in this proceeding to show entitlement to all expenses and

deductions claimed on his 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 his 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]).[5]

C. The largest component of petitioner's claim for refund amounts to personal car mileage alleged to have been incurred while employed as an auditor for Wagner & Zwerman, LLP. As noted above, IRC § 162 (a) allows deductions for ordinary and necessary expenses paid or incurred during the taxable year in carrying on a trade or business. Conversely, IRC § 262 (a) disallows deductions for "personal, living, or family expenses." Generally, a taxpayer cannot

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[5] 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]).

deduct the cost of commuting between the taxpayer's residence and the taxpayer's place of business, except when the taxpayer travels "away from home in pursuit of a trade or business" (IRC § 162 [a] [2]; ***see*** Rev. Rul. 99-7, 1999-1 CB 361). Revenue Ruling 99-7 provides three exceptions by which expenses incurred from traveling between a taxpayer's residence and work location may be deducted:

> "(1) A taxpayer may deduct daily transportation expenses incurred in going between the taxpayer's residence and a *temporary* work location *outside* the metropolitan area where the taxpayer lives and normally works. However, unless paragraph (2) or (3) below applies, daily transportation expenses incurred in going between the taxpayer's residence and a *temporary* work location *within* that metropolitan area are nondeductible commuting expenses.
>
> (2) If a taxpayer has one or more regular work locations away from the taxpayer's residence, the taxpayer may deduct daily transportation expenses incurred in going between the taxpayer's residence and a *temporary* work location in the same trade or business, regardless of the distance. . . .
>
> (3) If a taxpayer's residence is the taxpayer's principal place of business within the meaning of § 280A(c)(1)(A), the taxpayer may deduct daily transportation expenses incurred in going between the residence and another work location in the same trade or business, regardless of whether the other work location is *regular* or *temporary* and regardless of the distance" (Rev. Rul. 99-7, 1999-1 CB 361).

The Division incorrectly argues that petitioner is not entitled to deduct transportation expenses between his home and temporary work locations because the temporary work locations are within his "metropolitan area." The Division's argument incorrectly conflates the first and second exceptions of Revenue Ruling 99-7. Contrary to the Division's argument, if petitioner establishes and substantiates transportation expenses incurred from traveling between his residence and temporary work locations, such expenses would be deductible regardless of whether petitioner was traveling within or outside his "metropolitan area" because petitioner had a regular work location. Specifically, petitioner established that his regular work location was at

the office of Wagner & Zwerman, LLP, in Hauppauge, New York. Petitioner further established that his work required field audits involving travel to temporary locations away from his regular work location.[6] As such, if properly substantiated, petitioner would be entitled to deduct unreimbursed travel expenses between home and temporary work locations, regardless of the distance traveled.

D. Although petitioner has met his burden of proving that he had a regular work location away from his residence and traveled for work between his residence and temporary work locations, petitioner has the further burden of proving the actual travel expenses incurred. Vehicle expenses will be disallowed in full unless the taxpayer satisfies strict substantiation requirements (IRC §§ 274 [d]; 280F [d] [4]). To satisfy the requirements of IRC § 274 (d), a taxpayer generally must maintain adequate records or produce sufficient evidence corroborating his or her own statement, which, in combination, are sufficient to establish the amount, date and time, and business purpose for each expenditure for travel away from home or expenditure or business use of listed property (Treas Reg § 1.274–5T [b] [2], [6], [c] [1]). Here, petitioner has failed to meet this requirement.

In this case, although petitioner's time and expense reports indicate the date and purpose of travel, distinguish between commuting travel ("office work") and temporary work locations ("field work"), and list the total miles traveled, the reports list only the name of the companies where petitioner traveled and do not state the address. As such, there is no way to verify the total number of miles petitioner claims to have traveled to each work location. Moreover, petitioner

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[6] Here, the field audits were temporary in that they were realistically expected to last, and did last, for less than one year (***see*** Rev. Rul. 99-7, 1999-1 CB 361).

failed to state the starting mileage and ending mileage of the vehicle. Petitioner's claim that he used the vehicle 96.5% for business travel is found to be incredible. Petitioner's claim that total miles driven in 2015 was 9,230 and total business miles was 8,906 is contradicted by his own testimony that he commuted from home to his Hauppauge office every Monday in 2015. Based on petitioner's testimony alone, he traveled at least 4,368 miles for nondeductible commuting travel (84 miles round-trip from petitioner's residence to Hauppauge office x 52 Mondays in 2015 = 4,368). Petitioner's claim is further belied by the documentary evidence in the record. Specifically, a comparison of E-ZPass records versus petitioner's time and expense reports shows that the vehicle was used for more than "field work" and Monday office commutes. Indeed, a comparison of the E-ZPass records for the period provided with the time and expense reports for the same period shows that petitioner used the vehicle's E-ZPass 44.34% for non-business purposes and 55.66% for business purposes, in contrast with petitioner's claimed vehicle usage of 96.5% for business (***see*** finding of fact 6). While I do not doubt that petitioner traveled as a field auditor for his employer, I find that the documentation as a whole does not meet the strict substantiation requirements of IRC § 274 (d). Therefore, petitioner's claim for unreimbursed transportation expenses is disallowed in its entirety (***Sanford v Commr.***, 50 TC 823, 827 [1968], ***affd*** 412 F2d 201 [2d Cir 1969]).

E. Addressing petitioner's claimed non-cash charitable contributions, it is first noted that determinations made in a notice of deficiency are presumed correct, and the burden of proof is upon petitioner to establish, by clear and convincing evidence, that those determinations are erroneous (***see Matter of Leogrande v Tax Appeals Trib.***, 187 AD2d 768 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]; ***see also*** Tax Law § 689 [e]). The burden does not rest with the

Division to demonstrate the propriety of the deficiency (***see Matter of Scarpulla v State Tax Commn.***, 120 AD2d 842 [3d Dept 1986]).

IRC § 170 allows as a deduction any contribution made within the taxable year to a charitable organization (26 USCA § 170 [a] [1], [c]). Such deductions are allowable only if the taxpayer satisfies statutory and regulatory substantiation requirements (***see*** 26 USCA § 170 [a] [1]; 26 CFR 1.170A-13). The nature of the required substantiation depends on the size of the contribution and on whether it is a gift of cash or property. For noncash contributions, the taxpayer must maintain reliable written records that include the name and address of the donee, the date and location of the contribution, and a description of the property in detail reasonable under the circumstances (26 CFR 1.170A-13 [b]). The taxpayer must also maintain records to establish "the fair market value of the property at the time the contribution was made" and "the method utilized in determining the fair market value" (26 CFR 1.170A-13 [b] [2] [ii] [D]). For all contributions valued at $250.00 or more, the taxpayer must obtain a "contemporaneous written acknowledgment" from the donee including a description of the non-cash property contributed (26 USCA § 170 [f] [8]). Additional substantiation requirements are imposed for contributions of property with a claimed value exceeding $500.00 (26 USCA § 170 [f] [11] [B]). Still more rigorous substantiation requirements are imposed for contributions of property with a claimed value exceeding $5,000.00 (26 USCA § 170 [f] [11] [C]). In determining whether donations of property exceed these thresholds, "similar items of property" (other than cash and publicly traded securities) must be aggregated (26 USCA § 170 [f] [11] [F]). The term "similar items of property" is defined to mean "property of the same generic category or type," such as clothing (26 CFR 1.170A-13 [c] [7] [iii]).

If property or similar items of property are valued in excess of $5,000.00, the taxpayer must complete section B of form 8283 and substantiate the value of the property with a "qualified appraisal of such property" (26 USCA § 170 [f] [11] [C]). He must also attach to his return a fully completed "appraisal summary" on form 8283 (***see Grainger v Commr. of Internal Revenue***, T.C. Memo 2018-11, 116 T.C.M. [CCH] 107; ***Costello v Commr.***, T.C. Memo 2015-87, 109 T.C.M. [CCH] 1441, 1445; 26 CFR 1.170A-13 [c] [2] [I] [B]).

To substantiate his contributions, petitioner produced receipts from the Salvation Army indicating the date of the donation and the general types of items donated (i.e. bags of clothing). The receipts from the Salvation Army merely state that he donated bags of clothing; they do not indicate what specific items of clothing he donated or the number of items he donated on any particular visit. Petitioner also supplied a spreadsheet he had prepared, listing a description of the items, their cost and fair market value according to petitioner. Petitioner did not provide any other records to establish the fair market value of the property at the time the contribution was made and the method utilized in determining the fair market value. The spreadsheet and valuation is not acknowledged by a Salvation Army official.

Petitioner has fallen far short of substantiating non-cash charitable contributions in excess of the amount the Division has allowed as a deduction. Because all of petitioner's donations were of similar items of property (i.e., clothing), they must be grouped together for purposes of determining whether the $5,000.00 substantiation threshold has been reached (***see*** 26 CFR 1.170A-13 [c] [7] [iii]). Petitioner claimed that the value of this clothing was $7,100.00, but he did not file section B of form 8283, did not provide a donee acknowledgment on form 8283, and did not obtain a qualified appraisal (***see*** 26 USCA § 170 [f] [11] [C]). Petitioner has therefore

failed to meet his burden of proving entitlement to any deduction above the amount allowed by the Division.

F. The petition of Boris Minevich is denied, and the notice of disallowance, dated December 20, 2016, and notice of deficiency, dated January 3, 2017, are sustained.

DATED: Albany, New York
April 25, 2019

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE