STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARCOS ROSALES	:	DETERMINATION DTA NO. 828043
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 2012.	: : :	

Petitioner, Marcos Rosales, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2012.

A hearing was held on March 27, 2019 in New York, New York, at 10:30 a.m., with all briefs to be submitted by August 12, 2019, which date began the six-month period for issuance of this determination. Petitioner appeared by the Holtz Group (Mark Glass, EA). The Division of Taxation appeared by Amanda Hiller, Esq. (Charles Fishbaum, Esq., of counsel). After due consideration of the documents and arguments submitted, James P. Connolly, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner has substantiated his entitlement to claimed deductions for unreimbursed business expenses, a business loss, and charitable contributions.

FINDINGS OF FACT

1. On his timely-filed New York State resident income tax return (form IT-201) for 2012, petitioner, Marcos Rosales, reported, *inter alia*, wage income of $83,061.00, with a federal adjusted gross income (AGI) of $70,572.00. In computing his federal AGI on the return, petitioner included a net business loss of $13,266.00. The return also claimed a total of $16,817.00 in New York itemized deductions. That amount was broken down on the return's resident itemized deduction schedule (form IT-201-D) and included $6,471.00 in "gifts to charity" and $10,346.00 in "job expenses/miscellaneous deductions (federal schedule A, line 27)." No schedule C from petitioner's federal return for 2012 was attached to petitioner's form IT-201. The return requested a refund of $1,914.00, which was paid by the Division of Taxation (Division).

2. By letter dated November 23, 2015, the Division informed petitioner that his 2012 form IT-201 had been selected for review and that petitioner needed to furnish documentation to substantiate his claimed business loss and his itemized deductions for charitable contributions and unreimbursed job expenses. The letter advised petitioner of the type of documentation that he would need to supply for each of the above categories.

3. Having received no response from petitioner, the Division mailed to him a statement of proposed audit change, dated December 30, 2015, proposing to assess $2,280.87 in additional personal income tax, plus interest, for the year 2012, and advising him that the Division would issue a notice of deficiency for that amount, plus interest and penalty, if he did not respond by January 29, 2016. The statement explained that, because petitioner did not respond to its previous letter, the Division was disallowing his claimed business loss and that it had disallowed

the itemized deductions claimed and instead applied the appropriate standard deduction, which resulted in his owing additional tax.

4. While no response from petitioner to the statement of proposed audit change was entered into evidence at the hearing, he appears to have responded to the statement, because the Division issued a letter dated January 25, 2016, to petitioner, replying to "your correspondence" about the statement. Regarding petitioner's claimed business loss, the letter asserted that petitioner's response had not adequately documented the business loss because "[b]ased on the information provided, we cannot verify if the business expenses claimed pertain to your business or are personal in nature." According to the letter:

> "If your business income is more than your business expenses for at least 3 years out of a period of 5 consecutive years, you are presumed to be in business to make a profit.
>
> Based on a review of your previous filing history, it has been determined that your business is a not-for-profit enterprise."

The letter explained that the Division granted petitioner only $10.00 for his charitable deduction on the ground that his response "did not include the required documentation to support the gifts to charity claimed as an itemized deduction." Similarly, it denied petitioner's itemized deduction for job expenses, explaining that he failed to "include the required documentation to support the job expenses . . . along with a letter from your employer stating the [expenses] were necessary for your employment and weren't reimbursed or reimbursable." The letter further explained that, because petitioner's itemized deductions, as adjusted, were less than the standard deduction, the Division would apply the standard deduction.

5. Based on the audit of petitioner's 2012 form IT-201, the Division issued a notice of deficiency (L-044176631), dated February 18, 2016, to petitioner, asserting $2,280.87 in additional tax due, plus interest.

6. At the hearing, the Division introduced a copy of schedule A, itemized deductions, to the federal form 1040 filed by petitioner for 2012. The amounts of the itemized deductions shown on that schedule are consistent with the itemized deductions petitioner took on his 2012 form IT-201 (***see*** finding of fact 1). Attached to the schedule A was federal form 8283, noncash charitable contributions, which described petitioner's charitable contributions as consisting of donations to the Salvation Army of (i) gifts by cash or check of $295.00; (ii) clothing with a fair market value of $1,454.00; and (iii) clothing, CDs and DVDs with a fair market value of $4,722.00.

7. The Division also introduced copies of the schedule C forms petitioner had filed with his federal return for the years 2010 through 2016, which listed "Artist" as the principal business, and did not list any name for the business. The schedule C forms showed the following gross receipts, expenses and net profit amounts[1]:

Year	Gross receipts or sales	Expenses	Net Profit (or loss)
2010	$1,050.00	$9,814.00	($8,764.00)
2011	$575.00	$12,306.00	($11,731.00)
2012	$659.00	$13,925.00	($13,266.00)
2013	$1,460.00	$12,127.00	($10,667.00)
2014	$1,050.00	$12,981.00	($11,931.00)
2015	$450.00	$11,057.00	($10,607.00)

Petitioner's schedule C for 2013 showed $1,025.00 as a bad debt, while his schedule C for 2014 showed a bad debt of $1,700.00.

8. For 2012, petitioner's federal schedule C reported the expenses shown in the following table:

[1] The table omits the results from 2016, which are similar to results for the years shown.

Type of Expense	Amount
Other business property	$899.00
Supplies	$3,231.00
Travel	$5,410.00
Deductible meals and entertainment	$1,013.00
Other expenses	$3,372.00

The “other expenses” category was broken down further in part V of schedule C, as follows:

Expense	Amount
Telephone	$840.00
Outside services	$400.00
Mobile data plan	$48.00
Local transportation	$370.00
Cable/Internet/Videos	$864.00
Books/videos/research materials	$850.00

9. Petitioner did not appear at the hearing because, according to his representative, “he’s working.” The notice of hearing advising petitioner of the hearing date and location was issued to petitioner and his representative on February 18, 2019.

10. At the hearing, petitioner offered into evidence eight exhibits. The documents were not sworn to and the only foundation laid for them was through the testimony of petitioner’s representative, Mr. Glass, who testified that the documents were prepared by petitioner. In admitting the documents into evidence, the administrative law judge noted that the inadequacy of the foundation provided for them would be taken into account in determining the weight to be accorded them.

11. One of the documents was a three-page resume for petitioner, which showed him to have a bachelor’s degree in fine arts from the University of Northern Texas, and a masters of fine

arts degree from the California Institute of the Arts, and to have been the winner of nine honors and awards. The resume lists, among other things, nine “one and two persons exhibits,” 43 “selected group exhibits and screenings,” and 23 “performance / collaborations,” with the month and year for each. The resume does not specify petitioner’s role in any of the exhibits, screenings, or collaborations.

12. Another of the evidentiary exhibits introduced by petitioner was a two-page document entitled “Marcos Rosales-Tax Forms 2012” (summary exhibit), which, according to the testimony of Mr. Glass, is the summary of the expenses reported by petitioner on his schedule C for 2012. Review of the summary exhibit shows that some of the expenses listed on it are personal expenses that do not appear to have been included in petitioner’s schedule C expenses, such as “student loan,” gym membership, rent, and renters insurance, all of which appear under the heading “Monthly Bills” on the first page of the exhibit. The expenses from petitioner’s 2012 schedule C shown in the tables in finding of fact 8 tie into the summary exhibit, with the following exceptions:

> (i) the “deductible meals and entertainment” expense of $1,013.00 is almost exactly half of the $2,025.44 shown as the amount for “Meals (Travel/Business/Assistants)” on the summary exhibit;
>
> (ii) the “cable/internet/movies” item in petitioner’s schedule C “other expense” list is almost exactly one-half the total amount shown on the “monthly bills” section of the summary schedule for “the sum of “Cable/Internet” ($1,560.04) and “Netflix” ($168.00); and
>
> (iii) the amount of the telephone “other expense” item on schedule C, $840.00, is less than half of the total “phone” expense shown in the “monthly bills” section of the summary exhibit.

13. Mr. Glass testified that the remaining exhibits submitted by petitioner (exhibits 3 through 8) were documentary “backup” for the expenses shown on the summary exhibit. Many

of the receipts included in exhibits 3 through 8, however, do not, on their face, identify the purchaser and in some cases the item purchased. For example, exhibit 4's cover page indicates that the exhibit contains "Studio Supplies/Art Production" expense documentation. The second page of exhibit 4 contains five store invoices, two of which are largely illegible, and the other three of which are from the "Aurora Hardware Locksmith" store, but do not identify the purchaser and describe the item purchased only as "DP'04."

14. The summary exhibit shows total "travel costs" of $5,410.00, which equals the "travel" expense line (line 24a) on petitioner's schedule C for 2012. The summary exhibit breaks down that expense total into the expenses for different trips, and provides the date for each trip, including a trip to "Singapore/Malaysia/Thailand/Myanmar" (Asia trip), and a trip to Istanbul, Turkey. Mr. Glass testified that the backup for that trip was in petitioner's exhibit 5. The expense documentation in exhibit 5 is not presented in the order of the trips shown on the summary exhibit and in fact does not appear to follow any discernable order. Review of exhibit 5 did not identify any single receipt that tied into an air travel expense of $240.00 on "Air Asia" shown for the Asia trip. Moreover, review of exhibit 5 did not show any invoice or other documentation for five "airport transfers" totaling $340.00 listed on the summary exhibit or an invoice matching the $200.00 shown for the Istanbul, Turkey hotel stay claimed on the summary exhibit.

15. Mr. Glass testified that petitioner told him that the trips shown on the summary exhibit, including the Asia trip, were for "research on projects that he will do in the future." Mr. Glass testified further that petitioner did not provide him with any information about any art exhibits petitioner saw on that trip, or any artist with whom petitioner talked on that trip.

16. The cover page of petitioner's exhibit 7 indicates that the enclosed documentation was for petitioner's "Art Related Expenses" with a subheading of "Meals (Travel/Business/Assistants)," which was followed by 12 pages of receipts. The exhibit did not include any total charge by page. Review of the attached invoices, some of which included totals that were hard to discern, showed that petitioner had included documentation for $1,512.94 in meals. None of the invoices identified the customer making the purchase.

17. In his testimony, Mr. Glass was inconsistent about whether petitioner's exhibits contained anything regarding petitioner's itemized deductions for charitable contributions or for unreimbursed job expenses. Review of the exhibits reveals only that the summary exhibit has a single heading entitled "Donations." The information under that heading does not tie into the charitable deduction information shown on petitioner's schedule A for 2012, as the summary exhibit reports a total donation of $200.00, including gifts of clothing, CDs and books to the Salvation Army, while petitioner claimed $6,471.00 in such gifts on his schedule A.

CONCLUSIONS OF LAW

A. Petitioner has the burden to show entitlement to all expenses and deductions claimed on his returns and to substantiate the amount of such expenses and deductions (***see Matter of Goode***, Tax Appeals Tribunal, October 17, 2013; Tax Law §§ 658 [a], 689 [e]; 20 NYCRR 158.1). Because the starting point for determining New York personal income tax liability is the taxpayer's federal adjusted gross income (***see*** Tax Law § 612 [a]), federal law is determinative of the substantive questions presented in this matter (***see Hunt v State Tax Commn***., 65 NY2d 13, 16-17 [1985]; ***Matter of Rizzo***, Tax Appeals Tribunal, June 3, 1993, ***confirmed Rizzo v Tax Appeals Trib.***, 210 AD2d 748 [3d Dept 1994]). In order to maintain the deductions for the business expenses, petitioner has 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 [3d Dept 1999]). Petitioner has not met these burdens here.

B. Turning first to petitioner's deduction for a business loss, IRC (26 USCA) § 162 (a) provides for a deduction from income for all the "ordinary and necessary" expenses paid or incurred during the taxable year in carrying out any trade or business. Deductions for activities not engaged in for profit are allowable only to the extent of income from such activities (IRC [26 USCA] § 183 [b] [2]; ***Matter of Temple***, Tax Appeals Tribunal, July 8, 2004).

C. Determining whether petitioner's activities were engaged in for profit is based on a review of all the surrounding facts and circumstances while considering the nine factors set forth in Treasury Regulation (26 CFR) § 1.183-2 (b) (***see Matter of Horn***, Tax Appeals Tribunal, April 20, 2017, citing ***Hoag v Commr.***, TC Memo 1993-348 [1993]). The nine factors in the regulation 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, which are earned; (8) the financial status of the taxpayer; and (9) elements of personal pleasure or recreation (***see*** 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]).

Here, petitioner has not submitted sufficient evidence to prevail with regard to any of these factors, as he chose not to appear at the hearing or even provide an affidavit. While petitioner submitted his resume into the record, without his testimony as to its accuracy, the resume does not establish that petitioner had the necessary expertise to succeed in his art business. Moreover, the evidence that the Division submitted is sufficient to show that several of the above factors militate against petitioner conducting a trade or business. For example, the copies of petitioner's schedule C's for the years 2010 through 2016 show that the business had scant revenue, much of which was later treated as a bad debt and, in fact, lost money each year. Furthermore, petitioner's handwritten, disorganized tax records suggest that he was not pursuing an art business in a serious manner.

D. Even if petitioner were found to have a trade or business, he would still have to show that his claimed business expenses were ordinary and necessary in relation to his art business. An ordinary expense is one that is common and acceptable (***see 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 (***see Heineman v Commr.***, 82 TC 538, 543 [1984]). "An expense that serves primarily to furnish the taxpayer with a social or personal benefit, and is only secondarily related to business, is not a necessary business expense" under § 162 (a) (***see*** 6 Mertens, Law of Fed. Income Tax'n § 25D:3). Generally, even if a meal is a deductible business expense, only 50% of the price of the meal may be deducted (***see*** IRC [26 USC] 274 [n]). Furthermore, IRC [26 USC] § 274 (d) applies a stricter substantiation requirement for certain business expenses, including, among other things, travel, meals and entertainment, and cellular telephone expenses (IRC § 274 [d] [4]). This heightened documentation burden

requires the taxpayer to show, for each item, among other things, the business purpose of the expense, as well as "the business relationship to the taxpayer of the person receiving the benefit."

Petitioner's evidence is not adequate to establish that the expenses shown on his schedule C are ordinary and necessary for his art business, let alone sufficient to satisfy the heightened proof requirements to substantiate his travel and meals expense under IRC [26 USC] § 274 (d). Petitioner failed to submit any sworn testimony substantiating that those expenses were necessary for his business and were not engaged in for reasons of personal pleasure. Mr. Glass lacked sufficient personal knowledge of petitioner's business and those expenses for his testimony to supply the necessary evidence. Finally, petitioner's evidence is not sufficient to establish even the amount of those expenses because the totals of the expense records submitted often do not tie into the summary exhibit's expense totals and because the expense records do not show that he was the purchaser of the goods or services purchased (***see*** findings of fact 13 through 16).

E. Regarding the Division's denial of petitioner's itemized deduction for unreimbursed business expenses, petitioner failed to submit any evidence into the record to substantiate that deduction, whether by testimony or through documents, so that denial is sustained.

F. Finally, with respect to petitioner's entitlement to the claimed charitable deductions, 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]).

26 USC § 170 (a) generally allows a deduction for charitable contributions, provided the contributions are "verified under regulations prescribed by the Secretary" (26 USC § 170 [a] [1]). The regulations specify that for each contribution of money, taxpayers must keep one of the following:

> "(i) A cancelled check.
>
> (ii) A receipt from the donee charitable organization showing the name of the donee, the date of the contribution, and the amount of the contribution. A letter or other communication from the donee charitable organization acknowledging receipt of a contribution and showing the date and amount of the contribution constitutes a receipt for purposes of this paragraph (a).
>
> (iii) In the absence of a canceled check or receipt from the donee charitable organization, other reliable written records showing the name of the donee, the date of the contribution, and the amount of the contribution" (Treas. Reg. § 1.170A–13 [a] [1]).

26 USC § 170 (f) (8) provides that no deduction may be taken for cash or non-cash contributions of $250.00 or more unless the donee charity provides the donor with a written acknowledgment that contains the following information:

> "(i) The amount of cash and a description (but not value) of any property other than cash contributed.
>
> (ii) Whether the donee organization provided any goods or services in consideration, in whole or in part, for any property described in clause (i).
>
> (iii) A description and good faith estimate of the value of any goods or services referred to in clause (ii) or, if such goods or services consist solely of intangible religious benefits, a statement to that effect" (26 USC 170 [f] [8] [i-iii]).

Petitioner's federal form 8283 showed him to have made cash contributions of $295.00 and donations in kind with a fair market value of $6,176.00 to the Salvation Army. Because petitioner did not present any proof at the hearing of these contributions, let alone the written acknowledgement required by 26 USC § 170 (f) (8), petitioner's itemized deduction for charitable contributions fails as a matter of law (***see*** 26 USC § 170 [f] [8]; ***Matter of Balkany***,

Tax Appeals Tribunal, October 28, 2015). Moreover, the amount reported on the return is inconsistent with the amount of the donations listed on the summary schedule (***see*** finding of fact 17). Thus, petitioner's itemized deduction for charitable contributions is denied.

G. The petition of Marcos Rosales is denied, and the notice of deficiency, dated February 18, 2016, is sustained.

DATED: Albany, New York
February 6, 2020

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE