STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARCO DILAURENTI	:	DETERMINATION DTA NO. 828311
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 2011 and 2012.	:	

Petitioner, Marco DiLaurenti, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under article 22 of the Tax Law and the New York City Administrative Code for the years 2011 and 2012.

A hearing was commenced before Dennis M. Galliher, Administrative Law Judge, in New York, New York, on May 22, 2019 at 1:15 p.m., and was continued to conclusion at the same location on September 18, 2019, with all briefs to be submitted by February 28, 2020, which date commenced the six-month period for issuance of this determination.[1] The Division of Taxation appeared by Amanda Hiller, Esq. (Linda A. Farrington, Esq., of counsel). Petitioner appeared by David Sobel, CPA.

ISSUES

I. Whether the Division of Taxation had a rational basis for issuing a notice of deficiency to petitioner asserting additional New York State and New York City personal income taxes due for the years 2011 and 2012.

[1] Due to the COVID-19 pandemic, which constitutes good cause, the due date for issuance of this determination was extended by three months, pursuant to 20 NYCRR 3000.15 (e).

II. Whether, for the years 2011 and 2012, the Division of Taxation properly determined that petitioner owed tax on management fees paid to him by his wholly-owned subchapter S corporation for such years in the respective amounts of $81,186.00 and $157,000.00.

III. Whether, for the year 2012, the Division of Taxation properly determined that petitioner owed tax on funds transferred to him by the like kind exchange (LKE) qualified intermediary for his wholly-owned subchapter S corporation, in the amount of $2,102,334.83, on the basis that such funds were not reinvested in qualified replacement property, so as to therefore constitute taxable "boot" received as a consequence of a LKE.

IV. Whether the Division of Taxation properly recalculated and reduced the claimed adjusted basis for replacement property received by petitioner's wholly-owned subchapter S corporation in a LKE.

V. Whether petitioner was properly subjected to penalties for failure to file tax returns for the years at issue and for negligence.

FINDINGS OF FACT

1. During 2011 and 2012 (years at issue), petitioner, Marco DiLaurenti, was a resident of New York State and New York City. Although not described in significant detail, it appears clear that for many years prior to and including the years at issue, petitioner was engaged in various real estate activities, including investing in, owning, and managing various properties or interests therein. Petitioner engaged Stuart Sinclair, CPA, to prepare his personal, corporate and other entity tax returns for the years at issue, as well as for prior years. Mr. Sinclair did not appear or provide testimony on either of the hearing dates in this matter, or provide any information

concerning how he prepared any of the tax returns submitted in this matter, including any information or description of the documents he may have relied upon in doing so.

2. In July of 2014, the Division of Taxation (Division) commenced an audit of petitioner for the years at issue. In addition, the Division commenced a simultaneous audit of Spring Sunshine Corporation (Sunshine Corp.). At all relevant times, Sunshine Corp. was an S corporation, and petitioner was its sole shareholder.

3. Petitioner claims to have filed a form 1040 (U.S. Individual Income Tax Return) for each of the years 2005 through 2012. Copies of such returns were offered, and were accepted into evidence, at the September 18, 2019 (second) day of hearing in this matter. The copies of the returns introduced in evidence by petitioner are stamped as having been prepared by Mr. Sinclair. Though such copies are unsigned and undated, the Division does not dispute petitioner's claim that the same were filed with the Internal Revenue Service (IRS). While, as noted, the copies of such returns are undated, there is no claim or indication that extensions of the time for filing were sought or were obtained by petitioner for any of such filing years. Hence, it is assumed that these returns were filed on or before the due date for filing for each of such years, i.e., on or before the 15th day of April following the close of the calendar year(s) for which the return(s) were being filed (***see*** IRC [26 USC] § 6072).

4. As is particularly relevant to this matter, these returns reveal the following:

Earlier Years

a) petitioner's form 1040 for the year 2005 reports, as "other income" (at line 21), a net loss in the amount of $638,924.00. After increasing the same by the allowable standard deduction amount for 2005 ($5,000.00), petitioner reported a loss of $643,924.00, and taxable income of $0.00 for 2005.

b) petitioner's form 1040 for the year 2006 reports, as "other income" (at line 21), a net loss in the amount of $613,411.00, with the reference "see statement 21." Statement 21, attached to this form 1040, reports a "net operating loss (NOL) carryover from a prior year" (at line

7) in the amount $638,924.00, reports "other taxable income" (at line 17) in the amount of $25,513.00, and thus reports a negative total amount of $613,411.00. After increasing the same by the allowable standard deduction amount for 2006 ($5,150.00), petitioner reported a loss of $618,561.00, and taxable income of $0.00 for 2006.

c) The forms 1040 for the ensuing years through 2010 follow the same general manner of calculation, including the use of NOL carryforwards to offset reported income. As a result of such ongoing calculations, petitioner's form 1040 for the year 2010 reports as "other income" (at line 21), a negative amount of $203,941.00, with the reference "see statement 21." Statement 21, attached to this form 1040, reports "taxable income from Form 1099-MISC" (at line 3), specifically "other income from Box 3" (at line 3-b), in the amount of $197,883.00, a "net operating loss carryover from a prior year" (at line 7) in the amount $401,824.00, and thus (after accounting for other income and losses set forth on lines 8-a through 17 of form 1040), results in a negative total amount of $198,347.00. After increasing the same by claimed itemized deductions ($6,549.00), petitioner reported a loss of $204,896.00, and taxable income of $0.00 for 2010.

In sum, all of these returns report negative adjusted gross income, and taxable income of $0.00.

Years at Issue

d) petitioner's form 1040 for the year 2011 reports as "other income" (at line 21), a negative amount of $122,755.00, with the reference "see statement L21." Statement L21, attached to this form 1040, reports a "net operating loss carryover from a prior year" (at line 7) in the amount $203,941.00, reports "other taxable income: management fee" (at line 17) in the amount of $81,186.00, and thus (after accounting for other income and losses set forth on lines 8-a through 17 of form 1040), reports a negative total amount of $114,286.00. After increasing the same by the allowable standard deduction amount for 2011 ($5,800.00), petitioner reported a loss of $120,086.00, and taxable income of $0.00 for 2011.

e) petitioner's form 1040 for the year 2012 reports $42,714.00 as "other income" (at line 21), with the reference "see statement 21 Other income" Statement 21, attached to this form 1040, reports a "net operating loss" in the amount $114,286.00, "management fees" in the amount of $157,000.00, and thus (after accounting for other income and losses set forth on lines 8-a through 17 of form 1040), reports adjusted gross income (at line 37) of $57,878.00. After decreasing the same by the allowable standard deduction amount for 2012 ($5,950.00), petitioner reported taxable income of $48,120.00 and tax due thereon in the amount of $6,410.00.

f) attached to petitioner's forms 1040 for the years 2006 and 2007 is a single, handwritten sheet of paper, titled "Schedule of Net Operating Losses." The author of these one-page sheets is not specified thereon, but may be presumed to be Stuart Sinclair. Each sheet is identical, and reflects a progression listing "net operating losses available" for the years 2003 through 2007, as follows:

"Net operating loss available to 2003	(713,924)
Profit 2003	75,000
Net operating loss available to 2004	(638,924)
Profit 2004	-0-
Net operating loss available to 2005	(638,924)
Profit 2005	-0-
Net operating loss available to 2006	(638,924)
Profit 2006	25,513
2006 itemized deductions	5,150
Net operating loss available to 2007	(618,561)."

5. The record does not include copies of petitioner's returns for 2003 or 2004, as referenced above in the one-page handwritten schedule of net NOLs. Likewise, there is no information to establish that any returns were filed by petitioner for 2003 or 2004, or that the earliest year set forth on the foregoing handwritten sheets (2003) was the initial (or source) year in which petitioner reported a NOL, and if so, any substantiation in support of the source and amount of that initial claimed loss, or of any losses claimed for any of the ensuing years including the years at issue.

6. At the September 18, 2019 hearing, petitioner also submitted a form 1040 X (Amended U.S. Individual Income Tax Return), for each of the years 2005 through 2010, and for the years at issue. These amended returns are stamped as having been prepared by Yehezkel CPA LLC (for the years 2005 through 2009), and by Schrier & Company PLLC (for the years 2010 through 2012). They are dated as signed by petitioner on September 8, 2017 (for the years 2005 through 2011), and January 17, 2018 for the year 2012. The record does not disclose whether these amended returns, all of which are dated as signed subsequent to April 2016 completion of the audit at issue herein, were in fact filed with the IRS. In general, the amended returns reflect increases for previously unreported income (e.g., foreign income, cancelled debt, etc.), increases in claimed losses, and increases to claimed itemized deductions, the mathematical consequence of which impacts (increases or decreases) the dollar amounts of petitioner's claimed losses and

carryovers thereof for each of such years. For each of the years, including those at issue, the amended returns result in claimed losses (i.e., negative adjusted gross income), and taxable income of $0.00. The persons involved in preparing these amended returns did not appear or provide testimony on either of the hearing dates in this matter, or provide any information concerning how any of the amended returns submitted in this matter were prepared, including any information or description of the documents they may have relied upon in doing so.

7. As is relevant to this matter, the amended returns for the years at issue reveal the following:

a) petitioner's form 1040 X for 2011 increases the amount of petitioner's reported loss amount of $114,286.00, per his original form 1040, by $83,044.00, thus resulting in a claimed corrected loss amount of $197,330.00 (compare finding of fact 3 [d]). After increasing the same by the allowable standard deduction amount for 2011 ($7,250.00), petitioner reported a negative amount of $204,850.00, and taxable income of $0.00 for 2011.

b) petitioner's form 1040 X for 2012 eliminates the amount of petitioner's adjusted gross income ($57,878.00), per his original form 1040, by an offsetting claimed loss amount of $99,452.00, thus resulting in a claimed corrected loss amount of $20,787.00 (compare finding of fact 3 [e]). After increasing the same by the allowable standard deduction amount for 2012 ($7,400.00), petitioner reported a negative amount of $28,187.00, and taxable income of $0.00 for 2012.

8. It is undisputed that petitioner did not file New York State or City personal income tax returns for any of the years 2005 through 2010 before submitting the same to the Division on October 29, 2019. Likewise, it is undisputed that petitioner did not file any such returns for the years at issue at any time before submitting the same to the Division on October 10, 2019. Both of these filing dates fell after the hearing held herein.[2] Since petitioner did not file New York State

[2] The Division submitted certifications of non-filing stating that a search of its records confirms no such filings were made prior to the described submissions dated October 29, 2019 and October 10, 2019. These returns were submitted after the hearings in this matter, essentially only set forth calculations that follow from the information set forth on the amended forms 1040 described hereinabove, and hence are of little utility at best in considering the issues presented in this matter. Noting the Division's objection, they are nonetheless included as part of the record only for purposes of reference with regard to statements in Exhibit M in evidence (affidavit of Thomas Rogers).

and City personal income tax returns, the Division's audit activities focused initially on Sunshine Corp. As described hereinafter, the audit of Sunshine Corp. resulted in a finding of deductions (management fees in 2011 and 2012), and of additional income (taxable boot from a reported LKE transaction in 2012) that, in turn, flowed through as additional income to petitioner as the sole shareholder of Sunshine Corp.

9. Sunshine Corp. filed a form 1120 S (U.S. Income Tax Return for an S Corporation) for each of the years at issue. The dates of the filing of these returns were not specified. In addition, Sunshine Corp. filed a form CT-3-S (New York S Corporation Franchise Tax Return) for each of the years 2011 and 2012. The form CT-3-S for the year 2011 is signed by petitioner, and includes the typed date "3/12/12." The form CT-3-S for the year 2012 is signed by petitioner and includes the typed date "3/14/13," as well as the signature of Stuart Sinclair and the handwritten date "[illegible]/23/13."

10. The federal returns submitted on the second day of hearing are petitioner's individual income tax returns (***see*** finding of fact 3). There is no evidence that these returns were provided to the auditor during the audit. References in the audit report to returns supplied and federal transcripts reviewed therefore pertain to forms 1120 S filed by Sunshine Corp., that were provided to the auditor.[3]

11. On its forms 1120 S for the years 2011 and 2012, Sunshine Corp. claimed a deduction, on form 8825 (Rental Real Estate Income and Expenses of a Partnership or an S Corporation), for management fees it paid in the respective amounts of $81,186.00 (2011) and

[3] In his reply brief, petitioner claims his federal income tax returns were presented at the time of audit, citing Exhibit J, IDR # 1, question 5. This claim is inaccurate and misleading. In fact, the referenced IDR pertains to documents and information sought in the audit of Sunshine Corp., as opposed to the audit of petitioner. The referenced IDR notes in response to question 5 that only one page from form 1040 was supplied. There is no evidence in the record establishing that petitioner's individual income tax returns were supplied to the auditor during the audit, or at any time prior to the second day of hearing, despite petitioner's claim to the contrary (***see*** findings of fact 13 and 14).

$157,000.00 (2012). These are the same management fee amounts that appear as "other income" on petitioner's forms 1040, as initially filed for the years at issue, but that were entirely offset by a claimed loss carryforward in 2011, and were partially offset by a claimed loss carryforward in 2012, (***see*** finding of fact 4 [d] and [e]).

12. In addition to the foregoing management fees, Sunshine Corp. reported that in 2012, it participated in a like-kind exchange (LKE) pursuant to IRC (26 USC) § 1031. With its form 1120 S for 2012, Sunshine Corp. included form 8824 (LKEs), reporting thereon that it exchanged a commercial building located at 154 Spring Street, New York, New York (Spring Street building), for another building located at 53 Mercer Street, New York, New York (Mercer Street building). On its form 8824, Sunshine Corp. reported that it acquired the Spring Street building on January 1, 1985, and that it was exchanged for the Mercer Street building on August 9, 2012. At the time of the exchange, Sunshine Corp. reported the fair market value (FMV) of the Spring Street building as $17,018,000.00, and reported its adjusted basis in that building as $10,500,000.00. Sunshine Corp. reported that the FMV of the Mercer Street building it received in the exchange as replacement like-kind property on January 23, 2013 was $8,500.000.00, thus resulting in a claimed deferred loss of $2,000,000.00.

13. As part of its audit, the Division issued to Sunshine Corp. three IDRs, dated July 29, 2014 (IDR # 1), January 15, 2015 (IDR #2), and May 19, 2015 (IDR # 3), respectively. These IDRs sought information and substantiating documents regarding the management fees it paid and deducted, and information concerning the LKE, including substantiation concerning the $10,500,000.00 adjusted basis claimed for the Spring Street building, as well as information showing how the proceeds of the exchange were distributed. More specifically, and as is relevant to the issues presented here, IDR # 1 requested:

a) copies of form 1120-S, U.S. Income Tax Return (item 4-a);
b) supporting documentation for management fees (item 5-a) and interest expense (item 5 – b);
c) a copy of the contract between Sunshine Corp. and the qualified intermediary facilitating the LKE (item 6);
d) closing agreement for all properties acquired in the LKE (item 7);
e) the description of all the properties acquired in the LKE (item 8);
f) documentation supporting all replacement properties being identified within 45 days from the date of sale of the relinquished property (item 9);
g) documentation supporting the exchange completion being no later than 180 days after the sale of the exchange property or due date of the income tax return for the year in which the relinquished property was sold whichever is earlier (item 10);
h) documentation showing the transfer of funds directly to the qualified intermediary (item 11);
i) supporting documentation for the cost basis of property sold (item 12); and
j) a complete copy of form CT-3-S for filing (item 13).[4]

14. IDR #1 reflects, in its "Date(S) Provided" checkbox area, that except for the information specified in items 5-a and b (management fees and interest expense), and item 12 (cost basis of property sold), the requested information was provided on December 10, 2014. Handwritten notes in the checkbox area for item 5-a (management fees) note: "Only pg from 1040 provided-make sure reported on ind[ividual] level," for item 5-b (interest expense), "2011 given, 2012 not given," and for item 12 (cost basis) "none provided."

1. IDR #2 requested:

a) supporting documentation for cost basis of the property sold (item 1);
b) supporting documentation for interest expense reported on form 8825 for the year 2012 (item 2);
c) a signed complete copy of form CT-3-S for filing (item 3);
d) support for how the proceeds disbursed to seller (Pryor Cashman) were used (item 12);[5] and
e) a copy of the complete selling agreement for the property located at 53 Mercer Street, along with the assignment of contract dated 08/10/2012 (item 5).

The Date(s) Provided checkbox area of IDR #2 shows no entries therein.

[4] IDR #1, Item 13, states that the Division did not have a record of form CT-3-S having been filed by Sunshine Corp for the year 2011.

[5] Pryor Cashman apparently served as the LKE attorneys for Sunshine Corp., and for petitioner.

2. IDR #3 requested:

a) supporting documentation for the cost basis of the property sold (item 1); and
b) support how the proceeds disbursed to seller (Pryor Cashman) were used (item 2).

As with IDR E 2, the Date(s) Provided checkbox area of IDR #3 shows no entries therein.

15. The Division's auditor concluded that Sunshine Corp. had completed a valid LKE, involving the Spring Street building and the Mercer Street building, as described above, using Riverside 1031 LLC as its qualified intermediary. Petitioner provided the auditor with two pages from a Pryor Cashman transaction report titled "Trust Transaction Detail Report – Trust Account, Client Matter." The two pages further identify the same as pertaining to "Client 18139 Marco DiLaurenti: Matter 18139.000: 154 Spring Street, NY, NY."[6]

16. Notwithstanding the accepted validity of the LKE, the Division's auditor identified certain issues impacting the tax consequences of the LKE. In particular, the auditor questioned the $10,500,000.00 adjusted basis claimed for the Spring Street building, and requested substantiation for that amount. In addition, the auditor questioned an entry on page 9 of the trust account stating "Wire received: from Riverside 1031 LLC," reflecting (after a relatively small "Return of overage RE: wire received 01/24/13, Riverside 1031 LLC"), an account balance of $2,102,334.83. The auditor concluded that this amount represented cash received by petitioner from the qualified intermediary as a result of the LKE, and treated the amount as taxable "boot" received by petitioner.

17. Review of the trust account transcript pages shows cash transfers to Waterbridge

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[6] The transaction dates on these pages are not clearly discernable. Post-hearing, petitioner provided a clearer copy of Exhibit I, page 9, that was accepted in evidence as Exhibit 11. A clearer copy of Exhibit I, page 10 was not provided. However, post-hearing, petitioner provided a one-page wire transfer confirmation of the transfer of funds in the amount of $1,290,000.00 to Waterbridge Capital LLC dated January 10, 2013. This document, accepted in evidence as Exhibit 13, appears to represent the transfer of funds described as "release of escrow" on Exhibit I, page 10, the date of which appears thereon as "[illegible]/10/2013."

Capital LLC, Waterbridge Equities LLC, and Halabridge 154 Spring LLC. These transfers are accompanied by the notation "release of escrow." There is no further description or explanation set forth on the transcript sheets concerning these transfers. Petitioner claims these transfers represent purchases of additional qualified replacement property (or interests therein), made in connection with the above-described LKE, as follows:

DATE	PAYEE	AMOUNT
01/10/2013	Waterbridge Capital LLC	$1,290,000.00
02/06/2013	Halabridge 154 Spring LLC	$ 150,000.00
02/26/2013	Waterbridge Capital LLC	$ 500,000.00
05/01/2013	Waterbridge Equities LLC	$ 333,000.00
07/02/2013	Waterbridge Capital LLC	$1,000,000.00

Petitioner has claimed that the total of the foregoing cash transfers, $3,273,000.00, exceeds the taxable "boot" determined on audit, and that deferral would be proper, so long as the foregoing fund transfers were for purchases of qualifying like-kind replacement properties (or interests therein), and occurred within the requisite identification and acquisition time frames for the LKE.

18. The auditor recalculated Sunshine Corp.'s. form 8824 by reducing the adjusted basis for the Spring Street building from the amount claimed thereon ($10,500,000.00), to the amount set forth on the balance sheet accompanying Sunshine Corp.'s form 1120 S as the value of buildings and other depreciable assets ($297,092.00). The auditor further determined Sunshine Corp. had taxable gain from the LKE in the amount of $2,102,334.83, representing taxable cash boot received by petitioner as Sunshine Corp.'s sole shareholder. The auditor concluded that Sunshine Corp.'s basis in the Mercer Street property acquired in the LKE (i.e., $279,000.00) resulted in a deferred gain amount of $8,202,908.00, the impact of which would be accounted for upon the future disposal of the Mercer Street building by Sunshine Corp. The $2,103,335.00

recognized gain resulting from the foregoing audit adjustments and treated as taxable cash boot received, flowed through from Sunshine Corp. to petitioner.[7]

19. In making his calculations, the auditor did not accept any of the foregoing transfers claimed as purchases of additional qualifying like-kind properties (or interests therein). A summary of the LKE provided by Riverside 1031 (the qualified intermediary) describes the LKE as involving only the exchange of the Spring Street building for the Mercer Street building, and does not mention or identify any additional replacement like-kind properties to be included therein. While exhibit I, page 5 references the full exchange agreement between Sunshine Corp. and Riverside 1031, the record does not include a copy of that full agreement.

20. As noted, petitioner did not file New York State personal income tax returns for either of the years at issue (***see*** finding of fact 8). Consequently, petitioner's federal adjusted gross income as reported to the Division was treated, upon audit, as zero for the years at issue. No information or explanation was provided at the time of audit as to who received the management fees paid and deducted by Sunshine Corp. on its forms 1120 S. Since petitioner was the sole shareholder of Sunshine Corp., the auditor concluded that these fees were paid to petitioner, and should have been reported as income on his New York individual income tax returns for the respective years at issue. Accordingly, for 2011, the auditor increased petitioner's New York adjusted gross income by $81,186.00, for management fees received but not reported to New York State. For 2012, the auditor increased petitioner's New York adjusted gross income by $2,259,334.83, representing the management fee received for that year ($157,000.00), plus the taxable cash boot determined to have been received as a result of the LKE ($2,102,334.83). In testimony at hearing, and by affidavit, the Division's auditor rejected the claim that the

[7] The auditor's recalculation based on the foregoing audit adjustments is set forth on a form 8824 he prepared during the course of his audit of Sunshine Corp. (***see*** Exhibit I, pages 12 and 13).

management fees were properly subject to elimination or reduction based on loss carryforwards from prior years, based on the lack of any substantiation concerning such claimed losses.[8] The auditor further concluded that petitioner had failed to substantiate Sunshine Corp.'s. claimed basis in the property relinquished in the LKE (the Spring Street building), or that any additional investments in qualifying like-kind properties (or interests therein) were identified or made as part of, and within the requisite time limits for, that LKE.

21. On April 26, 2016, the Division issued to petitioner a notice of deficiency (L-044652959) asserting additional New York State (NYS) and New York City (NYC) personal income tax due for the years 2011 ($4,650.00 [NYS] and $2,750.00 [NYC]), and 2012 ($198,612.00 [NYS] and $86,023.00 [NYC], for a total tax amount of $291,855.00, plus penalties (Tax Law § 685 [a] [1]; [b] [1] and [2]), and interest (Tax Law § 684 [a]).

22. Petitioner filed a petition challenging the foregoing notice on a number of bases. Petitioner first maintains that the Division erred in treating his federal adjusted gross income reported to New York as zero, on the basis of the fact that petitioner did not file New York State or City returns for the years at issue (***see*** findings of fact 8 and 19). Petitioner specifically points out that he filed federal income tax returns for the years at issue, whereon his reported income, including the management fees of $81,186.00 (2011) and $157,000.00 (2012), was offset by loss carryforwards and other deductions, leaving no federal adjusted gross income and hence no obligation to file New York State or City returns.[9] Petitioner maintains, on this issue, that since

[8] The auditor did not, as claimed by petitioner, "double count" the management fees reported as "other income" on petitioner's federal returns. Rather, the auditor challenged the computation of other income by disallowing the offsetting losses claimed by petitioner in calculating other income, for lack of substantiation of such claimed losses.

[9] Notwithstanding the management fees admittedly paid to petitioner by Sunshine Corp., petitioner's representative asserted that petitioner was under no obligation to file federal returns for the years at issue, presumably since the claimed loss carryforwards and other deductions reduced petitioner's gross income to an amount less than the combined total of the personal exemption and standard deduction amounts to which petitioner was entitled based upon his filing status (single and over 65 years of age) during the years at issue. For the year 2011, such filing threshold

the Division has the ability to access federal income tax information, pursuant to information sharing agreements between it and the IRS, but did not do so, the issuance of the asserted deficiency lacks a rational basis and should be cancelled.

23. Within the foregoing argument, petitioner specifically posits that the amounts of the losses reported to the IRS were validly claimed losses, to which he is entitled and which serve to eliminate the management fees at issue. The record in this matter includes no claim, documents, or other evidence to support that the losses in question were ever audited, or were subject to any examination or review, by the IRS or by New York State, for any of the years for which the returns were provided herein (2005 through the years at issue), or for any prior years, including specifically the earliest (or source) loss year from which any carryover losses followed.

24. Petitioner also challenges the Division's audit change by which the $10,500,000.00 adjusted basis for the Spring Street building, as claimed by petitioner, was reduced to the amount reflected on Sunshine Corp.'s. form 1120 S balance sheet for "buildings and other depreciable assets," $297,092.00, based upon the absence of supporting documents substantiating the adjusted basis amount claimed by petitioner. On this issue, the petition states:

> "In absence of a complete set of original receipts/documentation (much of which was lost in Hurricane Sandy), the Petitioner provided a construction [sic] experts' analysis of physical property and available records. The Expert concluded the total tax basis, including improvements and other capitalized costs, for the property exchanged is properly estimated at $13,000.000; the amount claimed by petitioner."

25. The record does not include such expert's analysis of the physical property, does not

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amount was $9,500.00 (personal exemption $3,700.00 plus standard deduction $5,800.00). For the year 2012, such filing threshold amount was $9,750.00 (personal exemption $3800.00 plus standard deduction $5,950). Petitioner's representative "surmised" that petitioner filed federal returns only to memorialize his claimed losses and resulting loss carryforward amounts. This assertion overlooks the fact that petitioner's federal income tax return for 2012, as initially filed, reported adjusted gross income of $57,878.00 (***see*** finding of fact 4 [e]).

specify the nature and extent of any "available records" allegedly relied upon in conducting such analysis, and includes no testimony by such expert. A September 2, 2015 entry in the auditor's log references his receipt of photographs showing that petitioner had "access to storage unit" allegedly containing documents, and notes petitioner's claim that he had hired an accountant to evaluate and summarize such document. As noted, the record contains no evidence that such records in the storage unit were destroyed by Hurricane Sandy, or otherwise. Further, the record includes no other details concerning the types (nature and extent) of documents kept in the storage unit, or the alleged loss of any particular records. The record does not specify the location (address) of the storage unit allegedly impacted by Hurricane Sandy, or describe any particular efforts made to retrieve records, or of any insurance coverage on the contents of the storage unit or of any filings for any such coverage. Petitioner acknowledged that the Division may refuse to accept records other than original receipts, but asserts that some weight should be given to records that petitioner is able to reconstruct by alternative means or anecdotal approaches. No testimony by Mr. Sinclair or by petitioner, and no additional evidence, were provided on this issue.

26. Petitioner further asserts the Division erred in treating the $2,102,334.83 amount wired to petitioner's attorneys' trust account by the qualified intermediary (Riverside 1031 LLC) as taxable boot (***see*** finding of fact 16). On this issue, petitioner maintains that other qualifying like-kind properties (or interests therein) were identified and were received in addition to the Mercer Street building, within the applicable LKE time periods, and that petitioner's investments therein must be included in the LKE.

27. In support of his claim that he timely identified and acquired qualified like-kind properties in addition to the Mercer Street building, petitioner submitted a closing statement for the transfer of the Spring Street building. Notwithstanding that the form 8824 filed with

Sunshine Corp.'s form 1120 S for 2012 reported that it sold the Spring Street building on August 9, 2012, and identified the Mercer Street building as the replacement property on the same date, petitioner provided a closing statement showing a December 27, 2012 closing date for the transfer of the Spring Street building, and a closing statement showing that the Mercer Street building was transferred on January 23, 2013.

28. The Division does not dispute that the foregoing December 27, 2012 closing date is the appropriate date for measuring the date of property relinquishment, and in turn for determining the applicable dates for identifying and acquiring like-kind replacement property. Further, and as noted, the Division does not dispute that the like-kind transaction involving the exchange of the two properties specifically identified on form 8824 (the Spring Street and Mercer Street buildings) constituted a valid LKE. The Division does not dispute that funds received for an LKE relinquished property that are in turn reinvested in qualified like-kind replacement property (or interests therein), including additional qualified like-kind replacement property (or interests therein), within the requisite times frames, allows for LKE sanctioned gain recognition deferral. Rather, the Division disputes petitioner's claim that the funds in question were in fact reinvested in any qualifying replacement property, or interests therein, in addition to the identified Mercer Street building, within the requisite time frames.

29. Petitioner maintains that in order to show he was entitled to deferral, he was required to establish that additional qualified replacement property was identified by February 10, 2013, i.e., within 45 days after the December 27, 2012 transfer date of the Spring Street building that was relinquished, and that reinvestment in qualified replacement property was made by the earlier of: a) the due date (including extensions) for the filing of Sunshine Corp.'s income tax return for

2012, or b) by June 25, 2013, i.e., within 180 days of the December 27, 2012 transfer date of the Spring Street building.

30. To establish he invested directly in additional like-kind qualified replacement properties, or interests therein, within the requisite time periods noted, petitioner provided two transcript pages from his attorneys' trust account for review in order to show how the net disbursements into that account from Riverside 1031, in the net amount of $2,102,334.83 on January 24, 2013, were in turn paid out by petitioner's attorneys (***see*** findings of fact 14 through 16).

31. In his post-hearing memorandum, petitioner conceded that the transfers, made to Waterbridge Equities LLC ($333,000.00) on May 1, 2013, and to Waterbridge Capital LLC ($1,000,000.00) on July 2, 2013, respectively, do not qualify for like-kind treatment. Although not specified, it appears clear that this concession reflects admissions that these transactions occurred after the identification and acquisition dates allowing for investments in additional property interests as part of the subject LKE. Further, and as to the May 1, 2013 distribution to Waterbridge Equities LLC, the record includes a 2013 schedule K-1 (form 1065 Partner's Share of Income, Deductions, Credits, etc.), issued to petitioner by Waterbridge Equities LLC, and showing a $333,000.00 contribution to capital. Notwithstanding the issuance of Schedule K-1, indicating the acquisition of an interest in an entity subject to taxation as a partnership, petitioner asserts the transfer was the acquisition of a direct interest in the assets of an entity that chooses to opt out of such partnership taxation treatment by making a valid election available pursuant to IRC (26 USC) § 761 (a). There is no evidence in the record showing Waterbridge Equities LLC made such an election.

32. The Division likewise maintains that the remaining transfers, to Waterbridge Capital

LLC and to Halabridge 154 Spring LLC (***see*** finding of fact 17) were in fact capital contributions resulting in the acquisition of interests in entities that were subject to taxation as partnerships, as was the apparent case with respect to Waterbridge Equities, rather than in acquisitions of additional like-kind qualifying property, or direct interests therein. In addition, the February 26, 2013 date of the transfer to Waterbridge Capital LLC appears to fall beyond the applicable February 10, 2013 LKE replacement property identification date (***see*** finding of fact 29).

33. Petitioner submitted copies of two notices of pendency, filed on October 17, 2015, pertaining to two actions filed on the same date on the basis of summonses and verified complaints against Waterbridge Capital LLC (and others), by Brooklyn Sunrise LLC and by Spring Sunrise LLC. The complaints are verified by petitioner, as an authorized representative and signatory of Brooklyn Sunrise LLC and Spring Sunrise LLC, upon his stated knowledge of the matters set forth in the complaints.[10] These documents were offered in support of petitioner's claim to have made investments in additional like-kind property, as above. As is relevant here, there is no claim or evidence that the defendant entities Waterbridge Capital LLC (and others) made the above-described election under IRC § 761 (a). The third enumerated claim for relief in each complaint specifically alleges the defendants' refusal to issue K-1 tax forms to the plaintiffs. Petitioner asserts herein that a reasonable inference from the refusal to issue K-1 forms to petitioner is that the investments were not in business entities requiring one, and therefore were investments directly into real estate (***see*** Reply Brief at page 11, n 42). [11]

[10] Exhibit 10 in evidence, titled "affidavit of Marco DiLaurenti," states that the sole member of Spring Sunshine LLC and of Brooklyn Sunshine LLC is his wholly-owned subchapter S corporation Spring Sunshine Corp. (i.e., Sunshine Corp.). Thought denominated as affidavit, petitioner's signature thereon is witnessed but is not sworn to before a notary public. Notwithstanding this distinction, the Division did not object to the inclusion of this exhibit in evidence.

[11] While various entities (primarily LLCs) are identified in the notices of pendency and in the complaints, a reading of these documents makes clear that petitioner, and one Joel Schreiber, are the controlling members of such entities.

34. Finally, petitioner maintains that if the asserted deficiency is upheld, the penalties imposed should be abated on the basis of reasonable cause and the absence of willful neglect. Petitioner is currently 86 years old, and for many years has been under the care of various physicians for numerous illnesses, including cancer, diabetes, heart disease and depression. Petitioner alleges these illnesses impair his ability to attend to his business affairs, and asserts that he now requires personal care assistance to attend to his daily living activities. Petitioner maintains that he reasonably relied upon professionals to provide tax advice and to file his personal tax returns, as well as returns for his business entities.

CONCLUSIONS OF LAW

A. New York State is a so-called "conformity" (or "piggyback") state and as such, federal adjusted gross income (FAGI) is the computational starting point for determining New York tax. For reporting purposes, New York resident individuals who are required to file a return (***see*** Tax Law § 651 [a]), do so on form IT-201, where items of income are first listed, followed by any federal adjustments thereto, to arrive at FAGI. Typically, the items set forth on a New York form IT-201 match such items as set forth on a federal form 1040 (assuming one is filed). Thereafter, New York specific modifications (additions and subtractions) are made to arrive at New York adjusted gross income (***see*** Tax Law §§ 611 [a]; 612 [a]). Subsequent reductions for either itemized deductions or the allowable standard deduction amount, and for dependent exemptions are made to arrive at New York taxable income and New York tax thereon (***id***). Though FAGI is the computational starting point for determining New York tax liability, New York State is a separate sovereign, and as such, is not bound to accept FAGI as reported to the IRS, nor is it bound to accept a federal determination with respect thereto, or to accept the amounts of any of the component items of income, or of federal adjustment, claimed in arriving at FAGI (***see Matter of***

Estate of Gucci, Tax Appeals Tribunal, July 7, 1997, citing ***Matter of Atlantic & Hudson Ltd. Partnership***, Tax Appeals Tribunal, January 30, 1992). Any other conclusion would serve to bind the Division to simply accepting the amounts set forth on federal tax returns, regardless of whether such amounts were ever audited or otherwise challenged by the IRS. Rather, the Division is clearly entitled to conduct its own examination and arrive at its own conclusions. Taxpayers, such as petitioner, in turn bear the burden of overcoming such conclusions (***see*** Tax Law § 689 [e]). Similarly, and in attempting to do so, taxpayers bear the burden of showing entitlement to any deductions or adjustments claimed by producing records that are adequate to substantiate the validity and amounts of any such claimed deductions or adjustments (***see*** Tax Law § 658 [a]; 20 NYCRR 158.1 [a]). In sum, the Division may independently examine and challenge any of such component items, as reported to the IRS, so as to verify the accuracy of a taxpayer's income, adjustments and, in turn, the amount of a taxpayer's FAGI.

B. Petitioners first challenge is that the Division did not have a rational basis for the issuance of its notice of deficiency. More specifically, petitioner maintains that because of losses he incurred and carried forward to the years at issue, he had no FAGI for either of such years, and therefore had no obligation to file either federal or New York State returns, and thus the Division had no basis to conclude AGI reported was zero. Petitioner's most direct assertion is that the Division had an obligation to obtain and review federal information, that doing so would have revealed petitioner's filings, including the claimed losses offsetting income, and confirmed that he had no obligation to file a return either federally, or in New York, as set forth above.

C. Petitioner's claim that there was no rational basis to support the Division's issuance of its notice of deficiency is rejected. As a result of its audit of Sunshine Corp., the Division determined that petitioner had flow-through gross income (management fees and taxable boot) for

the years at issue. The amount of such income for each of the years at issue exceeded the sum amount of petitioner's allowable standard deduction and personal exemption for his filing status, thus indicating a requirement to file a federal return for each of such years (***see*** finding of fact 22, n. 9), and, in turn, to file a New York return. There is no evidence in the record to show that, at the time of audit, petitioner offered any particular basis to support a contrary view, e.g., a claim of reported losses on his returns, the sum of which exceeded the flow-through income from Sunshine Corp. In fact, petitioner did not provide his federal returns at the time of audit (***see*** findings of fact 3 and 10, n.3). Rather, he provided the same during the second day of hearing in this matter, a point in time when conducting an audit of the claimed offsetting losses was clearly impractical. Moreover, petitioner has never provided substantiation concerning such claimed losses (***see*** findings of fact 1 and 6). Accordingly, based on the information adduced at the time of its audit, the Division in fact had a rational basis for the notice it issued.

D. Petitioner's challenge includes the assertion that the Division's affirmative failure to obtain and review federal information must result in negating the rational basis underlying its notice. This challenge is rejected. First, it is undisputed that the Division has the authority and ability to obtain and review federal information. Petitioner's argument, however, would effectively serve to impose this authority as a prerequisite audit obligation upon the Division prior to its issuance of a notice of deficiency. In fact, the Division is under no such obligation. It is well settled law that there is no requirement imposed upon the Division to request and examine books and records, or to apply a particular audit methodology before issuing a notice of deficiency (***see Matter of Mayo v New York State Division of Tax Appeals***, 172 AD3d 1554 [3d Dept 2019]; ***Matter of Ragozin***, Tax Appeals Tribunal, July 22, 1993). All that is necessary is that there be a rational basis for issuance of the notice (***Matter of Fortunato***, Tax Appeals Tribunal, February 22,

1990). As concluded above, the Division's audit of Sunshine Corp. clearly provided a rational basis for the issuance of the subject notice. Petitioner's argument to the contrary effectively, and incorrectly, attempts to create and shift the burden of proof to the Division, in contravention of Tax Law § 689 (e) and 20 NYCRR 3000.15 (d) (5).

E. In addition, petitioner's assertion that he was not required to file a New York return is rejected. As is relevant here, the tax law imposes an obligation on a New York resident individual to file a New York personal income tax return when that individual is either; a) required to file a federal income tax return for the taxable year, or b) has federal adjusted gross income for the taxable year that exceeds the lesser $4,000.00, or the amount of that individual's New York standard deduction (***see*** Tax Law § 651 [a] [1] [A]). As a result of the Division's audit of Sunshine Corp., petitioner had flow through income from that entity far in excess of the requisite amounts requiring the filing of a New York return. Furthermore, even if the Division had obtained and reviewed federal information, it was under no obligation to accept the amounts claimed thereon by petitioner for federal purposes, including specifically the claimed losses petitioner applied to offset such management fees in the calculation of "other income" (***see*** finding of fact 11). There is no obligation imposed that mandates the Division to accept such federally reported amounts, and the Division is entitled to and may, as here, challenge the same. The rationale underlying this conclusion is that any such obligation or mandate would preclude the Division from examining the legitimacy of a taxpayer's federal filings regardless of whether the same had ever been subject to federal review, including audit, at any time (***see*** conclusion of law A). Finally, and specifically for the year 2012, petitioner's federal return, as initially filed, reported adjusted gross income and a resulting federal tax liability (***see*** finding of fact 4 [e]). It is undisputed that petitioner was a resident of New York State during the years at issue. As such, and

regardless of any other bases, petitioner was indisputably a person who had an obligation to file a federal income tax return for 2012, and consequently was also required to file a New York State income tax return using his reported federal adjusted gross income as the statutory starting point for calculating New York State adjusted gross income (***see*** Tax Law § 651 [a]; ***see*** also conclusion of law A). In fact, petitioner did not file a New York State return for 2012, and thus did not report the foregoing income to New York, as required.

F. To the extent petitioner claims the income determined on audit for the years in issue was, and is, properly subject to offset and elimination by loss carryovers, it remains that there is no evidence in the record establishing the validity of such claimed losses, including for the initial or source year in which a net loss was incurred and was, thereafter, carried forward and applied (with other claimed losses) against income for subsequent years. It is noteworthy that the income and resulting liability reported for federal purposes for the year 2012 on petitioner's form 1040, as initially filed, was only eliminated upon petitioner's preparation of an amended return for that year (***see*** finding of fact 7 [b]). That amended return, like the other amended federal returns submitted herein, is not only signed as dated well after the conclusion of both the audit and the hearing herein, but relies upon the application of loss carryforwards to eliminate the initially reported income and resulting tax liability. Again, the record includes no evidence establishing the bona-fides of the earliest loss year or amount, or of any of the subsequent losses claimed by petitioner. In fact, there is no testimony by any of the individuals who prepared any of the returns submitted in this matter, addressing how such initial, and amended, returns were prepared, or any description of the documents relied upon in the preparation of any of such returns (***see*** findings of fact 1 and 6).

G. Turning to the LKE issues, IRC (26 USC) § 1031 allows for non-recognition of

gain upon the sale of real property (or certain interests therein). That provision instead provides for gain deferral, where the real property is transferred in exchange for like-kind real property (or certain interests therein). Deferral is accomplished by allowing the selling party to carry-over its basis in the transferred (relinquished) property, to the like-kind property for which it is exchanged (replacement property) (***see*** IRC [26 USC] § 1031 [d]). However, gain can be recognized in a LKE transaction if non-like-kind property, such as cash, is received in addition to the replacement like-kind property received (***see*** IRC [26 USC] § 1031 [b]). Such additional non-like-kind property is called "boot," gain is recognized to the extent boot is received, and the basis in the replacement property is adjusted accordingly.

H. To qualify as a valid LKE, certain criteria must be met:

> --First, the seller (exchanger) must report the LKE, must identify the property being relinquished, and must identify the replacement property within forty-five days from the date the relinquished property is transferred (***see*** IRC [26 USC] § 1031 [a] [3] [A]). On form 8824, as filed with its form 1120 S for 2012, Sunshine Corp. reported that it sold the relinquished property (the Spring Street building) on August 9, 2012, and it identified the Mercer Street building as the replacement property on the same date. No other replacement property was identified on form 8824, and the record does not show that any other replacement property was identified thereafter. Notwithstanding the August 9, 2012 date reported as the sale date for the Spring Street building, the record confirms that the actual transfer date for the property was December 27, 2012 (***see*** finding of fact 27). Hence, the date by which any replacement property was required to be identified was February 10, 2013.[12]
>
> --Second, the seller (exchanger) must receive the identified replacement property within the earlier of 180 days after the transfer of the relinquished property, or the due date (determined with regard to extensions) for the filing of the seller's return for the taxable

[12] The "45-day rule" for identifying replacement like-kind property, under IRC (26 USC) § 1031 (a) (3) (A), is jurisdictional, and requires that the replacement property must be identified by a written document signed by the taxpayer (***see*** Treas. Reg. § 1.1031 [k] – 1 [b] [1]), and must be unambiguously identified thereon (***see*** Treas. Reg § 1.1031 [k] – 1 [b], [c]). However, under the "actual purpose rule," actual acquisitions of qualified replacement property prior to the end of the 45-day rule identification period satisfies the identification requirements (***see*** Treas. Reg. § 1.1031 (k) – 1 [c] [4] [ii] [A]). Hence, actual acquisitions of replacement property on or before February 10, 2013 would satisfy the requirements in this instance, assuming such acquisitions of property (or interests therein) were, in fact, qualified like-kind property. It appears the Waterbridge Capital LLC and the Halabridge 154 Spring Street LLC transfer dates of January 10, 2013 and February 6, 2013 fall within the actual purpose rule, and thus the remaining question in this instance becomes whether those two transactions constituted additional acquisitions of qualifying like-kind property (or interests therein) for purposed of the LKE at issue herein.

year in which the transfer of the relinquished property occurs (***see*** IRC [26 USC] § 1031 [a] [3] [B] [i], [ii]). The record does not include any claim, or any evidence (e.g., form 7004 Application for Automatic Extension [of time to file]), that any extensions of the due date for the filing of Sunshine Corp.'s. form 1120 S for 2012 were sought or obtained, and therefore it is concluded that the filing due date for that return was March 15, 2013 (***see*** IRC [26 USC] §§ 6012, 6037, 6072–b; Treas. Reg. § 1-6037.1).[13] Consequently, any identified replacement property was required to be received by March 15, 2013. In this case, the Mercer Street building, previously identified as the replacement property on form 8824, was transferred on January 23, 2013. This date clearly falls within 45 days after the December 27, 2012 date on which the Spring Street building was transferred.

--Third, the exchanged properties must be considered qualified like-kind properties held for a business purpose (***see*** IRC [26 USC] § 1031 [a] [1]). The Division does not challenge that these two properties were qualified like-kind properties, and on audit, accepted the exchange transaction of the Spring Street building for the Mercer Street building as a valid LKE transaction.

--Finally, if, as here, the sale and purchase of the properties do not occur simultaneously, the exchange proceeds from the transfer of the relinquished property must remain in the hands of the qualified intermediary pending transfer of the replacement property to prevent a gain from being recognized (***see*** Treas. Reg. § 1.1031 (k) – 1 [g] [3]). If any funds are not reinvested in qualifying replacement property, but are instead returned to the transferor, such funds will be considered boot (***see*** IRC [26 USC] § 1031 [b]).

I. During the years at issue, investments in partnership interests were disqualified and excluded from constituting qualified like-kind property under IRC (26 USC) former § 1031 (a) (2) (D), unless all of the members of the entity in which they invested made a valid election under IRC (26 USC) § 761 (a) to treat the investments as acquisitions of direct interests in the assets (here interests in real property) of the entity in which they invested (the entities here are Waterbridge Capital LLC and Halabridge Spring 154 LLC). [14]

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[13] For purposes of the "180-day rule," IRC (26 USC § 1031 (a) (3) (B) (1) requires the filing of an actual request for extension of the time within which to file a return, without which (as here), the due date for the return is the statutory filing due date (i.e., March 15, 2013) in this instance (***see Christianson v Com'r.***, TC Memo 1996-254; ***affd in unpub opin*** 142 F3d 442 [3d Cir 1998]).

[14] The limitation imposed under IRC (26 USC) former § 1031 (a) (2) (D) was removed from the statute subsequent to the period at issue, as part of the Tax Cuts and Jobs Act of 2017 (***see*** Pub. L. 115-97, Title I, § 13303 [a], [b] [1 – 5], Dec. 22, 2017, 131 Stat. 2123).

J. In this matter, while a schedule K-1 was issued to Waterbridge Equities LLC (***see*** finding of fact 31), no such schedule K-1 appears to have been issued to petitioner by either Waterbridge Capital LLC, or by Halabridge Spring 154 LLC, notwithstanding petitioner's demand for such schedules as set forth in the verified complaints described herein (***see*** finding of fact 33). Further, there is no evidence that all members of the noted entities made a valid election under IRC (26 USC) § 761 (a). The absence of a schedule K-1, without more, does not establish the existence of a valid election under IRC § 761 (a), so as to support the result sought by petitioner.[15] Taken together, these facts do not establish that the purchases in question were additional investments in qualified like-kind interests in real property, but instead support the conclusion that petitioner invested in entities properly treated as partnerships for tax purposes that did not (during the year at issue) qualify as additional investments in like-kind interests in real property.

K. Finally, the penalties imposed are sustained. Petitioner's claims that he engaged competent professionals, including Mr. Sinclair, and relied upon their advice regarding his tax reporting and filing obligations must be balanced against all of the circumstances presented. In particular, there is no explanation for petitioner's failure to have filed a New York return for the year 2012 when it is clear that his federal return for that year, as initially filed, reported both adjusted gross income and a federal liability (***see*** finding of fact 4 [e]). Further, while petitioner claimed that many of his alleged substantiating documents were lost as a result of Hurricane Sandy, there is little actual evidence concerning such documents themselves, or the circumstances under which they were lost (***see*** findings of fact 24 and 25). In turn, there is no testimony or other

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[15] Petitioner has asserted (by reply brief) that the absence such schedules K-1 warrants an inference that all members of the entities in question in fact jointly made a valid election under IRC § 761 (a), and therefore such entities did not issue schedules K-1 because they were not required to do so (***see*** Reply Brief at page 11, n 42). That assertion, and requested inference, is rejected as speculation.

evidence concerning the manner by which, or the documents upon which, petitioner's amended returns were prepared (***see*** finding of fact 6). Based upon all of the circumstances of this case, it cannot be said that petitioner has shown he reasonably relied upon the advice of those he engaged to prepare his returns, or has established that his failures to have filed New York returns for the years at issue, and reported and paid New York tax due, were not the result of negligence (***see Matter of Wiesen***, Tax Appeals Tribunal, September 13, 2018).

L. It is possible that petitioner in fact had bona-fide losses, including carryover losses, sufficient to eliminate the income determined on audit for the years at issue, that Sunshine Corp.'s adjusted basis in the Spring Street building was $10,500,000.00, as claimed, that petitioner maintained records sufficient to substantiate each of the foregoing claims but that the same were lost or destroyed, and that petitioner made additional investments directly in qualified like-kind interests in real property. Unfortunately, there is a vast difference between such claims, and what the evidence provided in the record actually establishes. Review of that evidence shows that petitioner has failed to meet his burden of overcoming the Division's notice, and the same is therefore sustained (***see Leogrande v Tax Appeals Tribunal***, 187 AD2d 768 [3D Dept 1992], ***appeal dismissed*** 75 NY2d 946 [1993]).

M. The petition of Marco DeLaurenti is hereby denied, and the Division of Taxation's April 26, 2016 notice of deficiency is sustained.

DATED: Albany, New York
November 27, 2020

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE