STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ABRAHAM MASSIL	:	DETERMINATION DTA NO. 828399
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 2013.	:	

Petitioner, Abraham Massil, filed a petition for revision of a determination or for refund of personal income tax under article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2013.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, in New York, New York, November 13, 2018, at 10:30 A.M., with all briefs to be submitted by January 18, 2019, which date commenced the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (James Passineau, Esq., of counsel).

ISSUE

Whether petitioner has met his burden of establishing entitlement to deductions for claimed charitable contributions, gambling expenses and employee business expenses.

FINDINGS OF FACT

1. Petitioner, Abraham Massil, timely filed a New York State resident income tax return (form IT-201) for the year 2013. On this return, petitioner's filing status was listed as "single," and he reported federal adjusted gross income of $52,263.00, consisting of wage income of

$50,738.00 and lottery winnings of $1,525.00. Petitioner reduced such amount by claimed itemized deductions totaling $20,805.00, thus resulting in New York taxable income of $31,458.00, with New York State and City tax due thereon in the aggregate amount of $2,744.00. This tax amount was reduced by payments totaling $3,822.00, consisting of a claimed New York City school tax credit of $63.00, and State and City taxes withheld in the respective amounts of $2,316.00 and $1,443.00. Petitioner's reported tax liability ($2,744.00) compared to his reported total payments ($3,822.00), resulted in petitioner's claim for a refund in the amount of $1,078.00.

2. The $20,805.00 of itemized deductions reported by petitioner consisted of claimed charitable contributions of $2,000.00, and job expenses/miscellaneous deductions of $18,805.00. The claimed job expenses/miscellaneous deductions consisted of:

a) non-winning (primarily scratch-off) lottery ticket purchases totaling $10,356.75, and

b) cleaning expenses for the business suits petitioner wore to work, plus round-trip subway expense for commuting between his home in Queens and his workplace in Manhattan, totaling together $8,448.25. This total of claimed cleaning and commuting expenses was not further specified as to individual amounts, but rather represented petitioner's estimate of the total of each of such expense amounts.

3. The Division of Taxation (Division) performed a desk audit of petitioner's return for the year 2013. As part of its audit, the Division requested that petitioner furnish substantiation in support of the itemized deductions for charitable donations and job expenses as claimed on his return.

4. By a statement of proposed audit change, dated August 24, 2016, the Division advised petitioner that the foregoing itemized deductions had not been substantiated as allowable, and of its proposed disallowance of the same. The Division recalculated petitioner's liability by allowing the standard deduction amount of $7,700.00, in reduction of petitioner's reported income of $52,263.00, thereby reducing the same to taxable income of $44,563.00, with New

York State ($2,550.00) and New York City ($1,511.00) taxes due thereon. This total tax amount of $4,061.00 was reduced by total payments and refundable credits of $3,822.00, leaving a balance of tax due of $239.00. This balance was increased by $1,078.00, to reflect the add back of amounts previously applied by the Division via the refund claimed on petitioner's return as filed, thus resulting in total tax due in the amount of $1,317.00.[1]

5. On September 12, 2016, petitioner provided documentation in support of his payment of union dues in the amount of $665.00 for 2013. No documentation was furnished by petitioner to substantiate the claimed itemized deductions for charitable donations or job expenses.[2]

6. On November 4, 2016, the Division issued to petitioner a notice of assessment resolution, advising petitioner that he had not supplied any documentation to substantiate his claimed charitable donations or his claimed job expenses, and that such claimed amounts remained disallowed.[3] By a letter dated November 21, 2016, petitioner requested additional time to submit further documentation. However, no further documents were provided.

7. As a result of its review, the Division issued to petitioner a notice of deficiency (assessment ID L-045411053), dated December 1, 2016, asserting additional tax due for 2013 in the amount of $1,317.00, plus interest. This notice was premised upon petitioner's failure to

---

[1] Part of petitioner's initially claimed refund had been applied by the Division as an offset against other existing New York State tax liabilities ($783.89), and part of such claimed refund had been previously refunded to petitioner ($294.11). The total of these two amounts ($1,078.00), plus the balance due, post-desk audit ($239.00), together results in the $1,317.00 amount of tax asserted as due herein. The calculations set forth herein do not reflect amounts of interest due with respect thereto.

[2] As noted, petitioner's claimed itemized deductions of $18,805.00 for job expenses, as filed, included together non-winning lottery tickets, cleaning, and commuting expenses (***see*** finding of fact 2). It appears petitioner would, by submission of the union dues substantiation, also include union dues within that amount as a part of his total claimed job expenses.

[3] The Division's assessment resolution notice indicates that while petitioner had substantiated his claim of union dues paid in the amount of $665.00, such amount was less than the statutory 2% of adjusted gross income job expense miscellaneous deduction threshold limitation under IRC § 67 (a) (computed here as $1,045.00), leaving such claimed expense unavailable and, hence, disallowed.

have provided proof sufficient to substantiate and allow any part of the itemized deductions claimed on his return in reduction of his reported income.

8. Petitioner explained that the major portion of his $18,805.00 in claimed job expenses/miscellaneous deductions consisted of lottery ticket losses of $10,356.75, calculated as the amount he spent on non-winning tickets in excess of his reported lottery ticket winnings of $1,525.00 in 2013. At hearing, petitioner offered a box containing losing lottery tickets totaling $10,356.75 as support of his claimed gambling loss for such amount. The Division conceded that the box of losing tickets totaled the dollar amount of petitioner' claim, thereby obviating the need to place the same in evidence, but did not agree that such losses in excess of winnings were properly allowable as a deduction against petitioner's income. Petitioner did not, and does not claim that he is a professional gambler.

9. The $8,448.25 remaining balance of petitioner's claimed job expenses/miscellaneous deductions consisted, in part, of dry cleaning expenses for suits petitioner wore to work and, in part, of subway commuting expenses to and from his home in Queens and his workplace in Manhattan. Petitioner is a fire safety director for two large, high-rise apartment buildings, located next door to each other, in Manhattan. Petitioner is engaged in fire safety planning, meeting with new tenants to educate them as to fire safety protocols, emergency evacuation and the like, as well as setting up legally required periodic fire safety drills for the tenants in the buildings. Petitioner purchases and wears black business suits while performing his job duties, and the claimed dry cleaning expense was for such suits.

10. Petitioner did not keep any receipts or other documentation to substantiate the amounts of his claimed dry cleaning and commuting expenses, but rather estimated the same.

There is no distinction in the record detailing the estimated individual total amount of either of such two types of claimed expenses.

11. At hearing, petitioner testified that his claimed charitable donations were the sum of four gifts of cash he made directly to either Pastor Antonio Rosado, or a representative of Pastor Rosado, of the Inglesia Pentacostal El Taller del Maestro Church in Guayama, Puerto Rico. Petitioner testified that Pastor Rosado, and various parishioners, regularly traveled to New York from Puerto Rico to participate in services at a sister church located in Bushwick, New York, and request support for the church in Puerto Rico. Petitioner testified that he attended such services, and handed cash to the pastor, or to such other parishioners, when they traveled to New York. Petitioner noted that the donations were made by "[m]oney, not credit card, not checks. Cash money to the pastor." Petitioner testified that he gave the total sum of $2,000.00, in increments on four different occasions.

12. Petitioner did not seek or receive a receipt when he donated in cash, but did seek receipts, after the fact and in connection with the audit here at issue. At hearing, petitioner submitted an email, dated March 17, 2017, under the letterhead of the Inglesia Church in Puerto Rico, stating the following:

> "Please be informed that Mr. Abraham S. Massil has been an amazing support for our church for years. Therefore, during the year 2013 he contributed with a total amount of $2,000.00, as follow [sic]; $600.00 on February 2013; $500.00 on May 2013; another $500.00 on September 2013, and $400.00 on November 2013."

CONCLUSIONS OF LAW

A. The starting point for determining New York personal income tax liability is a taxpayer's federal adjusted gross income (***see*** Tax Law § 612 [a]). In turn, a taxpayer can claim either his itemized deductions, or the allowable New York standard deduction, but cannot claim

both (***see*** Tax Law § 613, 20 NYCRR 113.1). In this case, petitioner claimed itemized deductions. A taxpayer's New York itemized deductions are derived from the deductions taken from federal adjusted gross income (***see*** Tax Law § 615 [a]), with modifications not in issue herein. Tax Law § 689 provides that petitioner bears the burden of establishing his entitlement to both the amount and the deductibility of any of the expenses claimed as deductions, so as to establish that the Division erred in its disallowance of such claimed expenses as deductions (***see Matter of Temple***, Tax Appeals Tribunal, July 8, 2004).

B. Internal Revenue Code (IRC) § 162 (a) generally allows a deduction for all ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. Unreimbursed employee business expenses generally are deductible under IRC § 162 (a). However, such expenses are miscellaneous itemized deductions (***see*** IRC § 62 [a] [1]; 67 [b]), and are deductible only to the extent such deductions, in the aggregate, exceed two percent of the taxpayer's adjusted gross income (***see*** IRC § 67 [a]; ***see also Alexander v Commissioner***, TC Memo 1995–51, ***affd*** 72 F3d 938 [1st Cir 1995]). Since the New York State personal income tax is patterned after the federal income tax laws, the IRC is determinative on 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 [3rd Dept 1994]).

C. Petitioner claimed a combined total itemized deduction of $8,448.25 for expenses allegedly incurred in commuting to and from work, and for dry cleaning costs. These claimed expenses were properly disallowed by the Division. First, petitioner did not break down the combined total amount claimed so as to specify the respective individual amounts attributable to commuting and dry cleaning. In addition, petitioner provided no documents in support of any of

such claimed expenses, but rather admitted that the claimed total reflects his estimate of all of such expenses. As such, petitioner has failed to substantiate the total amount claimed, or the individual amounts attributable to either of the categories of claimed deductible expenses. As to the substantive question of deductibility, commuting costs between one's home and his or her principle place of employment are simply not deductible as expenses incurred in carrying on a trade or business, or as unreimbursed employee business expenses (***see*** IRC § 162 [a] [2]; Rev. Rul. 99-7, 1991-1 CB 361; IRC § 262 [a]). As to the claimed dry cleaning costs, there is no evidence to establish that any such costs were necessarily incurred by petitioner to clean and maintain an employer required uniform. For the cost of clothing and related items to be deductible, the same must be required or essential in the taxpayer's employment, the clothing cannot be suitable for general or personal wear, and the clothing cannot be so worn (***see Coppin v Commissioner***, 98 TCM 277 [2009]; ***Deihl v Commissioner***, 90 TCM 579 [2005]). Petitioner failed to offer any evidence that the business suits he wore to work were not suitable for general wear by him (***Boltinghouse v Commissioner***, 94 TCM 416 [2007]). In sum, petitioner's claimed combined deduction for commuting and dry cleaning expenses, in the estimated amount of $8,448.25, is denied in full.

D. Petitioner also claimed a deduction in the amount of $10,356.75, representing gambling losses in excess of his gambling winnings. He explained that the amount of the claimed deduction was computed as the dollar amount of the non-winning (primarily scratch-off) lottery ticket purchase expense remaining after reducing his total lottery ticket purchase expense ($11,881.75), by the amount he won and reported as income ($1,525.00), on such purchased tickets. The Division does not challenge the foregoing computation of the dollar amount of the

claimed deduction, or the substantiation offered in support thereof, but rather only maintains that petitioner is not entitled to such deduction (***see*** finding of fact 10).

E. Petitioner admitted that he is a casual gambler. Casual or recreational gamblers, as opposed to those engaged in gambling as a trade or business, must report their gambling winnings in gross income, and carry the same through to federal adjusted gross income. Gambling losses are allowable to the extent of gambling winnings, are reported as miscellaneous itemized deductions on schedule A, and are commonly referred to as "below the line" deductions. As such, the casual gambler's losses and expenses are not allowable to reduce adjusted gross income (***see Matter of Kayata***, Tax Appeals Tribunal, December 21, 2017). Accordingly, petitioner's claimed deduction for gambling losses in excess of gambling winnings was properly disallowed by the Division.

F. The final issue to be addressed is petitioner's entitlement to claimed charitable donations totaling $2,000.00. IRC § 170 (a) generally allows a deduction for charitable contributions, provided the contributions are "verified under regulations prescribed by the Secretary" (IRC § 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 cancelled 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]).

IRC § 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 certain specified information. The relevant regulations provide that a factor indicating that a written record is reliable for the purpose of substantiating a claimed charitable contribution is the contemporaneous nature of the written record (***see*** Treas Reg § 1.170A-13 [a] [2] [i] [A]).

G. Petitioner claimed on his 2013 return that he made gifts to charity in the aggregate amount of $2,000.00, consisting of four cash gifts as specified in findings of fact 11 and 12. To substantiate the claimed cash gifts to charity, petitioner introduced an unsigned email statement, dated March 17, 2017, under the letterhead of the claimed donee church. The email sets forth individual amounts for each of the four separate contributions claimed to have been made, and the months, though not the particular dates, on which such contributions were allegedly made (***see*** finding of fact 12). This email statement, while qualifying as a "written receipt," or "other communication," cannot be considered a "reliable written record." It is not signed, and though it is in the form of an email, it bears no email address from the sender. Petitioner did not make the alleged donations by check (or by credit card), and hence could provide no cancelled checks or other, third-party, independently verifiable proof in support thereof. Further, the document is dated approximately four years after the alleged donations were made, and as such is not a contemporaneous receipt. Finally, it is not clear that the putative author of the email, Father Antonio Rosado, actually received the alleged contributions, or that the statements concerning receipt of the contributions are based on statements made by other persons. Petitioner admitted that the contributions were made either to Pastor Rosado, or to other parishioners who

accompanied Pastor Rosado on his trips to Bushwick. Given these circumstances, the Division's disallowance of the claimed cash gifts was proper.

H. It is also noted that even if petitioner had shown that he was properly entitled to the deductions for contributions as claimed on his return, it would not change the computation of the additional tax due as made by the Division. This is because the record fails to establish that any of the other deductions, in addition to petitioner's claimed charitable contributions, were properly allowable as deductions (***see*** conclusions of law C and E). Thus, even if petitioner's claimed deductions for contributions were allowed in full, said amounts would not exceed the $7,700.00 available standard deduction allowed by the Division for the year at issue.

I . The petitioner of Abraham Massil is hereby denied and the notice of deficiency, dated December 1, 2016, is sustained.

DATED: Albany, New York
July 11, 2019

/s/ Dennis M.. Galliher
ADMINISTRATIVE LAW JUDGE