STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **STELLA JACKSON** For Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Articles 22 and 30-A of the Tax Law and the Administrative Code of the City of New York for the Year 2015.	DETERMINATION DTA NO. 828563

Petitioner, Stella Jackson, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under articles 22 and 30-A of the Tax Law and the Administrative Code of the City of New York for the year 2015.

A hearing was held on September 19, 2019 in New York, New York. The Division of Taxation appeared by Amanda Hiller, Esq. (Charles Fishbaum, Esq., of counsel), and petitioner appeared by American Tax Consulting Group, LLP (Larry Johnson, MBA, EA). Petitioner failed to file an initial brief. The Division of Taxation timely filed a letter brief and petitioner timely filed a reply letter brief,[1] which was due January 30, 2020, which date commenced the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

[1] Petitioner attempted to submit additional evidence into the record with its reply brief. The attempted submission was rejected and the additional documents were returned to petitioner (***see Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991).

ISSUES

I Whether petitioner has substantiated her entitlement to schedule A itemized deductions for job expenses.

II. Whether petitioner has substantiated her entitlement to claimed schedule C business losses.

III. Whether petitioner has substantiated her entitlement to claimed schedule E rental business losses.

IV. Whether petitioner has substantiated her entitlement to claim a filing status of "single" on her tax return.

FINDINGS OF FACT

1. Petitioner, Stella Jackson, timely filed a New York State personal income tax return for tax year 2015. On the return, petitioner reported wage income of $114,944.00 from New York Presbyterian Hospital, a capital loss of $3,000.00, business losses of $27,890.00, and a schedule E rental real estate loss of $25,000.00, resulting in New York adjusted gross income of $59,054.00. From this amount, petitioner deducted claimed itemized deductions in the amount of $59,296.00, and reported New York taxable income of $0.00. Petitioner reported New York State taxes withheld in the amount of $6,541.00, and New York City taxes withheld of $3,986.00 and requested a refund of overpayment in the amount of $10,527.00.

2. Attached to petitioner's return was form IT-201-D, resident itemized deduction schedule, reporting total itemized deductions of $59,296.00, including, among other items, job expenses/miscellaneous deductions in the amount of $39,758.00.

3. Attached to petitioner's return was a schedule E, supplemental income and loss statement, reporting rental income and losses for property located at 3235 Wilson Avenue, Bronx, New York. On the schedule E, petitioner reported rents received in the amount of $10,950.00 and a real estate loss of $25,00.00. Petitioner reported the following expenses associated with the rental property:

Auto and Travel	$4,285.00
Insurance	$2,055.00
Mortgage Interest Paid	$2,826.00
Repairs	$5,000.00
Supplies	$450.00
Taxes	$4,296.00
Utilities	$2,994.00
Water	$465.00
Flood Insurance	$125.00
Paints and Labor	$2,500.00
Repairs	$2,500.00
Mortgage / Home Equity Loan Payments	$26,000.00
ADT	$631.00
Total / Subject to Limitations	$54,127.00

4. Also attached to petitioner's return was a schedule C, profit and loss from business statement, reporting losses for petitioner as the sole proprietor of a commercial cleaning business, Royal Cleaning Agency Group, LLP, with a business address in Royal Palm Beach, Florida. On the schedule C, petitioner checked the box indicating that she "materially participate[d]" in the operation of the business during 2015. The reported loss of $27,890.00 consisted of $12,200.00 of gross receipts, and the following expenses:

Advertising	$3,500.00
Contract Labor	$9,200.00
Other	$11,400.00
Vehicles, Machinery, and Equipment	$5,200.00
Taxes and Licenses	$150.00
Meals and Entertainment	$5,820.00
Utilities	$4,820.00
Total Expenses	$40,090.00

5. The Division of Taxation (Division) selected petitioner's return for review. The Division issued petitioner form DTF-973, dated April 11, 2016, requesting that petitioner provide information to substantiate the itemized deductions taken on her 2015 tax return.

6. The Division issued form DTF-960-E statement of proposed audit change, dated September 9, 2016, disallowing petitioner's claimed job expenses of $39,758.00, for her failure to provide supporting documentation and not supplying a letter from her employer verifying that the expenses claimed were necessary for her employment and were not reimbursed or reimbursable by her employer. The correspondence informed petitioner that her 2015 schedule E losses were being disallowed because she had failed to provide supporting documentation for the rental property as requested by the Division in 2014 and again in the current audit cycle. In particular the Division requested: copies of lease/rental agreements; support for the mortgage interest expense claimed; support, including receipts for the utilities expenses claimed; and, receipts for other repairs/expenses claimed. The correspondence requested that petitioner provide documentation to support the claimed schedule C business losses including: the documents that were used to calculate the income and expenses reported on the return, such as ledgers, spreadsheets or income and expense journals; detailed documentation, such as sales slips, invoices, bank statements, or receipts. Form DTF-960-E informed petitioner that the Division was allowing the taxes paid and gifts to charity as claimed on her 2015 tax return.

7. The Division issued petitioner form DTF-987, notice of adjustment for tax year 2015, dated February 6, 2017, wherein the Division informed petitioner that it was disallowing petitioner's itemized job expenses claimed and schedule C business losses due to petitioner's failure to provide the Division with adequate documentation to support such claimed deductions.

The correspondence also informed petitioner that her filing status was adjusted from single to married filing separate.

8. The Division recomputed petitioner's 2015 tax liability. The Division issued petitioner notice of deficiency L-045437278, dated March 1, 2017 (notice), assessing additional tax due in the amount of $2,944.18 plus interest.

9. Petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) challenging the notice.

10. BCMS issued a conciliation order, dated November 10, 2017, sustaining the notice.

11. Petitioner filed a petition with the Division of Tax Appeals on January 13, 2018.

12. A hearing was held on September 19, 2019 in New York, New York. At the beginning of the hearing, petitioner made a motion to have the notice dismissed. The undersigned indicated that based upon the timing of the motion, it would be ruled on in due course with the determination itself.

13. The Division presented the testimony of its auditor, Kathleen Loos, who testified that petitioner's business loss, itemized business expenses and rental loss were all denied because petitioner failed to provide adequate documentation and support for her filing positions. Ms. Loos also testified that it appeared that the petitioner was eligible for reimbursement from her employer for her itemized business expenses and thus could not claim the deductions on her tax return. Ms. Loos testified that in the prior audit cycle, the Division had requested support for petitioner's claimed rental losses including proof that the property in question was actually being rented. Ms. Loos explained that petitioner failed to provide support, either in the prior audit cycle or during the current audit, establishing that the subject property was being rented. Ms. Loos testified that based upon a LEXUS personal information report the auditors ordered, it

appeared that the petitioner resided at the subject property and the utilities at the subject property were paid by petitioner. Ms. Loos testified that petitioner never established that the property was available for rent. Ms. Loos also testified that petitioner failed to provide support for the cleaning business losses claimed on her tax return.

14. The Division's auditor testified that the Division changed petitioner's filing status from single to married filing separately because of representations petitioner had made during the prior year's audit cycle. At the hearing, petitioner's representative claimed to be in possession of a divorce certificate for petitioner; however, petitioner's representative never placed such into evidence.

15. Petitioner was physically present at the hearing but did not testify. Petitioner did not present any witnesses at the hearing.

16. At the hearing, petitioner offered into evidence several documents. The documents were not sworn to and no foundation was laid for the documentation. Petitioner's representative merely noted that the documentation was allegedly support for petitioner's job expenses and that the documentation had previously been supplied to the Division. In particular, petitioner submitted into the record a copy of her employer's business expense reimbursement policy, which in part noted "[i]t is the policy of NewYork [sic]-Presbyterian Hospital (NYP) to reimburse employees for all reasonable and substantiated out-of-pocket business-related expenses, including travel-related and other miscellaneous expenses incurred by the employee on behalf of NYP." Petitioner's submission also included copies of cancelled checks which appear to be related to properties other than the rental property at issue or alternatively do not reflect what property they relate to; a mortgage interest statement which does not indicate what property it pertains to; home equity line of credit statements which do indicate what property they relate

to; insurance premium notices that do not indicate what property they relate to; medical prescription, dentist and eye doctor receipts for petitioner; checks for water bills that do not indicate what property they relate to; Con-Edison energy bills which pertain to the rental property in question; ADT security service bills which pertain to the rental property in question; copies of cancelled checks which appear to be for home improvement expenses that pertain to a property other than the rental property in question; copies of charitable donation receipts for petitioner; copies of receipts with the notation "gas purchases" but otherwise do not specify what they are for; copies of receipts for what appear to be automobile repairs; cancelled checks for E-Z pass payments; a summary tape for what appears to be dry cleaning expenses; a spreadsheet noting mileage driven for each month of 2015 among 6 different locations; a sheet of paper that reads "no lease agreement, month to month rental"; and, a 2015 year end payroll summary statement from petitioner's employer indicating parking fees paid by petitioner for the year.

CONCLUSIONS OF LAW

A. Petitioner has the burden in this proceeding to show entitlement to all expenses and deductions claimed on her return and to substantiate the amount of the expenses and deductions (***see*** Tax Law §§ 658 [a]; 689 [e]; 20 NYCRR 158.1; ***Matter of Macaluso***, Tax Appeals Tribunal, September 22, 1997, ***confirmed*** 259 AD2d 795 [3d Dept 1999]; ***Matter of Goode***, Tax Appeals Tribunal, October 17, 2013). Petitioner was required under the Tax Law to maintain adequate records of her items of expenses and deductions for the year in issue (Tax Law § 658 [a]; 20 NYCRR 158.1 [a]).

B. 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 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***). Petitioner has not met these burdens in this case.

C. Turning first to petitioner's deduction for a business loss, Internal Revenue Code (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. An ordinary expense is one that is "common and accepted," although not necessarily "habitual" (***Welch v Helvering***, 290 US 111, 114 [1933]). A necessary expense is one that is "appropriate and helpful in carrying on the trade or business" (***Heineman v Commr.***, 82 TC 538, 543 [1984]).

D. 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).

E. 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]).

F. Here, petitioner has not submitted sufficient evidence to prevail with regard to any of these factors as she chose not to testify at the hearing, nor is there anything else in the record to support a claim that the alleged commercial cleaning business was ever conducted as a business for a profit.

G. Even if petitioner were found to have a trade or business, she would still have to show that her claimed business expenses were ordinary and necessary in relation to her commercial cleaning business. 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 [26 USC] § 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." In this case petitioner does not offer any detail or support for the expenses associated with the claimed schedule C cleaning business allegedly conducted.

H. Certain deductions from adjusted gross income, such as the claimed unreimbursed employee business expenses at issue, are considered miscellaneous itemized deductions and are allowed only to the extent that the aggregate of such deductions exceeds 2% of the taxpayer's adjusted gross income (IRC [26 USC] § 67 [a]). The performance of services as an employee is

considered a trade or business (***see O'Malley v Commr.***, 91 TC 352, 363-364 [1988]). However, an employee business expense is not deductible as "ordinary and necessary" if the employee is entitled to reimbursement from his or her employer for such expenses (***see Podems v Commissioner***, 24 TC 21, 22-23 [1955]; ***Noz v Commissioner***, TC Memo. 2012-272). If an employee is entitled to reimbursement under the employer's reimbursement policy and fails or forgets to seek it, the employee is not allowed a deduction for the expenses (***see Orvis v Commissioner***, 788 F.2d 1406, 1408 [9th Cir. 1986], ***affg*** TC Memo. 1984-533; ***Lucas v Commissioner***, 79 TC 1, 7 [1982]; ***Kennelly v Commissioner***, 56 TC 936, 943 [1971], ***aff'd*** 456 F.2d 1335 [2d Cir. 1972]). In the case at hand, petitioner's employer's written reimbursement policy appears to reimburse employees for most, if not all, ordinary and necessary business expenses incurred (***see*** finding of fact 16) and thus it is uncertain if petitioner's claimed business expenses were reimbursable. Petitioner offers no compelling evidence to challenge this possibility.

I. Furthermore, the IRC, in conjunction with relevant regulations, and several Internal Revenue Service publications, discuss numerous types of employee job expenses that may be claimed as miscellaneous itemized deductions (e.g., union dues, subscriptions to professional journals, tools and supplies, licenses and regulatory fees, travel, transportation, meals, works clothes and uniforms, work-related education expenses that maintain or improve employee job skills or are required by an employer), and detail the specific requirements regarding the substantiation necessary to support the deductibility of such claimed unreimbursed employee job expenses (***see generally*** 26 USC §§ 67, 162; Treas. Reg § 1.62-2; IRS Publications 17 [2015], 529 [2015]). In this case, the documents submitted into the record lack a sufficient foundation in order to determine if such expenses were ordinary and necessary business expenses of petitioner.

Furthermore, without a proper foundation it is difficult to determine if many of the claimed expenses are nondeductible commuting expenses of petitioner (***see*** IRC § 162 [a] [2]; Rev. Rul. 99-7, 1999-1 CB 361). Vehicle expenses will be disallowed in full unless the taxpayer satisfies strict substantiation requirements (***see*** IRC §§ 274 [d]). To satisfy the requirements of IRC § 274 (d), a taxpayer generally must maintain adequate records or produce sufficient evidence corroborating his or her own statement, which, in combination, are sufficient to establish the amount, date and time, and business purpose for each expenditure for travel away from home or expenditure or business use of listed property (***see*** Treas Reg § 1.274-5T [b] [2], [6], [c] [1]). Here, petitioner has failed to meet this requirement. It is noted that some of the documentation submitted by petitioner appears to relate to items unrelated to business expenses (e.g., charitable donations, medical expenses, etc.) and petitioner has never raised the argument that these expenses were at issue.

J. Petitioner has failed to submit appropriate evidence in support of the claimed schedule E real estate losses. Initially, it is noted that petitioner failed to establish that the claimed property was actually rental property and that petitioner did not reside at the property during the period in question. As noted, taxpayers are allowed deductions for certain business and investment expenses under IRC (26 USC) §§ 162 and 212. Section 469 (a) of the IRC generally disallows any passive activity loss, defined as the excess of aggregate losses from all passive activities for the taxable year over the aggregate income from all passive activities for the year (***see*** IRC [26 USC] § 469 [d] [1]). A passive activity is any trade or business in which the taxpayer does not materially participate (IRC [26 USC] § 469 [c] [1]). For the purposes of section 469 and to the extent provided in regulations, a trade or business includes any activity with respect to which expenses are allowable as a deduction under section 212 (IRC [26 USC] § 469 [c] [6] [B]).

Rental activity is usually treated as a per se passive activity regardless of whether the taxpayer materially participates (IRC [26 USC] § 469 [c] [2], [4]). Material participation is defined as involvement in the operations of the activity that is regular, continuous, and substantial (IRC [26 USC] § 469 [h] [1]).

K. An exception to the rule that a rental activity is per se passive is found in IRC (26 USC) § 469 (c) (7). If the taxpayer qualifies as a real estate professional, the taxpayer's rental real estate activity is treated as a trade or business subject to the material participation requirements of section 469 (c) (1) (***see*** Treas Reg § 1.469 [e] [1]). A taxpayer may qualify as a real estate professional if:

> "(i) more than one-half of the personal services performed in trades or businesses by the taxpayer during such taxable year are performed in real property trades or businesses in which the taxpayer materially participates, and
> (ii) such taxpayer performs more than 750 hours of services during the taxable year in real property trades or businesses in which the taxpayer materially participates" (IRC [26 USC] § 469 [c] [7] [B]).

Only time spent in those businesses in which the taxpayer materially participates count toward the requisite 750 hours. A taxpayer materially participates in an activity if he or she works on a regular, continuous and substantial basis in operations (IRC [26 USC] § 469 [h] [1] [A] - [C]). The regulation at 26 CFR § 1.469-5T (f) (4) provides the types of proof to be used in determining the extent of an individual's participation in an activity as follows:

> "The extent of an individual's participation in an activity may be established by any reasonable means. Contemporaneous daily time reports, logs, or similar documents are not required if the extent of such participation may be established by other reasonable means. Reasonable means for purposes of this paragraph may include but are not limited to the identification of services performed over a period of time and the approximate number of hours spent performing such services during such period, based on appointment books, calendars, or narrative summaries."

L. As set forth above, in order to determine whether a taxpayer qualifies as a real estate professional, the inquiry begins with a description of a taxpayer's occupation that is not related to the real estate activities. This analysis allows the Division to understand what a taxpayer's primary employment involves on a day-to-day basis and, then, to view the claimed real estate tasks and duties, in an effort to view a full picture of both income producing activities and determine if more than one-half of the personal services performed by the taxpayer are performed in real property trades or businesses. Here, petitioner was employed by New York Presbyterian Hospital in 2015 and reported wage income of $114,944.00. Petitioner has presented no evidence regarding the number of hours she worked for New York Presbyterian Hospital and no evidence as to the number of hours spent on real estate activities. As such, petitioner has failed to meet her burden of proving that more than one-half of the personal services performed by her were performed in real property trades or businesses and has failed to establish that she performed more than 750 hours of services in real property trades or businesses in which she materially participated.

M. In addition to failing to satisfy the requirements to qualify as a real estate professional, petitioner failed to fully substantiate the expenses claimed for the rental property. It is not clear how much of the documentation petitioner submitted into the record related to the rental property at issue, and in fact much of documentation appears to relate to other properties (***see*** finding of fact 16). As such, the Division properly disallowed the claimed schedule E real estate losses.

N. Finally, petitioner challenges the Division's determination that she must file her tax returns as married filing single. At the hearing, petitioner's representative indicated that he brought a divorce certificate for petitioner that would establish the fact that she is no longer married. However, petitioner's representative failed to offer that, or any other competent

evidence, of petitioner's correct filing status into the record. Accordingly, petitioner has failed to meet her burden in this regard.

O. Petitioner's motion to dismiss the notice is denied, the petition of Stella Jackson is denied and the notice of deficiency, dated March 1, 2017 is sustained.

DATED: Albany, New York
July 30, 2020

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE