STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

| | | |
|---|---|---|
| In the Matter of the Petition | : | |
| of | : | |
| **CARLTON P. AND POOI STEWART** | : | ORDER<br>DTA NO. 826178 |
| for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 2012. | : | |

---

Petitioners, Carlton P. and Pooi Stewart, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 2012.

Petitioners, by their representative, Accountancy Lane, Ltd. (Waverly Lane, Jr., EA) brought a motion on July 9, 2014 seeking summary determination in their favor pursuant to Tax Law § 2006(6) and section 3000.9 (b)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. On August 7, 2014, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Kent J. Gebert, Esq., of counsel), submitted a response to the motion and a cross-motion for summary determination. Accompanying the Division's cross-motion was the affirmation of Kent J. Gebert, Esq., dated August 7, 2014, and annexed exhibits. Petitioner did not respond to the Division's cross-motion. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following order.

## *ISSUE*

Whether either party is entitled to summary determination on the propriety of the Division of Taxation's disallowance of petitioners' Schedule E losses from certain rental properties.

## *FINDINGS OF FACT*

1. Petitioners timely filed a joint New York State resident income tax return, form IT-201, for the year 2012, and on it, claimed a refund of $2,796.00. Their supplemental income and loss statement, federal Schedule E, indicates that petitioners owned rental real estate property located at 153 Morton Avenue, Bronx, New York (Bronx property), and 1201 Hamlet Drive, Tobyhanna, Pennsylvania (Pennsylvania property). Their percentage of ownership of either property was not indicated on the return.

2. Petitioners' federal Schedule E and New York State resident income tax return indicate total rental losses of $16,663.00. For the Bronx property, petitioners reported rents received of $14,400.00 and total expenses of $20,430.00, resulting in a net loss of $6,030.00. They did not report any rent received for the Pennsylvania property, but claimed total expenses and, thus, a loss of $10,633.00 on that property.

3. On their return, petitioners reported a federal adjusted gross income of $73,849.00, which was calculated after application of the $16,663.00 in total rental losses referenced in Finding of Fact 2.

4. Petitioners' motion for summary determination contains an unsworn letter from their representative asserting various facts and arguments. Included in this letter was the statement that "[t]he impetus for renting these two properties is to defray the carrying and operating costs of ownership. It is not to make a profit . . . ." This position was also proffered in the petition.

5. Petitioners did not submit any affidavits along with their motion for summary determination. They did, however, attach an unsworn letter from Duane Jones, of Jones Homes Realty Inc., stating that he is petitioners' broker for the Pennsylvania property. In his letter, Mr. Jones confirms that petitioners were unable to rent the Pennsylvania property to tenants in 2012.

6. Other than the unsworn letter from Mr. Jones, neither party offered any evidence regarding maintenance or management of either rental property.

7. Following a review of petitioners' 2012 income tax return, the Division of Taxation (Division) issued to petitioner an account adjustment notice, dated November 22, 2013, which allowed a refund of $1,133.56 of the $2,796.00 claimed, and explained the adjustment, in part, as follows:

> It does not appear you rented your rental property at fair market value during 2012. In addition, it appears you do not rent your property for profit. Therefore, you can deduct your rental expenses only up to the amount of your rental income. If your rental income is more than your rental expenses for at least 3 years out of period [sic] of 5 consecutive years, you are presumed to be renting your property to make a profit.
>
> Based on a review of your previous filing history, it has been determined your property is a not-for-profit rental enterprise. As a result, we have disallowed the rental loss claimed.

8. On March 12, 2014, the Division issued to petitioner a Notice of Disallowance for the year 2012 denying petitioners' remaining refund claim of $1,673.05.

9. Attached to the Division's cross-motion for summary determination is the affidavit of Michael Foley, a Tax Technician I with the Division. He states that his responsibilities include conducting audits and reviewing and resolving disputes. Mr. Foley adds that he was assigned the instant matter in the course of his duties.

10. Mr. Foley avers that, in reviewing petitioners' 2012 New York State resident income tax return and the attached Schedule E, he found the Bronx property was a two-family residence in which petitioners lived. He concluded that petitioners were not entitled to claim a loss as they were "presumed not to be renting the Bronx property for profit." His conclusion was based on petitioners' reporting losses on the Bronx property for two of the previous five years and an undermarket rent of $1,200.00 per month for a unit worth $1,800.00 per month.

11. Mr. Foley also concluded that petitioners were not entitled to any losses from the Pennsylvania property as they received no income from it in 2012.

***CONCLUSIONS OF LAW***

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

> Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]; ***see also*** Tax Law § 2006[6]).
>
> The motion shall be granted if, upon all papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefor, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact (20 NYCRR 3000.9[b][1]; ***see also*** Tax Law § 2006[6]).

In this case, the parties have brought cross-motions for summary determination.

B. The standard with regard to a motion for summary determination is well settled. A motion for summary determination made before the Division of Tax Appeals is "subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR" (20 NYCRR 3000.9[c]; ***see also Matter of Service Merchandise, Co.***, Tax Appeals

Tribunal, January 14, 1999). Summary determination is a "drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (***Moskowitz v. Garlock***, 23 AD2d 943 [1965]; ***see Daliendo v. Johnson***, 147 AD2d 312 [1989]). Because it is the "procedural equivalent of a trial" (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572 [1989]), undermining the notion of a "day in court," summary determination must be used sparingly (***Wanger v. Zeh***, 45 Misc 2d 93 [1965], ***affd*** 26 Ad2d 729 [1966]). If any material facts are in dispute, if the existence of a triable issue of fact is "arguable," or if contrary inferences may be reasonably drawn from the undisputed facts, the motion must be denied (***Gerard v. Inglese***, 11 AD2d 381 [1960]).

C. In the instant case, the parties dispute whether petitioners are entitled to a refund claim based on passive rental losses incurred in 2012 on the Bronx and Pennsylvania properties. Section 469(a) of the Internal Revenue Code (IRC) generally disallows any passive activity loss. A passive activity loss is defined as the excess of the aggregate losses from all passive activities for the taxable year over the aggregate income from all passive activities for that year (***see*** IRC § 469[d][1]). A passive activity is any trade or business in which the taxpayer does not materially participate (IRC § 469[c][1]). For our purposes, rental activity is generally treated as a per se passive activity regardless of whether the taxpayer materially participates (IRC § 469[c][2], [4]).

D. An exception to the rule that a rental activity is per se passive is found in IRC § 469(c)(7), which provides that the rental activities of certain taxpayers in real property trades or businesses are not per se passive activities under section 469(c)(2), but are 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 (1) more than one half of the personal services performed in trades or businesses by the taxpayer during the taxable year are

performed in real property trades or businesses in which the taxpayer materially participates and (2) the 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 § 469[c][7][B][i], [ii]). In the case of a joint tax return, either spouse may satisfy both requirements (IRC § 469[c][7][B]). As petitioners concede that they are not real estate professionals, however, they are not entitled to this exception to the passive activity rule.

E. Despite the limitations imposed by the passive loss rules, individual taxpayers may nevertheless offset up to $25,000.00 of passive activity losses attributable to rental real estate activities for which such individuals actively participated in the relevant taxable year (IRC § 469[i][1]). The $25,000.00 limit is subject to a phase-out when a taxpayer's adjusted gross income exceeds $100,000.00 and is completely phased out at the $150,000.00 adjusted gross income level. Pursuant to IRC § 469(i)(3)(F), petitioners' modified adjusted gross income is computed by adding to federal adjusted income, claimed passive losses, and tuition and fee deductions. A review of petitioners' 2012 return indicates that they fall below the $100,000.00 threshold and, therefore, they meet the initial requirement for this exception.

The exception also compels petitioners' active participation in the rental real estate activity. To be eligible, petitioners must have owned at least a 10% interest in each property throughout the taxable year (IRC § 469(i)(6)(A). In addition, petitioners must have participated in management decisions, such as approving new tenants, deciding on rental terms, approving capital or repair expenditures, and similar decisions (***see Madler v. Commr.***, 75 TCM 2025 [1998]). Except for the unsworn letter of petitioners' broker, Mr. Jones (***see*** Finding of Fact 5), neither party produced evidence with regard to this standard, leaving significant questions of material fact unanswered. Petitioners' exact ownership interest is unclear, as is their

involvement in each rental. Unfortunately, petitioners failed to offer an affidavit that may have addressed these factual issues. Consequently, based on the motion papers, it cannot be determined, without further inquiry, whether petitioners actively participated in the rental activity in 2012 and, thus, qualify pursuant to IRC § 469(i)(1) for the $25,000.00 offset to their claimed passive losses.

F. Petitioners' motion for summary determination is denied. The Division of Taxation's cross-motion for summary determination is likewise denied, and a hearing in this matter will be scheduled in due course.

DATED: Albany, New York
November 26, 2014

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE