STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

JOHN F. LERNIHAN and CAROL LERNIHAN DECISION

for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1980.

Petitioners, John F. Lernihan and Carol Lernihan, RD #1, Box 143, Mt. Vision, New York 13810, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1980 (File No. 47798).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax-Commission, 164 Hawley Street, Binghamton, New York, on November 19, 1986 at 9:15 A.M., with all documents to be submitted by January 8, 1987. Petitioners appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUE

Whether a portion of petitioners' claimed investment credit for 1980 was properly disallowed by the Audit Division.

FINDINGS OF FACT

I. Petitioners, John F. Lernihan and Carol Lernihan, husband and wife, timely filed a New York State Income Tax Resident Return (Form IT-201) for 980, under filing status "3" (married filing separately on one return). included with petitioners' filing for 1980 was Form IT-212, by which petitioners claimed an investment credit in the sum of $222.28, calculated as follows:

Property	Principal Use	cost
Sheep (4 Ewes)	breeding	$ 348.00
Fencing (Electric)	protect livestock	198.00
Rototiller and attachments	tilling for crops & livestock feed	1,031.00
1980 4 W-D (50% farm use)	hauling feed, animals, equipment, logs	4,000.00
	Total	5,577.00
	x Applicable Rate	$ .04
	Investment Credit Claimed	222.28

2. The above-noted investment credit was, along with certain other credits, split equally between petitioners on their separate returns.

3. On July 13, 1983, the Audit Division issued to petitioners a Statement of Audit Changes indicatinga proposed additional tax due for 1980 in the aggregate amount of $346.46, plus interest. This additional liability was computed upon certain adjustments described as follows:

> "This statement is based on the results of a review of your 1980 New York State income tax return and information in our files which indicates that the Internal Revenue Service adjusted your 1980 Federal income tax return per IRS form 4549 dated September 9, 1982.
>
> The Federal examination changes resulted in adjustments to income of $2,324.00 and an adjustrnent to miscellaneous itemized deductions of $1,353.00 for a total adjustment to taxable income of $3,677.00.
>
> Under section 606 of the New York State Tax Law, a New York State investment credit is allowed only on property used principally in the production of goods. Since your 1980 four wheel drive vehicle does not meet this qualification,, the portion of your claim for 1980 New York State investment credit based on this property is disallowed. Your allowable investment credit has been computed as follows:
>
> ($5,557.00 $4,000.00) X 4% = $62.28
>
> In addition, for married taxpayers filing separately, an allowable New York State investment credit can be claimed only by the spouse deriving profit or loss from the business for which qualified property was acquired. Since only John claimed the farm loss on your 1980 New York State income tax return, only he is eligible to claim the investment

Regarding the New York State child care credit, for married taxpayers filing separately this credit may only be applied against the tax imposed on the spouse with the lower taxable income. Therefore, only Carol can claim a New York State child care credit for tax year 1980."

4. On October 13, 1983, the Audit Division issued two notices of deficiency, reflecting the assertion of additional tax due for 1980 from petitioner John F. Lernihan in the amount of $235.90, plus interest, and from petitioner Carol Lernihan in the amount of $110.56, plus interest (aggregating $346.46, plus interest).

5. Petitioners contest the disallowance of investment credit on the four wheel drive vehicle ($4,000.00 out of the $5,577.00 claimed as qualified property for investment credit purposes). Petitioners did not specifically contest the audit changes reallocating the items of claimed credit in accordance with the filing status (separate filing on one return) elected by petitioners. Further, assuming an investment credit is allowable on the four wheel drive vehicle, it does not appear to be contested that any such credit could only be taken on petitioner John F. Lernihan's return.

6. During the year in question, John F. Lernihan worked as a pharmacist for Rite-Aide Corporation. He worked, in general, two twelve-hour days per week and every other weekend. Carol Lernihan worked as a teacher five days per week. In addition, the Lernihans operated a farm on the approximately twenty-five acres they owned and lived on in Kt. Vision, New York. No question is raised as to whether the farm was operated with the intent of earning a profit.

7. During 1980, the farming activity included the the breeding, raising and selling of lambs, sheep and a few goats, shearing and selling wool from these animals and also, to a lesser extent, raising crops.

8. In 1980, the Lernihans acquired a 1980 Chevrolet Blazer four-wheel drive vehicle. In addition, the Lernihans owned two other vehicles, a Mercedes Benz Diesel Sedan and a Volkswagon Sirrocco.

9. The Blazer was allegedly purchased for use mainly in connection with farm related activities. It was, however, registered for over-the-road use rather than as a farm vehicle, due to the limitations on areas of use which apply to a vehicle registered for farm use. The Blazer was not generally used by either of the Lernihans to commute to their respective jobs as pharmacist and teacher, inasmuch as their other two vehicles achieved better gas mileage than the Blazer. However, during snowstorms or on occasion when the roads were in bad condition, the Blazer was used for commuting to their jobs.

10. The Blazer was used at least twice per week to travel into town (a one-way distance of 5 to 7 miles) to pick up feed or medicine for the livestock, fencing, fence posts and other hardware and supplies. In addition, the Blazer was used.to transport sheep to the veterinarian's office (a one-way distance of about 15 miles). and on a weekly basis to pick up hay from neighboring farms. The Blazer was used twice per year to transport wool shorn from the sheep to a marketing co-operative (a distance of about 30 miles one-way). The Blazer was also used to bring sheep to county fairs for shows. This occurred about twice per year and petitioners also brought their camping trailer along to such shows. finally, the Blazer was used twice in 1980 for family camping vacations.

11. The Blazer was not used to drive around the pastures at the farm, but ras backed up to the fence line to unload feed or to pick up sheep. In total, .he Blazer was driven seven to eight thousand miles per year.

1.2 It is petitioners' position that the Blazer's use was primarily farm

that as part of a *1980* I.R.S. audit, it was determined that the Blazer was used "at least" fifty percent of the time **on** farm related business and was properly a depreciable asset.

13. The Audit Division asserts, by contrast that the Blazer was not used principally in the production of goods by farming and that an investmentcredit is not allowable. Further, it is alleged that since the Lernihans filed separate New York State returns and since only John Lernihan's return reflected the farm's **loss**, only John Lernihan is entitled to claim any investment credit which may **be** allowable. No question is raised as to Mr. Lernihan's entitlement to an investmen credit of $62.28 on the other items ***of*** qualified property claimed **on** Form IT-212 (see Findings of Fact "**1**" and "**3**").

14. At line *"44"* **of** Federal Schedule F (Farm Income and Expenses), petitioner claimed gasoline, fuel and oil expenses for the Blazer totalling $500.00, based on 2500 miles of use. On Part **IV** of Form IT-212, petitionersnoted parentheticall: with respect to the Blazer, "(50% farm use)".

CONCLUSIONS **OF** LAW

A. That Tax Law § 606(a)(2) provides for a credit against personal income tax, based on the cost or other basis of:

> --tangible personal property and other tangible property, including buildings and structural components of buildings, which are: depreciable pursuant to section one hundred sixty-seven of the internal revenue code, have **a** useful life of four years or more, are acquired by purchase as defined in section one hundred seventy-nine (d) of the internal revenue code, have *a* situs in this state and are principally used by the taxpayer in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing." (Emphasis added.)

B. That the term "principally used" means that in order to qualify for

the production of goods by farming (see 20 NYCRR 103.l[d][3], effective January 28 1982, which is after the year at issue herein, but evidencing the generally understood meaning of the phrase."principallyused" and the Commission's interpretation of such phrase).

C. That as the facts bear out, the Blazer was not used more than fifty percent of the time in the production of goods by farming. Many of its uses were in the nature of administrative and transportation uses which, while farm related, are not uses in the production of goods. **Also**, the Blazer was registered **and** used over the road as opposed to being registered as a farm vehicle[1]. Finally, the Blazer was admittedly used for personal transportation purposes. In this regard, it appears that the Blazer was used for farming only 2,500 miles out of its 7,000 to 8,000 miles *of* usage in 1980 (see Findings of Fact "11" and *"14")*. Accordingly, based on the evidence presented, the Blazer .did not qualify for investment credit in 1980.

D. That with respect to the allocation of the credits at issue as claimed by petitioners on their separate returns, petitioner Carol Lernihan claimed **a** portion of the investment credit on farm equipment while only John Lernihan claimed the net loss resulting from farming on his return. Likewise, John Lernihan claimed a portion of the child care credit computed by petitioners.

E. That Tax Law § 651(b)(2)(B) provides that a husband and wife:

> "may elect to file separate New York income tax returns **on** a single form if they comply with the requirements of the tax commission in setting forth information, in which event their tax liabilities shall be separate...."

It is noted [redacted]l(d)(2), enacted and effective after the year in issue but offering some evidence of the Commission's **position**

F. That since petitioner Carol Lernihan did not claim net income or loss from farming on her form IT-201, 'she is not entitled to an investment tax credit on farm equipment for the year at issue.

G. That Tax Law § 606(c) provides a credit for certain household and dependent care services necessary for gainful employment. Tax Law § 606(c)(2) provides:

> "In the case of a husband and-wife who filed a joint federal return, but elect to determine their New York taxes separately, the credit allowed pursuant to this subsection nay only be applied against the tax imposed on the spouse with the lower taxable income, computed without regard to such credit."

H. That pursuant to Tax Law § 606(c)(2), petitioner John Lernihan was not entitled to claim a child care credit on his Form IT-201, and the full amount of. said credit for the year at issue should have been taken by the petitioner Carol Lernihan.

I. That the petition of John F. Lernihan and Carol Lernihan is hereby denied, the Audit Division's disallowance of part of petitioner's claimed investment credit and reallocation of the balance thereof as well as the reallocation of petitioner's claimed child care credit was proper, and the notices of deficiency dated October 13, 1983 are sustained.

DATED: Albany, New York

MAR 2 0 1987

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER