

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Robert J. & Eileen M. Clune :

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the Year 1972. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 5th day of September, 1980, he served the within notice of Decision by certified mail upon Robert J. & Eileen M. Clune, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert J. & Eileen M. Clune
211 Christopher Ln.
Ithaca, NY

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
5th day of September, 1980.

Debbie Bank

Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

September 5, 1980

Robert J. & Eileen M. Clune
211 Christopher Ln.
Ithaca, NY

Dear Mr. & Mrs. Clune:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ROBERT J. CLUNE and EILEEN M. CLUNE	:	DECISION
for Redetermination of a Deficiency or for Re-	:	
fund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1972.	:	

Petitioners, Robert J. Clune and Eileen M. Clune, 211 Christopher Lane, Ithaca, New York, 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 1972 (File No. 11827).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Governmental Civic Center, 44 Hawley Street, Binghamton, New York, on December 4, 1979 at 10:45 A.M. Petitioner Robert J. Clune, Esq. appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Barry M. Bresler, Esq., of counsel).

ISSUES

I. Whether the rental property held by petitioners during 1972 constituted an activity which was engaged in for profit, thus permitting them to properly deduct the rental loss which was sustained therefrom.

II. If the rental property constituted an activity engaged in for profit, what was the correct amount of depreciation.

FINDINGS OF FACT

1. Petitioners, Robert J. Clune and Eileen M. Clune, timely filed a New York State income tax resident return for 1972 on which they reported a rental loss of \$9,385.64.

2. The Income Tax Bureau issued a Statement of Audit Changes, on which it contended that petitioners did not purchase the real property in question for the primary purpose of engaging in rental activity for profit. It disallowed all expenses connected with the property, except for the allowable investor's expenses which consisted of interest expense and real estate taxes. Accordingly, on October 27, 1975, the Income Tax Bureau issued a Notice of Deficiency against petitioners for 1972 for \$975.11 in personal income tax, plus \$185.34 in interest, for a total due of \$1,160.45.

3. The property in question was a single family wood frame residential cottage with six rooms and one and one-half baths located on Cayuga Lake in Seneca County, New York. It was heated, insulated and suitable for winter habitation. It had been used by the previous owners as their personal residence. Petitioners purchased the property in November of 1971. Petitioners purchased the property for the purpose of converting it to rental property. To this date, petitioners still own and rent the property.

4. Shortly after they purchased the cottage, they listed the property with a real estate broker for rent. However, the real estate broker was not successful in renting it until 1973. Though the property was lake-front property, it lost its summer rental value for 1972 because of hurricane Agnes which flooded the house in June, 1972 and covered the floors with mud. Petitioners would have rented the house if they could have found someone interested.

5. Petitioners ordered furniture for the property to increase its rental value. However, the arrival of the furniture was delayed because of the hurricane's effect on the Elmira furniture store.

6. Petitioners have never occupied the house.

7. At the hearing, there was a stipulation made between the Audit Division and petitioner that the depreciation method used for the real property was improper, and if the State Tax Commission finds the rental of the real property constituted an activity engaged in for profit, the depreciation method should be changed to a "straight line" method using a \$30,000.00 basis.

CONCLUSIONS OF LAW

A. That the petitioners, Robert J. Clune and Eileen M. Clune, have established that the property was held for the production of income; therefore, the expenses are deductible under section 62(5) of the Internal Revenue Code and Article 22 of the Tax Law.

B. That although an allowance for depreciation is in essence basically a matter of judgment (i.e., an intelligent estimate) to be determined from evidence rather than by arbitrary formulas or theories, the practical necessities of tax administration compel the use of workable methods of determining depreciation. The "straight line" or "fixed percentage" method is now specifically recognized in the 1954 Internal Revenue Code. Based on the evidence, it is determined that the allowable rate is three and one-half percent. Accordingly, the depreciation in this case is \$1,050.00.

C. That the petitioners' rental loss is determined to be \$6,706.48.

D. That the Audit Division is directed to recompute the Notice of Deficiency issued on October 27, 1975 in accordance with Conclusion of Law "C"; and the petition of Robert J. Clune and Eileen M. Clune is granted to the extent indicated in Conclusion of Law "C"; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

SEP 05 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER