

STATE OF NEW YORK
STATE TAX COMMISSION

_____ :
In the Matter of the Petition :
of :
Robert & Theresa D'Andrea :
: **AFFIDAVIT OF MAILING**
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 years 1972 & 1973. :

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 13th day of February, 1980, he served the within notice of Decision by certified mail upon Robert & Theresa D'Andrea, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert & Theresa D'Andrea
R.D. #1
Saratoga Springs, NY 12866
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
13th day of February, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Robert & Theresa D'Andrea :
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County of Albany

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Mr. Donald Wilson
Gillen & Wilson
18 Seneca St.
Cohoes, 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 representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
13th day of February, 1980.

Joanne Knapp

J. Vredenburg

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

February 13, 1980

Robert & Theresa D'Andrea
R.D. #1
Saratoga Springs, NY 12866

Dear Mr. & Mrs. D'Andrea:

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
Donald Wilson
Gillen & Wilson
18 Seneca St.
Cohoes, NY
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

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In the Matter of the Petition :
of :
Joseph E. & Mary E. D'Andrea :
for Redetermination of a Deficiency or a Revision :
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Personal Income Tax :
under Article 22 of the Tax Law :
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State of New York
County of Albany

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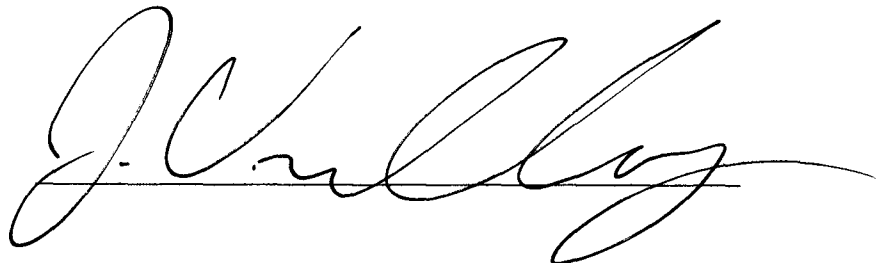
Joseph E. & Mary E. D'Andrea
254 Church St.
Saratoga Springs, NY 12866

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
13th day of February, 1980.

Joanne Knapp



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Joseph E. & Mary E. D'Andrea :
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 :
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Gillen & Wilson
18 Seneca St.
Cohoes, NY

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13th day of February, 1980.

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

February 13, 1980

Joseph E. & Mary E. D'Andrea
254 Church St.
Saratoga Springs, NY 12866

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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
Donald Wilson
Gillen & Wilson
18 Seneca St.
Cohoes, NY
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

_____ :
In the Matter of the Petition :
of :
Faust A. D'Andrea :
: AFFIDAVIT OF MAILING
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 years 1972 & 1973. :
_____ :

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 13th day of February, 1980, he served the within notice of Decision by certified mail upon Faust A. D'Andrea, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Faust A. D'Andrea
11 Patricia Lane
Saratoga Springs, NY 12866
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
13th day of February, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Faust A. D'Andrea :
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 years 1972 & 1973. :

AFFIDAVIT OF MAILING

State of New York
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Mr. Donald Wilson
Gillen & Wilson
18 Seneca St.
Cohoes, 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.

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13th day of February, 1980.

Joanne Knapp

J. Vredenburg

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

February 13, 1980

Faust A. D'Andrea
11 Patricia Lane
Saratoga Springs, NY 12866

Dear Mr. D'Andrea:

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.

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Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Donald Wilson
Gillen & Wilson
18 Seneca St.
Cohoes, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions :
of :
ROBERT D'ANDREA and THERESA D'ANDREA, :
JOSEPH E. D'ANDREA and MARY E. D'ANDREA :
and : DECISION
FAUST A. D'ANDREA. :
for Redetermination of Deficiencies or :
for Refund of Personal Income Tax under :
Article 22 of the Tax Law for the Years :
1972 and 1973. :

Petitioners, Robert D'Andrea and Theresa D'Andrea, R.D. 1, Saratoga Springs, New York; Joseph E. D'Andrea and Mary E. D'Andrea, 254 Church Street, Saratoga Springs, New York; Faust A. D'Andrea, 11 Patricia Lane, Saratoga Springs, New York 12866, filed petitions for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 1972 and 1973 (File Nos. 10332, 10333 and 10334).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on August 17, 1978 at 10:45 A.M. Petitioners appeared by Donald Wilson, CPA. The Income Tax Bureau appeared by Peter Crotty, Esq. (J. Ellen Purcell, Esq., of counsel).

ISSUE

Whether the partnership of Faust & Robert & Joseph D'Andrea properly computed a loss for the years 1972 and 1973.

FINDINGS OF FACT

1. Partnership returns of Faust & Robert & Joseph D'Andrea were timely filed for 1972 and 1973. Accordingly, the partners reported their proportionate share of the loss of the partnership on their New York State personal income tax returns for said years.

2. On December 22, 1975, the Income Tax Bureau issued notices of deficiency against each of the partners for additional personal income tax due as described below.

<u>Petitioners</u>	<u>Tax</u>	<u>Interest</u>	<u>Total</u>
Robert and Theresa D'Andrea	\$ 88.63	\$14.69	\$103.32
Joseph E. and Mary E. D'Andrea	273.15	40.37	313.52
Faust A. D'Andrea	334.92	52.82	387.74

These notices were issued based on the results of a field audit of Faust A. D'Andrea in which the nature of the loss was found to be as the result of the acquisition of land which the Income Tax Bureau contended was bought as an investment and not as rental property used for the production of income. Therefore, the Bureau adjusted the loss by disallowing depreciation, repairs and other miscellaneous deductions.

3. The partnership, in 1971, purchased for \$107,210.60, a parcel of land located in the city of Saratoga Springs, New York. On a portion of this land was a house and barn for which the partnership set values of \$45,000.00 and \$10,000.00, respectively.

4. A ten year mortgage with a four percent interest rate per annum is held by the seller.

5. In an agreement between the seller and the partnership, the following conditions were agreed on:

- a. The seller may live in the house and have control and use of the barn and a rectangular portion of the land located adjacent to said house for the length of the mortgage.

- b. The seller is to take care of all expenses relating to the driveway, interior of the premises and to the maintenance of the grounds around said premises.
- c. The partnership is to pay all reasonable expenses relating to the care and maintenance of the outside of the barn and house while occupied by the seller.
- d. The partnership is to pay all taxes and insurance premiums on the property except for personal property of seller.
- e. In the event that the house should be destroyed or made unlivable during the life of the mortgage or the death of seller, whichever occurs first, the partnership shall pay the seller \$150.00 a month, in addition to the principal and interest payments on the mortgage.
- f. On the expiration of the mortgage or the death of the seller, the premises reserved to the seller's use shall be turned over to the partnership.

6. Petitioners contended that the difference between the normal rate of interest and the four percent rate is a form of indirect rent.

CONCLUSIONS OF LAW

A. The Income Tax Bureau properly disallowed the expenses attributable to the premises reserved to the seller. In order to be deductible by petitioners, such expenses must be closely related to the production or collection of income (sections 162 and 212, Internal Revenue Code). The agreement between petitioners and the seller failed to provide for the production or collection of income. Therefore, any amounts paid other than for taxes and interest expense must be capitalized and added to the cost basis of the property.

B. That petitioners have failed to sustain the burden of proof imposed by section 689(e) of the Tax Law to establish that the property was rented with a profit motive. Accordingly, expenses attributable thereto cannot be deducted under sections 162 and 212 of the Internal Revenue Code and Article 22 of the Tax Law.

C. That the petitions of Robert D'Andrea and Theresa D'Andrea, Joseph E. D'Andrea and Mary E. D'Andrea and Faust A. D'Andrea are denied and the notices of deficiency issued on December 22, 1975 are sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

FEB 13 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER

COMMISSIONER