

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Gerald R. & Doris C. Thew :
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 - 1974. :

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 16th day of May, 1980, he served the within notice of Decision by certified mail upon Gerald R. & Doris C. Thew, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gerald R. & Doris C. Thew

LaGrangeville, NY 12540
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
16th day of May, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Gerald R. & Doris C. Thew :
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 - 1974. :

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 16th day of May, 1980, he served the within notice of Decision by certified mail upon Allan E. Rappleyea the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Allan E. Rappleyea
25 Market St.
Poughkeepsie, NY 12601

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
16th day of May, 1980.

Joanne Knapp

J. Vredenburg

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

May 16, 1980

Gerald R. & Doris C. Thew
LaGrangeville, NY 12540

Dear Mr. & Mrs. Thew:

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
Allan E. Rappleyea
25 Market St.
Poughkeepsie, NY 12601
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
GERALD R. THEW and DORIS C. THEW	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1972, 1973 and 1974.	:	

Petitioners, Gerald R. Thew and Doris C. Thew, La Grangeville, New York 12540, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1972, 1973 and 1974 (File No. 14980).

A formal hearing was held before Michael Alexander, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on July 28, 1977 at 1:15 P.M. Petitioner appeared by Corbally, Gartland & Rappleyea (Allan E. Rappleyea, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Richard M. Kaufman, Esq., of counsel).

ISSUE

Whether the losses experienced from the operation of an apple orchard and a small gasoline station constituted trade or business losses.

FINDINGS OF FACT

1. Petitioners, Gerald R. Thew and Doris C. Thew, filed New York State income tax resident returns (Form IT-201) for tax years 1972, 1973 and 1974. Petitioner Gerald R. Thew filed New York State unincorporated business tax returns (Form IT-202) for 1973 and 1974. On each return petitioners indicated substantial losses from orchard and gasoline station operations. The losses were applied against dividends received.

2. On March 29, 1976, the Audit Division issued a Notice of Deficiency to petitioners, Gerald R. Thew and Doris C. Thew, for personal income tax due under Article 22 of the Tax Law for 1972, 1973 and 1974 in the amount of \$18,716.10, plus interest of \$2,939.17, for a total of \$21,655.27. The notice was accompanied by a Statement of Audit Changes which stated that petitioners' operation of an apple orchard and related gasoline station were considered "an activity not entered into for profit". This resulted in the partial disallowance of losses claimed creating the deficiency at issue.

3. At the formal hearing, the Audit Division increased the deficiency which was asserted against petitioners to \$32,341.05, plus interest of \$8,749.10, for a new total deficiency of \$41,090.15.

4. Petitioner Gerald R. Thew owns and operates an apple orchard and a gasoline station located near the apple orchard. He has been operating this apple orchard for more than 30 years, and has spent his working life as a farmer. Petitioners have, for many years, lived in a home located on orchard land.

5. Petitioner Gerald R. Thew assembled several pieces of land over the years to form the apple orchard. The property was improved over the years with storage, refrigeration and processing buildings. Purchases for the operation of the orchard included tractors, sprayers, mowers, a forklift, an apple sorter, and automatic apple processing equipment. A camp for pickers was also maintained. Presently, there is enough cold storage space for 50,000 bushels of apples.

6. In operating the orchard, petitioner Gerald R. Thew sought, received and relied on outside experts and advice, such as that provided by the United States Department of Agriculture Soil Conservation Service, the Dutchess County Cooperative and various commercial sellers of orchard equipment and supplies.

7. Mr. Thew and his sons were actively involved in the operation of the orchard and the gasoline station, and devoted their full energy to them during the tax years involved. Despite the devotion of their full time to the operations, they have continually lost money every year since 1958.

8. For the tax years at issue, petitioner Gerald R. Thew attributes the losses to a government ban on the poison Endrin, which resulted in a proliferation of apple-tree-killing mice (pine voles). In addition, petitioners' two sons, who helped run the orchard and gasoline station, were either injured in automobile accidents or were seriously sick and unable to continue to assist petitioners during these years.

9. In years subsequent to the years at issue, petitioner Gerald R. Thew continued to make substantial investments in the orchard and to devote his energy to its operation. In both 1976 and 1977 petitioner Gerald R. Thew had a good expectation of profit from that year's crop of apples; however, these crops were destroyed by frost in 1976 and by hail in 1977.

10. Petitioners purchased the gasoline station in the hope of converting it to a fruit stand from which they could sell apples at retail. This conversion has not occurred and petitioners continue to run the gasoline station as such. They do make repairs to and service orchard equipment at the gasoline station.

11. Petitioners intend to continue trying their best, putting everything into the orchard with a good faith expectation of future profits.

CONCLUSIONS OF LAW

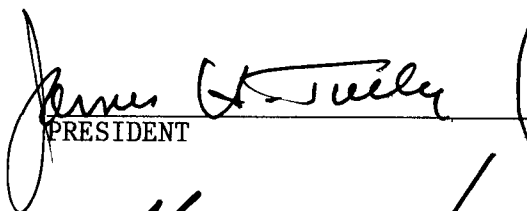
A. That the orchard and gasoline station operations of Gerald R. Thew and Doris C. Thew constituted the carrying on of a trade or business within the meaning of section 162 of the Internal Revenue Code.


B. That the petition of Gerald R. Thew and Doris C. Thew is granted and the Notice of Deficiency of March 29, 1976, as amended, is cancelled.

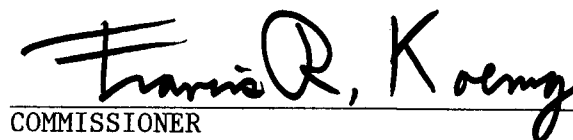
DATED: Albany, New York

STATE TAX COMMISSION

MAY 16 1980


PRESIDENT


COMMISSIONER


COMMISSIONER