

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Kent F. & Paula P. Smith

:

:

: 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 Year :
1972.

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 6th day of November, 1981, he served the within notice of Decision by certified mail upon Kent F. & Paula P. Smith, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kent F. & Paula P. Smith
51 W. 83rd St., #1
New York, NY 10024

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
6th day of November, 1981.

Carrie A. Hayward

J. Vredenburg

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

November 6, 1981

Kent F. & Paula P. Smith
51 W. 83rd St., #1
New York, NY 10024

Dear Mr. & Mrs. Smith:

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	:	
KENT F. SMITH and PAULA P. SMITH	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the year 1972.	:	

Petitioners, Kent F. Smith and Paula P. Smith, 51 West 83rd Street, New York, New York 10024, 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. 10837).

A small claims hearing was held before Samuel Levy, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 27, 1980 at 10:45 A.M. Petitioners appeared pro se. The Income Tax Bureau appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether petitioners' reported rental loss for 1972 was incurred from property held for the production of income.

FINDINGS OF FACT

1. Petitioners, Kent F. Smith and Paula P. Smith filed a New York State Income Tax Resident Return for subject year. Petitioners, for said year, reported a net rental loss in the amount of \$5,641.92.

2. On October 27, 1975, the Audit Division issued a Notice of Deficiency against the petitioners, imposing income tax of \$202.61, plus interest of \$38.51, for a total of \$241.12. The Notice was issued on the grounds that petitioners failed to establish that real estate was held for the production of

income and/or failed to establish a profit motive, and accordingly disallowed the rental loss. However, real estate taxes and interest expense included in the rental loss were allowed as itemized deductions. In addition, adjustments also included a disallowance of a portion of the claimed business expenses and an additional deduction for contributions previously unclaimed. Based on the foregoing, adjustments to taxable income were made as follows:

	<u>CLAIMED</u>	<u>ALLOWED OR SUBSTANTIATED</u>	<u>ADJUSTMENTS</u>
Rental Income and Expenses (Loss)	\$5,641.92 ¹	\$ 270.00	\$5,371.92
Business Expense	926.92	802.00	124.92
Contributions	656.00	715.00	(150.00)
Taxes	4,324.81	6,008.17	(1,683.37) (sic)
Interest Expense	2,624.50	4,491.24	(1,866.74)
Total Adjustments (Increase) and Taxable Income			<u>\$1,796.73</u>

¹ Rental loss allowed to extent of rental income pursuant to section 183 of the Internal Revenue Code and section 1.183-(b)(1) of the Treasury Regulations.

3. Petitioners did not contest the adjustments made to business expense and contributions, and, therefore, such adjustments are not at issue.

4. Petitioners purchased a two family house in the borough of Manhattan, City of New York for \$83,000.00 during the year 1971. Petitioners made extensive renovations to the house during the years 1971 and 1972. The renovations were made by independent contractors as well as by petitioner Kent F. Smith.

While renovation to the house was in progress in 1972, petitioners leased one of the two available apartments to petitioner Kent F. Smith's sister at a rental of one dollar (\$1.00) a day.

5. Petitioner Kent F. Smith contended that the rent charged his sister while the house was undergoing extensive renovation was reasonable and not because of any financial or filial obligation to her. Petitioners argued that

under the circumstances, they would have been unable to obtain a greater rent because the lessee's use and enjoyment of the premises was constantly interfered with by workmen employed in the renovation as well as the interference caused by petitioner Kent F. Smith who did extensive carpentry work on said property. Petitioners further argued that the lessee's presence in the apartment while the house was undergoing extensive renovation over an extended period of time negated the requirement that petitioners hire someone to guard against theft of supplies and materials used in renovation and also prevented vandalism which could have occurred had the house been permitted to remain unoccupied.

6. Upon completion of a major portion of the renovations, petitioners obtained increased rentals from petitioner Kent F. Smith's sister of \$4,000.00 for 1973 and \$8,000.00 for 1974.

In addition, there was significant appreciation in value of petitioners' two family house.

CONCLUSIONS OF LAW

A. That petitioners' ordinary and necessary expenses paid or incurred in the maintenance on that portion of the two family house devoted to rental purposes was held for the production of income, and are deductible notwithstanding that the income derived therefrom for subject year is de minimis. That, "in the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income; for the management, conservation, or maintenance of property held for the production of income." [I.R.C. section 212(1) and (2).]

"The term "income" for the purpose of section 212 includes not merely income of the taxable year but also income which the taxpayer has realized in

a prior taxable or may realize in subsequent taxable years and is not confined to recurring income but applies as well to gains from the disposition of property.... Similarly, ordinary and necessary expenses paid or incurred in the management, conservation, or maintenance of a building devoted to rental purposes are deductible notwithstanding there is actually no income therefrom in taxable year...." (Treas. Reg. Sec. 1.212-(b)).

B. That the two family house was acquired for the production of income, and the fact that petitioners failed to make a profit from the rental of the property for subject year does not change the status of the property and the allowable deductions under sections 167(a)(2) and 212(2) (1954 Code). That petitioners held the property for the production of income, and accordingly are entitled to the deduction of the net rental loss under sections 167(a)(2) and 212(2) of the Internal Revenue Code.

C. That the petition of Kent F. Smith and Paula P. Smith is granted, and the Notice of Deficiency dated October 27, 1975 is cancelled.

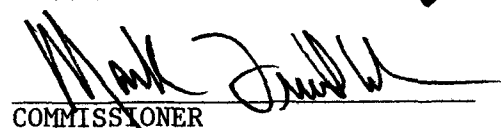
DATED: Albany, New York

NOV 06 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER