

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Grace A. Altenau :  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law and Chapter 46, Title T of the Administrative :  
Code of the City of New York for the Years 1977 :  
and 1978. :

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AFFIDAVIT OF MAILING

State of New York }  
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 21st day of March, 1984, he served the within notice of Decision by certified mail upon Grace A. Altenau, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Grace A. Altenau  
544 78th St.  
Brooklyn, NY 11209

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
21st day of March, 1984.

David Parchuck

James P. [Signature]  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Grace A. Altenau :  
AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law and Chapter 46, Title T of the Administrative :  
Code of the City of New York for the Years 1977 :  
and 1978. :

State of New York }  
ss.:  
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 21st day of March, 1984, he served the within notice of Decision by certified mail upon George A. Donley, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

George A. Donley  
Fraser & Fraser  
32 Court St.  
Brooklyn, NY 11201

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
21st day of March, 1984.

David Parchuck

James A. [Signature]  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

March 21, 1984

Grace A. Altenau  
544 78th St.  
Brooklyn, NY 11209

Dear Ms. Altenau:

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 & 1312 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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  
Law Bureau - Litigation Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
George A. Donley  
Fraser & Fraser  
32 Court St.  
Brooklyn, NY 11201  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
GRACE A. ALTENAU	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law and Chapter 46, Title T of the	:	
Administrative Code of the City of New York for	:	
the Years 1977 and 1978.	:	

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Petitioner, Grace A. Altenau, 544 78th Street, Brooklyn, New York 11209, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the years 1977 and 1978 (File No. 35035).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 30, 1983 at 9:00 A.M. Petitioner appeared by George A. Donley, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUES

- I. Whether the Audit Division's estimate of \$4,000.00 per year for personal living expenses paid in cash is excessive.
- II. Whether the Audit Division properly disallowed rental losses claimed by petitioner as an activity not engaged in for profit.

FINDINGS OF FACT

1. Petitioner herein, Grace A. Altenau, filed New York State and New York City resident income tax returns for the years 1977 and 1978 on July 12, 1978

and April 17, 1980, respectively. On said returns petitioner reported the net profit generated from her practice of medicine in the specialized field of pediatrics. Also, the 1977 return claimed a rental loss of \$2,533.00, while the 1978 return claimed a rental loss of \$1,546.00.

2. On June 8, 1981, the Audit Division issued a Notice of Deficiency to petitioner for the years 1977 and 1978 assessing additional New York State and New York City personal income tax of \$3,015.20, plus penalty and interest of \$869.82, for a total alleged due of \$3,885.02. Penalty was asserted pursuant to section 685(b) of the Tax Law and section T46-185.0(b) of Title T of the Administrative Code of the City of New York for negligence.

3. The aforementioned Notice of Deficiency was premised on a Statement of Personal Income Tax Audit Changes dated January 9, 1981. Pursuant to said Statement numerous adjustments were proposed by the Audit Division based on a field audit of petitioner's personal and business books and records. Petitioner protests only the additional income found as the result of the Audit Division's use of cash availability analyses to reconstruct income and also the disallowance of the claimed rental losses as an activity not engaged in for profit.

4. The cash availability analyses performed by the Audit Division determined that petitioner had additional income of \$8,095.00 for 1977 and \$4,566.00 for 1978. At the hearing held herein the parties stipulated that said analyses should be revised to \$6,225.00 for 1977 and \$3,266.00 for 1978.

5. The Audit Division included in the revised analyses referred to in Finding of Fact "4", supra, \$4,000.00 per year for estimated personal living expenses paid in cash. Petitioner asserts that the estimated figure of \$4,000.00 per year is excessive. A substantial portion of petitioner's personal living expenses were paid by check, while cash living expenses consisted mainly of

food, clothing, entertainment, transportation and other miscellaneous items. Petitioner did not appear at the hearing to offer her testimony, nor was any credible documentary or other evidence presented to support that her actual cash living expenses were less than the amount estimated by the Audit Division.

6. Sometime in 1972 petitioner acquired real property improved by a three-story brick building located at 5503 8th Avenue, Brooklyn, New York. Petitioner obtained title to said property via foreclosure on a note she held against the former owner(s) of the property. The value of the note at the time of foreclosure was \$8,000.00 and, for income tax purposes, a value of \$6,000.00 was placed on the building and a value of \$2,000.00 was placed on the land.

7. The three-story brick building located at 5503 8th Avenue, Brooklyn, New York, contained a store front on the first floor and two rental apartments, one each on the remaining two floors. The former owner(s) of the property rented the store front and the second floor apartment from petitioner. The third floor apartment was at various times rented to others. None of the tenants were in any way related to petitioner.

8. For the year 1977 petitioner realized gross rents of \$875.00 and for 1978 gross rents amounted to \$1,350.00. In computing the net losses incurred on the rental property, petitioner claimed deductions for real estate taxes of \$756.00 and \$1,723.00 for the years 1977 and 1978, respectively. At various times throughout the years at issue, the tenant(s) of the store front and second floor apartment (the former owner(s) of the property) were unable to meet the monthly rental payments. Petitioner, having compassion for said tenant(s), did not force the collection of past due rent nor did she attempt to remove the tenant(s) from said property.

9. The record herein contains no evidence as to whether or not petitioner executed leases with her tenants nor is it known the amount of the monthly rent charged, the number of times the monthly rent was collected, the number of months the apartments were actually rented or whether petitioner listed the property for rental with agents.

10. It is petitioner's position that although she is incurring annual operating losses from the rental property that she will eventually realize substantial gain upon the disposition of said property. Submitted into evidence was the affidavit of one Ronald J. Swift, wherein he placed a fair market value of \$45,000.00 on the rental property in question as of March 25, 1983. Said affidavit, in addition to denying the Audit Division the right to cross examination, did not establish the qualifications of the affiant. Furthermore, no evidence was presented to establish the fair market value of the rental property at the time said property was acquired in 1972.

11. No argument or evidence was presented by petitioner with respect to the negligence penalties asserted pursuant to section 685(b) of the Tax Law and section T46-185.0(b) of the Title T of the Administrative Code of the City of New York.

#### CONCLUSIONS OF LAW

A. That section 689(e) of the Tax Law and section T46-189.0(e) of Title T of the Administrative Code of the City of New York both place the burden of proof on petitioner except in three specifically enumerated instances, none of which are applicable in the instant matter. That petitioner has failed to meet the burden of proof to establish that her personal living expenses paid in cash were less than the \$4,000.00 per year as estimated by the Audit Division. That

the additional income found as the result of the cash availability analyses, as modified in Finding of Fact "4", supra, is sustained.

B. That petitioner has also failed to meet her burden of proof to establish that her rental activity during the years at issue constituted an activity engaged in for profit. Petitioner has failed to show that her rental activities were carried on in a businesslike manner, that she had any expertise in the field of rental properties or consulted with experts or that she devoted any time or effort to the management of the rental property. These factors, when considered together with the fact that petitioner acquired the property via foreclosure and not customary purchase practices, that the property has annually shown losses and that petitioner did not actively force the collection of past due rent and allowed this situation to continue, leads to the conclusion that her rental activity was not carried on with a profit motive.

C. That petitioner's contention that a valid profit motive existed due to the appreciation of the land and building is unpersuasive. Petitioner did not selectively choose to acquire this property for its potential to appreciate in value, but instead acquired it through foreclosure on a note she held against the owners of said property. Additionally, acquisition of property in this manner cannot be considered a transaction between a willing buyer and a willing seller and, therefore, the value of the note, which amount represents petitioner's cost basis in said property, may not represent the actual fair market value of the property at the time it was acquired in 1972. Finally, the mere anticipation of selling property at a profit is not, in itself, sufficient to establish that the property was held primarily for profit (Kannas v. Comm., 40 T.C. M. 194).

D. That pursuant to section 183(b)(1) of the Internal Revenue Code and Treasury Regulation §1.183-1(b)(1)(i), petitioner is entitled to a deduction



for real estate taxes paid on the rental property without regard to whether or not said rental property constitutes an activity engaged in for profit. For the year 1977, real estate taxes on the rental property totalled \$756.00 however, since gross rents totalled \$875.00 for 1977, there is no excess deduction allowable. For 1978, real estate taxes totalled \$1,723.00 and gross rents amounted to \$1,350.00. Therefore, for 1978 petitioner is entitled to increase claimed itemized deductions for taxes by the sum of \$373.00 (\$1,723.00 - \$1,350.00).

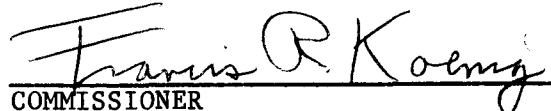
E. That the petition of Grace A. Altenau is granted to the extent indicated in Conclusions of Law "A" and "D", supra; that the Audit Division is directed to recompute the Notice of Deficiency dated June 8, 1981 consistent with the decision rendered herein; and that, except as so granted, the petition is in all other respects denied.

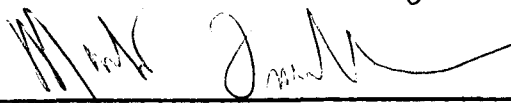
DATED: Albany, New York

MAR 21 1984

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER