

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>JOSEPH J. MAHAR AND</b>	:	DECISION
<b>RHEA M. MAHAR</b>	:	DTA NO. 801261
	:	
for Redetermination of a Deficiency or for Refund	:	
of Personal Income and Unincorporated Business	:	
Taxes under Articles 22 and 23 of the Tax Law for	:	
the Years 1978 through 1982.	:	

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Petitioners, Joseph J. Mahar and Rhea M. Mahar, 106 Normanor Drive, Syracuse, New York 13207, filed an exception to the determination of the Administrative Law Judge issued on November 13, 1987 with respect to their petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1978 through 1982 (File No. 801261). Petitioners appeared *pro se*. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Neither of the parties requested oral argument on this exception. Neither petitioner nor the Division of Taxation filed a brief.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether the Division of Taxation's methods and the assessment were proper in determine income tax deficiencies.

***FINDINGS OF FACT***

Petitioners waived their hearing and submitted this matter for determination based on the Division of Taxation file.

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference, except that we modify finding of fact "5" of the determination as stated below. The remaining facts may be summarized as followed.

Petitioners, Joseph J. Mahar and his wife, Rhea M. Mahar, filed a joint New York Resident Income Tax Return for each of the years 1978 through 1982, inclusive, whereon Mrs. Mahar reported net business income derived from Mahar's Grill as follows:

<u>Year</u>	<u>Net Profit or (Loss)</u>
1978	\$4,397.00
1979	\$5,152.00
1980	\$5,983.00
1981	\$4,475.00
1982	(\$2,887.00)

On January 15, 1984, The Division of Taxation issued three statements of audit changes to petitioners wherein adjustments were made for additional income derived from Mahar's Grill, as follows:

<u>Year</u>	<u>Additional Income</u>
1978	\$14,129.00
1979	\$11,967.00
1980	\$ 358.00
1981	\$ 7,396.00
1982	- 0 -

Adjustments were also made each year disallowing certain claimed rental expenses.

Based on the aforesaid adjustments, the Division of Taxation issued three notices of deficiency against petitioners on April 6, 1984, as follows:

(a) against Mr. and Mrs. Mahar asserting additional personal income tax for 1978, 1979 and 1980 of \$3,226.35, plus penalty of \$161.32 and interest of \$1,548.82, for a total due of \$4,936.49;

(b) against Mr. and Mrs. Mahar asserting additional personal income tax for 1981 and 1982 of \$1,113.93, plus penalty of \$55.70 and interest of \$242.13, for a total due of \$1,411.76;

(c) against petitioner, Rhea M. Mahar, asserting unincorporated business tax for the years 1978 and 1979 of \$804.99, plus penalty of \$40.25 and interest of \$396.41, for a total due of \$1,241.65. The aforesaid penalties were asserted for negligence pursuant to section 685(b) of the Tax Law.

The adjustments for additional income were based upon a sales tax markup audit conducted by the Division of Taxation. The resulting additional gross receipts of Mahar's Grill were determined to be additional income for personal income and unincorporated business tax purposes.

Finding of fact "5" is modified to read as follows:

Petitioners reported losses each year from the rental of fields. The Division of Taxation disallowed rental expenses claimed for insurance, utilities, telephone and depreciation because petitioners leased only the land and not the buildings located on the property during the years at issue. The petitioners never used the premises for personal reasons and they made improvements to the building for the purpose of producing income from it. The petitioners' plans with respect to the building were not realized during the years in issue due to Mr. Mahar's ill health; however, it was the intention of the petitioners to rent the building throughout the years 1978 to 1982. The petitioners contested the

disallowance of the rental expenses before the Administrative Law Judge.

At a prehearing conference the Division of Taxation adjusted the amount of additional income from Mahar's Grill for each year at issue to \$10,496.00 in 1978, \$7,465.00 in 1979, \$4,256.00 in 1980 and \$5,069.00 in 1981. Said adjustments were based in part on changes made to the markup percentage applied to the food purchases of Mahar's Grill during the years at issue.

As the result of the aforesaid prehearing conference, the additional tax due has been revised as follows:

	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>	<u>1982</u>
Personal Income Tax	\$1,071.00	\$860.00	\$193.00	\$729.00	\$86.00
Section 685(b) Penalty	54.00	43.00	-0-	36.00	4.00
Unincorporated Business Tax	284.00	138.00	-0-	-0-	-0-
Section 685(b) Penalty	14.00	7.00			

Petitioners submitted additional documentation to show that Mr. Mahar received several thousand dollars in Veterans Administration benefit payments during the years at issue. Other documentation of nontaxable personal receipts was submitted with respect to 1983, which is not at issue herein.

### ***OPINION***

The Administrative Law Judge sustained the income tax audit, with modifications to reflect adjustments made to the underlying sales tax audit. The petitioners have taken exception to this determination arguing that the income tax deficiency was erroneous because the Division of Taxation failed to take into account certain factors when conducting the sales tax audit. The petitioners also challenge the disallowance of the rental expenses.

First, the petitioners assert that the Division of Taxation conducted an erroneous sales tax

audit due to its failure to review the appropriate records which existed at the time of the audit. However, petitioners failed to prove that these records did in fact exist.

Second, the petitioners assert that the Division incorrectly failed to recognize that the compensation received from the Veteran's Administration was used to pay the restaurant bills. This assertion is without merit because the means of paying the restaurant bills would not have any effect on the audit performed, which was a mark-up audit.

Third, the petitioners assert that the sales tax audit was erroneous because the auditors knew that the prices charged included tax and this should have been considered when performing the audit. The petitioners failed to prove that the tax was included in the prices charged. Therefore, no adjustment to the mark-up audit was warranted.

Fourth, petitioners assert that the Division incorrectly disallowed rental expenses. The Division of Taxation disallowed these deductions upon the grounds that for the years in issue the petitioners had leased only the land and not the building. We find that the petitioners proved that they intended to lease this building and thus the rental expenses should be allowed.

Section 615(a) of the Tax Law provides that itemized deductions for state purposes shall be the same as the itemized deductions for Federal purposes, with certain modifications, not here relevant (Tax Law § 615[a]). According to the Federal tax law ordinary and necessary expenses incurred “for the management, conservation, or maintenance of property held for the production of income” (Internal Revenue Code § 212[2]) are deductible. The standard established for allowing these deductions is whether the taxpayer in light of all the facts and circumstances genuinely intended to make a profit; the absence of income from the property in the year of the deduction is not determinative (Coor v. Commr., 60 TC 368 410 [1973], affd 519 F2d 1280

[10th Cir 1975]). Petitioners proved that they intended to use the building for the production of income by leasing it and therefore the rental expenses are allowable for the years 1978 through 1982.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioners, Joseph J. Mahar and Rhea M. Mahar, is granted to the extent that rental expense deductions claimed for the tax years 1978 through 1982 are allowed, but except as so granted is in all other respects denied;
2. The determination of the Administrative Law Judge is reversed with regard to the rental expenses disallowed for the years 1978 through 1982, but is in all other respects affirmed; and
3. The petition of the petitioners, Joseph J. Mahar and Rhea M. Mahar, is granted to the extent indicated in paragraph "1" above and to the extent indicated in conclusion of law "E" of the Administrative Law Judge's determination; the Division of Taxation is directed to accordingly modify the three notices of deficiency issued on April 6, 1984; but, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York  
SEP 01, 1988

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John P. Dugan  
President

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Francis R. Koenig  
Commissioner