LEON & LINDA DUDEWICZ P.O. Box 415 Eufaula, AL 36028,	§ §	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayers,	§	DOCKET NO. INC. 02-367
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed 1997 income tax against Leon and Linda Dudewicz (together "Taxpayers"). The Taxpayers appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on November 19, 2002. CPA Richard Wingate and Leon Dudewicz (individually "Taxpayer") represented the Taxpayers. Assistant Counsel Keith Maddox represented the Department.

ISSUES

This case involves two issues:

(1) Should the Taxpayers be allowed to deduct the Taxpayer's fishing-related expenses during the subject year? That issue turns on whether the fishing activities were entered into for profit; and,

(2) Should the Taxpayers be allowed to deduct meal and lodging expenses relating to the Taxpayer's job in Montgomery with the Alabama Department of Mental Health?

FACTS

The Taxpayers reside in Eufaula, Alabama. The Taxpayer is employed as a maintenance supervisor for the Alabama Department of Mental Health. He worked at a facility in Eufaula until the facility closed in 1995. He was then transferred to a facility in

Montgomery. He commuted daily to Montgomery from his home in Eufaula through 1996.

In 1997, the Taxpayer's employer began requiring him to be available at the Montgomery facility on 15 minutes notice. Consequently, the Taxpayer was required to stay at a hotel in Montgomery when on duty.

The Taxpayer has enjoyed fishing as a hobby for a number of years. He competed in at least 32 fishing tournaments a year before 1997, strictly on a recreational basis. The Taxpayers also owned a farm outside of Eufaula, and tried to make additional income selling cattle and hogs. They were only marginally successful, and the Taxpayer realized that he needed another source of income. Consequently, he decided to become a professional fishing guide in 1997.

The Taxpayer signed a $500 sponsorship contract with Mercury Marine in 1997. He contacted various local businesses, but failed to obtain other sponsors. He advertised his guide service, and provided his services free to several local businesses. He failed, however, to receive any other income from his fishing activities, except the $500 received from Mercury Marine.

The Taxpayer continued to fish in numerous tournaments in 1997, but failed to win any money in that year. He also never took anyone fishing for hire. He has fished less in recent years because he has been required to work overtime on his job with the Department of Mental Health.

The Taxpayers claimed various Schedule A expenses on their 1997 Alabama return, including medical expenses, charitable contributions, and meal and lodging expenses relating to the Taxpayer's trips to Montgomery. They also reported fishing-related income of $500 and losses of $7,279 on Schedule C. The majority of the expenses, or $4,571,

constituted depreciation on the Taxpayer's fishing boat. Finally, the Taxpayers also claimed a farm-related loss in 1997.

The Department audited the return and disallowed the Schedule A expenses. It also disallowed the fishing and farm-related expenses because they were not entered into for profit.

The Taxpayers concede that the medical deductions were properly disallowed, and also that they are unable to verify the claimed charitable deductions. The Department concedes that the Taxpayers' farm-related expenses should be allowed. Consequently, the only disputed items are (1) the business-related meal and lodging expenses claimed on Schedule A, and (2) the fishing-related expenses claimed on Schedule C.

Issue (1) - The fishing expenses.

Whether the Taxpayer can deduct his fishing-related expenses turns on whether the activity was engaged in for profit. The criteria for determining if an activity is engaged in for profit was discussed in *State v. Lipscomb*, Inc. 92-288 (Admin. Law Div. O.P.O. 3/24/93), as follows:

> An expense can be deducted if the primary purpose for the activity was to make a profit. State, Department of Revenue v. Dawson, 504 So.2d 312, at pg. 313, and federal cases cited therein. The test is whether, from an objective review of all circumstances, the Taxpayer acted with a good faith expectation of making a profit. Dawson, supra, at pg. 313, citing Zell v. CIR, 763 F.2d 1139, at pg. 1142.
>
> Treas. Reg. §1.183-2(b) sets out a nonexclusive list of nine objective factors to be considered in determining whether an activity is "for profit." Those factors are:
>
> (1) The manner in which the taxpayer carries on the activity;
> (2) The expertise of the taxpayer or his advisor;
> (3) The time and effort expended by the taxpayer in carrying on the activity;

(4) Expectation that assets used in the activity may appreciate in value;
(5) The success of the taxpayer in carrying on other similar activities;
(6) The taxpayer's history of income or losses with respect to the activity;
(7) The amount of occasional profits earned, if any;
(8) The financial status of the taxpayer; and
(9) Elements of personal pleasure or recreation.

Lipscomb, Inc. 92-288 at 6.

The Taxpayer fished exclusively as a hobby before 1997. He claims he tried to make a profitable business out of his fishing activities in 1997. Toward that end, he signed a sponsorship agreement with Mercury Marine, and also advertised locally as a fishing guide. However, he never earned any income as a guide, nor did he win prize money in the many fishing tournaments he entered. He reduced his fishing activities after 1997 because of his full-time job with the Department of Mental Health.

Objectively reviewing the above facts, I cannot conclude that the Taxpayer had a reasonable expectation of making a profit from his fishing activities. The Taxpayer greatly enjoyed fishing as a hobby before 1997. He earned only $500 from his fishing activities over the years, and, importantly, he has never taken anyone fishing as a professional fishing guide. The fishing-related expenses claimed by the Taxpayer were thus properly disallowed.

Issue (2) - The meal and lodging expenses.

Unreimbursed travel, meal, and lodging expenses incurred by an employee can be deducted as ordinary and necessary business expenses pursuant to Code of Ala. 1975, §40-18-15(1). However, such expenses can only be deducted if incurred while the employee is away from his tax home. An employee's "tax home" is defined by Dept. Reg. 810-3-15-10(1)(b)(1) as a place where his business activities are centered, or he spends

most of his working time, or the place where he reports to or receives instructions from his employer.

In this case, the Taxpayer's tax home in 1997 was the Montgomery facility to which he was permanently assigned. The lodging and meal expenses were thus incurred by the Taxpayer at his tax home, not away from his tax home. The Taxpayer could have moved to Montgomery after he was permanently reassigned to the Montgomery facility in 1995. He elected not to. The meal and lodging expenses incurred by the Taxpayer were nondeductible commuting expenses, and thus cannot be allowed.

The Department is directed to recompute the Taxpayers' liability as indicated above. A Final Order will then be entered for the adjusted amount due.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered January 6, 2003.

BILL THOMPSON
Chief Administrative Law Judge