STEVE E. & BONNIE J. TONDERA 1808 Epworth Drive, NE Huntsville, AL 35811-2129,	§ §	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayers,	§	DOCKET NO. INC. 02-870
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed 1999 income tax against Steve E. and Bonnie J. Tondera (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 May 7, 2003. Steve Tondera (individually "Taxpayer") represented the Taxpayers. Assistant Counsel Glen Powers represented the Department.

The issue in this case is whether the Taxpayers can deduct all of their cattle farming related expenses in 1999. That issue turns on whether the Taxpayers were in the trade or business of cattle farming in that year.

The Taxpayer was employed as an engineer/mathematician/physicist with NASA in Huntsville, Alabama from the 1950s until he retired in 1996. His wife worked as a registered nurse until recently. The couple live in Huntsville, Alabama.

The Taxpayer purchased a 255 acre farm east of Huntsville in 1958. The Taxpayer initially purchased 12 heifers and 1 bull to raise on the farm. Over the years, the Taxpayer has attempted to develop a superior breed of cattle that will mature faster, and thus cost less to raise. The Taxpayers regularly traveled to the farm after work and on weekends to feed and otherwise care for the herd. They generally sold the weaker or inferior calves each year, and kept the rest.

The Taxpayers have never made a profit raising cattle. From 1995 through 2002, they reported losses from the cattle farm that totaled over $354,000. They claimed income of $8,634 and expenses of $52,110, or a net loss of $43,476, from the cattle farm on their 1999 Alabama return.

The Department audited the Taxpayers' 1999 return, determined that the farm activities were not engaged in for profit, and thus disallowed the farm-related expenses in that year.[1]

A taxpayer may deduct all ordinary and necessary expenses incurred in carrying on a trade or business. Code of Ala. 1975, §40-18-15(a)(1). That Alabama statute is patterned after its federal counterpart, 26 U.S.C. §162. Consequently, federal case law may be applied in interpreting the Alabama statute. *Best v. Dept. of Revenue*, 417 So.2d 197 (Ala.Civ.App. 1981).

An activity is considered a trade or business if the taxpayer entered into the activity for profit. "The general test for whether the taxpayer is engaged in a 'trade or business' . . . is whether the taxpayer's primary purpose and intention in engaging in the activity is to make a profit." *State of Alabama v. Dawson*, 504 So.2d 312, 313, citing *Zell v. Comm. of Internal Revenue*, 763 F.2d at 1139, 1142 (10th Cir. 1985). Conversely, nonbusiness "hobby losses" can be deducted only to offset income from the activity. See, 26 U.S.C. §183. All facts and circumstances must be considered in determining if an activity was entered into for profit.

The Taxpayer is a sincere individual. However, an objective review of the facts

[1]The Department also audited the Taxpayers' 2000 return and disallowed the farm-related expenses in that year. However, only the 1999 final assessment is in issue in this

shows that the Taxpayer was not cattle farming to make a profit. First, the Taxpayers did not rely on cattle farming to make ends meet. Rather, they had good jobs from which they earned sufficient income to pay living expenses, and also the expenses incurred on the cattle farm. Importantly, the Taxpayers have never realized a profit in over 44 years of cattle farming. The Taxpayer clearly enjoys raising cattle, and takes personal pride in breeding superior calves. But an objective person would not realistically expect to begin making a profit after 40 plus years of losses. The Taxpayer's personal pleasure realized from the activity also supports the finding that the activity was not entered into for profit.

In *Dawson*, *supra*, the Court of Civil Appeals found that a taxpayer that regularly raced cars was engaged in a trade or business. An important factor in the Court's decision was that the taxpayer was not otherwise employed during the subject years, and racing was his only money making activity. The taxpayer had large expenses and lost money when he began racing. The Court explained, however, that they were "start up" expenses, and instead put emphasis on the fact that the taxpayer recognized a gain in a later year. None of the factors relied on by the Court in *Dawson* to find that the activity was for profit are present in this case.

Because the Taxpayer's cattle breeding activity was not entered into for profit, he can only deduct his farm-related expenses to offset his farm income. A review of the Department's adjustment report shows that total farming expenses were disallowed. Consequently, the Department should recompute the Taxpayers' 1999 liability by allowing farm expenses to offset farm income in that year. A Final Order will then be entered for the adjusted amount due.

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case.

This Opinion and Preliminary Order is not an appealable Order. The Final Order, when entered, may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered June 26, 2003.