STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
HERBERT ABRAMOWITZ	:	DECISION
For Redetermination of a Deficiency or for Refund of New York State and New York City 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 Year 1981.	:	

Petitioner, Herbert Abramowitz, 143 19-25 Avenue, Whitestone, New York 11357, filed an exception to the determination of the Administrative Law Judge issued on June 8, 1989 with respect to his petition for redetermination of a deficiency or for refund of New York State and New York City 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 year 1981 (File No. 803313). Petitioner appeared by William Liebowitz, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq. of counsel).

Petitioner did not file a brief. The Division filed a letter in lieu of a brief. Oral argument, at the request of the petitioner, was heard on January 31, 1990.

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

ISSUE

Whether the Division of Taxation properly disallowed a loss arising out of the operations of H&A Enterprises, Inc., and claimed on petitioner's New York State personal income tax return

for 1981, upon the assertion that H&A Enterprises, Inc. did not timely file an election to be treated as a small business corporation for New York State tax purposes for such year.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below. We find additional facts which are also separately stated below.

On April 12, 1985, the Division of Taxation issued to petitioner, Herbert Abramowitz, a Notice of Deficiency asserting additional personal income tax due for 1981 in the amount of $2,172.76, plus interest.

Prior thereto, on April 1, 1985, the Division of Taxation issued a Statement of Audit Changes to petitioner indicating that the aforementioned Notice of Deficiency was premised on two bases, to wit (a) disallowance of a loss in the amount of $11,785.00 incurred by H&A Enterprises, Inc. ("H&A") and carried through and claimed on petitioner's personal income tax return for 1981, and (b) disallowance of certain claimed itemized deductions in the amount of $689.00.[1] At hearing it was conceded that the disallowed itemized deductions were not at issue and that the only issue was the propriety of the Division of Taxation's disallowance of petitioner's claimed loss. The Division's sole basis for disallowance is the assertion that H&A did not timely elect treatment as a small business corporation for New York State tax purposes by filing a Form CT-6 (Election by Shareholders of a Small Business Corporation for New York State Personal Income Tax and Corporation Franchise Tax Purposes).

Petitioner, Herbert Abramowitz, a dentist, is also the sole shareholder of the 100 shares of stock of H&A. H&A is engaged in the manufacture of jewelry, more specifically medicated earrings. H&A was incorporated and received authority to conduct business in New York State on July 31, 1968. It is undisputed that petitioner elected treatment as a small business corporation (Internal Revenue Code Subchapter S) for Federal corporation income tax purposes,

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[1]The same itemized deductions were disallowed upon audit by the Internal Revenue Service with the result thereof (an increase to petitioner's taxable income) not reported by petitioner to New York State.

and has filed accordingly for Federal purposes for each year since 1970, including the year at issue herein (1981).

Both petitioner and H&A had been clients of petitioner's representative, William Liebowitz, C.P.A., since approximately 1968 (the inception of H&A). During the early part of 1981, the year in which New York State first allowed corporations to elect Subchapter S treatment for New York tax purposes, petitioner and Mr. Liebowitz discussed and decided that H&A would elect to file in such fashion.

At hearing, Mr. Liebowitz testified to the circumstances surrounding this matter. In or about September 1981, Mr. Liebowitz prepared and also made a photocopy of Form CT-6 (the "Form") on behalf of H&A. In accordance with his regular office practice, Mr. Liebowitz brought the original of such Form to petitioner who signed the same at Mr. Liebowitz's direction. Mr. Liebowitz witnessed petitioner sign the election Form, after which he returned with the Form to his office. In turn, Mr. Liebowitz personally brought the completed Form CT-6, as well as other (unspecified) outgoing mail, to the U.S. Post Office located at Tillery Street, Brooklyn, New York, where he delivered such Form in a properly addressed post paid envelope to the postal clerk for handling. Mr. Liebowitz testified to his specific recollection of these steps and noted that he did not give the Form to his secretary for mailing or place the Form in a mail box, but rather personally delivered it to the Post Office, as described.

Mr. Liebowitz (and petitioner) alleges the Form to have been completed, signed and mailed on September 15, 1981. In accordance with his standard office practice, Mr. Liebowitz retains a photocopy of all forms, tax returns, etc. prepared in his office. These forms are duplicates of the originals in all respects, but are unsigned. At hearing, Mr. Liebowitz produced a copy of the Form CT-6 allegedly filed on behalf of H&A, which Form bears a handwritten date of September 15, 1981. Mr. Liebowitz noted that he keeps a mailing log with respect to all tax returns filed from his office. However, with respect to submissions of other forms, such as the Form at issue herein, he merely keeps a copy thereof. Mr. Liebowitz noted that the Post Office at Tillery Street is open 24 hours per day, 7 days per week.

The Form CT-6 in question was mailed by Mr. Liebowitz via ordinary mail as opposed to certified or registered mail. Mr. Liebowitz notes that he is, and was during 1981, a notary public. Mr. Liebowitz, however, did not notarize petitioner's signature on the Form CT-6, because such Form does not call for notarization. However, Mr. Liebowitz did witness petitioner affix his signature to the noted Form.

Introduced in evidence were copies of H&A's Forms CT-4 (Corporation Franchise Tax Report) for the years 1981 and 1982. The 1981 Report reflects no tax liability for H&A and includes the statement (at line 21) "not subject - 1120 S Election". The Form CT-4 filed for 1982, however, reflects a (minimum) tax liability of $250.00, which amount appears to have been paid. In response to the Division of Taxation's assertion that such manner of filing and payment would appear contrary to having a valid CT-6 election in place, petitioner's representative noted that at the time of filing he had become aware of the Division's position that no timely election was on file. Hence, he advised H&A to file and pay minimum tax due in order to "protect petitioner's position if the Subchapter S case was lost" and "at least avoid the potential of being in violation of Tax Law Article 9-A requirements".

In 1983, H&A filed a Form CT-6. As described by petitioner's representative, this filing was to ensure that the Division admitted that, at least by 1983, a valid CT-6 election was in place.

Also introduced at hearing was an Internal Revenue Service verified photocopy of H&A's Form 1120S (U.S. Small Business Corporation Income Tax Return) for 1981.

We find as an additional fact that petitioner introduced into evidence 1) a certification of the original 1981-CT-6; 2) a copy of the original 1981-CT-6; and 3) a copy of a "new" CT-6 for 1981.

These documents were submitted into evidence along with the Internal Revenue Service verified photocopy of H&A's Form 1120S, noted above, with a cover letter from petitioner's representative to the Division which indicates the documents were being furnished as per a letter

dated March 15, 1988 from the Division's representative to petitioner's representative. A copy of the March 15, 1988 letter was also submitted.

OPINION

The Administrative Law Judge determined that petitioner's representative was a credible witness; that it was not beyond the realm of belief that handling/delivery errors can occur, in general, and could have occurred in this case but that as a matter of law, proof of ordinary mailing is insufficient to prove timely filing where, as here, there is no actual delivery of the document in question. The Administrative Law Judge concluded that since petitioner could offer no receipt showing timely mailing by certified or registered mail to prove that the Subchapter S election was filed as required, the election was not timely filed and petitioner's losses are disallowed.

On exception, the petitioner reasserts the argument that, based on the testimony of his representative, he had proven proper mailing of the election and thus that it was timely filed. If there is failure, petitioner asserts, it is subsequent mishandling by the Postal Service or the Division.

The Division asserts that, under the facts in this case, petitioner did not prove timely filing of the election.

The Administrative Law Judge determined that petitioner's representative was a credible witness. The Administrative Law Judge also determined that the petitioner did not prove the timely mailing and, thus, the timely filing of the Subchapter S election (Matter of Sipam Corporation, Tax Appeals Tribunal, March 10, 1988). We affirm this determination of the Administrative Law Judge.

At oral argument before this Tribunal the representative of the Division raised a question of fact concerning the existence of a policy of the Division of Taxation which allows taxpayers who claim to have timely filed a Subchapter S election by mail, but who cannot prove such by evidence of certified or registered mail, to submit alternative documentation to prove filing. The question was raised in the context of the $250.00 payment made by petitioner for 1982, Article 9-

A liability and the various documents submitted by petitioner at hearing, particularly, the 1981 Federal 1120S form.

We remand the case to the Administrative Law Judge for further proceedings to determine the Division's policy concerning the handling of Subchapter S elections and whether the Division reasonably applied such policy to the facts and circumstances of the case at hand.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the case is remanded to the Administrative Law Judge for a new hearing to be scheduled to determine the Division of Taxation's policy on accepting Subchapter S elections and the application of this policy in the instant case.

DATED: Troy, New York
March 22, 1990

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner