

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
YANNIS AND ALANNA PLATIAS : **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 New York :
City Administrative Code for the Year 1982. :

Petitioners Yannis and Alanna Platias, 429 East 52nd Street, New York, New York 10022 filed an exception to the determination of the Administrative Law Judge issued on April 12, 1990 with respect to their 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 New York City Administrative Code for the year 1982 (File No. 805557). Petitioner Yannis Platias appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation filed a letter in opposition to the exception. Petitioners' request for oral argument was denied.

ISSUE

Whether the Division of Taxation properly disallowed a loss arising out of the operations of a corporation and claimed on petitioners' New York State personal income tax return for 1982, upon the assertion that the corporation 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. These facts are set forth below.

Yannis and Alanna Platias (hereinafter "petitioners") timely filed a 1982 New York State Resident Income Tax Return under the filing status "married filing joint return". On the return, petitioners claimed a loss of \$36,281.00 from Hartley's Restaurant, Inc. ("Hartley's").

On February 13, 1986, the Division of Taxation issued to petitioners a Statement of Audit Changes which contained the following explanation:

"If a subchapter S corporation does not make the election provided under section 660 of the New York Tax Law, each shareholder must increase his Federal adjusted gross income by an amount equal to his proportionate share of the net operating loss of the corporation to the extent the shareholder deducted such loss in determining his Federal adjusted gross income. This provision pertains to all subchapter S corporations with tax years beginning on or after January 1, 1981. (Section 612(b)(19) of the N.Y. State Tax Law.)"

Pursuant to this explanation, the Statement of Audit Changes recomputed petitioners' 1982 personal income tax liability after disallowance of the loss of \$36,281.00 from Hartley's as claimed by petitioners.

On April 11, 1986, the Division of Taxation issued to petitioners a Notice of Deficiency in the amount of \$5,112.36, plus interest.

Petitioner Yannis Platias was an officer and shareholder of Hartley's, owning 50 percent of the outstanding shares. Hartley's was incorporated and received authority to conduct business in New York State on July 17, 1979. It filed its tax returns on the basis of the calendar year.

At hearing, Mr. Platias testified that his accountant handled the filing of all tax forms relating to the corporation. He stated that the accountant filed the Election by Shareholders of a Small Business Corporation for New York State Personal Income Tax and Corporation Franchise Tax Purposes, Form CT-6, on January 14, 1981. As the corporation had been out of business since 1981, the accountant was unable to find a copy of the filed Form CT-6. The accountant did provide Mr. Platias with a sample copy of a completed Form CT-6 and wrote a letter to the Division of Taxation which stated that the Form CT-6 was timely filed. Mr. Platias further testified that, although he was not certain whether a Federal election had been filed, he had not

been contacted by the Internal Revenue Service concerning the tax year 1982. In addition, the accountant had been unable to locate any documentation relating to the corporation's Federal filings. Information submitted by the Division of Taxation into evidence, although not conclusive, indicates that petitioners had claimed a 1982 subchapter S corporation loss of \$36,281.00 on their Federal income tax return.

OPINION

In the determination below, the Administrative Law Judge held that petitioners had not proved that they timely filed Form CT-6 on behalf of Hartley's for 1982. The Administrative Law Judge based his decision on petitioners' failure to offer proof of certified or registered mailing and petitioners' failure to submit a copy of the filed CT-6, evidence of the federal election or Hartley's U.S. Small Business Corporation Income Tax Return for 1982.

On exception, petitioners assert that they proved the timely filing of the Form CT-6 through the letter of their accountant and the fact that there was no logical reason not to have filed the election.

In response, the Division requests that the decision of the Administrative Law Judge be affirmed. In addition, the Division acknowledges that it has a policy of granting subchapter S elections where the taxpayer cannot prove the timely filing of the CT-6 provided that certain evidence is submitted. The Division asserts that petitioners failed to submit this evidence at the hearing and, thus, the Division is precluded from taking favorable administrative action in this case.

We remand this matter for a further hearing.

We have remanded cases similar to the instant one on the basis that they raised unresolved issues of fact about the existence and application of a policy by the Division to accept other than certified or registered mailing evidence as proof of a timely filed CT-6 (Matter of Parks, Tax Appeals Tribunal, August 9, 1990; Matter of Abramowitz, Tax Appeals Tribunal, March 22, 1990). In this case, the letter submitted by the Division on exception acknowledges the existence of this policy; however, we are not able to determine if this policy was applied to petitioners prior to their hearing. Specifically, the Division's letter states that taxpayers who do not have a valid CT-6 on file are requested to supply a properly completed, signed and dated copy of the original CT-6 filed and a copy of the Federal subchapter S approval letter. If this

material is submitted, the taxpayer will be granted the subchapter S election. In this case, petitioners did not provide either of these documents at the hearing. However, the record does not indicate that the Division ever specifically requested this material from petitioners. Since a specific request to these pro se petitioners for the necessary information could have changed the outcome of this case, we remand this matter for a hearing to determine if the Division applied its policy to these taxpayers and requested the required information.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this matter is remanded to the Administrative Law Judge for a hearing to determine if the Division of Taxation applied its policy of requesting specific evidence as proof of filing the CT-6 in the instant case.

DATED: Troy, New York
December 6, 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