

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
LYNDA JURIST : DECISION
for Redetermination of a Deficiency or for Refund of : DTA No. 806488
Personal Income Tax under Article 22 of the Tax Law and :
of New York City Personal Income Tax under Chapter 46, :
Title T of the New York City Administrative Code for the :
Years 1983 and 1984. :

Petitioner Lynda Jurist, 888 Park Avenue, New York, New York 10021, filed an exception to the determination of the Administrative Law Judge issued on December 31, 1992. Petitioner appeared by Richard DeMarco, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation filed a letter brief in response. Petitioner was given until April 19, 1993 to file a reply brief. No reply was filed by petitioner and, therefore, the six-month period to issue this decision began on April 19, 1993. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioner met her burden to prove that no business was carried on in New York State.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The Division of Taxation ("Division") issued a Statement of Personal Income Tax Audit Changes dated April 9, 1987 against petitioner, Lynda Jurist, asserting additional New York

State/City personal income taxes for 1983 and 1984 as follows:

	1983		1984	
	<u>NYS</u>	<u>NYC</u>	<u>NYS</u>	<u>NYC</u>
Reliance Capital Advisors, Inc.	\$53,212.00	\$53,212.00	\$ 2,031.00	\$ 2,031.00
Net Adjustment	53,212.00	53,212.00	2,031.00	2,031.00
Taxable Income Previously Stated	<u>16,055.00</u>	<u>16,055.00</u>	<u>239,436.00</u>	<u>239,436.00</u>
Corrected Taxable Income	\$69,267.00	\$69,267.00	\$241,467.00	\$241,467.00
Tax on Above				
Max Tax if Applicable	\$ 8,257.38		\$ 32,365.38	
Add: New York City		\$ 2,578.48		\$ 9,983.08
New York City Surcharge		257.85		499.15
Min Tax		0.00	9,883.90	4,118.29
Min Tax Surcharge City		0.00		205.91
Corrected Tax Due	\$ 8,257.38	\$ 2,836.33	\$ 42,249.28	\$ 14,806.43
Tax Previously Computed/Adjusted	<u>966.00</u>	<u>389.00</u>	<u>41,982.00</u>	<u>14,721.54</u>
Additional Tax Due	\$ 7,291.38	\$ 2,447.33	\$ 267.28	\$ 84.89

Total Additional Tax Due: \$10,090.88

Penalties for negligence under Tax Law § 685(a)(2) equal to five percent of the additional tax due plus interest were added to the additional tax asserted as due.

The following explanation was provided for the audit changes:

"Reliance Capital Advisors, Inc. has not elected sub-chapter [S] status with NY State."

The Division then issued a Notice of Deficiency dated July 3, 1987 against petitioner for 1983 and 1984 asserting additional personal income tax due of \$10,090.88, plus penalties and interest.

Petitioner alleged in her petition that the Division erroneously disallowed her distributive share of the income and loss of Reliance Capital Advisors, Inc. (hereinafter "Reliance Capital"), which was a Delaware subchapter S corporation. According to petitioner, because Reliance Capital was not required to pay Article 9-A tax since it conducted no business activities in New York, she was required to report her share of the income or loss of Reliance Capital, a subchapter S corporation, on her New York State/City tax returns.

In particular, the Division denied knowledge and information of the following allegations

included in the petition:

"Reliance Capital Advisors, Inc. is a Delaware Subchapter S corporation which engages in trading for its own account on the Philadelphia Stock Exchange and owns a seat on the New York Mercantile Exchange (but has not engaged in any trading therein). Reliance Capital Advisors, Inc. is not doing business, employing capital, owning or leasing property in a corporate or organized capacity nor maintaining an office in New York State and is not subject to the tax imposed under Article 9-A of the New York State Tax Law."

By a letter dated April 24, 1992, petitioner submitted the following documents in support of her position that Reliance Capital is not subject to tax under Article 9-A because it was not doing business in New York during the years at issue:

(i) Petitioner submitted a Form CT-245, "Maintenance Fee and Activities Report of Foreign Corporations Disclaiming Tax Liability", for 1984,¹ which showed the address of Reliance Capital as 4 Penn Center Plaza, Philadelphia, Pennsylvania. Its principal business activity was described as "trading on Philadelphia Stock Exchange." This report also disclosed that Reliance Capital, a Delaware corporation, was incorporated on January 11, 1979 and became "authorized to do business in New York State" on September 21, 1979. The activities report on the Form CT-245 showed that it actually began trading on the Philadelphia Stock Exchange on September 20, 1983. The 15 questions included in the activities report, which are posed to detect any business activities in New York, were all answered in the negative except for "9(g)" which asked whether officers or employees of the corporation "perform other activities in New York State." Petitioner responded: "mailed requests required by government regulating bodies"²

(ii) Petitioner submitted one page only of Reliance Capital's Pennsylvania corporate tax return, "Settlement Computation", for 1983, which showed a minimum tax of \$75.00.

¹The photocopy of this document is poor, and the date this report was signed by Reliance Capital's vice-president, whose signature is also not readable, was some date in June of 1987. According to the letter brief dated July 23, 1992 of the Division, petitioner previously filed "New York corporate franchise tax reports indicating that [Reliance Capital] had activities in New York and was subject to New York taxation." However, these returns were not submitted for review.

²Reliance Capital's ownership of a seat on the New York Mercantile Exchange, which was mentioned in petitioner's letter brief dated April 24, 1992, was not noted in the Form CT-245.

(iii) Petitioner also submitted Reliance Capital's Pennsylvania corporate tax report for 1984 which listed Pennsylvania taxable income of 0 and showed tax of \$75.00.

(iv) An excerpt from a "statement of financial condition" of Reliance Capital prepared by the certified public accountants, Touche Ross & Co., described Reliance Capital as follows:

"[Reliance] was incorporated in 1979 and was dormant until its capitalization on July 13, 1983. The Company registered in 1983 as a broker-dealer under the Securities Exchange Act of 1934. The Company is a member of the Philadelphia Stock Exchange and commenced activities in November 1983 as a registered market maker in securities options. As a market maker, the Company operates under Subsection (a)(6) of Rule 15c3-1.

"Revenues result principally from options transactions with other brokers which are cleared on a fully disclosed basis with a clearing broker. The Company does not carry customer accounts and introduces customer transactions to another clearing broker. Accordingly, the Company is not subject to the Securities and Exchange Commission's customer protection rule (SEC Rule 15c3-3) under exemptive provision (k)(2)(B)."

Two months after petitioner's submission, the Division, by a letter dated June 24, 1992, submitted additional documents including a complete copy of Reliance Capital's Pennsylvania corporate tax return settlement computation for 1983. The "Notice of Settlement", which was a part of such computation, showed a "revenue code" used by Pennsylvania of "foreign franchise" for Reliance Capital and a resulting tax balance of \$75.00. In addition, the Division submitted a copy of Reliance Capital's 1983 Pennsylvania corporate tax return which showed Reliance Capital's principal office as Park Avenue Plaza in New York City. A review of this return also showed that Reliance Capital reported as a foreign corporation to Pennsylvania, with no income or loss. Reliance Capital checked the following box on the 1983 Pennsylvania return:

"This Foreign Corporation, chartered under the laws of a state other than Pennsylvania, did not conduct any business, own property, or exercise any corporate rights or privileges of any kind within the Commonwealth of Pennsylvania during the tax year ended 12/31/83 [emphasis in original]."

The same box was checked off by Reliance Capital on its 1984 Pennsylvania return which was also submitted by the Division on June 24, 1992. Petitioner had submitted only the front page of Reliance Capital's 1984 Pennsylvania return.

In its submission dated June 24, 1992, the Division argued:

"Nothing has been submitted in evidence to show that Reliance was a subchapter S

corporation for federal tax purposes. Therefore, the petitioner is barred from taking such loss on her New York return and the adjustments adding back the losses to her New York income should be sustained."

In response, petitioner, by a letter dated July 13, 1992, submitted a copy of Reliance Capital's Form 1120S, "U.S. Income Tax Return for an S Corporation" for 1983 which showed an ordinary loss of \$1,520,335.00. Petitioner also submitted a copy of a Schedule K-1, "Shareholders Share of Income, Credits, Deductions, etc.", for petitioner which showed her distributive share of Reliance Capital's ordinary loss as \$53,212.00. Copies of Form 1120S and a Schedule K-1 for petitioner were also submitted for 1984. The 1984 Schedule K-1 showed petitioner's distributive share of Reliance Capital's ordinary loss for 1984 as \$2,301.00. It also showed her share of Reliance Capital's net short-term capital gain and net long-term capital gain as \$18,046.00 and \$27,068.00, respectively. A copy of a Federal Form 2553, "Election by a Small Business Corporation" dated December 30, 1983 showed the election to be treated as an "S corporation" was to be effective for the tax year beginning November 7, 1983. It is observed that on all of the returns and schedules described in Finding of Fact "7" the address provided for Reliance Capital was either 55 East 52nd Street or Park Avenue Plaza in New York City.

OPINION

The Administrative Law Judge determined that the shareholders of a corporation, which is a subchapter S corporation for Federal income tax purposes and is doing business in New York State, must make an election under Article 22 in order to be taxed on the S corporation's items of income, loss, gain, deduction, etc. The Administrative Law Judge further determined that the shareholders of an S corporation, which is not doing business in New York State, are not required to make an election under Article 22 in order to be taxed on the corporation's items of income, loss, gain, deduction, etc. The issue before the Administrative Law Judge was, therefore, whether Reliance Capital was doing business in New York State. The Administrative Law Judge noted that "even a small amount of New York business activity subjects a foreign corporation to tax in New York (see, Tax Law § 209.1; 20 NYCRR 1-3.2[b]; see also, Matter of Hugo Bosca Company, Tax Appeals Tribunal, October 17, 1991)" (Determination, conclusion

of law "D"). The Administrative Law Judge found that the record was inadequate to determine the extent of the corporation's business activities in New York. Further, the Administrative Law Judge found that the burden was on petitioner to establish that the corporation was not doing business in New York and that petitioner failed to meet this burden. As a result, the Administrative Law Judge found Reliance Capital was doing business in New York and that, because no election had been made by the shareholders of Reliance Capital to treat the corporation as an S corporation under New York Tax Law, the losses must be added back to Federal adjusted gross income.

Finally, the Administrative Law Judge did find evidence that petitioner had included in her 1984 New York adjusted gross income her share of Reliance Capital's net short-term capital gain and net long-term capital gain and, in view of the above, these amounts should be subtracted from petitioner's Federal adjusted gross income for 1984.

On exception, petitioner continues to assert that Reliance Capital was not doing business in New York and, therefore, an S corporation election was not available to it. Petitioner contends that her distributive share of losses and gains from Reliance Capital were properly included in her 1983 and 1984 New York State income tax returns.

Petitioner further argues that the financial description prepared by Touche Ross & Co. describing the business of Reliance Capital proves that no business was done in New York. Petitioner asserts that if this description was not satisfactory to resolve the extent of the business activities of Reliance Capital in New York, then the Division should have requested the books and records of Reliance Capital. Petitioner states that, as a shareholder, she did not have access to the books and records of the corporation.

In response, the Division maintains that petitioner carried the burden of proof to establish that no business was conducted in New York State and she failed to meet this burden. The Division argues that the documentation submitted by petitioner was inadequate and confusing. Further, the Division asserts that petitioner was not in a situation where she was prevented from getting additional information regarding Reliance Capital's business activities as her

representative's stationery lists him as "Assistant Director of Taxes of Reliance" (Division's brief on exception, p. 1).

We affirm the determination of the Administrative Law Judge. With respect to petitioner's assertion that the Division should have requested the books and records of Reliance Capital, we find that the burden of proof was on petitioner to furnish this information (Tax Law § 689[e]).

We find no basis in the record before us for modifying the Administrative Law Judge's determination. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Lynda Jurist is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Lynda Jurist is granted to the extent indicated in conclusion of law "E" of the Administrative Law Judge's determination, but is otherwise denied; and
4. The Division of Taxation is directed to modify the Notice of Deficiency dated July 3, 1987, in accordance with paragraph "3" above, but such notice is otherwise sustained.

DATED: Troy, New York
September 30, 1993

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

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