STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PARAMOUNT PICTURES CORPORATION AND SUBSIDIARIES	:	DECISION
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Years 1968, 1972, 1973, 1978 and 1981 through 1985.	:	

Petitioner Paramount Pictures Corporation and Subsidiaries, 101 Merritt Seven Corporate Park, P.O. Box 5105, Norwalk, Connecticut 06856-5105, filed an exception to the determination of the Administrative Law Judge issued on June 14, 1990 with respect to its petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 1968, 1972, 1973, 1978 and 1981 through 1985 (File No. 806624). Petitioner appeared by Ernst & Young (Kenneth T. Zemsky, CPA). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Both parties filed briefs on exception. Oral argument was denied.

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

ISSUE

Whether penalties imposed for petitioner's failure to have timely reported Federal audit changes on Form CT-3360 and paid tax due in connection therewith should be abated.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "4" and "6" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

In September 1984 (for the years 1968 and 1972) and August and September 1985 (for the years 1973 and 1978) petitioner, Paramount Pictures Corporation and Subsidiaries ("Paramount"), and the Internal Revenue Service ("IRS") finalized certain corporate Federal income tax audit changes.[1] In turn, however, petitioner did not report these final Federal changes to New York State until July 29, 1986 (for the years 1968, 1972 and 1973) and September 26, 1986 (for the year 1978).

On August 20, 1987, the Division of Taxation issued to petitioner four notices of deficiency together with statements of audit changes pertaining to the years at issue. These notices of deficiency assert corporate franchise tax due for each of the years in question, together with penalty, imposed under Tax Law § 1085(a)(1) and (2), and interest. Penalty imposition was based upon petitioner's failure to have timely filed a Report of Change in Taxable Income by U.S. Treasury Department (Form CT-3360) for each of the years in question as well as for its failure to have timely paid the tax due per such Form CT-3360's.

Subsequent to issuance of the above-described notices, and as the result of a prehearing conference, petitioner paid the tax and interest asserted via the notices of deficiency and such amounts are no longer at issue. Pursuant to the Conciliation Order issued after conference, the only remaining issue involves penalty in the aggregate amount of $129,513.00.

We modify the Administrative Law Judge's finding of fact "4" to read as follows:

> Petitioner is a large corporation, including some 450 subsidiaries, which does business or has some presence in nearly all, if not all, 50 states. Petitioner regularly files annual tax returns in each of these states, and is under constant Federal audit (Tr., pp. 44, 45). Petitioner, during the years in question, employed a state and local tax staff of approximately 17 persons, of which 11 persons were assigned to handle state and local franchise (or corporate income) tax matters. Although petitioner, at hearing, claimed that such a limited staff could not possibly comply with the tax reporting requirements, no attempt was made by petitioner to assign additional employees to meet this burden (Tr., p. 38).

---

[1]The years at issue herein are 1968, 1972, 1973 and 1978. Although the notice of hearing also indicates the years 1981 through 1985, the parties have stipulated that such years are no longer in issue. Accordingly, they will not be addressed.

> During the years in question, petitioner's overall business allocation percentage to New York State was approximately eight percent. Petitioner had higher business allocation percentages to California and Illinois (the percentages were not specified) and a nearly identical business allocation percentage to New Jersey.[2]

In addition to the Federal audit changes for the years in question, the IRS also audited petitioner's 1980 corporate Federal income tax return, which audit resulted in a substantial net operating loss for said year. As a result, petitioner was aware at the time the Forms CT-3360 were due that a net operating loss from 1980 would be available for carryback to 1978 which would more than offset petitioner's tax liability to New York State for 1978.[3]

We modify the Administrative Law Judge's finding of fact "6" to read as follows:

> Petitioner admitted it was aware of its obligation, pursuant to Tax Law § 211.3, to report the Federal changes in taxable income for the years in question to New York State via the filing of Forms CT-3360 within 90 days after the final Federal determinations. Likewise, petitioner admits that such forms were not timely filed with New York State and that tax due in connection therewith was not timely paid. In this vein, however, petitioner noted that a New York State auditor was scheduled to audit petitioner's returns for subsequent years and that petitioner, in accordance with its policy where field audits are scheduled, awaited the arrival of the auditor and then voluntarily gave the reports of Federal changes to the auditor.[4] This field audit, which takes place every three years, was

---

[2]The Administrative Law Judge's finding of fact "4" read as follows:

> "Petitioner is a large corporation, including some 450 subsidiaries, which does business or has some presence in nearly all, if not all, 50 states. Petitioner, during the years in question, employed a state and local tax staff of approximately 17 persons, of which 11 persons were assigned to handle state and local franchise (or corporate income) tax matters. During the years in question, petitioner's overall business allocation percentage to New York State was approximately eight percent. Petitioner had higher business allocation percentages to California and Illinois (the percentages were not specified) and a nearly identical business allocation percentage to New Jersey."

We have modified this finding of fact to reflect the record in more detail.

[3]Application of the 1980 net operating loss as a carryback to the other years in question was precluded by operation of the statute of limitations.

[4]The deemed filing dates for the Forms CT-3660 are the dates when petitioner gave the forms to the auditor.

commenced according to schedule on July 29, 1986. Petitioner was aware of the timing of this field audit (Tr., p. 46).[5]

OPINION

In the determination below, the Administrative Law Judge denied petitioner's request to abate penalties imposed due to petitioner's failure to timely report Federal audit changes in accord with Tax Law § 211(3). Specifically, it was determined that petitioner failed to show the existence of reasonable cause for this delinquency sufficient to abate the penalty as required by Tax Law § 1085(a)(1).

On exception, petitioner argues that due to the existence of a large tax compliance burden, as well as a severe staffing cutback brought on by corporate overhead reductions, timely filing of the CT-3360 was physically impossible. Petitioner contends that these facts, together with its voluntary submission of the CT-3360 to a New York State auditor sent to examine its books, its minimal nexus with the State, and its excellent compliance record in New York, are evidence of reasonable cause and an absence of willful neglect, and together are sufficient to abate the penalties imposed.

Additionally, petitioner notes the existence of a 1980 net operating loss carryback, which would completely offset the increase to its 1978 taxable income arising from the Federal audit adjustments. Petitioner contends that this fact, although alone not determinative, is sufficient to abate the penalty imposed when viewed together with all the surrounding facts and circumstances.

In response, the Division of Taxation (hereinafter the "Division") contends that petitioner's decision to allocate resources to pursuits other than timely tax compliance, and to submit the adjustment reports to an auditor upon the commencement of a future examination is not a "reasonable cause," and constitutes a willful failure to file within the required period.

---

[5]We have modified finding of fact "6" of the Administrative Law Judge's determination by adding the last two sentences in order to reflect the record in more detail.

In addition, the Division asserts that the significant percentage of business conducted by petitioner in New York State is not accurately characterized as a "minimal nexus." Further, it states that even if this "minimal nexus" characterization is proper, a mistake of fact on the part of the taxpayer, which is a requirement to abate the penalty under this analysis, does not exist in this case.

The Division also asserts that petitioner's record of conscientious compliance with New York tax requirements is irrelevant, as it is useful only in determining whether a taxpayer's mistake of fact is reasonable. The Division contends that because petitioner was aware of its duty to file in New York, this reasonable mistake analysis may not be applied in this case.

We affirm the determination of the Administrative Law Judge.

Tax Law § 211(1) imposes a duty upon every taxpayer required to file a report under Article 9-A of the Tax Law to transmit whatever reports, facts, and information the Commissioner may require for the administration of this Article. Tax Law § 211(3) states that a taxpayer whose taxable income has been changed or corrected by the IRS must report the change or correction to the Division within 90 days after the final determination of such change or correction. Under this authority, the former State Tax Commission duly promulgated 20 NYCRR 6-3.1(b), which provides in relevant part:

> "A change in Federal taxable income must be reported on Form CT-3360. Form CT-3360 must be accompanied by a copy of the revenue agent's report and copies of all other pertinent information."

Tax Law § 1085(a), which imposes penalties upon a taxpayer for failure to file a return or pay tax on a timely basis, allows for an abatement of these penalties only upon a showing that "such failure is due to reasonable cause and not due to willful neglect." The standard to be applied under this circumstance is set forth in 20 NYCRR 46.1(d)(4), which defines "reasonable cause" as:

> "Any . . . cause . . . which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect may be

> determined to be reasonable cause. Ignorance of the law, however, will not be considered as a basis for reasonable cause."

We will first address petitioner's contention that a severe staffing shortage and an arduous compliance burden rendered timely filing of the reports physically impossible and, thus, constituted reasonable cause. To support this position, petitioner contends that during this period it was faced with the task of closing ten years of books in a two-year period. Petitioner also claims its ability to report the adjustments was further hampered by its inability to hire additional staff to timely complete this work, as its tax department was undergoing a period of retrenchment due to corporate overhead reduction. Petitioner relies on Matter of Armour & Co. (State Tax Commn., April 4, 1985) to support this position. In Armour, a penalty for late filing of Forms CT-3360 was abated due to the existence of a "staffing problem, inexperienced employees and a substantial workload," as well as petitioner's "excellent compliance record in New York State [and elsewhere] and its giving of prompt, voluntary notice of the Federal changes to the New York auditor upon [his] arrival for audit."

Petitioner contends that because these same factors, which collectively were determinative in Armour, exist in the present case, a similar result should be reached. Although these factors together may in certain circumstances indicate that a taxpayer's noncompliance with the Tax Law was due to "reasonable cause and not willful neglect," the fact that they exist in some degree does not compel an abatement of the penalty in all cases. Rather, in order to evaluate the significance of these factors in determining whether "reasonable cause" exists, it is necessary to examine the underlying circumstances giving rise to their existence.

Petitioner is a large corporation with significant resources. The heavy tax compliance burden complained of by petitioner was continuous, arising from petitioner being under constant Federal audit and its regular filing of tax returns in nearly all 50 states. Although petitioner contends that it had limited personnel to meet its tax reporting requirements, it acknowledges that there was no attempt to redress this problem by assigning additional employees. Petitioner's claim that a tax department request for additional personnel was not feasible due to corporate

overhead reductions is not persuasive. If a taxpayer decides to allocate its resources in a manner which places a low priority on tax compliance, then it should also assume the additional costs brought on by this decision. Thus, if timely reporting was a "physical impossibility," it appears this resulted from petitioner's decision to have it remain so.

This position is consistent with that taken in the analogous situation of an individual's failure to file a timely return (Dustin v. Commr., 467 F2d 47, 72-2 USTC ¶ 9610). In applying a similar "reasonable cause" standard in Dustin, the United States Court of Appeals for the Ninth Circuit rejected a certified public accountant's claim that his workload was such that he could not timely file his own return, holding that this choice would not excuse him from fulfilling his own legal obligations (Dustin v. Commr., supra). We agree with the Administrative Law Judge that petitioner's result, if adopted, would allow a corporate taxpayer to ignore statutory time requirements and decide on its own when to meet its tax reporting obligations. Thus, we find that petitioner's staffing shortages and workload do not constitute "reasonable cause."

In further support of its argument that timely reporting was not possible, petitioner points to its favorable tax compliance history in New York State, as well as the voluntary submission of the CT-3360 to the State auditor upon his arrival, factors which were considered in abating the penalty in Armour. More specifically, in an attempt to parallel the facts of these two cases, petitioner notes that in Armour, the taxpayer promptly and voluntarily submitted the adjustment report to the auditor upon the commencement of the audit. Petitioner thus concludes from this fact that the taxpayer in Armour, like petitioner, had knowledge that the adjustment report was required to be timely submitted. However, the fact that the taxpayer in Armour had knowledge of the reporting requirement at the time of the audit does not address the critical time period in determining whether "reasonable cause" existed, which is whether a taxpayer possessed such knowledge at the time the report was due. While it cannot be determined upon a reading of Armour when the taxpayer became aware of this reporting requirement, petitioner acknowledges that it was aware of its obligation prior to the deadline. Moreover, the head of petitioner's tax

department testified that at the time the task of filing the adjustment reports with all the states (including New York) was assigned to a corporate employee, it was aware of the probability that some reporting deadlines would not be met (Tr., p. 35). Thus, to allow the mere fact that these reports were voluntarily submitted to serve as the primary basis to abate the penalty imposed would, in light of the surrounding circumstances, sanction such knowing deviations from the statute.

Petitioner also contends that its minimal business activities with New York State serve as further support to abate the penalty. In support of its position, it cites Matter of Chain Store Properties (State Tax Commn., May 20, 1986). In Chain Store, the only activity of the taxpayer in New York State was the holding of a six percent interest in a joint venture that owned one property in the State. The location of this property was overlooked by the corporation's bookkeeper who prepared the tax returns, resulting in a failure to file a New York State franchise tax return.

Petitioner would interpret Chain Store to hold that a taxpayer's "minimal nexus" with New York, coupled with an ignorance of the statutory reporting requirements, provides reasonable cause for delay in filing a franchise tax report. Further, it contends that because a mistake of law is never an excuse for failure to comply with the tax laws, a minimal nexus with the state may alone constitute "reasonable cause." This interpretation, however, is inconsistent with the language of Chain Store, which explicitly states that any ignorance of the law on the part of the corporation was of no consequence. Rather, it was the corporation's mistake of fact, together with its minimal nexus with the state, which excused the late payment. The State Tax Commission's conclusion that the mistake was reasonable was based on the corporation's minimal nexus with New York (cf., Matter of McDonnell Douglas Corp., Tax Appeals Tribunal, May 4, 1989 [where penalty was not abated because the petitioner failed to prove that the mistake was reasonable]). Clearly, no mistake of fact exists in the present case, as petitioner's tax department was fully aware of petitioner's tax reporting responsibilities within New York and

specifically chose not to comply. Therefore, this "minimal nexus" analysis is not relevant here to excuse petitioner's failure to report on a timely basis.

Petitioner also contends that its decision to wait until a future audit to personally submit the audit adjustments to a State auditor is a reasonable cause for delay. Central to petitioner's argument is the existence of a net operating loss carryback arising in 1980, which would offset the tax increase for the year 1978 resulting from the audit adjustments. Petitioner argues that it was reasonable to wait and submit these changes upon a future audit, whereupon the tax increase and the loss carryback could be consolidated, rather than to pay the 1978 tax liability and then receive a complete refund.

Upon an examination of the surrounding facts, petitioner's argument clearly falters. The benefit to petitioner arising from the application of the loss carryback was limited to an offset of its tax liability for 1978 and, therefore, would not be an excuse for the failure to file the report of Federal audit changes for the other years at issue. Petitioner's view of administrative efficiency fails to justify such a deliberate violation of its reporting responsibilities under the Tax Law. To allow returns to be filed and tax paid according to the discretion of the taxpayer would frustrate the goal of timely reporting that section 211 seeks to achieve.

Based upon all the evidence presented, we conclude that petitioner made a conscious decision not to comply with the clear language of Tax Law § 211(3). We agree with the Administrative Law Judge's position that to allow such a blatant disregard for the statutory time requirement set forth in Tax Law § 211(3) would render this provision meaningless. We find, therefore, that the arguments advanced by petitioner, considered individually as well as taken together, are insufficient to abate the penalties in question.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Paramount Pictures Corporation and Subsidiaries is in all respects denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Paramount Pictures Corporation and Subsidiaries is denied; and

4. The penalties asserted on the notices of deficiency dated August 20, 1987 are sustained.

DATED: Troy, New York
March 14, 1991

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

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

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