STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
UPLAND, INC.	:	DECISION
for Redetermination of a Deficiency/Revision of a Determination or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Year 1987	:	

Petitioner, Upland, Inc., 8559 Hudson Road, RD 2, Wayland, New York 14572, filed an exception to the order of the Administrative Law Judge issued on May 11, 1989 with respect to its petition for redetermination of a deficiency, revision of a determination or for refund of corporation franchise tax under Article 9-A of the Tax Law for the year 1987 (File No. 806786). Petitioner appeared by Alaine T. Espenscheid, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Mark Volk, Esq., of counsel).

Petitioner filed a brief on exception. The Division submitted a letter in lieu of a brief.

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

ISSUES

I. Whether the Division of Tax Appeals has jurisdiction to entertain petitioner's petition if it was timely filed.

II. Whether petitioner's petition for a hearing was timely filed.

III. If petitioner's petition for a hearing was timely filed, whether petitioner has shown reasonable cause and the absence of willful neglect sufficient to abate the Tax Law § 685(h)(2) penalties.

FINDINGS OF FACT

We find the following facts.

On November 23, 1988 the Division of Taxation issued a Notice and Demand for Payment in the amount of $2,000.00. The notice stated that it was assessing penalty for late filing of CT-3S at $50 per shareholder per month for a maximum of five months. Petitioner filed a petition dated March 31, 1989 for revision of the foregoing notice. The petition was received bythe Division of Tax Appeals on April 3, 1989. Accompanying the petition was a copy of a handwritten letter which contained a request that the notice be rescinded. The letter had a handwritten date of November 29, 1988 and bore the signature and social security number of Vincent Monaco, Jr. The letter also explained that Mr. Monaco was the bookkeeper and a shareholder of petitioner. In addition to the received stamp of the Division of Tax Appeals dated April 3, 1989, the letter bore a received stamp of December 2, 1988 from an unknown source. Also accompanying the petition received on April 3, 1989 was a copy of a document issued by the Division of Taxation to petitioner which indicated that it was a response to earlier correspondence from petitioner concerning the notice being petitioned. The response contained an explanation that the assessment would be upheld since reasonable cause had not been established. In addition to the received stamp of the Division of Tax Appeals dated April 3, 1989 the response bore a received stamp of March 1, 1989 from an unknown source. On May 11, 1989 an Administrative Law Judge dismissed the petition with prejudice sua sponte on the grounds that a review of the file indicated that the petition was not timely filed.

OPINION

In the order dismissing the petition the Administrative Law Judge decided sua sponte that the petition should be dismissed as untimely since it appeared that the petition was not filed within 90 days after the issuance of the Notice and Demand for Payment as prescribed by Tax Law § 2006.4.

On exception petitioner argues that it timely filed a petition, as a letter protesting the Notice and Demand was submitted within 90 days from the issuance of the Notice and Demand.

Further, petitioner contends that its late filing of form CT-3S for 1987 was due to reasonable cause and not due to willful neglect such that the Tax Law § 685(h)(2) penalty should be abated.

In response, the Division of Taxation relies upon the order of the Administrative Law Judge for its position that petitioner did not timely file a petition.

We affirm the order of the Administrative Law Judge.

Tax Law § 209.8 provides, in part, that "[a] taxpayer which is an S corporation for federal income tax purposes shall not be subject to the tax under this article [9-A] for any taxable year for which an election is in effect pursuant to subsection (a) of section six hundred sixty of this chapter." Shareholders of electing S corporations are taxed under the applicable personal income tax provisions of Article 22 of the Tax Law (Tax Law § 660[a]). Tax Law § 685 imposes a number of additions to tax and civil penalties and establishes the means for assessing and collecting these additions and penalties. The penalty imposed upon petitioner, specifically prescribed by Tax Law § 685(h)(2), is for late filing of the S Corporation Information Report, form CT-3S.

Tax Law § 685(l) provides in part that:

> "Additions treated as tax.--The additions to tax and penalties provided by this section shall be paid upon notice and demand and shall be assessed, collected and paid in the same manner as taxes, and any reference in this article to income tax or tax imposed by this article, shall be deemed also to refer to the additions to tax and penalties provided by this section" (emphasis added).

In general this means that a notice of deficiency is issued by the Division of Taxation to inform a taxpayer of an asserted penalty. The taxpayer then has the right to contest such a notice of deficiency before having to pay it (Tax Law § 689[b]). However, Tax Law § 685(l) goes on to provide several exceptions to this general procedure:

> "For purposes of section six hundred eighty-one [which deals generally with the procedure for issuance of notices of deficiency], this subsection shall not apply to:
> (1) any addition to tax under subsection (a) except as to that portion attributable to a deficiency;
> (2) any addition to tax under subsection (c);
> (3) any penalty under subsection (h) and any additional penalty under subsection (i); and

> (4) any penalties under subsections (j), (k), (q), (r) and (s)" (emphasis added).

In these situations the Division of Taxation can proceed against the taxpayer by the issuance of a Notice and Demand, as it did in this case. Further, Article 22 of the Tax Law does not provide a taxpayer with the right to petition a Notice and Demand.

> "The principle underlying the difference in treatment among the various additions to tax and penalties is apparently based on whether or not such addition or penalty is measured by the amount of an asserted deficiency. If the addition or penalty is measured by an asserted deficiency then a 'notice of deficiency' is required to be issued and the taxpayer will have the right to contest the deficiency, and the addition or penalty that is based upon it, before payment. If, however, the addition or penalty is not measured by an asserted deficiency then a 'notice and demand' is issued and the taxpayer must pay the amount shown in order to contest the deficiency." (Matter of Dreisinger, Tax Appeals Tribunal, July 20, 1989 [emphasis as in original]).

An application of these principles to the facts before us results in the conclusion that petitioner's right to contest the liability asserted pursuant to Tax Law § 685(h)(2) is conditioned upon payment of the amount assertedly due followed by the filing of a claim for refund (see, Tax Law § 687). Since petitioner did not abide by these procedures the petition is premature and untimely in that respect (see, Matter of Dreisinger, supra).

The next issue to be addressed is the effect of Tax Law § 2006.4 which grants the Tax Appeals Tribunal the power:

> "To provide a hearing as a matter of right, to any petitioner upon such petitioner's request, pursuant to such rules, regulations, forms and instructions as the tribunal may prescribe, unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter. Where such a request is made by a person seeking review of taxes determined or claimed to be due under this chapter, the liability of such person shall become finally and irrevocably fixed, unless such person, within ninety days from the time such liability is assessed, shall petition the division of tax appeals for a hearing to review such liability" (emphasis added).

This language is derived from former Tax Law § 171(21) enacted in 1979 as part of the taxpayer's bill of rights which vested similar authority in the State Tax Commission, this Tribunal's predecessor, to insure taxpayers a hearing as of right.

We conclude that petitioner may not avail itself of Tax Law § 2006.4 in order to obtain a hearing as other statutory provisions have modified the right to such a hearing. Specifically, the right of petitioner to challenge the penalties imposed by Tax Law § 685(h)(2) is denied by the combined operation of Tax Law §§ 681(a), 685(h)(2), 685(l)(3) and 689 (see, Matter of Dreisinger, supra).

The last issue which we will address is the timeliness of the petition. The facts here lead us to conclude that if petitioner was entitled to a hearing upon the issuance of the Notice and Demand, we would remand this case for a hearing to determine if the petition was timely filed. Tax Law § 2006.4 requires that the Division of Tax Appeals be petitioned within 90 days of the assessment of liability if a hearing is to be allowed. Here the Notice and Demand was mailed on November 23, 1988. The petition was not mailed until March 31, 1989 which was 128 days later. Petitioner, however, claims that the assessment was protested in a timely manner by way of a letter which it issued to the Division of Taxation which contains a handwritten date of 11/27/88. We agree that the letter could qualify as a petition, but petitioner has so far failed to prove that the letter was properly mailed or timely received. Petitioner argues that the conclusion that the letter was timely filed gains support from the receipt by petitioner of a response to such letter from the Division of Taxation which denied petitioner's claim for abatement of the penalties and which is undated but bears a stamped received date of March 1, 1989. Missing from the record before us is the envelope in which the Division of Taxation's response was mailed to petitioner. Without the envelope in which the response was sent we cannot verify the accuracy of the received stamp on the response. Therefore, if the Notice and Demand at issue gave rise to a hearing right, we would remand this matter for a hearing to give petitioner an opportunity to prove that the letter was timely filed. However, since we have concluded that the Notice and Demand does not give rise to a hearing, we need not remand it for this purpose and we are without jurisdiction to reach the merits of petitioner's claim for the abatement of the penalties imposed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, Upland, Inc., is denied;

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

3. The petition of Upland, Inc. is denied; and

4. The Notice and Demand for Payment of Corporate Franchise Tax Due issued on November 23, 1988 is sustained.

DATED: Troy, New York
April 12, 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