

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
HERBERT ABRAMOWITZ : DETERMINATION
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 a 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).

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on March 1, 1989 at 1:15 P.M. Petitioner appeared by William Liebowitz, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Andrew Zalewski, Esq. of counsel).

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

1. 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.

2. 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).

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

4. 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.

5. 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

¹The 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.

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.

6. 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.

7. 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.

8. 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".

9. 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.

10. 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.

SUMMARY OF THE PARTIES' POSITIONS

11. The Division of Taxation argues that it has searched for but found no record of having received a timely Form CT-6 for 1981 on behalf of H&A, thus maintaining that H&A was not entitled to "pass through" to petitioner the loss in question. Petitioner asserts, by contrast, and in reliance upon the testimony by Mr. Liebowitz, that Form CT-6 was timely filed for 1981, hence maintaining that petitioner properly claimed the loss in question on his personal income tax return for such year.

CONCLUSIONS OF LAW

A. Tax Law § 209.8, as in effect during the period in question, permitted shareholders of a corporation, which had made an election under Subchapter S of the Internal Revenue Code, to elect to be taxed on the corporation's items of income, loss, gain, deduction, etc. under the New York State Personal Income Tax Law (Article 22), with the corporation thereby becoming exempt from corporation franchise tax as imposed under Tax Law Article 9-A. This provision pertained to corporate taxable years beginning on or after January 1, 1981, and required that every shareholder of the corporation make the election to be taxed, as specified, under Article 22.

B. Tax Law § 660(d)(3), as in effect during the period in question, provided that the aforementioned election of Subchapter S treatment by the shareholders of the corporation, for any taxable year beginning on or after January 1, 1981 and ending prior to December 31, 1982, was to be made within nine months from the beginning date of such taxable year. Thus in order for H&A to have been exempt from corporation franchise tax, and for petitioner to have been entitled to claim the loss in question, H&A's sole shareholder (petitioner) was required to file Form CT-6 within nine months of the January 1, 1981 commencement of H&A's 1981 taxable year, to wit by September 30, 1981. It is noted that such election, though made on Form CT-6 and allowing exemption from tax at the corporate level, is made pursuant to provisions of the Personal Income Tax Law (Tax Law § 660).

C. As was held in Matter of Sipam Corporation (Tax Appeals Tribunal, March 10, 1988), "proof of ordinary mailing is insufficient, as a matter of law, to prove timely filing, where there is no actual delivery of the petition." (Emphasis added.) It was also pointed out that use of registered or certified mail provides prima facie evidence of delivery of documents, whereas by using ordinary mail the taxpayer bears the risk that the document may not be delivered at all

(Matter of Sipam Corporation, supra). Although the Sipam case dealt with the filing of a petition, the rule set forth therein is equally applicable to the filing of a document such as the Form CT-6 at issue herein (see 20 NYCRR 146.4[d] [which broadly defines "document" to include "any...tax return, claim, statement, notice, petition or other document required to be filed under the authority of any provision of article 22 of the Tax Law"]; cf. Matter of Harron's Electric Service, Inc., Tax Appeals Tribunal, February 19, 1988).

D. In this case, petitioner's representative provided testimony as to his well established office practice regarding preparation and mailing of documents such as the election form in question and also as to his specific recollection of dealing with the subject election form, as detailed. In turn, there is nothing in the record which would impugn the credibility of petitioner's representative or his testimony. In short, petitioner alleges to have proven proper mailing with subsequent mishandling either by the U.S. Postal Service or by the Division of Taxation.

E. As noted, petitioner's representative was a credible witness. Further, it is not beyond the realm of belief that handling/delivery errors can occur, in general, and could have occurred in this case. However, 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. Petitioner can offer no receipt showing timely mailing by certified or registered mail to prove that the election via Form CT-6 was filed as required within 9 months of the commencement of H&A's 1981 tax year, with which proof the present problem could have been overcome (see, Matter of Sipam Corporation, supra; Matter of Harron's Electric Service, Inc., supra). However, and unfortunately, without such proof, the petition must be denied.

F. The petition of Herbert Abramowitz is hereby denied and Notice of Deficiency dated April 12, 1985 is sustained.

DATED: Troy, New York

June 8, 1989

/s/ Dennis M. Galliher

ADMINISTRATIVE LAW JUDGE