

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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

Petitioners, Yannis and Alanna Platias, 429 East 52nd Street, New York, New York 10022, 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 New York City Administrative Code for the year 1982 (File No. 805557).

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on February 8, 1990 at 10:45 A.M. Petitioner Yannis Platias appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

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

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.

SUMMARY OF THE PARTIES' POSITIONS

The Division of Taxation argues that, not having received a timely Form CT-6 for 1982 on behalf of Hartley's, Hartley's is not entitled to "pass through" to petitioners the loss in question.

Petitioners contend that the Form CT-6 was timely filed and that there exists no reason why they would not have filed such a form, in light of the obvious tax benefits involved.

CONCLUSIONS OF LAW

A. Tax Law § 612(b) (former [19]), in effect for the year at issue, provided that in computing the New York adjusted gross income of a resident individual who is a shareholder of a corporation which is an electing small business corporation for Federal income tax purposes, and where the election provided for in Tax Law § 660 (former [d]) has not been made for a taxable year of such corporation, there is added to Federal adjusted gross income an amount equal to the individual's portion of the loss of such corporation, where such loss was deducted by the shareholder pursuant to Internal Revenue Code § 1374.

B. Tax Law § 209 (former [8]), as in effect during the period in question, permitted shareholders of a corporation which has 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.

C. Tax Law § 660 (former [d][1]), as in effect during the period in question, provided that the election of subchapter S treatment by the shareholders of the corporation was to be made at any time during the preceding taxable year of such corporation, or at any time during the first 75 days of such corporation's taxable year. Thus, in order for Hartley's to have been exempt from corporation franchise tax, and for petitioners to have been entitled to claim the loss in question, Hartley's shareholders were required to file Form CT-6 within the year 1981 or within 75 days of January 1, 1982, to wit, by March 16, 1982.

D. In Matter of Sipam Corporation (Tax Appeals Tribunal, March 10, 1988) it was 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. 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 (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).

E. 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 the year 1981 or within 75 days of January 1, 1982, with which proof the present problem could have been overcome (see, Matter of Sipam Corporation, supra; Matter of Harron's Electric Service, Inc., supra). Furthermore, petitioner was unable to provide a copy of the Form CT-6 claimed to have been filed, any documents relating to the corporation electing to be an S corporation for Federal purposes, or Hartley's Form 1120S (U.S. Small Business Corporation Income Tax Return) for 1982. Under these circumstances, without such proof, the petition must be denied.

F. The petition of Yannis and Alanna Platias is hereby denied and the Notice of Deficiency dated April 11, 1986 is sustained.

DATED: Troy, New York
April 12, 1990

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE