

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

RICHARD SPITALNY AND DIANNE SPITALNY

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Year 1981.

DECISION

In the Matter of the Petition

of

PETER JABLON AND DIANE JABLON

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Year 1981.

Petitioners, Richard Spitalny and Dianne Spitalny, 24 Tanglewild Road,
Chappaqua, New York 10514, filed a petition for redetermination of a deficiency
or for refund of personal income tax under Article 22 of the Tax Law for the
year 1981 (File **No.** 61746).

Petitioners, Peter Jablon and Diane Jablon, 46 Valley Lane, Chappaqua, New
York 10514, filed a petition for redetermination of a deficiency or for refund
of personal income tax under Article 22 of the Tax Law for the year 1981 (**File**
No. 61580).

A consolidated hearing was held before Allen Caplowaith, Hearing Officer,
at the offices of the State Tax Commission, Two World Trade Center, New York,
New York, on September 9, 1986 at 9:15 A.M. Petitioners appeared by Bernard
Rappaport, CPA. The Audit Division appeared by John P. Dugan, **Esq.** (Herbert
Kamrass, Esq., **of** counsel).

ISSUE

Whether the Audit Division properly disallowed each petitioner's proportionate share of a net operating loss derived from a small business corporation which failed to make an election to be a subchapter S corporation for New York State purposes, but made such election for Federal purposes.

FINDINGS OF FACT

1. Richard Spitalny and his wife, Dianne Spitalny, filed a New York State Resident Income Tax Return for 1981 whereon Mr. Spitalny reported his proportionate share of the net operating loss of Pona Star Entertainment, Inc. ("Pona Star"), a small business corporation. His proportionate share, as reported, was \$27,155.00.

2. Peter Jablon and his wife, Diane Jablon, filed a New York State Resident Income Tax Return for 1981 whereon Mr. Jablon reported his proportionate share of the net operating loss of Pona Star. His proportionate share, as reported, was \$13,577.00.

3. Said losses were claimed on each petitioner's 1981 Federal return.

4. For Federal purposes, Pona Star elected to be a subchapter S corporation for 1981. No such election was made by Pona Star for 1981 for New York State purposes.

5. On March 25, 1985, the Audit Division issued a Statement of Audit Changes to Mr. and Mrs. Spitalny wherein the aforestated claimed loss of \$27,155.00 was disallowed. The explanation provided in said statement was as follows:

"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 New York State Tax Law)."

6. On March 27, 1985, the Audit Division issued a Statement of Audit Changes to Mr. and Mrs. Jablon wherein the aforesaid claimed loss of \$13,577.00 was disallowed for reasons identical to those provided with respect to Mr. and Mrs. Spitalny.

7. Based on the aforesaid statement, a Notice of Deficiency was issued against Mr. and Mrs. Spitalny on April 8, 1985, asserting additional personal income tax of \$3,621.26, plus interest of \$1,301.18, for a total due of \$4,922.44. A Notice of Deficiency was also issued against Mr. and Mrs. Jablon on April 12, 1985, asserting additional personal income tax of \$1,357.60, plus interest of \$490.83, for a total due of \$1,848.43.

8. Petitioners claim that the adjustments are unduly harsh and unfair since they had intended to file a subchapter S election for 1981 but failed to do so based on the confusion created by changes in the law.

CONCLUSIONS OF LAW

A. That section 660 of the Tax Law, as amended in 1981, provided for the benefit of a pass through of income and loss from a subchapter S corporation to the individual shareholders if all shareholders filed the election for subchapter S status. To obtain such pass through benefit, the election had to be filed with New York State even if a Federal election had been made.

B. That if such election is not made, the shareholders must add back to Federal adjusted gross income their pro-rata share of the net operating loss of the corporation to the extent such loss was deducted for Federal income tax purposes pursuant to section 612(b)(19) of the Tax Law.

C. That since such election was not made by the shareholders of Pona Star for taxable year 1981, the shareholders, in determining their New York adjusted gross incomes, are required to increase their respective Federal adjusted gross incomes by their pro-rata share of the net operating loss of Pona Star as reported on their Federal returns.


D. That the petition of Richard Spitalny and Dianne Spitalny **is** denied and the Notice of Deficiency issued against them on April 8, 1985 **is** sustained, together with such additional interest as may be lawfully owing.


E. That the petition of Peter Jablon and Diane Jablon is denied and the Notice of Deficiency issued against them on April 12, 1985 is sustained, together with such additional interest as may be lawfully owing.


DATED: Albany, New York

STATE TAX COMMISSION

MAR 13 1987


PRESIDENT


COMMISSIONER


COMMISSIONER

