

STATE OF NEW YORK

STATE TAX COMMISSION

In the Platter of the Petition

of

DAVID A. JOHNSON and ELIZABETH M. JOHNSON :

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 Platter of the Petition

of

DEAN F. MELVILLE and SANDRA A. MELVILLE

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

Petitioners, David A. Johnson and Elizabeth M. Johnson, 75 Glenwood Road, Saranac Lake, New York 12983, 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. 66818).

Petitioners, Dean F. Melville and Sandra A. Melville, 22 Catherine Street, Saranac Lake, New York 12983, 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. 61745).

A combined hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, W.A. Harriman State Office Building Campus, Albany, New York on October 21, 1986 at 1:15 P.M., with all briefs to be submitted by December 23, 1986. Petitioner David A. Johnson appeared ~~pro se~~. Petitioner Dean F. Melville appeared ~~pro E~~. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUES

I. Whether the statute of limitations bars the Audit Division from asserting deficiencies of personal income tax for the year 1981.

II. Whether the Department of Taxation and Finance was obligated to notify petitioners of their opportunity to elect to have small business corporation tax treatment.

III. Whether the shareholders of Paradox Aero, Ltd. filed a timely election to have their corporation treated as a small business corporation for franchise tax and personal income tax purposes for the year 1981.

FINDINGS OF FACT

1. Petitioners, David A. Johnson and Elizabeth M. Johnson, filed a New York State Resident Income Tax Return for the year 1981 wherein they elected a filing status of "Married filing joint return". On this return, Mr. and Mrs. Johnson reduced their adjusted gross income by their share of the net operating loss of Paradox Aero, Ltd.

2. On April 8, 1985, the Audit Division issued a Notice of Deficiency to David A. Johnson and Elizabeth M. Johnson, asserting a deficiency of personal income tax for the year 1981 in the amount of \$1,049.74 plus interest of \$377.19 for a balance due of \$1,426.93. To the extent at issue herein, the previously issued Statement of Audit Changes explained that since Paradox Aero, Ltd. did not make a New York election to be treated as a small business corporation each shareholder must increase his Federal adjusted gross income by his proportionate share of the net operating loss of the corporation. The amount of the increase in adjusted gross income was determined by the extent to which the shareholder deducted such loss in determining his adjusted gross income.

3. Petitioners, Dean F. Melville and Sandra A. Melville, filed a New York State Resident Income Tax Return for the year 1981 electing a filing status of "Married filing joint return". On this return Mr. and Mrs. Melville reduced their adjusted gross income by **Mr.** Melville's share of the net operating loss of Paradox Aero, Ltd.

4. On April 12, 1985 the Audit Division issued a Notice of Deficiency to Dean F. Melville and Sandra A. Melville asserting a deficiency of personal income tax for the year 1981 in the amount of \$1,085.92 plus interest of \$392.62 for a balance due **of** \$1,478.54. **To** the extent at issue herein, the previously issued Statement of Audit Changes contained the same explanation as had been given to Mr. and **Mrs.** Johnson.

5. On or about December 31, 1980, Paradox Aero, Ltd. submitted a Federal election form to be treated as a small business corporation. On March 12, 1981, the Internal Revenue Service advised the corporation that its election was effective for the tax year beginning December 26, 1980.

6. Paradox Aero, Ltd. filed a U.S. Small Business Corporation Income Tax Return for the year 1981.

7. Paradox Aero, Ltd. filed a State **of** New York Corporation Franchise Tax Report for the year 1981. The preparer of the report did not indicate whether a New York election to be treated as a small business corporation had been filed. However, the corporation did remit the minimum tax of \$250.00.

8. On or about July 28, 1981 the Technical Services Bureau of the Taxpayer Services Division issued a memorandum which set forth the procedure for electing to be treated as a small business corporation. Petitioners assert that the Technical Services Bureau erred in failing to send the memorandum to them.

9. On March 15, 1985, petitioners filed an Election by a Small Business Corporation form with the New York State Department of Taxation and Finance. Prior to this time, petitioners were not aware that they were required to file such an election.

CONCLUSIONS OF LAW

A. That Tax Law § 683(a) provides that tax shall be assessed within three years after the returns were filed. However, a return filed prior to the last date prescribed by law **is** deemed to be filed on such last date (Tax Law § 683[b][1]). The last day for the filing of the personal income tax returns involved herein for the year 1981 was April 15, 1982 (20 NYCRR 146.1). Since the notices of deficiency were issued within three years of the date the returns were deemed filed, the notices of deficiency were not barred by the statute of limitations.

B. That the Audit Division was not under any duty to advise petitioners of legislative changes in the Tax Law (Matter of Patrick's Food Service, Inc., State Tax Commn., April 15, 1986). Therefore, the fact that petitioners did not receive a particular Taxpayer Services Bureau memorandum **is** not a basis for cancelling the notices of deficiency.

C. That 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 under the New York State personal income tax law, with the corporation thereby becoming exempt from corporation franchise tax. This provision pertained to corporate taxable years beginning on or after January 1, 1981.

D. That in order for petitioners to have been able to claim the corporation's **loss**, the corporation's shareholders were required to make the necessary

election by filing form CT-6 within nine months of the January 1, 1981 commencement of the corporation's taxable year. (Tax Law former § 660[d][3].) Since the election was not made until March 15, 1985, which is well beyond the statutory nine month period, the election was untimely and petitioners were not permitted to claim the corporation's loss on their personal income tax returns.

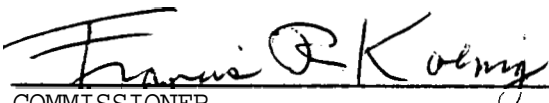
E. That the petitions of David A. Johnson and Elizabeth M. Johnson and Dean F. Melville and Sandra A. Melville are denied and the notices of deficiency dated, respectively, April 8, 1985 and April 12, 1985 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 29 1987


PRESIDENT


COMMISSIONER


COMMISSIONER