

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
David A. & Elizabeth M. Johnson : AFFIDAVIT OF MAILING

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

State of New York :
ss.:
County of Albany :

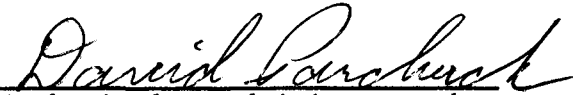
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 29th day of May, 1987, he/she served the within notice of decision by certified mail upon David A. & Elizabeth M. Johnson the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

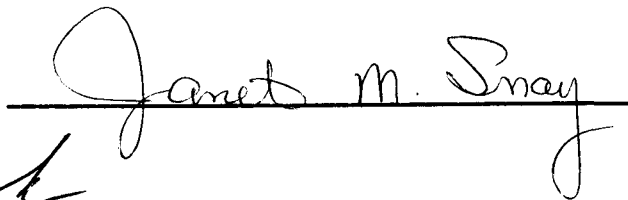
David A. & Elizabeth M. Johnson
75 Glenwood Road
Saranac Lake, NY 12983

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
29th day of May, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Dean F. & Sandra A. Melville : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Year 1981. :

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 29th day of May, 1987, he/she served the within notice of decision by certified mail upon Dean F. & Sandra A. Melville the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dean F. & Sandra A. Melville
22 Catherine Street
Saranac Lake, NY 12983

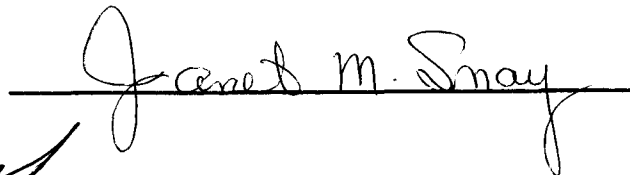
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Sworn to before me this
29th day of May, 1987.



Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

May 29, 1987

David A. & Elizabeth M. Johnson
75 Glenwood Road
Saranac Lake, NY 12983

Dear Mr. & Mrs. Johnson:

Please take notice of the decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

May 29, 1987

Dean F. & Sandra A. Melville
22 Catherine Street
Saranac Lake, NY 12983

Dear Mr. & Mrs. Melville:

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Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter 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 Matter 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 se. 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