

STATE TAX COMMISSION

Richard &amp; Dianne Spitalny :

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Personal Income  
Tax under Article(s) 22 of the Tax Law for the :  
Year 1981.

SS. :

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 13th day of March, 1987, he/she served the within notice of Decision by certified mail upon Richard & Dianne Spitalny the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

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  
13th day of March, 1987.

Authorized to administer oaths  
pursuant to Tax Law section 174

Janet M. Smay

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of  
Peter & Diane Jablon :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Personal Income  
Tax under Article(s) 22 of the Tax Law for the :  
Year 1981.  
\_\_\_\_\_ :

State of New York :

ss.:

County of Albany :

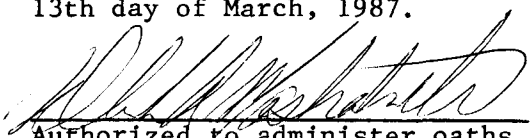
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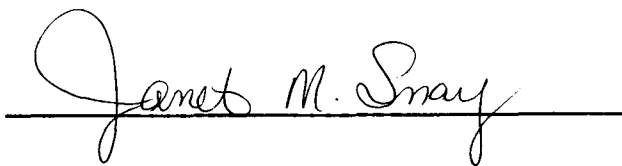
Peter & Diane Jablon  
46 Valley Lane  
Chappaqua, NY 10514

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of

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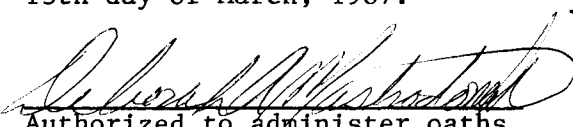
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 13th day of March, 1987, he served the within notice of Decision by certified mail upon Bernard Rappaport, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

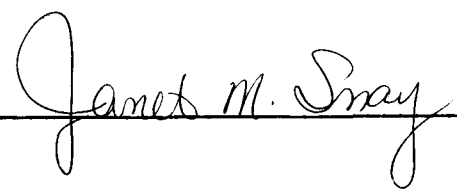
Bernard Rappaport  
c/o Seymour Schneidman & Associates  
405 Park Ave.  
New York, NY 10022

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

Sworn to before me this  
13th day of March, 1987.

  
Authorized to administer oaths  
pursuant to Tax Law section 174

  
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STATE OF NEW YORK

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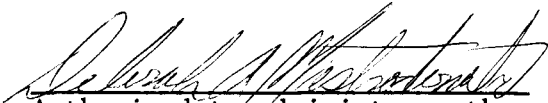
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Sworn to before me this  
13th day of March, 1987.

Janet M. Snay

  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

March 13, 1987

Richard & Dianne Spitalny  
24 Tanglewild Rd.  
Chappaqua, NY 10514

Dear Mr. & Mrs. Spitalny:

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

Petitioner's Representative:  
Bernard Rappaport  
c/o Seymour Schneidman & Associates  
405 Park Ave.  
New York, NY 10022

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

March 13, 1987

Peter & Diane Jablon  
46 Valley Lane  
Chappaqua, NY 10514

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Petitioner's Representative:  
Bernard Rappaport  
c/o Seymour Schneidman & Assoc.  
405 Park Avenue  
New York, NY 10022

STATE OF NEW YORK

STATE TAX COMMISSION

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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.

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DECISION

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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.

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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 aforesated 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