STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| PARAMOUNT PICTURES CORPORATION AND SUBSIDIARIES | : | DETERMINATION |
| for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Years 1968, 1972, 1973, 1978 and 1981 through 1985. | : | |

Petitioner, Paramount Pictures Corporation and Subsidiaries, 101 Merritt Seven Corporate Park, P.O. Box 5105, Norwalk, Connecticut 06856-5105, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 1968, 1972, 1973, 1978 and 1981 through 1985 (File No. 806624).

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on January 9, 1990 at 9:15 A.M., with all briefs to be submitted by April 20, 1990. Petitioner appeared by Ernst & Young (Kenneth T. Zemsky, CPA, and Corey L. Rosenthal, Esq.) The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether penalties imposed for petitioner's failure to have timely reported Federal audit changes on Form CT-3360 and paid tax due in connection therewith should be abated.

FINDINGS OF FACT

In September 1984 (for the years 1968 and 1972) and August and September 1985 (for the years 1973 and 1978) petitioner, Paramount Pictures Corporation and Subsidiaries ("Paramount"), and the Internal Revenue Service ("IRS") finalized certain corporate Federal

income tax audit changes.[1] In turn, however, petitioner did not report these final Federal changes to New York State until July 29, 1986 (for the years 1968, 1972 and 1973) and September 26, 1986 (for the year 1978).

On August 20, 1987, the Division of Taxation issued to petitioner four notices of deficiency together with statements of audit changes pertaining to the years at issue. These notices of deficiency assert corporate franchise tax due for each of the years in question, together with penalty, imposed under Tax Law § 1085(a)(1) and (2), and interest. Penalty imposition was based upon petitioner's failure to have timely filed a Report of Change in Taxable Income by U.S. Treasury Department (Form CT-3360) for each of the years in question as well as for its failure to have timely paid the tax due per such Form CT-3360's.

Subsequent to issuance of the above-described notices, and as the result of a prehearing conference, petitioner paid the tax and interest asserted via the notices of deficiency and such amounts are no longer at issue. Pursuant to the Conciliation Order issued after conference, the only remaining issue involves penalty in the aggregate amount of $129,513.00.

Petitioner is a large corporation, including some 450 subsidiaries, which does business or has some presence in nearly all, if not all, 50 states. Petitioner, during the years in question, employed a state and local tax staff of approximately 17 persons, of which 11 persons were assigned to handle state and local franchise (or corporate income) tax matters. During the years in question, petitioner's overall business allocation percentage to New York State was approximately eight percent. Petitioner had higher business allocation percentages to California and Illinois (the percentages were not specified) and a nearly identical business allocation percentage to New Jersey.

In addition to the Federal audit changes for the years in question, the IRS also audited

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[1]The years at issue herein are 1968, 1972, 1973 and 1978. Although the notice of hearing also indicates the years 1981 through 1985, the parties have stipulated that such years are no longer in issue. Accordingly, they will not be addressed.

petitioner's 1980 corporate Federal income tax return, which audit resulted in a substantial net operating loss for said year. As a result, petitioner was aware at the time the Forms CT-3360 were due that a net operating loss from 1980 would be available for carryback to 1978 which would more than offset petitioner's tax liability to New York State for 1978.[2]

Petitioner admitted it was aware of its obligation, pursuant to Tax Law § 211(3), to report the Federal changes in taxable income for the years in question to New York State via the filing of Forms CT-3360 within 90 days after the final Federal determinations. Likewise, petitioner admits that such forms were not timely filed with New York State and that tax due in connection therewith was not timely paid. In this vein, however,

petitioner noted that a New York State auditor was scheduled to audit petitioner's returns for subsequent years and that petitioner, in accordance with its policy where field audits are scheduled, awaited the arrival of the auditor and then voluntarily gave the reports of Federal changes to the auditor.[3]

SUMMARY OF PETITIONER'S POSITION

Petitioner alleges several bases in support of its request for abatement of penalty. First, petitioner maintains that it has a relatively minimal presence in New York State, as indicated by its eight percent business allocation percentage. Petitioner further explained that given the size of its organization it has massive state tax filing obligations in all of the various other state jurisdictions, and alleged that it had only limited personnel available to comply with all of its filing requirements. Petitioner asserts that its course of action in choosing to file the Forms CT-3360 with the New York State auditor upon his arrival, as opposed to filing said forms when

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[2]Application of the 1980 net operating loss as a carryback to the other years in question was precluded by operation of the statute of limitations.

[3]The deemed filing dates for the Forms CT-3360 are the dates when petitioner gave the forms to the auditor (see, Finding of Fact "1", supra).

due, is justified given the size of its presence in New York, its heavy filing obligations to other states, and its knowledge that the State auditor was arriving to conduct an audit and would "undoubtedly want copies of the forms". Petitioner also points out that as the result of the Federal adjustments for the year 1980, it was certain that petitioner would have available a huge loss which could be carried back and applied to eliminate any deficiency for 1978. In fact, based upon this 1980 net operating loss carryback, a Claim for Credit or Refund (Form CT-8) was

filed by petitioner for the year 1978. Petitioner thus argues, upon all of these bases, that its course of action was reasonable and should serve to excuse its late filing and payment as described.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 211.3, if the amount of taxable income as reported by a taxpayer to the IRS has been changed or corrected by the IRS, the taxpayer must report the change or correction to the former State Tax Commission[4] within 90 days after the final determination of such change or correction.

B. Tax Law § 211.1 imposes a duty upon every taxpayer required to file a report under Article 9-A of the Tax Law to transmit whatever reports, facts and information the Commissioner may require for the administration of that Article. Under this authority, the former State Tax Commission duly promulgated 20 NYCRR 6-3.1(b) which provides, in part, as follows:

> "A change in Federal taxable income must be reported on Form CT-3360. Form CT-3360 must be accompanied by a copy of the revenue agent's report and copies of all other pertinent information."

It should be noted that the form requires the taxpayer to calculate additional tax due as a result

[4]Effective September 1, 1987, under Tax Law § 2026 references to the State Tax Commission in the Tax Law, in all instances other than in relation to the administration of the administrative hearing process, are deemed to refer to the Division of Taxation or Commissioner of Taxation and Finance.

of the Federal change, plus interest, and remit payment for the total amount.

C. Petitioner freely admits to knowledge of these requirements under the Tax Law. Petitioner also freely admits that it did not comply with this 90-day statutory rule. However, petitioner alleges that there exists

reasonable cause pursuant to the Commissioner's regulations, specifically, 20 NYCRR 46.1(d)(4), which provides, in substance, that penalties may be abated upon a showing of cause which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect.

D. The arguments advanced by petitioner, standing alone as well as taken together, do not suffice to support abatement of the penalties in question. Petitioner argues, citing Matter of Chain Store Properties, Inc. (State Tax Commission, December 13, 1985 [TSB-H-86(1)C]), for the proposition that "minimal nexus" with a state provides a reasonable basis excusing failure to comply with a given provision of the Tax Law. Chain Store, however, involved that taxpayer's failure to file a corporation franchise tax return due to its bookkeeper's error based on lack of knowledge that the taxpayer owned any property in New York State subjecting the taxpayer to New York taxation. Here, petitioner has neither alleged nor proven error or a lack of knowledge. Rather, petitioner freely admits it knew of its obligation to file the Forms CT-3360 within 90 days. Petitioner also cites to Matter of Armour and Company (State Tax Commission, April 4, 1985 [TSB-H-85(12)C]), in support of its reqest for abatement. In Armour, abatement of penalty imposed for late filing of Forms CT-3360 was allowed upon the factors of "a staffing problem, inexperienced employees and a substantial workload" coupled with petitioner's "excellent tax compliance record in New York State [and elsewhere]" and "its giving of prompt, voluntary notice of the Federal changes to a New York auditor upon [his] arrival for audit." Though Armour includes facts similar to those found herein, it is distinguishable from the instant matter. More specifically, unlike the present case there is no evidence that the taxpayer in Armour made an apparently conscious choice to file late.

E. Petitioner essentially argues that given its allegedly "minimal nexus" to New York coupled with its concededly heavy filing obligations in a number of other jurisdictions and its allocation of a limited number of personnel to such obligations, allows petitioner to accord less priority to the statutory requirements for filing in New York State. This argument should not be countenanced. It was admitted at hearing that petitioner possessed all of the necessary information to have timely filed the subject Forms CT-3360. In fact, the only item lacking here was timely action on petitioner's behalf to make such filing. Petitioner's presentation has established that its limited staff (viewed in light of its overall filing obligations) and its apparent unwillingness to allocate more personnel to help comply with its filing obligations was the main reason for its lateness. Petitioner would seek to justify its lateness upon the arguments that petitioner knew it had a large net operating loss which would be available for carryback and that petitioner voluntarily gave the Federal audit changes to New York's auditor upon his arrival for an audit of subsequent years. Petitioner's justifications are insufficient as a basis to overcome the penalties imposed. In fact, petitioner's result, if adopted, would leave a taxpayer free to ignore statutory time requirements and decide on its own when to file forms, based essentially on its own choice of how to allocate resources and manpower. Such a result would render statutory time periods meaningless. In sum, a taxpayer's choice to allocate resources to areas other than tax compliance, thus leaving insufficient resources for tax compliance, leaves that taxpayer open to the consequences of its failure to comply with statutory requirements.

F. The petition of Paramount Pictures Corporation and Subsidiaries is hereby denied and the penalties in issue are sustained.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE