STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CHUDY PAPER CO., INC.	:	DECISION
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Year 1982.	:	

Petitioner, Chudy Paper Co., Inc., 930 Bailey Avenue, Buffalo, New York 14206, filed an exception to the determination of the Administrative Law Judge issued on December 15, 1988 with respect to its petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the year 1982 (File No. 804946). Petitioner appeared by Henry A. Orlowski, P.A. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Neither petitioner nor the Division filed a brief on exception. Oral argument at the request of the petitioner was heard on November 14, 1989.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly recomputed petitioner's franchise tax liability on a separate basis in the absence of prior permission to file its report on a combined basis.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and also find additional facts as stated below.

On September 15, 1983, petitioner, Chudy Paper Co., Inc., and its subsidiary, Rochester Paper Co., Inc., filed a combined franchise tax report for the calendar year 1982. Petitioner had

applied for and been granted extensions of time through September 15, 1983 to file its 1982 report.

On September 8, 1986, the Division of Taxation issued to petitioner a Statement of Tax Reduction or Overpayment for the year 1982.[1] Said statement was based on a recomputation of petitioner's 1982 franchise tax liability on a separate (as opposed to a combined) basis and resulted in the following adjustments:

"Entire net income	$286,144.10
Tax on entire net income @ 10%	28,614.41
Plus: Tax on subsidiary capital @ .0009	22.50
Tax due	28,636.91
Less: Tax per original report	6,971.73
Tax deficiency	21,665.18
Less: Overpayment per CT-412 attached	28,328.27
Net refund due	6,663.09cr
	[plus interest]"

In early 1982, petitioner acquired 80 percent of the stock of Rochester Paper Co., Inc. Petitioner retained an attorney to handle its acquisition. At that time, petitioner's accountant was under the impression that said attorney had also handled all necessary filings with respect to requesting permission to file combined franchise tax reports. Petitioner intended to file a combined report for 1982.

On September 26, 1983, the Division received a photocopy of a letter, dated December 14, 1982, from petitioner's accountant which advised the Division that petitioner and its subsidiary would be "filing a Consolidated [sic] Return for Federal and State Tax purposes." The letter also stated the following:

> "If I do not receive any response to this communication, it will [sic] presumed that this communication will fulfill the requirement of notifying The Corporation Tax Bureau of our filing intentions."

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[1]The Division of Taxation also issued a Notice of Deficiency to petitioner for the year 1983. Said notice was cancelled by a Conciliation Order, dated September 25, 1987, issued by the Division's Bureau of Conciliation and Mediation Services.

The Division received no communication from petitioner regarding its filing of a combined report other than petitioner's franchise tax report and the above-noted letter which was received on September 26, 1983.

At no time did petitioner or its accountant receive any communication from the Division either granting or denying petitioner's request to file combined reports.

We find the following additional facts.

Copies of the December 14, 1982 and January 15, 1983 letters submitted by the petitioner were addressed as follows: Processing Unit, P.O. Box 1909, Albany, New York. The 1982 Combined Franchise Tax Report CT-3A directs taxpayers to file the report at the same address. The regulations in effect for 1982 did not prescribe a mailing address for the requests to file a combined report. Current regulations (filed November 30, 1983 effective for all tax years ending on or after December 31, 1983) provide that the request must be addressed as follows: Department of Taxation and Finance, Central Office Audit Bureau, Corporation Tax Section, Building 9, State Campus, Albany N.Y. 12227 (20 NYCRR 6-2.4[a]).

The Division introduced into evidence an affidavit executed by the Head Clerk assigned to the Business Tax Processing Unit describing the procedures employed by the Division regarding receipt and processing of correspondence concerning franchise tax which provides in relevant part as follows:

> "6. Clerical staff of the depository bank open each letter received at P.O. Box 1909. Immediately after opening an envelope the bank's clerk indates the item received with an indate stamp indicating the tax type "CORP. TAX" and that it was received at the depository bank ("BK"). There is no lapse of time between the receipt and opening of the mail by the bank clerk and the stamping of the indate on the item received.
>
> "7. The information regarding date of receipt of correspondence available to my processing unit is the actual indate stamped by the depository bank's staff, and whether or not there is an inconsistency between the date on correspondence and the indate stamp the material is forwarded to the appropriate operational unit for further action.
>
> "8. In my experience a significant lapse between the date on correspondence and the date of receipt shown on an indate stamp occurs when the correspondent sends in an item late or sends a

> copy after not receiving a response to the original correspondence. Most of the time when an item is a copy of something for which the correspondent did not receive a reply, there is some comment or notation that it is such a copy and that no reply had been received.
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> "9. Whatever the comments, or lack of comments, explaining a time lapse between the date on the correspondence and the date it was mailed, the depository bank indates an item upon receipt and forwards it to my unit. My unit then forwards the item to the appropriate operational unit."

OPINION

The Administrative Law Judge determined that petitioner did not receive permission from the Division to file its franchise tax report for 1982 on a combined basis. Therefore, the Division was correct in recomputing petitioner's tax liability for 1982 on a separate basis pursuant to 20 NYCRR 6-2.4(c).

On exception, petitioner reasserts that the original of the December 14, 1982 letter was mailed to the Division on or about that same date and that the January 15, 1983 letter which was intended as a follow-up was mailed on or about January 15, 1983.

The Division relies on the determination of the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge.

We deal first with the petitioner's assertion that the request for permission to file on a combined basis was timely mailed by petitioner's representative to the Division.

Tax Law section 1091(a) applicable during the period at issue here provides in relevant part as follows:

> "(a) Timely mailing. If any return, declaration of estimated tax, claim, statement, notice, petition, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of this article, or of article nine, nine-a, nine-b or nine-c, is, after such period or such date, delivered by United States mail to the tax commission, bureau, office, officer or person with which or with whom such document is required to be filed, or to which or to whom such payment is required to be made, the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery. This subsection shall apply only if the postmark date falls within the prescribed period or on or before the prescribed date for the filing of such document, or for making the payment, including any extension granted for such filing or

> payment, and only if such document or payment was deposited in the mail, postage prepaid, properly addressed to the tax commission, bureau, office, officer or person with which or with whom the document is required to be filed or to which or to whom such payment is required to be made. If any document or payment is sent by United States registered mail, such registration shall be prima facie evidence that such document or payment was delivered to the tax commission, bureau, office, officer or person to which or to whom addressed. To the extent that the tax commission shall prescribe by regulation, certified mail may be used in lieu of registered mail under this section. This subsection shall apply in the case of postmarks not made by the United States Post Office only if and to the extent provided by regulations of the tax commission."

The Division asserts that it has no record of receiving either the December 14, 1982 or January 15, 1983 letters which petitioner's accountant said he mailed to the Division. Petitioner here did not use registered mail, proof of which would be prima facie evidence of delivery to the Division pursuant to Tax Law section 1091(a). The only evidence of timely mailing offered by petitioner is the testimony of his accountant that both letters were mailed to the Division. We have held that proof of ordinary mailing is insufficient as a matter of law, to prove timely filing of a petition (Matter of Sipam, Tax Appeals Tribunal, March 10, 1988). If the Division does have any burden to produce evidence that it never received the letters, this burden is light (Matter of Mutual Life Ins. Co. v. State Tax Commn., 142 AD2d 41, 534 NYS2d 565, 567). Here the Division, by the affidavit of Mr. Cook which is not controverted, has described the procedure for handling of mail addressed to P.O. Box 1909 as was the petitioner's letter. We conclude that this would be enough evidence, if required, to rebut petitioner's evidence of mailing.

We turn next to the issue of the applicability of the regulatory requirement that petitioner must request permission to file on a combined basis within thirty days after the close of its fiscal year (20 NYCRR 6-2.4). In Fuel Boss, Inc. v. State Tax Commn. (128 AD2d 945, 512 NYS2d 595), the petitioner, for three consecutive years, filed combined franchise tax reports for itself and its two subsidiaries. Petitioner failed to obtain permission to file on a combined basis and the Division, in accordance with its regulations, computed the petitioner's tax on an individual rather than a combined basis. The Division denied the petitioner's request for retroactive permission to file on a combined basis. The court found that the Division's determination "is

based upon its interpretation and application of the relevant statutes, rules and regulations, and since the determination is not irrational, it cannot be disturbed."

Petitioner here does not challenge the validity of the regulation, merely its application. On the basis of Fuel Boss, Inc. v. State Tax Commn. (supra), we must affirm the determination of the Administrative Law Judge and conclude that under the circumstances in this case, the thirty day rule is applicable.

Petitioner's assertion that had the Division conducted an audit of petitioner's business activities, such audit would have shown that filing a combined report was proper is of no avail since an audit was not done (cf., Matter of Autotote, Tax Appeals Tribunal, April 12, 1990). Petitioner has not established that the decision of the Bureau of Conciliation and Mediation Services for a later year can be substituted for a finding of the Division of Taxation after a complete field audit.

Accordingly, it is ORDERED, ADUDGED and DECREED that:

1. The exception of petitioner, Chudy Paper Co., Inc., is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Chudy Paper Co., Inc. is denied; and
4. The Statement of Tax Reduction or Overpayment dated September 8, 1986 is sustained.

DATED: Troy, New York
April 19, 1990

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner