

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MARJAX ENTERPRISES, INC. : DETERMINATION
for Redetermination of a Deficiency or for :
Refund of Corporation Franchise Tax under :
Article 9-A of the Tax Law for the Fiscal Years :
Ending February 4, 1978 and February 3, 1979.

Petitioner, Marjax Enterprises, Inc., 1 Riverton Way, West Henrietta, New York 14586, 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 fiscal years ending February 4, 1978 and February 3, 1979 (File No. 804410).

A hearing was commenced before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 259 Monroe Avenue, Rochester, New York, on May 18, 1988 at 1:15 P.M and continued to conclusion on July 19, 1988, with additional evidence to be submitted by November 18, 1988. Petitioners appeared by Mousaw, Vigdor, Reeves, Heilbronner & Kroll (James S. Grossman, Esq., of counsel). The Audit Division appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioner timely filed claims for refund of corporation franchise tax for the fiscal years in issue.

FINDINGS OF FACT

1. On December 9, 1986, the Division of Taxation issued to petitioner, Marjax Enterprises, Inc., a letter denying Marjax's claims for refund of corporation tax paid for the fiscal years ending February 4, 1978 and February 3, 1979.
2. The refund claims were premised upon the carryback of a net operating loss for the fiscal year ending January 31, 1981 to the fiscal years ending February 4, 1978 and February 3, 1979, respectively. Marjax timely filed a New York State Corporation Franchise Tax Report for the fiscal year ending January 31, 1981 on October 19, 1981.
3. The Division's denial of refund was based on its conclusion that original copies of the refund claims were never received by the Division and that copies of the refund claims, received by the Division on November 28, 1986, were not filed within the statute of limitations set forth at section 1087(d) and (e) of the Tax Law. Copies of the refund claims received by the Division on November 28, 1986 were unsigned and dated May 23, 1983.
4. During the years in issue, Marjax's tax returns were prepared by Robert Tyle. Mr. Tyle

is a certified public accountant and an attorney admitted to practice in New York courts, all Second Circuit Federal courts, and the United States Tax Court. Since 1966, Mr. Tyle has been a member of the faculty of the University of Rochester. Mr. Tyle was employed by Marjax to conduct an annual audit of Marjax's books and records and to prepare its Federal and State tax returns.

5. It was Mr. Tyle's practice to prepare tax forms and deliver them to the business offices of Marjax for the signature of either Martin L. Shuster, president of the corporation, or Robert Hamilton, the corporate treasurer. He usually left the forms with instructions for mailing.

6. On or about May 23, 1983, Mr. Tyle prepared corporation franchise tax refund claims for the fiscal years ending February 4, 1978 and February 3, 1979. On May 23, 1983, Mr. Tyle personally brought the refund claims to Marjax's business offices where he had them signed by Mr. Hamilton. He then brought them to the main United States Post Office building on Jefferson Road in the Town of Henrietta, Monroe County and mailed them to the Corporation Tax Bureau in Albany, New York.

7. Mr. Tyle maintained a tickler system in his office to remind himself to pursue action on certain correspondence. In keeping with that system, he made a notation on the office calendar to follow up on the refund claims in approximately six months' time. On November 21, 1983, Mr. Tyle sent a letter to the Corporation Tax Bureau, State Campus, Albany, New York, stating:

"On or about May 23, 1983, Claims for Refund of Corporation Tax Paid were filed by my client, Marjax Enterprises, Inc., for the fiscal periods ended February 4, 1978 and February 3, 1979. The employer identification number for Marjax Enterprises Inc. is 16-0907849.

"Please advise the status of these claims and if anything further is needed. My client would like to obtain the refunds as soon as possible."

8. Mr. Tyle did not receive a response to this letter, and the Division has no record of its receipt. Mr. Tyle sent two similar letters to the Corporation Tax Bureau on February 22, 1984 and May 21, 1984. He received no response, and the Division has no record of receiving the letters.

9. When Mr. Tyle was in the City of Albany in November 1984, he made a telephone call to the Division regarding the refund claims. Mr. Tyle spoke to an individual who identified himself as Mr. Kretschmar. Although Mr. Kretschmar indicated he had no familiarity with Marjax, he asked Mr. Tyle to send him copies of the refund claims and promised to follow up on the claims as appropriate. On November 16, 1984, Mr. Tyle sent copies of the refund claims and a cover letter addressed to "Corporation Tax, State Campus, Albany, New York 12227, Attn: Mr. Kretschmar". He sent a follow-up letter to the same address on January 15, 1985.

An employee of the Division named David Kretschmar worked in an income tax audit group during the relevant period of time. He had no responsibilities in the area of corporation franchise tax, and he did not receive either the refund claims or letters addressed to him. Mr. Kretschmar denied speaking to Robert Tyle about Marjax's refund claims.

10. On or about May 17, 1985, Mr. Tyle attempted to contact Mr. Kretschmar by telephone. The telephone number dialed by Mr. Tyle is not known, but in any case, Mr. Tyle was

unable to contact Mr. Kretschmar. He was put in contact with an individual who identified himself as George Wilkes. Mr. Wilkes asked Mr. Tyle to send him copies of the refund claims. By letter dated May 20, 1985, Mr. Tyle sent the refund claims to Mr. Wilkes at "Corporation Tax Bureau, State Campus, Albany, New York". Mr. Wilkes received neither the letter nor the refund claims.

From May 1983 through the end of May 1985, Mr. Wilkes worked in the Taxpayer Services Division where he responded to taxpayer inquiries regarding corporation tax generally. In that position, he had no responsibility for, and no access to information regarding the status of, tax refunds.

11. Since he received no response from Mr. Wilkes, Mr. Tyle tried to telephone him to find out the status of the refund claims. He was unable to locate Mr. Wilkes but did speak to an unidentified woman who told him that the refund claims were being processed and had been or would be sent to the Office of the State Comptroller for payment. This conversation occurred in about August 1985.

12. By mid-September 1985, Marjax had received no refund. At the suggestion of a Rochester District Office employee, Mr. Tyle wrote a letter, dated September 12, 1985, to Mr. Joseph M. Fiano, head of the Tax Compliance Division, to seek his assistance in locating the refund claims. Mr. Fiano's secretary maintains a record of all correspondence received by Mr. Fiano. She has no record of Mr. Tyle's letter.

13. Sometime in 1986, Mr. Shuster of Marjax contacted his attorney, Sanford J. Liebschutz, a partner in a Rochester, New York law firm, and requested his help in obtaining corporation tax refunds for the fiscal years 1978 and 1979. Mr. Liebschutz referred the matter to Mr. Joseph Valenti, an attorney in the same firm and a former deputy commissioner in the Department of Taxation and Finance.

14. In July 1986, Mr. Valenti called the Corporation Tax Refund Unit and spoke to Mr. George Wilkes regarding the status of the refund claims. As a follow-up to that conversation, Mr. Valenti sent Mr. Wilkes a cover letter dated July 10, 1986; copies of Marjax's Federal returns and State corporation tax reports for the fiscal years 1980 and 1981; and copies of the refund claims for the fiscal years 1978 and 1979.

15. On August 12, 1986, Mr. Valenti called Mr. Wilkes and asked him whether he had been able to locate the original claims. He was told that the refunds were being traced and to call back at a later time. On August 14, 1986, Mr. Valenti again called Mr. Wilkes, and he was told that the refunds had been processed and sent to the Office of the State Comptroller for approval.

16. Based on Mr. Valenti's conversation with Mr. Wilkes, Mr. Liebschutz, by letter dated August 25, 1986, informed Mr. Schuster that Marjax could expect to receive a refund shortly.

17. Mr. Wilkes recalls having had several conversations with Mr. Valenti, but he does not recall the content of the conversations. He did not receive Mr. Valenti's letter of July 10 or its enclosures. In July and August 1986, Mr. Wilkes was the supervisor of the Corporation Tax Refund Unit. Among the functions of this unit is responding to inquiries regarding the status of corporation tax refund claims.

18. During the periods in issue here, applications for refund of corporation franchise tax received by the Division were forwarded to a clerical unit called the CT-8 Control Unit. This

unit stamps the refund application with the date of its receipt and makes a record of receipt of the application. At the instigation of the Control Unit, the Audit Services Bureau Stenographic Unit mailed each applicant an acknowledgement of receipt of the refund claim. The Control Unit has no record of having received Marjax's refund claims.

19. The Division searched its permanent files for evidence of receipt of Marjax's refund claims and found neither the claims themselves nor any evidence that they might have been received.

20. Within the Division's permanent computer files is a record of all inquiries made through the computer regarding any taxpayer in the files. There is no evidence in this file that Mr. Wilkes or any other Division employee made an inquiry regarding Marjax's refund claims in August 1986.

21. The Division does not dispute that Marjax would be entitled to a refund of tax paid for the fiscal years 1978 and 1979, if its applications for refund were received by the Division by October 19, 1984.

CONCLUSIONS OF LAW

A. Tax Law § 1087(d) provides, in pertinent part, that a claim for credit or refund of an overpayment of tax under article 9-A of the Tax Law, attributable to the application of a net operating loss carryback, must be filed within three years from the time the report for the taxable year of the loss was due (including extensions of time for filing). Here, the claims for refund related to a net operating loss from the fiscal year ended January 31, 1981. As the report for that period was timely filed on October 19, 1981, Marjax was required to file its claims for refund no later than October 19, 1984.

B. Section 1087(d) of the Tax Law is patterned after section 6511(d) of the Internal Revenue Code. In applying 26 USC § 6511, the Federal Courts have held that the filing of a document with the Internal Revenue Service is not complete until the document is delivered and received (see, Miller v. United States, 784 F2d 728, 730; cf. Deutsch v. Commissioner, 599 F2d 44, cert denied 444 US 1015).

Tax Law § 1091(a), which finds its analogue in 26 USC § 7502, provides two exceptions to this physical delivery rule, neither of which is applicable here. The first exception provides that if a document or payment required by law to be filed by a certain date is delivered by United States mail after the prescribed date, the date of delivery shall be deemed to be the date of the United States postmark stamped on the envelope. By its terms, this rule only applies where the document is actually delivered and the postmark date falls within the prescribed period. The second exception provides that if a document is sent by registered mail, such registration shall be prima facie evidence of delivery to the person or office to whom addressed.

The Federal courts have held that section 7502 provides the exclusive exceptions to the physical delivery rule, and therefore, the courts have consistently rejected testimony or other evidence as proof of the actual date of mailing (see e.g., Miller v. United States, supra; Deutsch v. Commissioner, supra). In construing Tax Law § 1147(a)(2) which is also patterned after section 7502, the Tax Appeals Tribunal adopted the analysis of the Federal courts and held that proof of ordinary mailing was insufficient, as a matter of law, to prove timely mailing where actual delivery was not effected (Matter of Sipam Corporation, Tax Appeals Tribunal, March 10,

1988). As the rule stated in the Sipam decision controls here and the refund claims were not sent by registered mail, the refund claims may be deemed timely filed only on the basis of evidence of actual delivery within the prescribed period.

C. As proof that the refund claims were actually delivered to the Division, petitioner offered the testimony of Mr. Tyle and Mr. Valenti who were both told by Division employees that the refund claims had been processed and forwarded to the Office of the State Comptroller for processing. Issues regarding the credibility of petitioner's witnesses were resolved in favor of petitioner, and as a consequence, the statements of those witnesses were found as facts. However, even when the testimony of petitioner's witnesses is accepted in its entirety, petitioner has failed to prove that its refund claims were physically delivered within the period prescribed at Tax Law § 1087(d).

The Division searched its own records and has found no evidence that any refund documents were received before November 28, 1986. Not only has the Division not found original copies of the documents themselves, but it has been unable to discover any evidence which would tend to show that timely refund claims were received and later mishandled. If either Mr. Tyle or Mr. Valenti was told that the refund claims had been processed, this information was obviously wrong. The erroneous statement of a Division employee is not sufficient to prove actual receipt of the refund claims by the Division, by October 19, 1984.

There is no doubt that petitioner's situation is a sympathetic one; however, the Tax Law contains specific provisions to prevent the occurrence of such a situation. Section 1089(c) of the Tax Law enables a taxpayer to file a petition for refund with the State Tax Commission (now the Division of Tax Appeals) six months after a timely claim for refund is filed, and, as stated above, Tax Law § 1091(a) provides that the use of registered mail constitutes prima facie evidence of delivery. Had petitioner filed a petition or used registered mail, the seeming inequities of this case would not exist.

D. The petition of Marjax Enterprises, Inc. is denied in all respects.

DATED: Albany, New York
January 26, 1989

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE
