

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

NORLEN FOOD MARKETING COMPANY

DECISION

for Redetermination of a Deficiency or for  
Refund of Unincorporated Business Tax under  
Article 23 of the Tax Law for the Years 1978  
and 1979.

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Petitioner, Norlen Food Marketing Company, 338 Westbury Avenue, Carle  
Place, New York 11514, filed a petition for redetermination of a deficiency or  
for refund of unincorporated business tax under Article 23 of the Tax Law for  
the years 1978 and 1979 (File No. 36647).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices  
of the State Tax Commission, Two World Trade Center, New York, New York, on  
September 10, 1984 at 2:45 P.M., with all briefs to be submitted by August 15,  
1985. Petitioner appeared by James L. Tenzer, Esq. The Audit Division appeared  
by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division properly limited petitioner's exemption for  
corporate partners [Tax Law §709(2)] to the amount of the corporate partners'  
net income allocable to New York State as reported on said corporate partners'  
franchise tax reports.

11. Whether petitioner has substantiated and is entitled to deduct certain  
expenses that were originally claimed as deductions on the corporate partners'  
franchise tax reports.

FINDINGS OF FACT

1. Norlen Food Marketing Company ("Norlen") is a New York partnership engaged in the distribution of food products. Its business is conducted wholly within New York State. The partners are Leonard G. Epstein Associates, Inc. ("Epstein") and Remler Sales Co., Inc. ("Remler"), each owning a 50 percent interest. Each partner is *a* corporation organized under New York law which conducted no business of its own other than to manage and service Norlen.

2. Norlen timely filed New York State partnership returns for 1978 and 1979. The following chart sets forth Epstein's and Remler's distributive share of Norlen's net income, as reported on Norlen's partnership returns:

	<u>1978</u>	<u>1979</u>
Epstein's distributive share	\$168,542.00	\$169,163.00
Remler's distributive share	<u>142,541.00</u>	<u>143,164.00</u>
Total net income	<u>\$311,083.00</u>	<u>\$312,327.00</u>

3. On both its 1978 and 1979 partnership returns, Norlen, in the computation of taxable business income, claimed an additional exemption for corporate partners pursuant to section 709(2) of the Tax Law. For each of the years at issue, the claimed additional exemption was equal in amount to the total of the partners' distributive shares of net income (i.e., \$311,083.00 for 1978 and \$312,327.00 for 1979).

4. Epstein and Remler filed State of New York Corporation Franchise Tax Reports ("Reports") for 1978 and 1979. The Reports included each partner's respective 50 percent distributive share of Norlen's net income. Since neither Epstein nor Remler conducted any business of its own (other than to manage and service Norlen) and since Norlen's business was conducted wholly within New York, the Reports reflected a business allocation percentage of 100 percent.

The following chart sets forth the partners' allocated net income as shown on their respective New York State corporation franchise tax reports:

	<u>1978</u>	<u>1979</u>
Epstein	\$19,437.00	\$7,065.00
Remler	<u>( 1,675.00)</u>	<u>2,875.00</u>
Total	<u>\$17,762.00</u>	<u>\$9,940.00</u>

5. On September 8, 1981, the Audit Division issued a Statement of Unincorporated Business Tax Audit Changes ("Statement") to Norlen for the years 1978 and 1979. The only adjustment made on said Statement was to limit the amount of Norlen's additional exemption for corporate partners to the amount of said corporate partners' allocated net income as reported on their respective corporation franchise tax reports. The adjustment was computed in the following manner:

<u>"Additional Exemption Computation</u>	<u>1978</u>	<u>1979</u>
Corporate Partner's Distributive Share Included in Income under Art. 9A		
Remler Sales Co. Inc.	\$142,541	\$143,164
Leonard G. Epstein Assoc. Inc.	<u>168,542</u>	<u>169,163</u>
Exemption Before Limitation	\$311,083	\$312,327
<u>Limitation on Additional Exemption</u>		
Amount reported as "Allocated Net Income" on Corporation Franchise Tax Report		
Remler Sales Co. Inc.	(\$ 1,675)	\$ 2,875
Leonard G. Epstein Assoc. Inc.	<u>19,437</u>	<u>7,065</u>
Total Additional Allowable Exemption Based on Limitation	<u>\$ 19,437</u>	<u>\$ 9,940</u>
Exemption Disallowed	<u>\$291,640</u>	<u>\$302,387"</u>

6. Based on the aforementioned Statement, the Audit Division, on February 1, 1982, issued a Notice of Deficiency ("Notice") to petitioner for the years 1978 and 1979, wherein it asserted additional unincorporated business tax due of

\$26,764.72, plus interest of \$5,999.29, for a total allegedly due of \$32,764.01.

Norlen timely filed a petition for a redetermination of the deficiency.

7. For the years 1978 and 1979, year-end adjusting journal entries were made on Norlen's books and records allocating a portion of Norlen's expenses to each of its corporate partners. For 1978, expenses totalling \$176,364.80 were allocated equally between Epstein and Remler, while in 1979, expenses of \$242,033.08 were allocated equally between the corporate partners. These expenses, although allocated to the corporate partners, were expenses incurred by Norlen in the conduct of its business and were either paid directly by Norlen or paid by the corporate partners who thereafter received reimbursement from petitioner.

8. The year-end adjusting entries allocating expenses to Epstein and Remler were made by a certified public accountant who was a partner in the accounting firm retained by Norlen. Said accountant made the adjusting entries as the result of his misinterpretation of information received from the tax section of said accounting firm. The adjusting entries were not made in 1977 or in years subsequent to 1979. In 1980, the accounting firm determined that the adjusting entries allocating a portion of Norlen's expenses to the two corporate partners were incorrect. Amended returns for 1978 and 1979 were not immediately filed since the accounting firm was of the opinion, at that point in time, that the erroneous journal entries did not increase or decrease the tax liability of petitioner or its two corporate partners.

9. After review of the aforementioned Statement of Unincorporated Business Tax Audit Changes and Notice of Deficiency, petitioner's accountants determined that if the exemption for corporate partners was limited to the amounts proposed by the Audit Division, then reversal of the erroneous journal entries allocating

a portion of Norlen's expenses to the two corporate partners would reduce the unincorporated business tax due from Norlen. Reversing entries were made and petitioner, on April 12, 1983, submitted amended partnership returns for 1978 and 1979 claiming additional expenses of \$176,364.80 and \$242,033.08, respectively.

10. With respect to the amended returns submitted by petitioner, the Audit Division maintains that petitioner has failed to substantiate its claim of additional business expenses. Furthermore, the Audit Division, in its answer dated October 26, 1983, alleged that "...the amended return for the year 1978 was not accepted since it was not timely filed."

#### CONCLUSIONS OF LAW

A. That the additional exemption allowed an unincorporated business for its corporate partners is "...limited to the amount...included in a corporate partner's net income allocable to this state..." [Tax Law §709(2)]. In the instant matter, the Audit Division has properly limited petitioner's Tax Law §709(2) exemption to the amount of each corporate partner's net income allocable to New York (i.e., \$19,437.00 for 1978 and \$9,940.00 for 1979). See: Richmond Constructors v. Comm. of Finance for the City of New York, 61 N.Y.2d 1.

B. That petitioner has sustained its burden of proof to show that it erroneously made journal entries allocating a portion of its expenses to Epstein and Remler. Epstein and Remler conducted no business of their own other than to manage and service Norlen. The expenses in question were either paid by Norlen or reimbursed by Norlen to a corporate partner if a corporate partner made payment. Accordingly, petitioner is entitled to claim additional business expenses of \$176,364.80 for 1978 and \$242,033.08 for 1979.

C. That it was improper for the Audit Division to deny petitioner's 1978 amended return on the ground that it was not timely filed. Initially, it must

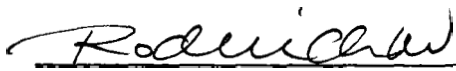
be noted that the two amended returns do not seek refunds. The amended returns seek only to reduce the deficiency asserted by the Audit Division. Furthermore, since the Notice of Deficiency was issued within the statute of limitations for refund (i.e., February 11, 1982) and since a petition for redetermination was timely filed by Norlen, a refund, if one **were** due, could **be** granted pursuant to sections 722, 687(f) and 687(g) of the Tax Law (Matter of the Petition of Liu, State Tax Comm., November 27, 1981).

D. That the petition of Norlen Food Marketing Company **is** granted to the extent indicated in Conclusion of Law "B", supra; that the Audit Division is directed to recompute the Notice of Deficiency consistent with the conclusions rendered herein; and that, except as *so* granted, the petition **is** in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 11 1986

  
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PRESIDENT

  
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COMMISSIONER

  
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COMMISSIONER