

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

WISE FRIEDMAN, INC.

DECISION

for Redetermination of a Deficiency or for  
Refund of Corporation Franchise Tax under  
Articles 9-A and 27 of the Tax Law for the  
Fiscal Year Ended November 30, 1980.

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Petitioner, Wise Friedman, Inc., 525 Central Avenue, Cedarhurst, New York 11516, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Articles 9-A and 27 of the Tax Law for the fiscal year ended November 30, 1980 (File No. 55672).

A hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 9, 1985 at 1:15 P.M. Petitioner appeared by Monroe Friedman, Officer. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

#### ISSUES

I. Whether petitioner timely filed a claim for refund.

11. Whether petitioner is entitled to a refund under the special refund authority of the State Tax Commission under section 1096(d) of the Tax Law.

#### FINDINGS OF FACT

1. Petitioner Wise Friedman, Inc. filed its New York Corporation Franchise Tax Report for the fiscal year ended November 30, 1980 on February 26, 1981, having previously timely filed an application for a three month extension for

filing. Thus, petitioner's extended date for filing was May 15, 1981. On its return, petitioner computed its tax on an alternative base utilizing entire net income plus compensation paid to officers and certain stockholders.

2. On May 8, 1984, petitioner prepared a claim for refund of corporation tax paid of \$22,562.00 for the fiscal year ended November 30, 1980. The basis of the claim was that the officers' compensation used to compute the tax was actually derived from commissions paid to the officers computed solely on total sales. Such compensation is excluded from the alternative tax base. Thus, the alternative base for computation of tax should not have been used; rather, the tax should have been computed on entire net income. The Audit Division stamped the claim for refund with a date received of May 22, 1984.

3. On June 22, 1984, the Audit Division sent a letter to petitioner denying its refund claim, stating, in part, as follows:

"A claim for refund must be filed within three (3) years from the date the return was filed. Since the New York State franchise tax report for the period ending 11/30/80 was filed on 2/26/81 and the claim for refund was received on 5/22/84, the 3 year limitation has expired. Therefore, your claim for refund must be denied."

4. The Audit Division concedes that the tax on petitioner's original return was computed incorrectly and that the computation on the claim for refund is correct. The refund was denied solely because the claim was considered to be untimely. Petitioner maintains that since it had filed for an extension to May 15, 1981, its return, although filed on February 26, 1981, is deemed to have been filed on May 15, 1981. Therefore, petitioner further maintains that it mailed its refund claim prior to May 15, 1984, although the claim was not received until May 22, 1984. The claim form had no envelope attached so that it was impossible to determine the exact mailing date from the postmark. The

Audit Division's position is that, regardless of the extension, the claim was

petitioner's claim was untimely because the deadline for filing for a refund expired on February 26, 1984, three years from the date that the original return was filed.

5. Petitioner maintains that even if the claim was filed late, there are no questions of fact or law involved in whether petitioner is entitled to a refund and, therefore, the refund should be granted under the special refund authority of section 1096(d) of the Tax Law.

#### CONCLUSIONS OF LAW

A. That section 1087(a) of the Tax Law provides, in part, that a claim for refund under Article 9-A shall be filed by the taxpayer within three years from the time the return was actually filed or two years from the time the tax was paid, whichever is later, or if no return was filed, within two years from the time the tax was paid. Section 1087(h) of the Tax Law provides that:

"[f]or purposes of this section, any return filed before the last day prescribed for the filing thereof shall be considered as filed on such last day, determined without regard to any extension of time granted the taxpayer."

B. That petitioner filed its corporation tax report for the year in issue on February 26, 1981. In determining when the three year period for filing a claim for refund expires, the actual date of filing is used as a starting point except when a return is filed before the original due date. In this case, the original return due date was February 15, 1981. Since the expiration date for refunds is determined without regard to any extension granted, then the three year period began running on February 26, 1981, the actual filing date. Therefore, the period for filing a claim for refund expired on February 26, 1984 and petitioner's claim filed in May, 1984 was untimely.

C. That section 1096(d) of the Tax Law provides:

"Special refund authority. -- Where no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts, pursuant to the provisions of this article or of article nine, nine-a, nine-b or nine-c, the tax commission at any time, without regard to any period of limitations, shall have the power, upon making a record of its reasons therefor in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certificate to the comptroller."

D. That petitioner did not notify the Audit Division that the compensation of officers was derived from commissions rather than salaries within the time prescribed by section 1087(a) of the Tax Law nor did it disclose such information on its New York State tax report filed for the year in issue or on its federal return submitted for such year. Unless it is clear from the face of the return that moneys have been erroneously or illegally collected there is a question of fact or law. Matter of National Benefit Fund for Hospital and Health Care Employees, State Tax Commission, October 7, 1983. Moreover, petitioner did not pay the tax under a mistake of facts since the preparer had all of the information available to file a correct return. Accordingly, petitioner is not entitled to a refund based on section 1096(d) of the Tax Law.

E. That the petition of Wise Friedman, Inc. is denied and the denial of refund issued June 22, 1984 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER