

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

C. RIEGEL, INC.

DECISION

for Redetermination of a Deficiency or for
Refund of Corporation Franchise Tax under
Article 9-A of the Tax Law for the Fiscal Years
Ended April **30**, 1980 and April 30, 1981.

Petitioner, C. Riegel, Inc., 812 Central Avenue, Albany, New York 12206,
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 ended
April **30**, 1980 and April 30, 1981 (File No. 57013).

A hearing was commenced before Brian L. Friedman, Hearing Officer, at the
offices of the State Tax Commission, Building #9, State Office Campus, Albany,
New York, on November 19, 1985 at 2:45 P.M. and was continued to conclusion
before the same Hearing Officer at the same location on December 16, 1985 at
1:15 P.M., with all briefs to be submitted by February 10, 1986. Petitioner
appeared by Scully & Scully, CPAs (John J. Scully, Jr., C.P.A.) at the hearing
commenced on November 19, 1985 and by Gerard R. Gemmette, Esq. at the conclusion
thereof on December **16**, 1985. The Audit Division appeared by John P. Dugan,
Esq. (Thomas Sacca, Esq., of counsel).

ISSUES

I. Whether the notice requirement of section 1081 of the Tax Law is
satisfied by the timely mailing, by certified mail, of notices of deficiency
issued to petitioner, but mailed to the home address of its president.

11. Whether the petitioner filed a timely petition within the ninety day period set forth under section 1089(b) of the Tax Law; and if so,

111. Whether the Audit Division, pursuant to a field audit, properly determined additional corporation franchise tax due from petitioner.

FINDINGS OF FACT

1. C. Riegel, Inc. (hereinafter "petitioner") timely filed corporation franchise tax reports for the fiscal years ended April 30, 1980 and April 30, 1981.

2. Pursuant to a field audit of petitioner, a Statement of Franchise Tax Audit Changes was issued by the Audit Division to petitioner on July 12, 1983, containing the following explanation:

	<u>FYE</u> <u>4/30/80</u>	<u>FYE</u> <u>4/30/81</u>	<u>TOTAL</u>
"The following Adjustments are made as a result of a field audit:			
- Additional Receipts per mark up audit:	52,926.26	29,952.59	
- Automobile Depreciation disallowed 50% for personal use.	935.00	893.00	
- Automobile Expense disallowed 50% for personal use.	917.00	985.00	
NET ADJUSTMENT	54,778.26	31,830.59	
TAXABLE INCOME AS REPORTED	96,064.00	65,849.00	
CORRECTED TAXABLE INCOME	150,842.26	97,679.59	
Tax @ 10%	15,084.22	9,767.95	
Franchise Tax	15,084.22	9,767.95	
Less Credits	-	-	
Net Tax	15,084.22	9,767.95	
Tax Previously Paid	(9,606.00)	(6,585.00)	
Tax Due	5,478.77	3,182.95	8,661.17
Penalties			
INTEREST 9/30/83	2,351.17	1,092.84	3,444.01
TOTAL DUE	7,829.39	4,275.79	12,105.18"

On December 21, 1983, a Revised Statement of Franchise Tax Audit Changes was issued to petitioner which, but for the assertion of a 5 percent penalty and additional interest, was identical to the Statement issued on July 12, 1983. Both the original and the revised statements were sent by the Audit Division to 6 Joann Court, Albany, New York, the home address of Charles R. Riegel, President of petitioner, rather than to 812 Central Avenue, Albany, New York, petitioner's principal office. Charles R. Riegel acknowledged receipt of both statements of franchise tax audit changes.

3. On September 12, 1983, petitioner, by Charles R. Riegel, President, executed a Consent Extending the Period of Limitation of the Assessment of Tax for the fiscal year ended April 30, 1980 until July 15, 1984.

4. On March 29, 1984, the Audit Division issued to petitioner two notices of deficiency - Article 9-A, Tax Law asserting tax due for the period ended April 30, 1980 in the amount of \$5,478.77 plus interest and penalty for a total amount due of \$8,574.78, and asserting additional tax due for the period ended April 30, 1981 in the amount of \$3,182.95 plus interest and penalty for a total amount due of \$4,691.95. Both of these notices of deficiency were sent, by certified mail, to petitioner at 6 Joann Court, Albany, New York, the home address of Charles R. Riegel, President of petitioner, who claims that he never received them. At the time of the issuance of the notices of deficiency, Charles R. Riegel's wife, who was the Vice-President and Bookkeeper of petitioner, resided with him at the 6 Joann Court address. Mrs. Riegel is now deceased.

5. On July 17, 1984, two notices and demands for payment of corporation tax due for the periods ended April 30, 1980 and April 30, 1981 were sent to petitioner at its 812 Central Avenue address. Petitioner's President, Charles R. Riegel, stated that upon receipt thereof, he contacted Sullivan & Sullivan, CPA -

who assisted him in the preparation of a Petition for a redetermination of the deficiencies. On October 10, 1984, petitioner filed a Petition with the Tax Appeals Bureau which was received by said Bureau on October 16, 1984. Attached to the Petition were copies of both notices and demands for payment of corporate tax due which stated that the date of assessment was July 17, 1984. In its Petition, petitioner, under the mistaken impression that these said notices would become assessments within ninety days after issuance unless a Petition was filed, believed that since the notices were issued on July 17, 1984, that its Petition, having been filed within ninety days thereof, was timely filed. In its said Petition, petitioner, again under the mistaken impression that these notices were in lieu of notices of deficiency, asserted that they had been issued beyond the statutory period for assessment of tax for the fiscal years at issue.

6. Petitioner is in the business of retail sales of gasoline, motor oil and diesel fuel, maintaining a gas station at 812 Central Avenue, Albany, New York. It filed its Certificate of Incorporation on January 4, 1974 and listed thereon 812 Central Avenue, Albany, New York as its principal office address. On its corporation franchise tax reports filed for the fiscal years at issue, petitioner listed as its address, 812 Central Avenue, Albany, New York. With the exception of the original and revised statements of franchise tax audit changes and the two notices of deficiency, all correspondence between the Audit Division and petitioner, both prior to and subsequent to the audit, were sent to petitioner's principal office, the gas station located at the 812 Central Avenue address.

CONCLUSIONS OF LAW

A. That section 1081(a) of the Tax Law provides, in pertinent part, as follows:

"If upon examination of a taxpayer's return under article nine, nine-a, nine-b or **nine-c**, the tax commission determines that there is a deficiency of tax, it may mail a notice of deficiency to the taxpayer.... A notice of deficiency shall be mailed by certified or registered mail to the taxpayer at its last known address in **or** out of this state."

B. That section 1081(b) of the Tax Law provides as follows:

"Notice of Deficiency as assessment. -- After ninety days from the mailing of a notice of deficiency, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period filed with the tax commission a petition under section one thousand eighty-nine. If the notice of deficiency is addressed to a taxpayer whose last known address is outside of the United States, such period shall be one hundred fifty days instead of ninety days."

C. That section 1083(a) of the Tax Law provides as follows:

"Except as otherwise provided in this section, any tax under article nine, nine-a, nine-b or nine-c shall be assessed within three years after the return was filed (whether or not such return was filed on **or** after the date prescribed)."

D. That the Audit Division did not comply with the provisions of section 1081(a) of the Tax Law since **it** did not mail a Notice of Deficiency to the taxpayer "at its last known address." The Audit Division knew petitioner's address as evidenced by the fact that it corresponded with petitioner, both prior to and subsequent to the audit performed, at its principal office at 812 Central Avenue, Albany, New York, the address which petitioner listed on its Certificate of Incorporation and its corporation franchise tax reports. Instead, the Audit Division mailed notices of deficiency to the home address of petitioner's President, Charles R. Riegel, at 6 Joann Court, Albany, New York,


Central Avenue address notices and demands for payment of corporation franchise tax due, petitioner, under the mistaken impression that such notices were properly issued in lieu of notices of deficiency, it timely responded by filing a Petition for a redetermination **of** the deficiencies alleged. Since the notices of deficiency were not properly issued to petitioner, the tax deficiency alleged by the Audit Division to be due from petitioner for the taxable periods **at** issue were not assessed within the three year period as provided for in section 1083(a) of the Tax Law.


E. That in view of Conclusion of Law "D", supra, Issues II and III herein are rendered moot.


F. That the notices of deficiency - Article 9-A, Tax Law issued March 29, 1984 are cancelled in full.

DATED: Albany, New York

STATE TAX COMMISSION

APR 2 1984

PRESIDENT


COMMISSIONER


COMMISSIONER