

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition

of

BEREK NIERENSTEIN

DETERMINATION

for Revision of a Determination or for Refund  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period December 1, 1979  
through May 31, 1983.

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Petitioner, Berek Nierenstein, 932 Amsterdam Avenue, New York, New York 10025, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1979 through May 31, 1983 (File No. 64516).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 9, 1987 at 2:45 P.M., with all briefs to be submitted by September 14, 1987. Petitioner appeared by Rhea Flattum. The Audit Division appeared by John P. Dugan, Esq. (Michael Gitter, Esq., of counsel).

ISSUE

Whether the Audit Division properly denied a portion of petitioner's claim for credit or refund of sales and use taxes paid.

FINDINGS OF FACT

1. On December 14, 1984, the Audit Division received from petitioner, Berek Nierenstein, an Application for Credit or Refund of State and Local Sales or Use Tax, which application sought a refund of sales tax paid by petitioner in connection with the operation of a laundry business during the period December 1, 1979 through May 31, 1983. Petitioner's claim was in the total amount of \$16,667.19.

2. By a letter dated July 26, 1985, the Audit Division advised petitioner that the above-referenced refund claim was granted to the extent of \$9,667.31, (and a refund for such amount was issued), but was denied as to the balance claimed (\$6,999.88).

3. The denial of a portion of petitioner's refund claim is based on the assertion that such claim was not timely made with respect to the statute of limitations (Tax Law § 1139[a](1)). More specifically, the amount denied is equal to the dollar amount of the claim for the period earlier than three years before the December 14, 1984 date of receipt of the refund claim (i.e., for the quarterly periods prior to the quarterly period ended November 30, 1981).

4. Petitioner timely protested the partial denial on October 8, 1985 and requested a hearing thereon.

5. During the period in question, petitioner operated as a sole proprietorship a laundromat offering laundry, cleaning and pressing services, as well as retail sales of, inter alia, soaps, laundry bags and plastic bags.

6. Petitioner's claim is premised upon his inadvertent payment of sales tax on total receipts rather than solely taxable receipts arising from operation of the laundry business. No part of petitioner's claim for refund relates to sales of the above-noted retail items, upon which it is undisputed that sales tax, as due, was collected and remitted.

7. Petitioner asserts that the taxes in question were overpaid based on a misunderstanding of the taxability of certain services, and thus requests waiver of the statute of limitations and allowance of the full refund as claimed.

#### CONCLUSIONS OF LAW

A. That Tax Law § 1139(a) provides, in part, as follows:


"[i]n the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission as provided in section eleven hundred thirty-seven, or (ii) in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article...."

B. That here petitioner's application for refund was filed on December 14, 1984. Thus, claims for refund for quarterly periods prior to the quarterly period ended November 30, 1981 were barred as untimely pursuant to Tax Law § 1139(a)(1). There is no provision by which the statute of limitations, as set forth herein, may be waived.

C. That the petition of Berek Nierenstein is hereby denied and the Audit Division's denial of a portion of petitioner's claim for refund is sustained.

DATED: Albany, New York

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ADMINISTRATIVE LAW JUDGE