

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Master Eagle Photo Engraving Corp. :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Corporation :
Franchise Tax under Article 9A & 27 of the Tax Law :
for the Year 1974. :
_____ :

AFFIDAVIT OF MAILING

State of New York
County of Albany

David Parchuck, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of February, 1983, he served the within notice of Decision by certified mail upon Master Eagle Photo Engraving Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Master Eagle Photo Engraving Corp.
40 W. 25th St.
New York, NY 10010

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
4th day of February, 1983.

David Parchuck

Ann R. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :
of :
Master Eagle Photo Engraving Corp. :
for Redetermination of a Deficiency or a Revision :
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Franchise Tax under Article 9A & 27 of the Tax :
Law for the Year 1974. :
_____ :

AFFIDAVIT OF MAILING

State of New York
County of Albany

David Parchuck, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of February, 1983, he served the within notice of Decision by certified mail upon Michael A. Zimmerman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael A. Zimmerman
Lefrak, Fischer, Myerson & Mandell
575 Madison Ave.
New York, NY 10022

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
4th day of February, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

February 4, 1983

Master Eagle Photo Engraving Corp.
40 W. 25th St.
New York, NY 10010

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Michael A. Zimmerman
Lefrak, Fischer, Myerson & Mandell
575 Madison Ave.
New York, NY 10022
Taxing Bureau's Representative

II. Whether the Audit Division's reduction of petitioner's 1972 net operating loss was further improper because (a) the Audit Division had already exercised its discretion under section 208.9(b)(6) of the Tax Law by permitting carryback of the loss to 1969, 1970 and 1971; and (b) such reduction constituted a denial of due process under the Fourteenth Amendment to the United States Constitution.

FINDINGS OF FACT

1. Petitioner, Master Eagle Photo Engraving Corp., is a New York corporation which filed its franchise tax report for the year 1974 on a timely basis, after having been granted two consecutive extensions to file said report on or before September 15, 1975. Petitioner filed its 1972 report on a timely basis, after having been similarly granted two consecutive extensions to file on or before September 15, 1973. Therefore, on September 15, 1976, the three-year statute of limitations had expired within which the Audit Division could make an assessment to petitioner's 1972 report.

2. In 1972 petitioner had an investment of \$1,982,418.98 in Micro Miniature Circuits, Inc. ("Micro"), one of its subsidiaries. In that year petitioner's investment in Micro became worthless, and petitioner wrote off its investment on its federal corporation income tax return.

3. On August 10, 1978, the Audit Division issued to petitioner a Notice of Deficiency, asserting additional franchise tax due for 1974 in the amount \$5,843.65, plus interest thereon. The Statement of Audit Adjustment, issued on May 26, 1978, set forth two bases for the adjustment in tax: the disallowance of the portion of investment tax credit claimed by petitioner on automobiles; and the limitation of the amount of petitioner's New York net operating loss deduction to the amount of its federal net operating loss deduction.

4. On November 8, 1978, petitioner timely filed a petition in response to said adjustments, stating the following ground upon which relief was claimed:

"The taxpayer has filed a claim for refund with respect to the identical year for which the deficiency is asserted; consequently it is our position that no deficiency exists for taxable year ended 1974 insofar as the claim for refund exceeds the proposed deficiency."

5. On November 8, 1978, petitioner timely filed a claim for refund for 1974 in the amount of \$14,419.09, founded upon carryback of a net operating loss sustained in 1975.

6. On or about April 25, 1979, the Audit Division sent a Statement of Assertion of Greater Deficiency to petitioner in the amount of \$42,232.73, plus interest. The Statement of Assertion of Greater Deficiency was due to an adjustment made to petitioner's 1972 franchise tax report pursuant to section 208.9(b)(6) of the Tax Law wherein the Audit Division, in its discretionary authority granted by said section, disallowed petitioner's deduction of its investment in Micro. Because a substantial portion of petitioner's 1972 net operating loss was due to the write-off of Micro, the Division recalculated the net operating loss. Carryback of the adjusted loss resulted in its consumption; therefore, no part of the loss remained for carryover to 1974. In sum, petitioner's 1974 entire net income was increased from \$478,182.55 to \$882,505.72.

7. Petitioner's deduction of its investment in Micro on its 1972 federal return was not disallowed by the Internal Revenue Service.

8. Petitioner timely filed a petition and perfected petition in response to the Audit Division's Statement of Assertion of Greater Deficiency.

9. On October 7, 1980, petitioner filed an amended claim for refund for 1974, reducing its requested refund from \$14,756.12 to \$12,801.11. This

amended claim took into consideration the net operating loss deduction and investment tax credit as adjusted by the August 10, 1978 notice of deficiency.¹

10. On October 1, 1973, the Audit Division had issued to petitioner three statements of tax reduction or overpayment, calculating and granting tax credits for the years 1969, 1970 and 1971 due to the carryback of petitioner's 1972 net operating loss. The amounts of the credits and interest thereon were scheduled as follows:

<u>YEAR</u>	<u>CREDIT</u>	<u>INTEREST</u>	<u>TOTAL</u>
1969	\$35,249.09	\$1,586.21	\$36,835.30
1970	12,937.80	582.20	13,520.00
1971	2,286.41	102.89	2,389.30

CONCLUSIONS OF LAW

A. That section 1083, subdivision (a) of the Tax Law requires that assessment of any tax under Article 9-A be made within three years after the return was filed. The period for assessing any tax due for 1972 expired, as the parties so stipulated, on September 15, 1976. However, the expiration of the period of limitation for 1972 does not preclude this Commission from considering facts relating to the tax for that year in order to correctly determine petitioner's tax for 1974; subdivision (g) of section 1089 specifically confers jurisdiction upon the Tax Commission to undertake such a consideration.

"The tax commission shall consider such facts with relation to the taxes for other years as may be necessary correctly to determine the tax for the taxable year, but in so doing shall have no jurisdiction to determine whether or not the tax for any other year has been overpaid or underpaid."

¹ Petitioner's amended claim for refund, based upon carryback of its 1975 net operating loss, is not treated by this decision, as there is no evidence in the record regarding the loss except for the claim itself. Nor did the parties address the claim at the hearing or in their memoranda. The Audit Division is hereby directed to examine the claim and to take such action thereon as it deems appropriate.

Petitioner's position is that the greater deficiency asserted for 1974 was time-barred because it resulted from recomputation of its net operating loss sustained in a closed year. This very position was considered and rejected by the Tax Court in ABKCO Industries, Inc., 56 T.C. 1083, applying Internal Revenue Code section 6214(b) from which Tax Law section 1089(g) is derived. The Court held that in determining the deficiency in petitioner's 1962 income tax, the Commissioner was entitled to disallow a deduction petitioner claimed on its return for the short taxable period December 22 through December 31, 1961 (a period barred by the statute of limitations), for the purpose of recomputing the net operating loss carryback available to petitioner for the year at issue. See also Phoenix Coal Co. v. Commissioner, 231 F.2d 420 (2d Cir.); Greenleaf Textile Corp., 26 B.T.A. 737, affd. mem. 65 F.2d 1017 (2d Cir.); State Farming Co., 40 T.C. 774; Akeley Camera & Instrument Corp., 18 T.C. 1045; W.M. Ritter Lumber Co., 30 B.T.A. 231; Brown Dynalube Co., 20 T.C.M. 255.

B. That after the mailing of the notice of deficiency and before the hearing in this matter, the Audit Division asserted a greater deficiency against petitioner, based upon the disallowance of petitioner's loss attributable to subsidiary capital, in accordance with the procedure prescribed in Tax Law section 1089(d)(1). Having asserted the greater deficiency, the Audit Division then had the burden of proving that the increase was proper and correct. Section 1089(e)(3).

The Statement of Assertion of Greater Deficiency, offered in evidence by the Audit Division, explained the basis for the increase and made reference to the relevant statutory provisions. Petitioner argued in opposition to the increase that the Audit Division had already exercised its discretion under

section 208.9(b)(6) by permitting carryback of the net operating loss, and that the Audit Division's reduction of the loss constituted a denial of due process. This Commission has no jurisdiction to pass upon the constitutional issue. Further, the Audit Division was not bound, by having permitted carryback of the full amount of the loss to 1969, 1970 and 1971, to allow the carryover to 1974. Matter of National Elevator Indus., Inc. v. New York State Tax Comm., 49 N.Y.2d 538.

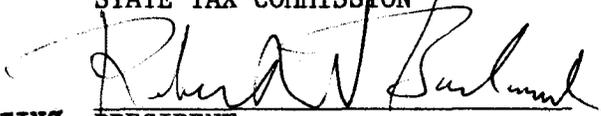
The Audit Division has thus sustained its burden of showing that the increased deficiency was proper.

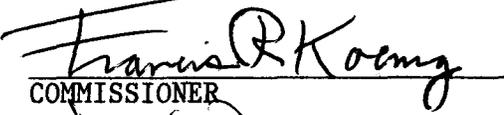
C. That the petitions of Master Eagle Photo Engraving Corp. are hereby denied; and that the Notice of Deficiency issued on August 10, 1978 and the Statement of Assertion of Greater Deficiency issued on April 25, 1979 are sustained in full.

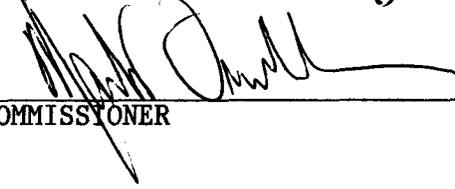
DATED: Albany, New York

FEB 04 1983

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER