

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Mrs. Adler's Foods Corp. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :  
of Franchise Tax on Business Corporations under :  
Article 9-A of the Tax Law for the Fiscal Years :  
Ended 6/30/76, 6/30/78 & 6/30/81. :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 23rd day of November, 1984, he served the within notice of Decision by certified mail upon Mrs. Adler's Foods Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mrs. Adler's Foods Corp.  
902 Essex St.  
Brooklyn, NY 11208

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
23rd day of November, 1984.

David Parchuck

Anna A. [Signature]

Authorized to administer oaths  
pursuant to Tax Law section 174



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

November 23, 1984

Mrs. Adler's Foods Corp.  
902 Essex St.  
Brooklyn, NY 11208

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Robert H. Frummer  
20 South Broadway  
Yonkers, NY 10701  
Taxing Bureau's Representative

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition  
of  
MRS. ADLER'S FOODS CORP.

for Redetermination of a Deficiency or for  
Refund of Franchise Tax on Business Corpora-  
tions under Article 9-A of the Tax Law for the  
Fiscal Years Ended June 30, 1976, June 30, 1978  
and June 30, 1981.

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DECISION

Petitioner, Mrs. Adler's Foods Corp., 902 Essex Street, Brooklyn, New York 11208, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Article 9-A of the Tax Law for the fiscal years ended June 30, 1976, June 30, 1978 and June 30, 1981 (File No. 39075).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 7, 1984 at 9:15 A.M. Petitioner appeared by Robert H. Frummer, CPA. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether on November 15, 1979, the Audit Division properly issued against petitioner a Notice and Demand for Payment of Corporation Tax Due for the fiscal year ended June 30, 1978, such assessment being founded on adjustments to credits from the two preceding fiscal years.

II. Whether petitioner's failure to file a franchise tax report and to pay the franchise tax for the fiscal year ended June 30, 1978 in a timely manner was due to reasonable cause, and not to willful neglect.

FINDINGS OF FACT

1.(a) For the fiscal year ended June 30, 1976, petitioner, Mrs. Adler's Foods Corp., timely filed a New York State franchise tax report, computing tax based upon entire net income plus salaries and other compensation paid to officers (the "alternative base") in the amount of \$9,471.27; prepayments made (\$15,000.00) satisfied the tax liability computed, as well as the first installment for the period following that covered by the report (\$2,500.00). At line 14(a) of Schedule A, petitioner indicated that the overpayment of \$3,028.73 was to be carried over for application against its liability for fiscal year 1977.

Petitioner failed to submit Form CT-12, Important Notice Tax Law Changes, and to pay the 20 percent surcharge (\$1,894.24) which was imposed by Chapter 895 of the Laws of 1975.

(b) When the Processing Division discovered that petitioner failed to pay the surcharge, it reduced the credit for fiscal year 1977 (\$3,028.73) by the amount of the surcharge due and owing (\$1,894.24), so that the available credit became \$1,134.56. The Processing Division did not notify petitioner of these adjustments to its account.

2.(a) For the fiscal year ended June 30, 1977, petitioner timely filed a franchise tax report, computing franchise tax, the first installment for the subsequent fiscal year, and the surcharge as shown below.

Franchise tax, computed on alternative base		\$6,935.24
First installment for fiscal year 1978		2,400.00
Surcharge		
20% Tax	\$1,387.05	
Less: Maximum surcharge credit	(5,000.00)	
Total		<u>-\$9,335.24</u>

Petitioner claimed total prepayments of \$13,894.17, including a remittance of \$1,894.17 made in response to a Notice of Mandatory Installment Due issued by the Audit Division for the period ended June 30, 1978.

(b) The Processing Division again adjusted petitioner's account and recomputed the credit available for fiscal year 1978, without notifying petitioner of the modifications.

Carryover from FYE 6/30/76	\$1,134.56
Installments	8,971.27
Total credit	<u>\$10,105.83</u>
Tax due	9,335.24
Credit to FYE 6/30/78	<u>\$ 770.59</u>

The Processing Division did not apply petitioner's payment of \$1,894.17, made to satisfy the Notice of Mandatory Installment Due, against petitioner's liability for fiscal year 1977 for the reason that the installment was properly applicable to fiscal year 1978.

3.(a) Petitioner submitted its franchise tax report for the fiscal year ended June 30, 1978 on or about March 20, 1979. (The circumstances of this filing are discussed infra.) Petitioner computed the balance of tax due as set forth below.

Franchise tax, computed on alternative base	\$7,330.59
First installment for fiscal year 1979	1,300.00
Total	<u>\$8,630.59</u>
Less: prepayments	(6,958.93)
Balance due	<u>\$1,681.66</u>

(b) The Processing Division continued to adjust petitioner's account and recomputed the balance of franchise tax due.

Tax due per report	\$7,330.59
Credits	
Carryover from FYE 6/30/77	\$770.59
Installment	2,400.00
Remittance in response to Notice of Mandatory Installment Due	1,894.17
Tax paid with report	1,681.66
	<u>(6,746.42)</u>
Balance due	<u>\$ 584.17</u>

(c) On November 15, 1979, the Audit Division issued to petitioner a Notice and Demand for Payment of Corporation Tax Due, assessing additional franchise tax, penalty and interest, scheduled as follows:

Tax per report	\$7,330.59
Interest	108.75
Penalties	594.95
Total	<u>\$8,034.29</u>
Less: amount paid	<u>(6,746.42)</u>
Amount assessed	<u>\$1,287.87</u>

The amount assessed consisted of the balance due as shown in paragraph (b) above, plus penalties and interest imposed for failure to file the report and pay the amount of franchise tax due in a timely manner. Tax Law section 1085(a)(1) and (2) penalties were imposed upon the amount of \$2,265.83 (the tax shown on the return [\$7,330.59] less prepayments made [\$5,064.76]), and Tax Law section 1085(a)(2) penalty was imposed upon the balance remaining due (\$584.17).

4.(a) Petitioner timely submitted its franchise tax report for the fiscal year ended June 30, 1979, calculating the tax and the installment due for the fiscal year to follow as shown below.

Franchise tax, computed on alternative base	\$6,095.31
First installment for fiscal year 1980	2,000.00
Total	<u>\$8,095.31</u>
Less: prepayments	<u>(12,550.00)</u>
Credit to FYE 6/30/80	<u>\$ 4,454.69</u>

(b) The Processing Division, still unable to reconcile the prepayments claimed by petitioner with its own records, adjusted petitioner's account and the credit to be carried forward to the fiscal year ended June 30, 1980 as set forth below.

Tax per report	\$6,095.31
First installment for fiscal year 1980	2,000.00
Total	<u>\$8,095.31</u>

Credits		
Installments	\$9,940.00	
Installment delinquency	\$1,300.00	
		(11,240.00)
Credit to FYE 6/30/80		<u>\$ 3,144.69</u>

5.(a) Petitioner's calculations of the franchise tax, the installment for the succeeding period and the credit available for the succeeding period for the fiscal years ended June 30, 1980 and June 30, 1981 are shown below.

	<u>FYE 6/30/80</u>	<u>FYE 6/30/81</u>
Franchise tax, computed on alternative base	\$6,164.93	\$5,203.51
First installment for succeeding tax year	1,613.67	0*
Total	<u>\$7,778.60</u>	<u>\$5,203.51</u>
Less: prepayments	(8,068.36)	(7,910.00)
Credit to succeeding period or refund	<u>\$ 289.76 credit</u>	<u>\$2,706.49 refund</u>

\* Line 7 of Schedule A contains the following notation inserted by the preparer, "CT-6 Subchapter S election pending."

(b) The Processing Division's further adjustments to petitioner's account are summarized below.

	<u>FYE 6/30/80</u>	<u>FYE 6/30/81</u>
Tax due per report	\$6,164.93	\$5,203.51
First installment for succeeding tax year	0	0
Total	<u>\$6,164.93</u>	<u>\$5,203.51</u>
Credits		
Credit from prior year	\$5,144.69*	\$593.43
Amount paid with application for extension	\$1,613.67	
Installments		4,696.57
Installment delinquency		1,310.00
	<u>(6,758.36)</u>	<u>(6,600.00)</u>
Credit to succeeding period or overpayment	<u>\$ 593.43 credit</u>	<u>\$1,396.49 overpayment</u>

\* The credit was apparently overstated by \$2,000.00 (see Finding of Fact 4(b)).

The overpayment of \$1,396.49 was applied against the assessment issued for the fiscal year June 30, 1978, resulting in a refund due petitioner of \$108.62.

6. On October 23, 1980, in response to petitioner's inquiries regarding the assessment for fiscal year 1978, the Audit Division forwarded to petitioner



six account reconciliations for each of the fiscal years 1976 through 1981 and offered the following explanation for the account modifications:

"Your payment problems seem to be very involved beginning with your June, 1976 report. In that year, your taxes were incorrect. No rider form CT-12 important tax notice changes (sic) was included with your report. This was the year a 20% surcharge was in effect. This started your payment problems with credits to the next period being adjusted. To date, they are still incorrect."

7. In its answer to the petition, the Audit Division revised the assessment for fiscal year 1978 and increased the refund due petitioner as follows:

Balance of franchise tax due	\$584.17
Interest	
\$2,265.83 X 4.37% (9/15/78 - 3/20/79)	
584.17 X 21.93% (3/21/79 - 9/15/81)	
	227.13
Penalty	
\$2,265.83 X 20% (12/15/78 - 3/20/79)	453.17
Corrected assessment	\$1,264.47
Overpayment for fiscal year 1981	(1,396.49)
Refund	\$ 132.02

8. Petitioner maintains that it is entitled to the full amount of the refund claimed on its franchise tax report for fiscal year 1981 (\$2,706.49), inasmuch as the Audit Division failed to notify petitioner until October 23, 1980 (a date beyond the three-year period of limitations for assessment) of the adjustments to its account commencing in fiscal year 1976. Petitioner further maintains that the Audit Division failed to furnish the corporation with a blank form CT-12 for fiscal year 1976 and thus failed to apprise the corporation of the imposition of the surcharge.

9. On or about September 14, 1978, petitioner filed an application for a three-month extension for filing its report for fiscal year 1978, enclosing no remittance therewith because prepayments (\$6,958.93) exceeded its estimated tax before any surcharge (\$5,200.00). For purposes of the within proceeding, the Audit Division deems this extension valid. On or about December 13, 1978,

petitioner filed with the Internal Revenue Service an application for an additional extension of time within which to file its federal corporation income tax return for fiscal year 1978 by reason of the temporary disability of its accountant, Robert Frummer. The application was granted, allowing petitioner until March 15, 1979 to file its return. Petitioner did not seek from the Audit Division any further extension of time for the filing of its fiscal year 1978 New York State franchise tax report. Petitioner alleges that reasonable cause existed for the late filing of the report and the late payment of tax for fiscal year 1978 such that all penalties should be cancelled: the physical incapacitation of its accountant as the result of an accident, and/or the accountant's lack of knowledge that for New York State franchise tax purposes a further extension (in addition to that filed on September 14, 1978 and the federal extension filed on December 13, 1978) was required to be submitted.

10. On or about November 3, 1978, petitioner's accountant, Robert Frummer, sustained serious injuries as the result of a fall and was incapacitated for approximately 13 weeks. Mr. Frummer has served as the corporation's accountant for the past thirty years.

#### CONCLUSION OF LAW

A. That the Tax Law change rider was distributed to taxpayers only as a convenience to them. The Department of Taxation and Finance is under no statutory obligation to notify each individual taxpayer of current changes in the law. Petitioner was therefore held to have knowledge of the enactment which imposed the 20 percent surcharge for its fiscal year 1976. (Matter of Martin Hurwitz, M.D., P.C., State Tax Comm., June 29, 1983.)

Section 1082(a) of the Tax Law provides that "the amount of tax which a return shows to be due, or the amount of tax which a return would have shown to

be due but for a mathematical error, shall be deemed to be assessed on the date of filing of the return." The definition of mathematical error is not so narrow as to exclude all but strictly arithmetic errors. (See e.g., Tax Law section 1081(d): mathematical error includes overstatement of amount paid as estimated tax.) Petitioner's failure to compute the 20 percent surcharge was a mathematical error within the meaning and intent of section 1082(a) of the Tax Law (Matter of Martin Hurwitz, supra); therefore, the correct tax due was deemed assessed as of the date of the filing of the franchise tax report for fiscal year 1976 and thus within the three-year period of limitations.

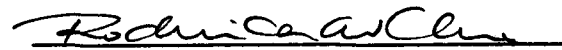
B. That on December 13, 1978, during the period of his disability, petitioner's accountant sought from the Internal Revenue Service a second extension of time within which to file petitioner's federal return for fiscal year 1978. It is thus apparent that his failure to seek a second extension of time from the Audit Division within which to file petitioner's franchise tax report for that year was attributable not to his disability, but to his failure to appreciate that a further extension was necessary. It therefore cannot be said that reasonable cause existed for petitioner's failure to timely file its franchise tax report and to timely pay its franchise tax for fiscal year 1978.


C. That the petition of Mrs. Adler's Foods Corp. is denied, and the Audit Division is directed to process petitioner's refund for fiscal year 1981.

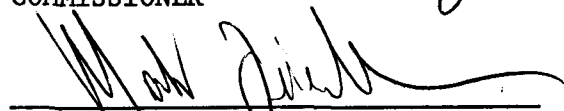
DATED: Albany, New York

NOV 23 1984

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER