

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Fuel Boss, Inc. :

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Corporation :  
Franchise Tax under Article 9A of the Tax Law for :  
the Fiscal Years Ended 11/30/79-11/30/81. :

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AFFIDAVIT OF MAILING

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 21st day of August, 1985, he served the within notice of Decision by certified mail upon Fuel Boss, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Fuel Boss, Inc.  
110 E. 59th St.  
New York, NY 10022

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  
21st day of August, 1985.

David Parchuck

James A. Hagelund  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of :  
Fuel Boss, Inc. :

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for Redetermination of a Deficiency or Revision :  
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the Fiscal Years Ended 11/30/79-11/30/81. :

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 21st day of August, 1985, he served the within notice of Decision by certified mail upon Mark A. Berlin, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mark A. Berlin  
Schulman, Berlin & Davis  
150 East 52nd Street  
New York, NY 10022

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 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  
21st day of August, 1985.

David Parchuck

Annunzio A. Hagedorn  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

August 21, 1985

Fuel Boss, Inc.  
110 E. 59th St.  
New York, NY 10022

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  
Mark A. Berlin  
Schulman, Berlin & Davis  
150 East 52nd Street  
New York, NY 10022  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
FUEL BOSS, INC.  
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 November 30, 1979 through November 30,  
1981.

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DECISION

Petitioner, Fuel Boss, Inc., 110 East 59th Street, New York, New York 10022, 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 November 30, 1979 through November 30, 1981 (File Nos. 44566 and 46166).

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 April 4, 1985 at 2:45 P.M. Petitioner appeared by Mark A. Berlin, Esq. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether the Audit Division properly denied petitioner permission to file corporation franchise tax reports on a combined basis for the fiscal years ended November 30, 1979, 1980 and 1981.

FINDINGS OF FACT

1. For fiscal years ended November 30, 1979 through November 30, 1981, petitioner, Fuel Boss, Inc., filed combined New York State corporation franchise tax reports with its wholly-owned subsidiary, National Energy Reduction Corp. ("National") and National's wholly-owned subsidiary, Fuel Boss Electric, Inc.

("Electric"). Petitioner did not make a written request of the State Tax Commission for permission to file on a combined basis.

2. On October 28, 1983, the Audit Division issued three notices of deficiency pursuant to Article 9-A of the Tax Law as follows:

<u>Year Ended</u>	<u>Tax</u>	<u>Interest</u>	<u>Additional Charge</u>	<u>Total</u>
November 30, 1979	\$18,215.00	\$ 8,722.61	\$ 546.48	\$ 27,484.09
November 30, 1980	\$77,512.00	\$30,529.60	\$2,325.36	\$110,366.96
November 30, 1981	\$42,448.00	\$10,672.21	-0-	\$ 53,120.21

3. Statements of audit adjustment issued December 10, 1982 and September 2, 1983 explained that, "In accordance with New York State Franchise Tax Regulation Section 6-2.4, permission to file a combined report must be requested not later than thirty (30) days after the close of your taxable year. As prior permission had not been obtained, your tax has been computed on an individual basis". Other adjustments made by the Audit Division were not raised as issues by petitioner.

4. Petitioner, during the years in issue, sold licenses to individuals and corporations for the exclusive right to sell petitioner's automatic vent dampers within specified geographical areas. The licensee purchased the unit from petitioner and sold it to the consumer. Petitioner also earned commissions as an equipment broker. National was engaged by petitioner as its purchasing agent and also as the exclusive selling agent retained by each licensee to market the dampers within the licensee's territory. National received a commission of 20 percent of the sales price of each damper. National was appointed by each licensee to promote, market, distribute, sell and install the units for each licensee. National purchased the units, sold them to petitioner and charged petitioner for the installation. National subcontracted the

installation of the units to Electric which installed the dampers and charged National for the installation<sup>1</sup>.

5. In fiscal year ended November 30, 1979, 75.6 percent of the income of National was derived from sales to and installations charged to petitioner. Electric was inactive during 1979. In 1980, 73.92 percent of National's income was derived from sales and installations between it and petitioner and 89.13 percent of Electric's income was derived from installations subcontracted by National. In 1981, 48.34 percent of National's income was derived from sales and installations between it and petitioner and 90.42 percent of Electric's income was derived from installations subcontracted by National.

6. In January, 1981, petitioner's accountants advised petitioner that it was qualified to file on a combined basis with its subsidiaries. Petitioner provided its accountants with the information necessary to request permission to file a combined report. Due in part to the illness of the accountant in charge of petitioner's account, the combined reports were filed without first requesting permission. Petitioner argues that due to its reliance on its accountants and the illness of its accountant at the time of filing, there was reasonable cause for failing to request prior permission and such permission should be granted retroactively.

#### CONCLUSIONS OF LAW

A. That section 211.4 of the Tax Law provides, in relevant part:

"In the discretion of the tax commission, any taxpayer, which owns or controls either directly or indirectly substantially all the capital stock of one or more other corporations...may be required or

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1 It is unclear when title to the vent dampers passed to the consumer but it appears that part of the sales process involved mere "paper" transactions between the companies. No contracts were offered in evidence.

permitted to make a report on a combined basis covering any such other corporations...".

B. That 20 NYCRR 6-2.4(a), applicable to taxable years beginning on or after January 1, 1976, provides:

"A taxpayer must make a written request for permission to file a combined report. The request must be received by the Tax Commission not later than thirty (30) days after the close of its taxable year. A report filed on a combined basis does not constitute a request for permission to file a combined report."


C. That, as articulated in the Matter of Walker Engraving Corporation, State Tax Commission, June 6, 1971, the filing of combined returns is not a statutory right on the part of the taxpayer. The detailed facts necessary to determine whether permission for combined filing should be sought from the Commission are available to the taxpayer at the time annual franchise tax reports are due; and, except under unusual circumstances, the taxpayer has no need of an extended period to determine whether permission should be requested. An "accounting oversight" does not constitute such an extraordinary circumstance as would entitle petitioner to file retroactive combined reports. Matter of Scholastic Bus Service, State Tax Commission, October 2, 1981. An illness at the accounting firm does not cause the failure to request permission to be anything more than an oversight and does not warrant granting permission to file retroactively. Petitioner's arguments with respect to reasonable cause for failure to request permission are without merit because the reasonable cause standard applies to the failure to file returns and pay tax, not to the failure to timely request permission to file combined reports.

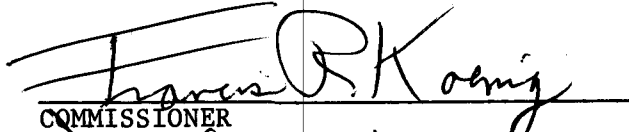
D. That the petition of Fuel Boss, Inc. is denied and the notices of deficiency issued October 28, 1983 are sustained.

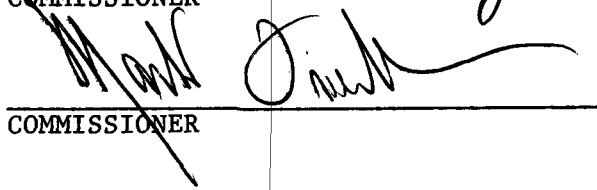
DATED: Albany, New York

STATE TAX COMMISSION

AUG 21 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER