

TA-26 (7/85)

STATE OF NEW YORK

State Tax Commission

TAX APPEALS BUREAU

W. A. Harriman Campus

ALBANY, N.Y. 12227



FROM

TO

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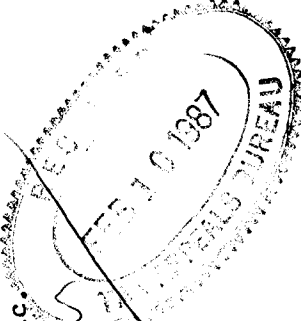
P 319 376 884

MAIL

Chin & Bros. Service Station, Inc.

3075 Boston Road

Bronx, New York 10469



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

February 3, 1987

Chin & Bros. Service Station, Inc.
3075 Boston Road
Bronx, New York 10469

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Lawrence E. Becker
McClung, Peters, Simon & Arensberg
41 State St.
Albany, NY 12207

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
LIN C. CHAN and YUK H. CHAN :
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law and Chapter 46, Title T of the :
Administrative Code of the City of New York for :
the Years 1980 through 1982. :

In the Matter of the Petition :
of :
GUM J. CHIN and MARY Y. CHIN : DECISION
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law and Chapter 46, Title T of the :
Administrative Code of the City of New York for :
the Years 1980 through 1982. :

In the Matter of the Petition :
of :
CHIN & BROS. SERVICE STATION, INC. :
for Redetermination of a Deficiency or for :
Refund of Corporation Franchise Tax under :
Article 9-A of the Tax Law for the Periods Ended: :
December 31, 1980, December 31, 1981 and :
December 31, 1982. :

Petitioners, Lin C. Chan and Yuk H. Chan, 82 East 208th Street, Bronx, New York 10467, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the Years 1980 through 1982 (File No. 61937).

Petitioners, Gum J. Chin and Mary Y. Chin, 82 East 208th Street, Bronx, New York 10467, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the Years 1980 through 1982 (File No. 61938).

Petitioner, Chin & Bros. Service Station, Inc., 3075 Boston Road, Bronx, New York 10469, 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 periods ended December 31, 1980, December 31, 1981 and December 31, 1982 (File No. 61942).

A consolidated hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Building #9, W. A. Harriman Office Campus, Albany, New York, on September 3, 1986 at 1:15 P.M. Petitioners appeared by McClung, Peters and Simon, Esqs. (Lawrence E. Becker, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether petitions for redetermination were timely filed.

FINDINGS OF FACT

1. On April 6, 1984, statements of personal income tax audit changes were issued to petitioner Lin C. Chan for the year 1980 and to petitioner Lin C. Chan and Yuk H. Chan for the years 1981 and 1982 which asserted that, as a result of an audit, additional taxable income had been derived by the taxpayers from partnerships, estates and trusts and small business corporations. Accordingly, on the same date (April 6, 1984), the Audit Division issued a Notice of Deficiency

to Lin C. Chan in the amount of \$4,798.52, plus penalty and interest, for a total amount due of \$6,757.80 for the year 1980, and a Notice of Deficiency to Lin C. Chan and Yuk H. Chan in the amount of \$9,354.54, plus penalty and interest, for a total amount due of \$11,973.61 for the year 1981 and in the amount of \$7,863.90, plus penalty and interest, for a total amount due of \$8,989.74 for the year 1982.

2. On April 6, 1984 a Statement of Personal Income Tax Audit Changes was issued to petitioners Gum J. Chin and Mary Y. Chin for the years 1980 and 1981 and an additional Statement of Personal Income Tax Audit Changes was issued to petitioner Gum J. Chin for the year 1982 which asserted that, as a result of an audit, additional joint taxable income had been derived by the taxpayers for the year 1980 and by Gum J. Chin for the year 1981 and 1982, said income having been received from partnerships, estates and trusts and small business corporations. Accordingly, on the same date (April 6, 1984), the Audit Division issued three notices of deficiency, one for each of the years 1980, 1981 and 1982, to Gum J. Chin and Mary Y. Chin, in the amount of \$5,384.51, plus penalty and interest, for a total amount due of \$7,651.48 for 1980, in the amount of \$9,477.05, plus penalty and interest, for a total amount due of \$12,239.48 for the year 1981 and in the amount of \$7,948.09, plus penalty and interest, for a total amount due of \$9,167.26 for the year 1982.

3. On February 22, 1984, the Audit Division issued to Chin & Bros. Service Station, Inc., a Statement of Franchise Tax Audit Changes for the years 1980, 1981 and 1982 which explained that, as a result of a recent audit, adjustment to petitioner's gross receipts were being made and that, for the year 1982, the Audit Division had computed petitioner's tax since there was no record of filing for that year. On May 5, 1984, the Audit Division issued to

Chin & Bros. Service Station, Inc. three notices of deficiency, one for each of the periods ending December 31, 1980, December 31, 1981 and December 31, 1982, asserting tax due of \$6,795.80, plus interest and additions to tax, for a total amount due of \$10,335.14 for the period ending December 31, 1980, tax due of \$11,447.90, plus interest and additions to tax, for a total amount due of \$15,736.10 for the period ending December 31, 1981 and tax due of \$10,445.50, plus interest and additions to tax, for a total amount due of \$15,540.49 for the period ending December 31, 1982.

4. Petitioners were initially represented by the firm of Stanley Geller & Associates, Accountants and more specifically by Dr. Stanley Geller of said accounting firm. Dr. Geller appeared at the hearing held herein and, on behalf of petitioners, stated the following:

- a. Upon receipt of the notices of deficiency from petitioners, he went to the offices of the Department of Taxation and Finance at Two World Trade Center, New York, New York and obtained TA-11 petition forms;
- b. On May 10, 1984, the petitioners came to Dr. Geller's office to fill out the petitions and, at that time, he had petitioners execute powers of attorney which were notarized by one John R. Russo;
- c. The mailing procedure in Dr. Geller's office was to have the postman who makes the daily mail delivery take the outgoing mail to the post office, since there was no mailbox within the vicinity of the office. Dr. Geller's wife typed a covering letter bearing the date May 17, 1984 and attached thereto copies of the petitions and powers of attorney.
- d. It is the usual practice whenever Dr. Geller mails something of importance to a governmental agency to personally hand the piece of mail to the postman with instructions that he not lose it. He presented the aforesaid letter with attachments to the postman on either May 17 or May 18, 1984.
- e. A few months after mailing the aforesaid petitions, Dr. Geller began receiving notices from the Tax Compliance Bureau of the Department of Taxation and

Finance concerning payment of the amounts alleged by the Department to be due and owing from petitioners. Dr. Geller telephoned the Department in New York City and, on August 28, 1984, wrote a letter to a Mr. Barrett of the Department's White Plains District Office to complain about the Tax Compliance Bureau notices and to make him aware that petitions had been filed.

- f. Several months later, Dr. Geller telephoned the Department to inquire about the status of this case and, at that time, was told that no petitions had ever been received. On December 11, 1984, Dr. Geller submitted copies of the original documents to the Tax Appeals Bureau which were received on December 19, 1984.

5. Dr. Geller stated that, on prior occasions, both mail sent from and mail sent to his office had been lost.

6. The copies of the petitions sent to the Tax Appeals Bureau on December 11, 1984 and the copies introduced at the hearing held herein were photocopies of page 1 of Form TA-11 and, as such, contained neither the signature of petitioners nor the date signed by said petitioners.

CONCLUSIONS OF LAW

A. Sections 689(b) and 1089(b) of the Tax Law provide that "[w]ithin ninety days... after the mailing of the notice of deficiency..., the taxpayer may file a petition with the tax commission for redetermination of the deficiency."

B. That "(a)ll proceedings before the Commission must be commenced by the filing of a petition...." (20 NYCRR 601.3[a].) The following time limitations regarding the filing of a petition are provided in 20 NYCRR 601.3(c):

"Time limitations. The petition must be filed within the time limitations prescribed by the applicable statutory sections, and there can be no extension of that time limitation. If the petition is filed by mail, it must be addressed to the particular operating bureau in Albany, New York. When mailed, the petition will be deemed filed on the date of the United States postmark stamped on the envelope."

C. That sections 1091(a) and 691(a) of the Tax Law provide, in pertinent part:

"Timely mailing. -- If any return, ... petition, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of this article is, after such period or such date, delivered by United States mail to the Tax Commission, bureau, office, officer or person with which or with whom such document is required to be filed..., the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery.... If any document or payment is sent by United States registered mail, such registration shall be prima facie evidence that such document or payment was delivered to the tax commission, bureau, office, officer or person to which or to whom addressed. To the extent that the tax commission shall prescribe by regulation, certified mail may be used in lieu of registered mail under this section."

D. That section 691(a) and 1091(a) of the Tax Law are patterned after Internal Revenue Code section 7502, "Timely Mailing Treated as Timely Filing and Paying." (Matter of Garofalo, State Tax Commn., September 28, 1983; Matter of Mancuso, State Tax Commn., September 28, 1983.) Treasury Regulations § 301.7502-1(d)(1) provides:

"Section 7502 is not applicable unless the document is delivered by United States mail to the agency, officer, or office with which it is required to be filed. However, if the document is sent by registered mail or certified mail, proof that the document was properly registered or that a postmarked certified mail sender's receipt was properly issued therefor, and that the envelope or wrapper was properly addressed to such agency, officer, or office shall constitute prima facie evidence that the document was delivered to such agency, officer, or office."

In Deutsch v. Commissioner (599 F2d 44 [2d Cir.], cert denied, 44 US 1015), a petition addressed to the Tax Court was never found and the taxpayer offered an affidavit of his accountant who claimed he mailed it within the statutory period. The Court noted that "(w)here as here, the exception of § 7502 is not literally applicable, courts have consistently rejected testimony

or other evidence as proof of the actual date of mailing." (Id. at 46 [citations omitted].)

E. That in Garofalo, supra and Mancuso, supra, petitions alleged to be timely mailed were never received by the State Tax Commission. The petitioners' representative, an attorney, testified to assembling the Garofalo and Mancuso petitions, signing the petitions and placing each petition in an envelope. Likewise, his secretary testified to mailing these petitions within the ninety day statutory period. The tax commission held the following in both cases:

"That to be timely, a petition must be actually delivered to the Tax Commission within ninety days after a deficiency notice is mailed, or it must be delivered in an envelope which bears a United States postmark of a date within the ninety day period. The petitioners have not shouldered their burden of proof under Tax Law § 689(e) to show that the petition was delivered to the Tax Commission. Proof of mailing by registered or certified mail was not shown. Proof of mailing by ordinary mail does not satisfy the requirement of proving delivery of the petition to the Tax Commission. See Deutsch v. Commissioner 599 F.2d 44 (2d Cir.), cert. denied, 444 U.S. 1015." (Garofalo, supra; Mancuso, supra.)

F. That petitions in the present matters were not received by the Tax Appeals Bureau of the State Tax Commission until December 19, 1984, well beyond the ninety-day period prescribed by sections 689(b) and 1089(b) of the Tax Law.

G. That petitioners have not carried their burden of proof under sections 689(e) and 1089(e) of the Tax Law to show that their original petitions were timely delivered. Although petitioners' accountant, Dr. Stanley Geller, testified that said petitions were mailed on May 17 or 18, 1984, proof of ordinary mailing does not satisfy the requirement of proving delivery of the petitions to the State Tax Commission. (Garofalo, supra; Moreover, supra.)

H. That copies of unsigned and undated petitions, received by the Tax Appeals Bureau on December 19, 1984, were not timely filed.

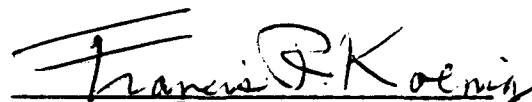
I. That the petitions of Lin C. Chan and Yuk H. Chan, Gum J. Chin and Mary Y. Chin and Chin & Bros. Service Station, Inc. are denied and the notices of deficiency issued on April 6, 1984 to Lin C. Chan and Yuk H. Chan and to Gum J. Chin and Mary Y. Chin, and the notices of deficiency issued on May 5, 1984 to Chin & Bros. Service Station, Inc. are hereby sustained.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 03 1987


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Lin C. & Yuk H. Chan :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law and Chapter 46, Title T of the :
Administrative Code of the City of New York :
for the Years 1980 - 1982. :

State of New York :

ss.:

County of Albany :

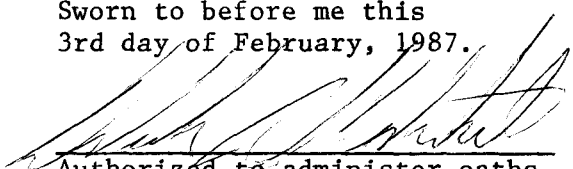
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 3rd day of February, 1987, he/she served the within notice of Decision by certified mail upon Lin C. & Yuk H. Chan the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

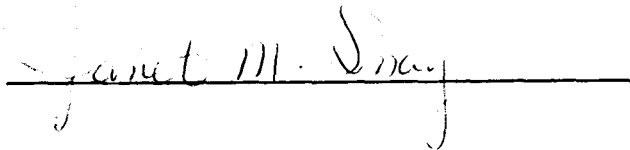
Lin C. & Yuk H. Chan
82 East 208th Street
Bronx, NY 10467

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
3rd day of February, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174


Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Gum J. & Mary Y. Chin :

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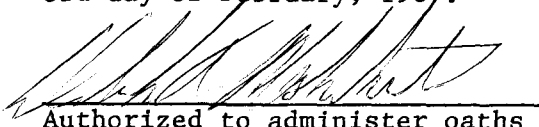
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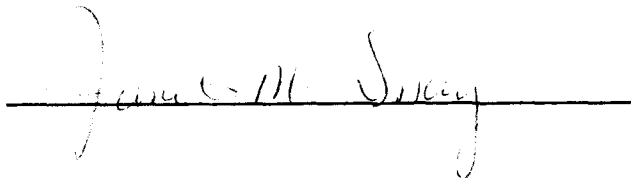
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STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Chin & Bros. Service Station, Inc. : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation
Franchise Tax under Article(s) 9-A of the Tax :
Law for the Periods Ended 12/31/1980, 12/31/81 :
and 12/31/82. :

State of New York :

ss.:

County of Albany :

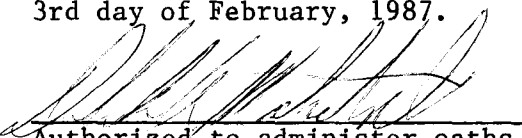
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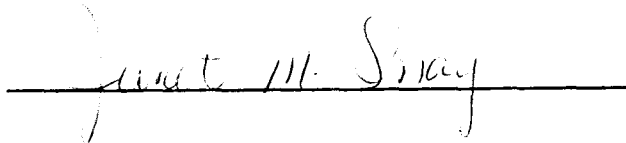
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for the Years 1980 - 1982.

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State of New York :

ss.:

County of Albany :

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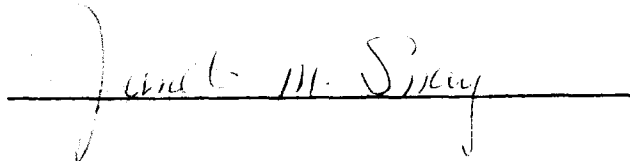
Lawrence E. Becker
McClung, Peters, Simon & Arensberg
41 State St.
Albany, NY 12207

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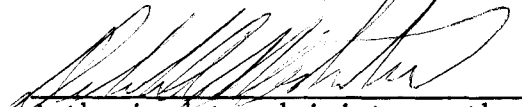
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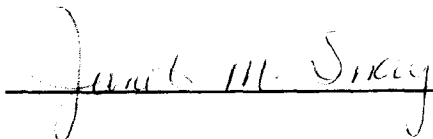
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STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
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Chin & Bros. Service Station, Inc. : AFFIDAVIT OF MAILING

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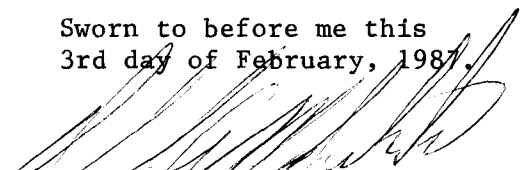
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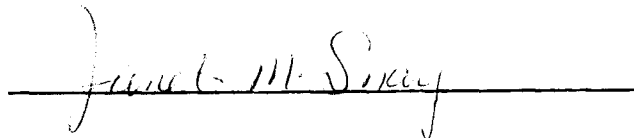
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STATE TAX COMMISSION
ALBANY, NEW YORK 12227

February 3, 1987

Lin C. & Yuk H. Chan
82 East 208th Street
Bronx, NY 10467

Dear Mr. & Mrs. Chan:

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) 690 and 1312 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:

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LIN C. CHAN and YUK H. CHAN :
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law and Chapter 46, Title T of the :
Administrative Code of the City of New York for :
the Years 1980 through 1982. :

In the Matter of the Petition :
of :
GUM J. CHIN and MARY Y. CHIN : DECISION
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law and Chapter 46, Title T of the :
Administrative Code of the City of New York for :
the Years 1980 through 1982. :

In the Matter of the Petition :
of :
CHIN & BROS. SERVICE STATION, INC. :
for Redetermination of a Deficiency or for :
Refund of Corporation Franchise Tax under :
Article 9-A of the Tax Law for the Periods Ended: :
December 31, 1980, December 31, 1981 and :
December 31, 1982. :

Petitioners, Lin C. Chan and Yuk H. Chan, 82 East 208th Street, Bronx, New York 10467, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the Years 1980 through 1982 (File No. 61937).

Petitioners, Gum J. Chin and Mary Y. Chin, 82 East 208th Street, Bronx, New York 10467, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the Years 1980 through 1982 (File No. 61938).

Petitioner, Chin & Bros. Service Station, Inc., 3075 Boston Road, Bronx, New York 10469, 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 periods ended December 31, 1980, December 31, 1981 and December 31, 1982 (File No. 61942).

A consolidated hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Building #9, W. A. Harriman Office Campus, Albany, New York, on September 3, 1986 at 1:15 P.M. Petitioners appeared by McClung, Peters and Simon, Esqs. (Lawrence E. Becker, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether petitions for redetermination were timely filed.

FINDINGS OF FACT

1. On April 6, 1984, statements of personal income tax audit changes were issued to petitioner Lin C. Chan for the year 1980 and to petitioner Lin C. Chan and Yuk H. Chan for the years 1981 and 1982 which asserted that, as a result of an audit, additional taxable income had been derived by the taxpayers from partnerships, estates and trusts and small business corporations. Accordingly, on the same date (April 6, 1984), the Audit Division issued a Notice of Deficiency

to Lin C. Chan in the amount of \$4,798.52, plus penalty and interest, for a total amount due of \$6,757.80 for the year 1980, and a Notice of Deficiency to Lin C. Chan and Yuk H. Chan in the amount of \$9,354.54, plus penalty and interest, for a total amount due of \$11,973.61 for the year 1981 and in the amount of \$7,863.90, plus penalty and interest, for a total amount due of \$8,989.74 for the year 1982.

2. On April 6, 1984 a Statement of Personal Income Tax Audit Changes was issued to petitioners Gum J. Chin and Mary Y. Chin for the years 1980 and 1981 and an additional Statement of Personal Income Tax Audit Changes was issued to petitioner Gum J. Chin for the year 1982 which asserted that, as a result of an audit, additional joint taxable income had been derived by the taxpayers for the year 1980 and by Gum J. Chin for the year 1981 and 1982, said income having been received from partnerships, estates and trusts and small business corporations. Accordingly, on the same date (April 6, 1984), the Audit Division issued three notices of deficiency, one for each of the years 1980, 1981 and 1982, to Gum J. Chin and Mary Y. Chin, in the amount of \$5,384.51, plus penalty and interest, for a total amount due of \$7,651.48 for 1980, in the amount of \$9,477.05, plus penalty and interest, for a total amount due of \$12,239.48 for the year 1981 and in the amount of \$7,948.09, plus penalty and interest, for a total amount due of \$9,167.26 for the year 1982.

3. On February 22, 1984, the Audit Division issued to Chin & Bros. Service Station, Inc., a Statement of Franchise Tax Audit Changes for the years 1980, 1981 and 1982 which explained that, as a result of a recent audit, adjustment to petitioner's gross receipts were being made and that, for the year 1982, the Audit Division had computed petitioner's tax since there was no record of filing for that year. On May 5, 1984, the Audit Division issued to

Chin & Bros. Service Station, Inc. three notices of deficiency, one for each of the periods ending December 31, 1980, December 31, 1981 and December 31, 1982, asserting tax due of \$6,795.80, plus interest and additions to tax, for a total amount due of \$10,335.14 for the period ending December 31, 1980, tax due of \$11,447.90, plus interest and additions to tax, for a total amount due of \$15,736.10 for the period ending December 31, 1981 and tax due of \$10,445.50, plus interest and additions to tax, for a total amount due of \$15,540.49 for the period ending December 31, 1982.

4. Petitioners were initially represented by the firm of Stanley Geller & Associates, Accountants and more specifically by Dr. Stanley Geller of said accounting firm. Dr. Geller appeared at the hearing held herein and, on behalf of petitioners, stated the following:

- a. Upon receipt of the notices of deficiency from petitioners, he went to the offices of the Department of Taxation and Finance at Two World Trade Center, New York, New York and obtained TA-11 petition forms;
- b. On May 10, 1984, the petitioners came to Dr. Geller's office to fill out the petitions and, at that time, he had petitioners execute powers of attorney which were notarized by one John R. Russo;
- c. The mailing procedure in Dr. Geller's office was to have the postman who makes the daily mail delivery take the outgoing mail to the post office, since there was no mailbox within the vicinity of the office. Dr. Geller's wife typed a covering letter bearing the date May 17, 1984 and attached thereto copies of the petitions and powers of attorney.
- d. It is the usual practice whenever Dr. Geller mails something of importance to a governmental agency to personally hand the piece of mail to the postman with instructions that he not lose it. He presented the aforesaid letter with attachments to the postman on either May 17 or May 18, 1984.
- e. A few months after mailing the aforesaid petitions, Dr. Geller began receiving notices from the Tax Compliance Bureau of the Department of Taxation and

Finance concerning payment of the amounts alleged by the Department to be due and owing from petitioners. Dr. Geller telephoned the Department in New York City and, on August 28, 1984, wrote a letter to a Mr. Barrett of the Department's White Plains District Office to complain about the Tax Compliance Bureau notices and to make him aware that petitions had been filed.

- f. Several months later, Dr. Geller telephoned the Department to inquire about the status of this case and, at that time, was told that no petitions had ever been received. On December 11, 1984, Dr. Geller submitted copies of the original documents to the Tax Appeals Bureau which were received on December 19, 1984.

5. Dr. Geller stated that, on prior occasions, both mail sent from and mail sent to his office had been lost.

6. The copies of the petitions sent to the Tax Appeals Bureau on December 11, 1984 and the copies introduced at the hearing held herein were photocopies of page 1 of Form TA-11 and, as such, contained neither the signature of petitioners nor the date signed by said petitioners.

CONCLUSIONS OF LAW

A. Sections 689(b) and 1089(b) of the Tax Law provide that "[w]ithin ninety days... after the mailing of the notice of deficiency..., the taxpayer may file a petition with the tax commission for redetermination of the deficiency."

B. That "(a)ll proceedings before the Commission must be commenced by the filing of a petition...." (20 NYCRR 601.3[a].) The following time limitations regarding the filing of a petition are provided in 20 NYCRR 601.3(c):

"Time limitations. The petition must be filed within the time limitations prescribed by the applicable statutory sections, and there can be no extension of that time limitation. If the petition is filed by mail, it must be addressed to the particular operating bureau in Albany, New York. When mailed, the petition will be deemed filed on the date of the United States postmark stamped on the envelope."

C. That sections 1091(a) and 691(a) of the Tax Law provide, in pertinent part:

"Timely mailing. -- If any return, ... petition, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of this article is, after such period or such date, delivered by United States mail to the Tax Commission, bureau, office, officer or person with which or with whom such document is required to be filed..., the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery.... If any document or payment is sent by United States registered mail, such registration shall be prima facie evidence that such document or payment was delivered to the tax commission, bureau, office, officer or person to which or to whom addressed. To the extent that the tax commission shall prescribe by regulation, certified mail may be used in lieu of registered mail under this section."

D. That section 691(a) and 1091(a) of the Tax Law are patterned after Internal Revenue Code section 7502, "Timely Mailing Treated as Timely Filing and Paying." (Matter of Garofalo, State Tax Commn., September 28, 1983; Matter of Mancuso, State Tax Commn., September 28, 1983.) Treasury Regulations § 301.7502-1(d)(1) provides:

"Section 7502 is not applicable unless the document is delivered by United States mail to the agency, officer, or office with which it is required to be filed. However, if the document is sent by registered mail or certified mail, proof that the document was properly registered or that a postmarked certified mail sender's receipt was properly issued therefor, and that the envelope or wrapper was properly addressed to such agency, officer, or office shall constitute prima facie evidence that the document was delivered to such agency, officer, or office."

In Deutsch v. Commissioner (599 F2d 44 [2d Cir.], cert denied, 44 US 1015), a petition addressed to the Tax Court was never found and the taxpayer offered an affidavit of his accountant who claimed he mailed it within the statutory period. The Court noted that "(w)here as here, the exception of § 7502 is not literally applicable, courts have consistently rejected testimony

or other evidence as proof of the actual date of mailing." (Id. at 46 [citations omitted].)

E. That in Garofalo, supra and Mancuso, supra, petitions alleged to be timely mailed were never received by the State Tax Commission. The petitioners' representative, an attorney, testified to assembling the Garofalo and Mancuso petitions, signing the petitions and placing each petition in an envelope. Likewise, his secretary testified to mailing these petitions within the ninety day statutory period. The tax commission held the following in both cases:

"That to be timely, a petition must be actually delivered to the Tax Commission within ninety days after a deficiency notice is mailed, or it must be delivered in an envelope which bears a United States postmark of a date within the ninety day period. The petitioners have not shouldered their burden of proof under Tax Law § 689(e) to show that the petition was delivered to the Tax Commission. Proof of mailing by registered or certified mail was not shown. Proof of mailing by ordinary mail does not satisfy the requirement of proving delivery of the petition to the Tax Commission. See Deutsch v. Commissioner 599 F.2d 44 (2d Cir.), cert. denied, 444 U.S. 1015." (Garofalo, supra; Mancuso, supra.)

F. That petitions in the present matters were not received by the Tax Appeals Bureau of the State Tax Commission until December 19, 1984, well beyond the ninety-day period prescribed by sections 689(b) and 1089(b) of the Tax Law.

G. That petitioners have not carried their burden of proof under sections 689(e) and 1089(e) of the Tax Law to show that their original petitions were timely delivered. Although petitioners' accountant, Dr. Stanley Geller, testified that said petitions were mailed on May 17 or 18, 1984, proof of ordinary mailing does not satisfy the requirement of proving delivery of the petitions to the State Tax Commission. (Garofalo, supra; Moreover, supra.)

H. That copies of unsigned and undated petitions, received by the Tax Appeals Bureau on December 19, 1984, were not timely filed.

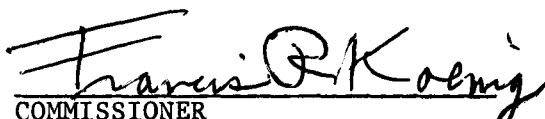
I. That the petitions of Lin C. Chan and Yuk H. Chan, Gum J. Chin and Mary Y. Chin and Chin & Bros. Service Station, Inc. are denied and the notices of deficiency issued on April 6, 1984 to Lin C. Chan and Yuk H. Chan and to Gum J. Chin and Mary Y. Chin, and the notices of deficiency issued on May 5, 1984 to Chin & Bros. Service Station, Inc. are hereby sustained.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 03 1987


PRESIDENT


COMMISSIONER


COMMISSIONER