

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Berbro International :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Year 1977. :
:

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 Berbro International, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Berbro International
2 Fifth Avenue
New York, NY 10011

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

Barbara A. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of :
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for Redetermination of a Deficiency or Revision :
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Business Tax under Article 23 of the Tax Law for :
the Year 1977. :
:

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 Steven Eyerman, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Steven Eyerman
Farber, Sherman & Blicht
100 Jericho Quadrangle
Jericho, NY 11753

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

David A. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

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

August 21, 1985

Berbro International
2 Fifth Avenue
New York, NY 10011

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) 690 & 722 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
Steven Eyerman
Farber, Sherman & Blicht
100 Jericho Quadrangle
Jericho, NY 11753
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
BERBRO INTERNATIONAL	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Year 1977.	:	

Petitioner, Berbro International, 2 Fifth Avenue, New York, New York 10011, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1977 (File No. 43832).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 23, 1985 at 9:15 A.M., with all briefs to be submitted by May 23, 1985. Petitioner appeared by Steven H. Eyerman, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether the Audit Division properly denied petitioner's claim for refund for the year 1977.

FINDINGS OF FACT

1. Petitioner herein, Berbro International, timely filed a New York State Partnership Return for 1977 reporting thereon unincorporated business taxable income of \$84,802.00. Unincorporated business tax paid by petitioner on its 1977 partnership return amounted to \$4,664.00.

2. Petitioner submitted to the Audit Division Form IT-113X, Claim for Credit or Refund of Personal Income Tax and/or Unincorporated Business Income Tax. On said form petitioner claimed a full refund of the \$4,664.00 of unincorporated business tax paid for 1977 based on the carryback of a 1978 net operating loss to 1977. Petitioner's claim for refund was received by the Audit Division in an envelope postmarked April 29, 1982.

3. On January 31, 1983, the Audit Division denied petitioner's claim for refund in full on the following grounds:

"The three (3) year Statute of Limitations for filing a 1977 refund claim based on the 1978 net operating loss expired on April 15, 1982. Since the envelope containing your 1978 tax return was postmarked April 15, 1982¹, the claim is not valid.

4. Petitioner conceded that its claim for refund for 1977 was filed some 14 days late, however, it maintains the refund should be allowed due to mitigating and extenuating circumstances. Petitioner argued that in 1978 it sustained a loss approximating \$1,500,000.00, that it has not yet fully recovered from said loss and that to deny the 1977 claim for refund is inequitable.

CONCLUSIONS OF LAW

A. That section 687(d) of the Tax Law, made applicable to this proceeding by section 722 of the Tax Law, provides, in pertinent part, as follows:

"Overpayment attributable to net operating loss carryback. A claim for credit or refund of so much of an overpayment as is attributable to the application to the taxpayer of a net operating loss carryback shall be filed within three years from the time the return was due for the taxable year of the loss..."

1 By letter dated September 6, 1983, the Audit Division advised petitioner that the 1978 tax return was received in an envelope postmarked April 29, 1982 and not April 15, 1982 as stated in the denial letter of January 31, 1983.

B. That the taxable year of the loss in the instant matter was 1978. Petitioner's 1978 return was due by April 15, 1979 and pursuant to section 687(d) of the Tax Law, supra, a claim for refund based on the carryback of a net operating loss for 1978 must be filed on or before April 15, 1982. Accordingly, petitioner's claim for refund for 1977, postmarked April 29, 1982, was not timely filed.

C. That section 687(e) of the Tax Law provides that:

"Failure to file claim within prescribed period. No credit or refund shall be allowed or made, except as provided in subsection (f) of this section or subsection (d) of section six hundred ninety, after the expiration of the applicable period of limitation specified in this article, unless a claim for credit or refund is filed by the taxpayer within such period. Any later credit shall be void and any later refund erroneous. No period of limitations specified in any other law shall apply to the recovery by a taxpayer of moneys paid in respect of taxes under this article."


Section 687(f) and 690(d) of the Tax Law are not applicable to the instant matter and, furthermore, there is no provision in the Tax Law which would allow a refund to be granted, regardless of the statute of limitations, based on mitigating and extenuating circumstances.


D. That the petition of Berbro International is denied and the notice of refund denial dated January 31, 1983 is hereby sustained.

DATED: Albany, New York

STATE TAX COMMISSION

AUG 21 1985


PRESIDENT


COMMISSIONER


COMMISSIONER