

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
UNICORP AMERICAN CORPORATION	:	DECISION
for Redetermination of a Deficiency or for	:	DTA No. 811873
Refund of Franchise Tax on Banking Corporations	:	
under Article 32 of the Tax Law for the Years	:	
1987 through 1989.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on January 12, 1995 with respect to the petition of Unicorp American Corporation, James P. Bressingham, c/o 8 Brixton Road, Garden City, New York 11530. Petitioner appeared pro se by James P. Bressingham (Vice President and Director of Taxation of petitioner). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John O. Michaelson, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a letter in opposition. Any reply brief by the Division of Taxation was due by July 18, 1995, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioners Koenig and DeWitt concur.

ISSUE

Whether interest should be imposed on a 1989 tax liability asserted as a result of a 1992 audit when petitioner elected an overpayment in 1989 to be credited against future taxes.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

In March of 1991,¹ petitioner, Unicorp American Corp. ("Unicorp"), filed a 1989 Combined Franchise Tax Return for Banking Corporations (Form CT-32-A) reporting a total combined tax and tax surcharge of \$95,748.00, plus an installment payment for the next period of \$422,816.00. From that amount petitioner subtracted prepayments of \$1,544,221.00, leaving an overpayment of \$1,025,657.00. Petitioner requested that \$500,000.00 of the overpayment be credited to the next period and that the remaining \$525,657.00 be refunded.

In June of 1991, the comptroller issued to petitioner a refund of \$205,208.00, and in September of 1991 petitioner received the \$320,449.00 balance of the refund of \$525,657.00, plus interest in the amount of \$47,199.65.

On its extended due date of March 15, 1991, petitioner also filed its 1989 Metropolitan Transportation Business Tax Surcharge Return (Form CT-32-M) reporting the metropolitan transportation business ("MTB") tax surcharge of \$12,379.00, less prepayments of \$325,000.00, leaving an overpayment of \$312,611.00. Petitioner requested that \$75,000.00 of the overpayment be credited to the next period's MTB tax and the balance of \$237,621.00 be refunded. In June of 1991, the comptroller issued a \$237,621.00 refund to petitioner.

In October of 1991, the Division of Taxation's ("Division") audit unit completed a field audit of petitioner covering the tax years 1987 through 1989. The Division issued a Consent to Field Audit Adjustment indicating additional tax due of \$589,251.00,² plus interest in the amount of \$115,544.00 computed to November 15, 1991.

¹Apparently, petitioner was given an extended due date for filing the 1989 tax return.

²According to petitioner's representative, the additional tax for 1989 involved a mortgage recording tax credit carryover, the elimination of which petitioner was unaware.

On or about November 5, 1991, petitioner filed an amended CT-32-A return and an amended CT-32-M return for the tax year 1989. The amended franchise tax return showed a recomputed total combined tax and tax surcharge of \$598,788.00, plus an amended first period installment of \$419,776.00, less amended prepayments of \$1,018,564.00, leaving a balance due of zero. The amended MTB return indicated a recomputed MTB tax surcharge of \$97,927.00, less amended prepayments of \$87,379.00, leaving a balance due of \$10,548.00, plus interest of \$1,793.00. Petitioner paid the total of \$12,341.00.

In a letter dated November 26, 1991, petitioner stated that it agreed with the audited tax liability but disagreed with the assessment of interest. Petitioner requested that the \$500,000.00 and \$75,000.00 overpayments credited from 1989 be applied against the audited tax pursuant to Tax Law § 1084(k) inasmuch as the credit was not needed to satisfy the 1990 combined tax liability because the first period installment for 1989 would cover the 1990 tax due.

Petitioner submitted a check in the amount of \$577,304.00 to cover the balance of the audited tax liability, less the \$12,341.00 paid with the amended MTB tax return. In an accompanying letter dated December 4, 1991, petitioner noted that although it made the payment, it was not changing its arguments set forth in the November 26, 1991 letter.

The Division issued a Notice of Deficiency, dated February 18, 1992, to petitioner for the tax periods ending December 31, 1987 through December 31, 1989. The amount of tax due for those periods was set forth as follows:

<u>Tax Period Ended</u>	<u>Tax Amount Assessed</u>	<u>Interest Amount Assessed</u>	<u>Penalty Amount Assessed</u>	<u>Assessment Payments/ Credits</u>	<u>Current Balance Due</u>
12-31-87	\$ 402.00	\$ 185.05	\$0.00	\$ 587.05	\$ 0.00
12-31-87	2,364.00	1,090.94	0.00	3,454.94	0.00
12-31-88	380.00	127.64	0.00	507.64	0.00
12-31-88	2,250.00	756.61	0.00	3,006.61	0.00
12-31-89	84,861.00	17,014.86	0.00	101,875.86	0.00
12-31-89	<u>498,994.00</u>	<u>102,626.58</u>	<u>0.00</u>	<u>467,871.90</u>	<u>133,748.68</u>
Totals	\$589,251.00	\$121,801.68	\$0.00	\$577,304.00	\$133,748.68

After a conciliation conference, the conferee issued an order, dated March 26, 1993, sustaining the statutory notice. In a letter dated February 11, 1993, the conferee explained the reasons for denying petitioner's request that the interest be cancelled with respect to its 1989 tax liability. Based on his reading of Tax Law § 1086(a) and (b), the conferee found that once petitioner filed its original 1989 return and credited the \$575,000.00 overpayment to 1990, it could not bring back the \$575,000.00 to offset the 1989 deficiency. The conferee reasoned that to allow the amended return "would not only remove the refunds from its prepayments, but also the amounts credited to the next period" and that this situation would "again result in the deficiencies determined on audit and interest under section 1084(a) would be applied from the prescribed date (March 15, 1990) to the date the deficiency was paid on December 5, 1991." The conferee therefore concluded that Tax Law § 1084(k) did not apply because there were no "overpayments" within the meaning of Tax Law § 1086 to be credited against the deficiencies.

Unicorp filed a petition, dated May 4, 1993, requesting a refund of the interest paid of \$131,710.00, plus interest. Petitioner argued that Tax Law § 1084(k) applies and that the conferee's reliance on the amendment to Tax Law § 1086(a), effective July 12, 1991, was erroneous inasmuch as the effective date of the amendment was after the years in question. Petitioner contends that Tax Law § 1084(k) provides that if any portion of a tax is satisfied by credit of an overpayment, then no interest shall be imposed. Petitioner notes that if the credit had not been made to the 1990 tax year, interest would have been allowed on the overpayment and that an amended return was filed for the 1989 tax year requesting the tax owed for 1989 be satisfied by payments made for the 1989 tax year.

The Division filed an answer dated June 10, 1993 affirmatively stating that petitioner cannot, "at its whim", reallocate an overpayment generated in 1989 that was credited on the 1990 return.

At hearing, the Division's counsel relied on the conferee's reasoning for the Division's position. In order to clarify that position, the Division's counsel, John O. Michaelson, was questioned as follows concerning his interpretation of the conferee's statements:

ADMINISTRATIVE LAW JUDGE: "There's something that was stated in the conferee's decision, I'm wondering if the parties could clarify this since we're relying so heavily on this decision for the Division's position, on the second to last page of the conferee's decision, the last paragraph, it says, midway through that paragraph --"

MR. BRESSINGHAM: "Which page again?"

ADMINISTRATIVE LAW JUDGE: "It's page 3, the conferee's order, the last paragraph. The conferee says, when filing the amended 1989 returns, the requester would not only remove the refund from the prepayment but also the amount credited to the next period. This would, again, result in the deficiencies determined on audit and interest under Section 1084-A would be applied from the prescribed due date to the date the deficiency was paid on December 5, 1991.

"I'm trying to understand the relevance of this section. My understanding of it is that the conferee would argue that if you remove these funds from the way . . . you had originally elected to have them credited to the next period, that there would be a deficiency in that next period."

* * *

MR. MICHAELSON: "Our argument, and I was going to address it in the letter memo, is, in substance, the way I read that is that, because this amount was credited against the 1990 tax initially that the interest on any underpayment of tax would continue to accrue up until such time as it was credited back or until the time the amount of the deficiency was paid, which in this case was in December of 1991."

ADMINISTRATIVE LAW JUDGE: "Okay."

MR. BRESSINGHAM: "Say that again."

MR. MICHAELSON: "That's the way I interpreted that particular sentence."

ADMINISTRATIVE LAW JUDGE: "So, it doesn't have anything to do with the removing of funds from that 1990, the amount of tax due for 1990. It doesn't have --"

MR. MICHAELSON: "No, not the way I read it. Again, this is a bizarre issue to be actually holding a hearing on. It's much more easily addressed in briefs."

ADMINISTRATIVE LAW JUDGE: "Well, perhaps then you understand my confusion about it. And would you address it in the brief?"

MR. MICHAELSON: "Oh, yes. No doubt." (Tr., pp. 14-16.)

The Division did not submit a brief to explain its position or to clarify further how it interpreted the conferee's explanation of not allowing the overpayment to be applied to the 1989 tax liability.

OPINION

The crux of the matter on this exception is the date for the accrual of interest where an overpayment for a given year is initially calculated by the taxpayer; that overpayment is credited to the subsequent year; and a deficiency is ultimately determined by the Division for the earlier year.

The pertinent facts in this case are that petitioner, on March 15, 1991, filed its 1989 Combined Franchise Tax Return reporting a total tax of \$95,748.00, plus an installment payment for the next period of \$422,816.00. From that amount, petitioner subtracted prepayments of \$1,544,221.00, leaving an overpayment of \$1,025,657.00. Petitioner requested that \$500,000.00 of the overpayment be credited to the next period and that the remaining \$525,657.00 be refunded. The overpayment was credited and the refund was made to petitioner. Subsequently, on November 15, 1991, a deficiency for 1989 was determined by the Division which was less than the amount of the overpayment applied to 1990.

The Administrative Law Judge determined that the interest on the 1989 deficiency did not accrue until March 15, 1991, the date on which the overpayment initially calculated for 1989 was credited to petitioner's 1990 taxes.

The Administrative Law Judge reviewed the report of the conferee of the Bureau of Mediation and Conciliation Services which formed the basis of the Division's legal argument at hearing.³

³While the Division acknowledged at hearing that the issue in this case was one of law that should be addressed in the post-hearing briefs filed by the parties, the Division did not file a post-hearing brief.

The Administrative Law Judge pointed out that the conferee, relying on Tax Law § 1086(a)⁴ as amended effective July 12, 1991, and section 1086(b),⁵ determined that once Unicorp filed its original 1989 returns and credited the \$575,000.00 overpayment to 1990, it could not use that amount to offset a 1989 deficiency.

The Administrative Law Judge found petitioner's position persuasive:

"on an equitable level, particularly when at the time of its amended 1989 return the overpayment was not needed to cover its 1990 tax liability, section 1086(b) nonetheless requires that once Unicorp elected to apply the overpayment to its 1990 liability, the overpayment was no longer applicable to the 1989 liability. In essence, the election removed the overpayment from the 1989 liability similar to the election of a refund of the 1989 payment" (Determination, conclusion of law "A").

She concluded:

"[h]owever, petitioner did not elect to apply the 1989 overpayment to its 1990 taxes until the filing of the original return on March 15, 1991. Therefore, until March 15, 1991, the overpayment was available to its 1989 liability. Accordingly, no interest should be charged for the period March 15, 1990 through March 15 1991" (Determination, conclusion of law "A").

On exception, the Division asserts that:

"[w]hen the petitioner elected to apply the 1989 overpayment to the 1990 liability, the election was made effective on the original due date of the 1989 franchise tax report: The 1989 overpayment was credited to the first payment of the 1990 estimated tax liability for purposes of

computation of the penalty for underpayment of estimated tax liability

"The ALJ erred when attempting to allow the petitioner to use the funds twice: The first instance being the application of the 1989 overpayment to the initial 1990 estimated tax payment, and the second instance being the ability to use the 1989 overpayment to avoid the payment of interest for the additional liability which was assessed for 1989.

⁴Tax Law former § 1086(a) provided that "[the] tax commission, within the applicable period of limitations, may credit an overpayment of tax and interest on such overpayment against any liability in respect of any tax imposed by the tax law on the taxpayer who made the overpayment."

⁵Tax Law § 1086(b) provides, in relevant part, that "[i]f any overpayment of tax is so claimed as a credit against estimated tax for the succeeding taxable year, such amount shall be considered as a payment of the tax under article nine-a . . . and no claim for credit or refund of such overpayment shall be allowed for the taxable year for which the overpayment arises" (emphasis added).

"Tax Law §1084(k) states, in part, that . . . no interest shall be imposed under this section on the portion of the tax so satisfied (Emphasis added). The overpayment was properly applied to the initial 1990 estimated tax payment and was properly utilized in 1990. The overpayment was not available to satisfy the outstanding 1989 tax liability, therefore interest should be properly computed from the original due date of the 1989 franchise tax report which was the date the overpayment was credited to 1990" (Division's brief, pp. 6-7).

In response, petitioner asserts that the determination of the Administrative Law Judge that interest on the 1989 deficiency should begin to accrue from the date the overpayment was credited to the subsequent years liability is correct.

We affirm the determination of the Administrative Law Judge.

We find Revenue Ruling 88-98 interpreting analogous provisions of the Internal Revenue Code particularly helpful.⁶ It addresses the accrual of interest in situations where (1) an overpayment for a given year is initially calculated by the taxpayer, (2) that overpayment is credited to a subsequent year, and (3) a deficiency is ultimately determined for the earlier year. The ruling is based upon Avon Products v. United States (588 F2d 342, 78-2 USTC ¶ 9821) and holds that interest on a deficiency will only be charged from the point the tax is both due and unpaid. Since the portion of the deficiency which is equal to the amount of the credited overpayment is not unpaid until the overpayment is credited to the subsequent period, interest should not begin to accrue on the deficiency until the time the overpayment is credited to the subsequent period. In other words, petitioner's interest on petitioner's subsequently determined

⁶Tax Law § 1084(a) imposes interest on any amount of tax that is not paid on or before the last day prescribed for payment. Tax Law § 1084(a) is virtually identical to section 6601(a) of the Internal Revenue Code.

Tax Law § 1084(k) provides that:

"[i]f any portion of a tax is satisfied by credit of an overpayment, then no interest shall be imposed under [section 1084(a)] on the portion of the tax so satisfied for any period during which, if the credit had not been made, interest would have been allowable with respect to such overpayment."

Section 1084(k) is similar to Internal Revenue Code § 6601(f).

1989 deficiency should run from March 15, 1991 -- the date on which the 1989 overpayment was credited to petitioner's 1990 taxes.

The Division's reliance on section 1084(k) is misplaced. Petitioner is not attempting to use the overpayment credited to 1990 to offset the 1989 deficiency, but rather seeks to rely on the actual date of the election to credit the overpayment for 1990 as the date from which interest will run on that deficiency.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Unicorp American Corporation is granted.

DATED: Troy, New York
December 28, 1995

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner