

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
HOECHST CELANESE CORP.	:	DECISION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 813849
Corporation Franchise Tax under Article 9-A of the Tax	:	
Law for the year 1979.	:	

Petitioner Hoechst Celanese Corporation, Route 202-206, P.O. Box 2500, Somerville, New Jersey 08876-1258, filed an exception to the determination of the Administrative Law Judge issued on November 27, 1996. Petitioner appeared by Richard S. Payne, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter in lieu of a brief in opposition and petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on October 8, 1997 in Troy, New York..

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner's claim for a refund of franchise tax paid for 1979 was barred by the statute of limitations provided in the Tax Law..

FINDINGS OF FACT

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

Petitioner, Hoechst Celanese Corporation, filed a New York State corporation franchise tax report for 1979 on December 18, 1980. It reported entire net income of \$52,871,062.00 and paid the tax of \$278,498.00 shown as due.

Petitioner filed a 1982 corporation franchise tax report in December 1983 reporting a net loss of \$85,378,287.00.

On or about March 11, 1983, petitioner filed two Federal forms 1139 ("Corporation Application for Tentative Refund") with the Internal Revenue Service, one for the tax year ended December 31, 1979 and one for the tax year ended December 31, 1982. Petitioner's Federal refund claim for 1979 was based on the carryback of a net operating loss from 1982.

Petitioner received an allowance of the tentative carryback adjustment from the Internal Revenue Service. Petitioner was informed that the allowance was approved in March 1983 and received payment in April 1983.

The Internal Revenue Service audited petitioner's Federal income tax returns for the years 1979 through 1987. In April 1991 and May 1992, petitioner executed forms which extended the time for the Internal Revenue Service to assess tax to September 30, 1993.

On August 5, 1992, petitioner received an audit report from the Internal Revenue Service. On August 7, 1992, petitioner's representative (R.W. Smedley, Vice-President) executed a waiver consenting to the final determination of the Internal Revenue Service. Among other things, petitioner and the Internal Revenue Service agreed that there had been an overassessment of tax in the amount of \$3,250,041.00 for the year 1979. The waiver was subject to review of the

Congressional Joint Committee on Taxation. (Internal Revenue Code § 6405[a].) That review was completed on or about November 18, 1992, and no exception was taken to the findings of the Internal Revenue Service.

On December 15, 1992, petitioner filed with the Division of Taxation ("Division") a form CT-3360, Federal Changes to Corporate Taxable Income, for 1979 where it claimed a refund of \$286,427.00 based on the carryback of a net operating loss from 1982. Petitioner attached a schedule to the form entitled "Finalized Federal Income Tax Deficiencies as settled with the Internal Revenue Service".

By letter dated March 22, 1993, the Division disallowed petitioner's 1979 refund claim on the basis that it was not filed within the statutory period of limitation set forth in Tax Law §1087(d).

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In her determination, the Administrative Law Judge noted that because petitioner's refund claim was attributable to the application of a net operating loss carryback, petitioner had the later of three years from the time the return was due for the taxable year of the loss or the period prescribed by Tax Law § 1087(c) within which to file its claim. Since petitioner's refund claim was not filed within three years from the time its loss year return was due, its claim would be deemed timely only if it was filed within the period of limitation provided for in Tax Law § 1087(c). Pursuant to Tax Law § 1087(c), petitioner had two years from the time its report or amended return in respect of Federal changes or corrections was required to be filed with the Division pursuant to Tax Law § 211(3) to file a claim for credit or refund.

The Administrative Law Judge noted that Tax Law § 211(3) required petitioner to file a report or amended return with the Division in respect of a change to its corporate Federal taxable income within 90 days after the final determination of such change or correction. A 1973 amendment to Tax Law § 211(3) (L 1973, ch 449) specifically provided that a Federal allowance of a tentative carryback adjustment based upon a net operating loss carryback is to be treated as a "final determination." Thus, the Administrative Law Judge concluded that petitioner had a period of two years and 90 days from the date of the allowance of a tentative carryback adjustment based upon a net operating loss carryback in which to file its claim for credit or refund with the Division.

Petitioner had conceded that it received a Federal allowance of a tentative carryback adjustment for 1979 in April 1983 but that petitioner did not report the change to its corporate Federal taxable income or claim a refund of corporation franchise tax until December 1992. Thus, the Administrative Law Judge concluded that petitioner's claim for refund was untimely as it was not filed within two years and 90 days from the date of the final determination of the Federal change or correction to its corporate income.

Petitioner argued that a final determination of a change to its corporate Federal taxable income was not actually issued until November 18, 1992, the date on which petitioner was advised that the audit results of the Internal Revenue Service were approved by the Joint Committee on Taxation. Petitioner contended that the statutory definition of a "final determination" in Tax Law § 211(3) is controlling only for the purpose of barring the accrual of interest on refunds or credits not filed within the 90-day period as provided in Tax Law § 1087(c) and not for the purpose of triggering the two-year period of limitation. Thus, argued petitioner,

its failure to file a claim or refund within two years of the allowance of a tentative carryback adjustment only affected the accrual of interest on its refund.

The Administrative Law Judge rejected this argument as contrary to the clear wording of Tax Law § 1087(c). The Administrative Law Judge concluded that a "final determination" pursuant to Tax Law § 211(3) allows for the termination of the accrual of interest on a refund amount if the required report is not filed within 90 days and also starts the running of the two-year period of limitation for filing a refund claim from the time the report of a Federal change was required to be filed. Thus, the Administrative Law Judge concluded that petitioner's failure to file a claim for refund within that period rendered its claim untimely.

ARGUMENTS ON EXCEPTION

In support of its exception, petitioner argues that Tax Law § 1087(d) provides three time periods for determining the timeliness of a refund claim attributable to a net operating loss carryback: 1) three years from the time the tax return for the loss year was due; 2) six months from the expiration of the time within which an assessment may be made pursuant to an agreement extending such time as provided in Tax Law § 1087(b) for the loss year; and 3) the time period provided in Tax Law § 1087(c) in respect of the year to which the loss is carried back. It is the third time period under which petitioner claims that its refund claim was timely filed.

The dispute in this matter, argues petitioner, focuses on the effect of Chapter 449 of the Laws of 1973. That chapter amended Tax Law § 211(3) to provide that the allowance of a Federal tentative carryback adjustment was to be treated as a "final determination" for purposes of that subdivision. Petitioner argues that the Administrative Law Judge incorrectly found that the allowance of a tentative carryback adjustment also served to commence the running of the

two-year statute of limitations provided in Tax Law § 1087(c). Petitioner maintains, relying on the legislative history of the 1973 amendment, that it only affected the right of a refund claimant to accrue interest on its claim and did not affect the time within which a claim for refund could be filed. Petitioner also argues that this interpretation is buttressed by the legislative history of Chapter 240 of the Laws of 1976, which amended Tax Law § 1088(d) by placing restrictions on the accrual of interest on tax refunds attributable to carrybacks of corporations taxed as subchapter S corporations for Federal purposes.

Petitioner argues that the Legislature's reference in Tax Law § 211(3) to the tentative carryback adjustment as "a final determination" rather than "the final determination" is indicative of its intent that there could be more than one final determination. Petitioner argues that its Federal taxable income for 1979 was not finally determined for Federal purposes until the Joint Committee on Taxation accepted the Form 870-AD executed by petitioner and the Internal Revenue Service in November 1992. Thus, its notification to the Division of those final Federal changes in December 1992 was timely.

In opposition, the Division argues that the Administrative Law Judge correctly analyzed the issues in this case and came to the proper conclusion. As to the legislative history of Tax Law § 1088(d), the Division argues that it does not support petitioner's case. Rather, petitioner's argument is contrary to the statutory scheme.

OPINION

We agree with petitioner that the issue in this case is the effect of Chapter 449 of the Laws of 1973. For petitioner to prevail, we must accept its argument that this 1973 amendment to Tax Law § 211(3) only serves to limit the accrual of interest on a refund claim based on a net operating loss carryback. We do not accept this premise.

When petitioner received a Federal allowance of a tentative carryback adjustment based on a net operating loss carryback, Tax Law § 211(3) provided that:

If the amount of taxable income for any year of any taxpayer . . . is changed or corrected by the commissioner of internal revenue . . . such taxpayer shall report such changed or corrected taxable income . . . within ninety days after the final determination of such change or correction . . . and shall concede the accuracy of such determination or state wherein it is erroneous. The allowance of a tentative carryback adjustment based upon a net operating loss carryback or net capital loss carryback . . . shall be treated as a final determination for purposes of this subdivision.

By its terms, therefore, the allowance of petitioner's tentative carryback adjustment based upon a net operating loss carryback was a final determination for purposes of Tax Law § 211(3) and commenced the 90-day period within which petitioner was to file a report of a change or correction of its Federal taxable income. Tax Law § 211(3) does not directly concern the accrual of interest on a claim for refund. For its effect on the accrual of interest, we must look to Tax Law § 1087, which provides the time limits for filing a claim for refund or credit of an overpayment of tax.

Subsection (d) of section 1087 provides, in applicable part, that a claim for credit or refund of an overpayment of tax attributable to a net operating loss carryback shall be filed within the time period provided in Tax Law § 1087(c) in respect of the year to which the loss is carried back. Tax Law § 1087(c) provides that when a taxpayer is required to file a report or amended return pursuant to Tax Law § 211(3) in respect of a Federal change or correction of tax which is treated for Federal income tax purposes as an overpayment, a "claim for credit or refund of any resulting overpayment of tax shall be filed by the taxpayer within two years from the time such report or amended return was required to be filed with the tax commission." However, that section further provides that if the report or amended return is not filed within the 90-day period

specified in Tax Law § 211(3), "interest on any resulting refund or credit shall cease to accrue after such ninetieth day."

Thus, Tax Law § 1087(c) restricts the accrual of interest to claims based on an overpayment of tax which are filed with the Division within 90 days of the final determination of a change or correction of Federal taxable income by the Commissioner of Internal Revenue. Subsequent to the 1973 amendment to Tax Law § 211(3), the 90-day period referred to in Tax Law § 1087(c) commenced to run on the allowance of a tentative carryback adjustment based upon a net operating loss carryback.

We do not accept petitioner's argument that the Legislature's designation of an allowance of a tentative carryback adjustment based upon a net operating loss carryback as "a" final determination rather than as "the" final determination to be supportive of its position. Tax Law § 211(3) concerns the obligation of a taxpayer to report changes or corrections of Federal taxable income without limitation as to the nature of such changes within 90 days of their final determination. Certainly, the allowance of a tentative carryback adjustment based upon a net operating loss carryback is only one example of the myriad of Federal determinations which might affect Federal taxable income. In other words, there is no specified limit on the types of final determinations which would be required to be reported to the Division pursuant to Tax Law § 211(3) concerning Federal taxable income. However, it does not necessarily follow, as petitioner argues, that the Legislature anticipated that there would be more than one final determination of carryback adjustments.

Our interpretation is consistent with the 1973 Department of Taxation and Finance's Memorandum in Support of Chapter 449 of the Laws of 1973. As provided therein, "[t]his amendment, in conjunction with section 1087(c) of the Tax Law, will, in effect, cut off the

accrual of interest if such notice of change is not filed within the 90 days required by subdivision 3 of section 211" (1973 NY Legis Ann, at 263). The memorandum also provided that "the limitations on the accrual of interest provided by this bill will not affect the time within which a claim for refund or credit of an overpayment must be made which is otherwise provided by subsection (d) of section 1087" (1973 NY Legis Ann, at 263). In enacting Chapter 449 of the Laws of 1973, the Legislature did not affect the time limit within which a claim for refund or credit must be made. However, by defining a tentative carryback adjustment based upon a net operating loss carryback as a final determination, it did affect the date on which that time period commenced to run.

As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Hoechst Celanese Corp. is denied,
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Hoechst Celanese Corp. is denied; and

4. The Division of Taxation's denial of petitioner's refund claim for 1979 is sustained.

DATED: Troy, New York
March 19, 1998

Donald C. DeWitt
President

Carroll R. Jenkins
Commissioner

Joseph W. Pinto, Jr.
Commissioner