STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SUMITOMO MITSUI BANKING CORP.	:	DECISION DTA NO. 820097
for Redetermination of a Deficiency or for Refund of Franchise Tax on Banking Corporations Under Article 32 of the Tax Law for the Fiscal Years Ended March 31, 1992 through March 31, 1994.	:	

Petitioner Sumitomo Mitsui Banking Corp., c/o Yuet Chan, 277 Park Avenue, 6th Floor, New York, New York 10172, filed an exception to the determination of the Administrative Law Judge issued on March 2, 2006. Petitioner appeared by Deloitte Tax LLP (Russell W. Banigan, CPA and Brian G. Gallagher, Esq.). The Division of Taxation appeared by Daniel Smirlock, Esq. (Jennifer L. Baldwin, Esq., of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on December 13, 2006 in Troy, New York.

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

ISSUES

I. Whether petitioner's refund claims were timely filed.

II. Whether personnel expenses of the Tokyo and Osaka head offices of a Japanese bank, which were apportioned to the bank's income effectively connected with a United States trade or

business and deducted on its Federal and New York tax returns, should be included in the denominator of its New York payroll factor.

FINDINGS OF FACT

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

The Sumitomo Bank Limited ("Sumitomo"), a banking corporation incorporated in Japan in March of 1912 (although founded in 1895), began to conduct business in New York in the fall of 1952. On April 1, 2001, Sumitomo and The Sakura Bank, Limited merged to form the Sumitomo Mitsui Banking Corp. Two years later, on March 17, 2003, Sumitomo Mitsui Banking Corp. was merged into Wakashio Bank, Ltd. The combined entity retained the name Sumitomo Mitsui Banking Corp., petitioner in this proceeding, and succeeded to the rights and obligations of Sumitomo.

During the years at issue, Sumitomo was a multinational banking corporation with 384 offices in Japan and 67 offices in 33 countries including the United States, which was Sumitomo's largest market outside Japan, and it had approximately 18,000 total employees. With the intention of being one of the world's premier financial institutions servicing the financial needs of multinational corporations, Sumitomo maintained "expert financial teams" in Tokyo, New York, London and Hong Kong. Sumitomo's 1993 annual report shows the following percentages of consolidated revenues by region for two of the three fiscal years ("FYs") at issue:

Region	FY ended 3/31/92	FY ended 3/31/93
Japan	68%	65%

Europe	15%	17%
Americas	9%	9%
Asia (except Japan)	8%	9%

Sumitomo filed a timely Form CT-32, Franchise Tax Return for Banking Corporations, for each of the years at issue after obtaining automatic six-month extensions. Consequently, the due dates for its New York franchise tax returns for the fiscal years at issue, which ended March 31, 1992, March 31, 1993 and March 31, 1994, were December 15, 1992, December 15, 1993 and December 15, 1994, respectively.[1] Sumitomo reported to New York (i) allocated taxable entire net income and (ii) total tax and tax surcharge due for the years at issue as follows:

Fiscal Year Ended	Allocated taxable entire net income	Total tax and tax surcharge
March 31, 1992	$23,733,046.00	$2,456,370.00
March 31, 1993	77,124,159.00	7,982,350.00
March 31, 1994	46,407,476.00	4,803,174.00

Sumitomo reported the following amounts as its (i) Federal taxable income before net operating loss and special deductions, (ii) "entire net income" after factoring in its New York specified additions and subtractions, and (iii) New York allocation percentages for the years at issue:

Fiscal Year Ended	Federal taxable income before net operating loss and special deductions	Entire net income after factoring in New York additions and subtractions	New York allocation percentage
March 31, 1992	$65,425,660.00	$52,725,479.00	45.012481%
March 31, 1993	173,092,682.00	176,893,113.00	43.5993%

[1] Pursuant to Tax Law § 1451, Sumitomo's tax returns were due "not later than the fifteenth day of the third month succeeding the close of such period" or 2 months plus 15 days after the ending date of the particular fiscal year. For example, for the fiscal year ending March 31, 1992, the tax return was due June 15, 1992. With the approved extensions, this due date was extended six months to December 15, 1992 as noted above.

March 31, 1994	93,425,328.00	98,347,386.00	47.1873%

In calculating its New York allocation percentages as shown in the table above, Sumitomo reported New York payroll percentages calculated as follows:

Fiscal Year Ended	A Wages of employees, except general executive officers, in New York	B 80% of prior column	C Wages of employees, except general executive officers everywhere	Percentage in New York Column B divided by Column C
March 31, 1992	$12,408,576.00	$ 9,926,861.00	$40,272,564.00	24.649190%
March 31, 1993	14,859,531.00	11,887,625.00	43,260,024.00	27.4795%
March 31, 1994	15,146,742.00	12,117,394.00	47,011,790.00	25.7752%

On August 27, 2002, claims for refund ("original refund claims") of New York franchise tax for each of Sumitomo's three fiscal years ended March 31, 1992, March 31, 1993 and March 31, 1994 in the amounts of $61,063.00, $255,764.00 and $134,427.00, respectively were filed. At the hearing, petitioner made a motion to modify these refund amounts to the lesser amounts of $39,703.00, $233,575.00 and $123,691.00 (total refund claim of $396,969.00) for the fiscal years ended March 31, 1992, March 31, 1993 and March 31, 1994, respectively, for the reasons discussed ***infra***.

The original refund claim for the fiscal year ended March 31, 1992 posited a decrease in the New York payroll percentage to 20.399908% based upon an increase in Sumitomo's "everywhere wages" from $40,272,564.00 to $48,661,301.00. The refund claim for the fiscal year ended March 31, 1993 posited a decrease in the New York payroll percentage to 24.40003% based upon an increase in Sumitomo's "everywhere wages" from $43,260,024.00 to

$52,792,390.00. The refund claim for the fiscal year ended March 31, 1994 posited a decrease in the New York payroll percentage to 22.2736% based upon an increase in Sumitomo's "everywhere wages" from an audited amount of $46,939,300.00 to $60,463,962.00. In recalculating Sumitomo's "everywhere wages," personnel expenses contained in the amounts representing Sumitomo's allocated head office (in Japan) expenses used to calculate its Federal taxable income and, in turn, its New York entire net income and alternative entire net income under Article 32 were included.

By a letter dated September 23, 2003, the Division of Taxation ("Division") by its Income/Franchise Field Audit Bureau denied the refund claims for the following reason:

> The information in your claims indicates that you are adjusting payroll factor by including salaries incurred by the head office [in Japan] into denominator of wage factor. The salary expense of the home office employees which is allocated to effectively connected income is not a salary expense of our taxpayer; it is a home office charge producing a foreign source gross income equaling the charge: the net effect is zero to the bank's total worldwide operations. As such this charge cannot be considered as wages, salaries and other personal service compensation as defined in regulation 19-5.1(c).

Sumitomo's Federal Tax Filings

As a foreign bank operating in the United States, Sumitomo filed a Federal form 1120-F, U.S. Income Tax Return of a Foreign Corporation, for each of the years at issue. In Section II of these Federal returns, it reported "income effectively connected with the conduct of a trade or business in the United States" including the following substantial amount of interest income on loans effectively connected with U.S. trade or business: $1,767,565,455.00 in its fiscal year ending March 31, 1992; $1,276,186,921.00 in its fiscal year ending March 31, 1993; and $1,178,176,458.00 in its fiscal year ending March 31, 1994. Sumitomo transferred some loans it originated in the United States to its head offices in Japan for administration. Consequently, it

allocated a portion of its so-called "indirect" head office expenses to its U.S. income in addition to its "direct" head office expenses that it also deducted on its Federal tax returns. "Direct" head office expenses related to salary and bonuses paid out of Japan to bank employees on U.S. assignments. According to Yuet Fong Chan, a certified public accountant employed by petitioner for its tax compliance:

> When a Japanese officer is transferred from Japan to work in the United States, part of their salary . . . and a portion of the bonus or the whole bonus, are paid out of Japan directly for their services . . . in the . . . United States . . . . While they are on assignment in United States, their wife and children may remain in Japan. So they have the election to have some of the salary being paid out of Japan [tr., pp. 43-44].

In contrast, "indirect head office expenses" were expenses incurred by Sumitomo in Japan which generated, in the words of Ms. Chan, "effectively connected income" in the United States so that they may be "allocated to the U.S. operations" (tr., p. 39). Sumitomo deducted (i) direct head office expenses and (ii) allocated indirect head office expenses on its Federal tax returns, as originally filed, in the following amounts:

	FYE 3/31/1992	FYE 3/31/1993	FYE 3/31/1994
Direct head office expenses deducted	$3,981,036.00	$4,525,252.00	$5,173,003.00
Allocated ("indirect") head office expenses deducted	20,075,424.00	21,543,212.00	27,153,699.00

A portion of the allocated or "indirect" head office expenses deducted, as shown in the table above, represented the following allocated or "indirect" Tokyo-based, head office *personnel*[2] expenses:

	FYE 3/31/1992	FYE 3/31/1993	FYE 3/31/1994
Allocated ("indirect") head office personnel expenses attributable to Sumitomo's international department deducted	$3,580,812.00	$3,907,242.00	$4,801,196.00
Allocated ("indirect") head office personnel expenses attributable to other departments deducted	4,807,914.00	5,625,161.00	8,722,926.00
Total of allocated ("indirect") head office personnel expenses deducted	$8,388,726.00	$9,532,366.00	$13,524,662.00

In its original Federal tax returns for the years at issue, Sumitomo included in its deduction for allocated "indirect" head office personnel expenses, the personnel expenses for its general executive officers. In calculating its New York payroll factors, petitioner concedes that the personnel expenses related to the compensation of Sumitomo's general executives, consisting of the 47 highest paid employees who earned annual salaries in the approximate range of $270,000.00 to $400,000.00, should not have been included in the denominator ("everywhere wages") of the payroll factors. Excluding such executive compensation results in somewhat

[2] The other allocated or indirect head office expenses were categorized as either "facility expenses" or "other expenses" (such as charitable contributions, entertainment and advertising expenses).

higher New York payroll factors and lowers the amounts now claimed for refund, as specified above.

Internal Revenue Service Audit

As a result of an Internal Revenue Service ("IRS") audit, which had commenced in the fall of 1996, the IRS field agent disallowed Sumitomo's "allocated head office expenses" claimed for (i) charitable contributions because they did not relate to U.S. charity; (ii) entertainment expenses and (iii) advertising expenses. The agent's notice of proposed adjustment dated December 17, 1997 included the following explanation:

> Expenses for donations to non-U.S. charities have been eliminated as they are not deductible for U.S. tax purposes. Advertisement and entertainment expenses have been eliminated as they are incurred for the benefit of the Japanese retail market.

The IRS Appeals Office proposed settlement adjustments which allowed 50% of Sumitomo's head office expenses for entertainment expenses and advertising expenses as follows:

Type of expense	FY 1992 Field agent disallowance	FY 1992 Appeals disallowance	FY 1993 Field agent disallowance	FY 1993 Appeals disallowance	FY 1994 Field agent disallowance	FY 1994 Appeals disallowance
Charity	$512,895.00	$512,895.00	$284,016.00	$284,016.00	$347,104.00	$347,104.00
Advertising	884,968.00	442,484.00	692,620.00	346,310.00	566,172.00	283,086.00
Entertain-ment	84,492.00	42,246.00	79,188.00	39,594.00	87,028.00	43,514.00

This proposal by the Appeals Office was accepted pursuant to a closing agreement signed on May 13, 2002 by Sumitomo's successor entity and on June 21, 2002 by the IRS.

In addition, minor changes were made by the IRS field agent to Sumitomo's indirect head office personnel expenses as follows:

	1992 FY	1993 FY	1994 FY
Indirect head office personnel expenses claimed on original Federal tax returns	$8,388,725.00	$9,532,403.00	$13,524,123.00
Amount allowed by IRS field agent	8,388,737.00	9,532,366.00	13,524,662.00
Resulting decrease or (increase) in amount	(12.00)	37.00	(539.00)

These meager changes were left unchanged on the IRS appeals level. The record includes no clear explanation of the basis for these corrections to Sumitomo's indirect head office personnel expenses claimed on its original Federal tax returns. Petitioner's witness conceded that it might have been due to a rounding off of numbers. Moreover, the relevant schedules showing the *audit adjustments* made by the IRS indicate no audit adjustment to Sumitomo's indirect head office personnel expenses. Instead, they indicate substantial audit adjustments to Sumitomo's indirect head office "other expenses." As detailed above, these "other expenses" audited and adjusted by the IRS were Sumitomo's head office charitable contributions, entertainment expenses and advertising expenses claimed as indirect head office expenses on its Federal returns. On cross-examination, petitioner's witness was compelled to answer "That's correct" to the question, "So prior to applying the percentages, the deductions for stewardship expense, *the IRS did not make any adjustments to personnel expenses*" (tr., pp. 118-119, [emphasis added]).

On August 26, 2002, Sumitomo's successor entity filed forms CT-3360, Federal Changes to Corporate Taxable Income, to report these changes made by the IRS to Sumitomo's taxable income for the years at issue. For fiscal year 1992, additional New York franchise tax due of

$361,288.00 plus an MTA surcharge of $53,407.00 was reported. For fiscal year 1993, additional New York franchise tax due of $1,050,459.00 plus an MTA surcharge of $155,285.00 was reported. For fiscal year 1994, an overpayment of New York franchise tax and MTA surcharge based upon primarily a reduction to its New York additions, not relevant to this proceeding, was reported. However, one day later, refund claims, as detailed above, were filed wherein Sumitomo's New York payroll percentages were recalculated for each of the years at issue based upon a change in the way "everywhere wages" were computed as detailed above.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The determination of the Administrative Law Judge held that the Division sustained its initial burden of establishing that the refund claims were not timely filed based on the general three-year statute of limitations for refund claims and that this assertion was not rebutted by petitioner's evidence. The determination also held that petitioner's claims for refund were barred by the special statute of limitations provided in Tax Law § 1087(c) which states in part as follows:

> If a taxpayer is required [to report changes or corrected taxable income made by the IRS], 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 commissioner of taxation and finance . . . . The amount of such credit or refund . . . shall be computed without change of the allocation of income or capital upon which the taxpayer's return (or any additional assessment) was based . . . .

This conclusion was found to be consistent with our decision in ***Matter of McDonnell Douglas Corp.*** (***infra***), because the Federal changes reported by the taxpayer in that case had a direct impact on the corporation's allocation percentage, unlike the present case.

The determination accordingly did not reach the substantive issues presented in those claims and described above as Issue II.

ARGUMENTS ON EXCEPTION

Petitioner argues that its claims for refund are governed by the normal two-year statute of limitations and thus are limited only by the amounts that were paid within two years of their filing. In particular, petitioner asserts that under our decision in ***Matter of McDonnell Douglas Corp.*** (***infra***), the prohibition on changing allocations found in Tax Law § 1083(c)(7) applies only to the Division and not to the taxpayer. Petitioner also contends that section 1087(c) is inapplicable because it is limited to Federal changes that directly result in an overpayment of franchise tax. The final sentence of section 1087(a) is said to be inapplicable because it applies only to taxes assessed under the specific provisions referred to in section 1083(c)(7). Finally, petitioner argues that the Division failed to establish that the general three-year statute of limitations on claims for refund under section 1087(a) had expired.

The Division argues that it sustained its initial burden of establishing that petitioner's refund claims were not timely filed because the record established the date on which the period commenced, the expiration of that period and the receipt of the claim after the date of expiration. The Division also asserts that petitioner's claims are barred by section 1087(c) and by section 1083(c)(7) through the cross reference in the last sentence of section 1087(a). Finally, the Division asserts that ***McDonnell Douglas*** is distinguishable because the adjustments to petitioner's payroll factors were not attributable to the Federal changes.

OPINION

The central issue in this case is whether the limitation on claims for refund of taxes that is set forth in the final sentence of Tax Law § 1087(a) as a cross-reference to section 1083(c)(7) applies to taxes assessed pursuant to section 1082(a)(2), as the Division contends, or instead applies only to taxes that were assessed pursuant to the provisions of section 1083 that are listed in section 1083(c)(7), as petitioner asserts. This issue was briefed by the parties before both the Administrative Law Judge and the Tax Appeals Tribunal. For the reasons discussed below, we have concluded that the first interpretation is correct.

The basic legal framework for the collection of taxes generally contemplates an assessment in which a public official makes an entry in an assessment roll and then issues to the taxpayer a notice of assessment and demand for payment. The taxpayer can challenge the assessment only by paying the tax and requesting a refund. In some cases, particularly those involving income taxes, this system has been modified to permit the taxpayer to challenge the assessment in advance of payment through what is generally referred to as a deficiency procedure. In this procedure, the tax collector issues a notice of deficiency giving the taxpayer a period of time, usually 90 days, in which to challenge the asserted tax. If no challenge is advanced, the assessment can proceed and a notice and demand will be issued.

The deficiency procedure is generally available under the Federal income tax and the similar New York taxes (***see,*** Internal Revenue Code §§ 6201, 6211-6213; Tax Law §§ 681-683, 1081-1089). Under the provisions applicable to the New York Corporation Franchise Tax and the Franchise Tax on Banking Corporations there are exceptions in which the deficiency procedure is not available and an assessment can be made and a notice and demand can be issued

without giving the taxpayer a notice of deficiency. For example, the tax shown as due on a report filed by the taxpayer can be assessed immediately (***see,*** Tax Law § 1082[a][1]). Underpayments resulting from errors in arithmetic on the face of the report can also be assessed without giving the filer a notice of deficiency (***Id.***). Another exception, which is described in greater detail below, applies to underpayments arising from changes in the taxpayer's Federal taxable income (***see,*** Tax Law § 1082[a][2]).

The starting place of the calculation of the franchise tax, to the extent it is based on income, is Federal taxable income as reported to the IRS on its Form 1120 (***see,*** Tax Law §§ 208.9, 1453). Various additions, subtractions and modifications are then applied to arrive at "entire net income" for franchise tax purposes. If there is an adjustment to Federal taxable income after the return is filed as the result of an IRS audit or otherwise, the taxpayer is required to provide a prompt notice of that change to the Division and to make any resulting adjustment to its franchise tax liability or to state why such an adjustment is unjustified (***see,*** Tax Law § 1462[e]). An increase in franchise tax liability so reported can also be assessed immediately without providing a notice of deficiency (***see,*** Tax Law § 1082[a][2]). Since adjustments to Federal taxable income as a result of Internal Revenue Service audits may occur long after the normal statute of limitations has closed, exceptions to those rules are provided as described below.

Assessment of an underpayment of tax must generally be made within three years of the filing of the report (***see,*** Tax Law § 1083[a]). A taxpayer's claim for refund of an overpayment of tax must generally be made within three years of filing or, if later, within two years of payment (***see,*** Tax Law 1087[a]). Where a report of Federal changes is made a resulting

underpayment of franchise tax may generally be assessed within two years of the report and a resulting overpayment may be claimed within two years (***see,*** Tax Law § 1083[c][3]).

A resounding theme in the statutory provisions relating to Federal changes is that an overpayment or underpayment of tax resulting from Federal changes and subject to the special statute of limitations for such adjustments should be computed without altering the allocations on the original return. Such a provision applies to resulting underpayment where the taxpayer files a report asserting that the determination is erroneous or fails to file a report (Tax Law § 1083[c][7]) and to claims for refund of such amounts (***Id.,*** Tax Law § 1087[a] [final sentence] and [g] [final sentence]). Another such provision applies in the case of a Federal change resulting in an overpayment of franchise tax (Tax Law § 1087[c]). Petitioner asserts however that these provisions do not apply where the taxpayer files a report of Federal changes conceding the accuracy of the determination which results in an immediate assessment of tax pursuant to section 1083(a)(2).

Petitioner asserts in its briefs that section 1083(c)(7) applies to restrict only the Division and not the taxpayer. This is correct but is merely a tautology. All of section 1083, which is entitled "Limitations on assessment," is addressed to the Division and circumscribes its authority to make assessments of taxes that have not already been assessed. Section 1087, entitled "Limitations on credit or refund," is the complementary provision which circumscribes the taxpayer's right to assert claims for refunds of taxes previously assessed and paid.

Section 1083(c)(7) reads as follows:

> No change of the allocation of income or capital upon which the taxpayer's return (or any additional assessment) was based shall be made *where an assessment of tax is made during the additional period of limitation under subparagraph (C) of paragraph (1), or under paragraph (3) or (4)*; and where any such assessment has

> been made, or where a notice of deficiency has been mailed to the taxpayer on the basis of any such proposed assessment, no change of the allocation of income or capital shall be made in a proceeding on the taxpayer's claim for refund of such assessment or on the taxpayer's petition for redetermination of such deficiency (emphasis added).

The final sentence of section 1087(a) is as follows:

> For special restriction in a proceeding on a claim for refund of tax paid pursuant to *an assessment made as a result of (i) a net operating loss carryback or capital loss carryback, or (ii) an increase or decrease in federal taxable income or federal tax, or (iii) a federal change or correction or renegotiation, or computation or recomputation of tax*, which is treated in the same manner as if it were a deficiency for federal income tax purposes, see paragraph (7) of subsection (c) of section one thousand eighty-three (emphasis added).

Section 1087(a) thus prohibits the taxpayer from making a change in the allocation of its income or capital in connection with a claim for refund of tax assessed as the result of a Federal change treated as a deficiency. The only question is whether that prohibition applies only to taxes assessed pursuant to the subdivisions of section 1083 referred to in section 1083(c)(7) or instead applies in the circumstances more broadly described in subdivisions (i), (ii), and (iii) of the final sentence of section 1087(a), possibly including an assessment pursuant to section 1082(a)(2). There are several reasons to think that the latter is the better interpretation. First, the fairly elaborate descriptions of the types of assessments covered by subdivisions (i), (ii) and (iii) of section 1087(a) would be mere surplusage without substantive effect if it is read to be only a paraphrase of the references in section 1083(c)(7). This would be contrary to the interpretative canon of giving effect to every word of the statute (***see,*** McKinney's Statutes § 231).

Second, as the facts of this case illustrate, the former interpretation would give the taxpayer an election whether to be subject to the prohibition on reallocation simply by choosing whether to file a report of Federal changes adjusted for a change in allocation or instead filing a

report with no such adjustment and the next day filing a refund claim having the same effect. If petitioner had filed its report of Federal changes and reduced its deficiency by making changes in its allocation percentages, the Division's challenge to its position would have been pursuant to a notice of deficiency described in section 1083(c)(3) which would bring the case squarely within the prohibition of section 1083(c)(7), as extended to the taxpayer's claims for credit or refund by section 1087(a)(final sentence) and section 1087(g)(final sentence). Petitioner seems to believe that it has found a trap door in the statute by making the same assertions in two contemporaneous steps rather than one. No basis in logic or policy for such a distinction has been presented by petitioner.

The only argument advanced by petitioner for its narrower reading of the cross reference in section 1087(a) is that there should be a symmetry between the restriction on changing allocations in the assessment of tax and the restriction on claims for refund of such taxes. It states, "Because such an assessment [under section 1083(c)(1)(C), (c)(3), or (c)(4)] cannot be based on a change to the business allocation percentage, then the limitation of the last sentence of section 1087(a) is to provide the same limitation on a refund claim filed to recover taxes so assessed" (Petitioner's Reply Brief, pp. 8-9). Including assessments under section 1082(a)(2) within the scope of the cross reference does not appear to create an asymmetry. Since that section requires the taxpayer's concession to the accuracy of the Federal change, it appears that there is no opportunity within section 1082(a)(2) to alter the business allocation percentage save in a case where, as in ***McDonnell Douglas***, the Federal change directly affects one of the factors from which the allocation is derived. Thus, the circumstances in which the taxpayer's allocation

percentage could be altered in connection with the assessment and the refund claim would be the same.

The result reached here is consistent with the principal holding of our decision in ***Matter of McDonnell Douglas Corp.*** (Tax Appeals Tribunal, January 8, 1998). In that case, a Federal change in the method of accounting for income from long term contracts resulted directly in an increase in the denominator of the taxpayer's receipts fraction. Here petitioner seeks to change the denominator of its payroll fraction while the Federal changes involved the disallowance of deductions for charitable contributions, entertainment expenses, and advertising. Although there is language in that decision that could be given a more general application, we think that the Administrative Law Judge was correct to read the holding of the case as confined to situations where the Federal change has a direct effect on a component of the business allocation formula.

Petitioner also relies on the decision of the Appellate Division, First Department, in ***Bankers Trust Corp. v. New York City Dept. of Fin.*** (301 AD2d 321, 750 NYS2d 29, ***modified and affirmed on other issues***, 1 NY3d 315, 773 NYS2d 1) (***see***, Oral Argument Tr., p. 29). In that case, the taxpayer complied with provisions of the New York City Administrative Code similar to the statute in the present case in reporting to the City changes in its entire net income reported to the State of New York. The state changes would have resulted in an overpayment but for the City's assertion of offsetting disallowances of deductions on the theory that they were properly allocable to foreign subsidiaries of the taxpayer. The Supreme Court held that these offsets were forbidden under a prohibition on "a change of the allocation of income or capital" like the one in this case. The Appellate Division reversed, holding that the word "allocation" referred only to the allocation percentages prescribed in the statute based on listed factors and

did not prevent the adjustment of calculation of entire net income grounded on other theories. The present case involves a proposed change in the payroll factor in calculating petitioner's business allocation percentage which clearly falls within the definition of "allocation" as interpreted in ***Bankers Trust***. That case is accordingly not supportive of petitioner's position on that issue.

Finally, petitioner's claim for the taxable year ended March 31, 1994 based on changing its allocation percentage is clearly barred by section 1087(c) since the Federal change for that year resulted in an overpayment.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Sumitomo Mitsui Banking Corp. is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Sumitomo Mitsui Banking Corp. is denied; and

4. The disallowance of the claims for refund of Sumitomo Mitsui Banking Corp. dated August 27, 2002 is sustained.

DATED: Troy, New York
May 31, 2007

/s/Charles H. Nesbitt
Charles H. Nesbitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott
Robert J. McDermott
Commissioner