

STATE OF NEW YORK
DIVISION OF TAX APPEALS

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

Petitioner, Hoechst Celanese Corporation, Route 202-206, Somerville, New Jersey 08876-1258, 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 year 1979.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on February 6, 1996 at 9:15 A.M., with all briefs to be submitted by May 31, 1996 which date began the six-month period for the issuance of this determination. Petitioner appeared by Richard S. Payne, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Andrew J. Zalewski, Esq., of counsel).

ISSUE

Whether petitioner's claim for a refund of franchise tax paid for 1979 was barred by the statute of limitations provided for in section 1087(c) of the Tax Law.

FINDINGS OF FACT

1. 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.
2. Petitioner filed a 1982 corporation franchise tax report in December 1983 reporting a net loss of \$85,378,287.00.

3. 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.

4. 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.

5. 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.

6. 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.

7. 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".

8. 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).

CONCLUSIONS OF LAW

A. In general, claims for refund of corporation franchise tax must be filed within three years after the return is filed or within two years from the time the tax is paid (Tax Law § 1087[a]). Petitioner concedes that its claim for refund was not filed within either of these periods of limitation. However, the limitation period is different if a refund claim is attributable to the application of a net operating loss carryback. In that instance, a refund claim must be filed within three years from the time the return was due for the taxable year of the loss or within the period prescribed by subsection (c) of Tax Law § 1087 (Tax Law § 1087[d]). Petitioner's 1992 refund claim was not filed within three years from the time its 1982 return was due; therefore, its claim may be deemed timely only if it was filed within the period of limitation provided for in Tax Law § 1087(c).

As relevant, subsection (c) of section 1087 provides that if a taxpayer is required by Tax Law § 211(3) to file a report or amended return in respect of an Internal Revenue Service change or correction to the corporation's Federal taxable income, the claim for credit or refund must be filed "within two years from the time such report or amended return was required to be filed with the tax commission" (now the Commissioner of Taxation and Finance) (Tax Law 1087[c]).

Pursuant to section 211(3), a taxpayer must report an Internal Revenue Service change or correction to Federal taxable income to the Division within 90 days after the final determination of such change or correction.

The interplay of section 1087(c) and section 211(3) establishes a period of limitation of 2 years and 90 days from the date of a final determination of a Federal change to or correction of Federal income. In the case of a net operating loss carryback, the term "final determination" is clearly defined by Tax Law § 211(3) which provides:

"The allowance of a tentative carryback adjustment based upon a net operating loss carryback . . . pursuant to section sixty-four hundred eleven of the internal revenue code of nineteen hundred fifty-four, as amended, shall be treated as a final determination for purposes of this subdivision" (emphasis added).

B. In this case, petitioner concedes that it received an allowance of a tentative carryback adjustment for 1979 in April 1983. Petitioner filed a CT-3360 reporting the Federal change and claiming a refund of corporation franchise tax in December 1992. Since petitioner's claim for refund was not filed within 2 years and 90 days from the date of the Internal Revenue Service final determination, its claim for a refund of tax was untimely and properly denied by the Division.

C. Petitioner's argument for finding its claim to be timely is not persuasive. Petitioner claims that a final determination was not issued until November 18, 1992, the date petitioner was advised that the audit results of the Internal Revenue Service were approved by the Joint Committee on Taxation. Petitioner's view of what constitutes a "final determination" conflicts with section 211(3) which clearly states that "[t]he allowance of a tentative carryback adjustment based upon a net operating loss carryback . . . shall be treated as a final determination" Despite the unambiguous wording of the statute, petitioner contends that the statutory definition of a "final determination" is controlling only for the purpose of calculating interest and not for the purpose of triggering the 2-year and 90-day period of limitation. In its brief, petitioner states:

"Petitioner admittedly failed to report on a timely basis the allowance of the tentative federal refund. The consequence of that failure, however, is not to bar the refund of franchise tax for 1979; rather, the consequence is to bar the accrual of interest on the refund on and after July 3, 1983. This is clear from examining the legislative history of Section 211.3". (Petitioner's brief, p. 4.)

This argument is untenable and contrary to the statutory scheme. Moreover, petitioner's reliance on the legislative history of section 211(3) is misplaced.

In general, Tax Law § 211(3) requires a taxpayer to report a Federal change or correction within 90 days of a final determination of the Internal Revenue Service. The provision which specifically states that the allowance of a tentative carryback adjustment based upon a net operating loss carryback is to be treated as a final determination was added to section 211(3) in 1973 (L 1973, ch 449, § 1). A 1973 Memorandum of the Department of Taxation and Finance explained the purpose of the amendment. It states:

"The amendment would terminate the accrual of interest on a credit or refund . . . attributable to a net operating loss if a taxpayer does not file a report of a federal tentative carryback adjustment . . . within 90 days of the allowance thereof".

The section 211(3) amendment did not accomplish this purpose directly. Rather, by deeming a "tentative carryback adjustment based upon a net operating loss carryback" to be a final determination for purposes of section 211(3), the amendment placed such an adjustment within the ambit of the broad language of section 1087(c) which provides:

"If the report or amended return required by [Tax Law § 211(3)] is not filed within the ninety day period therein specified, interest on any resulting refund or credit shall cease to accrue after such ninetieth day."

Tax Law § 1087(c) also states:

"This subsection shall not affect the time within which or the amount for which a claim for credit or refund may be filed apart from this subsection."

As noted, the interplay of section 211(3) and 1087(c) establishes two interconnected periods of limitation: (1) a period of 90 days within which a report of a final determination of a change to or correction of Federal income must be filed with the Division and (2) a period of 2 years within which a refund claim must be filed, measured from the time the report of the change "was required to be filed with the tax commission" (Tax Law § 1087[c]; emphasis added). The failure to file a report of a tentative carryback adjustment within 90 days terminates the accrual of interest, but the taxpayer still has 2 years from the date the report was required to be filed to file a claim for refund. Contrary to petitioner's contention, the definition of a "final determination" contained in section 211(3) operates for two purposes. First, it allows for the termination of the accrual of interest on the refund amount if the required report is not filed within 90 days. Second, it establishes the event which triggers the two-year period of limitation for filing a refund claim--two years from the time the report of a Federal change was required to be filed. Since petitioner did not file a claim for refund within that period, its refund claim is untimely.

D. The petition of Hoechst Celanese Corporation is denied, and the denial of its refund claim for 1979 is sustained.

DATED: Troy, New York
November 27, 1996

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE