

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BURNSIDE COAL & OIL CO., INC.	:	DETERMINATION
for Revision of a Determination or for a Refund of	:	DTA NOS. 814079
Petroleum Business Tax under Article 13-A of the Tax	:	AND 815259
Law for the Period July 1, 1983 Through April 30, 1987.	:	

Petitioner, Burnside Coal & Oil Co., Inc., 701 South Columbus Avenue, Mt. Vernon, New York 10550, filed a petition for refund of petroleum business tax under Article 13-A of the Tax Law for the period July 1, 1983 through April 30, 1987 (DTA No. 814079) and a petition for refund of petroleum business tax under Article 13-A of the Tax Law for the period May 1, 1984 through April 30, 1987 (DTA No. 815259).

The Division of Taxation, represented by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel), filed a motion to dismiss the petition, or in the alternative, a motion for summary determination in favor of the Division of Taxation. The motion was dated January 21, 1997. The Division of Tax Appeals granted petitioner an extension for filing responding papers until February 27, 1997, which date commenced the three-month period for issuance of this determination. Petitioner, represented by Carl S. Levine, Esq., filed responding papers on February 27, 1997. Upon review of all the papers submitted, Marilyn Mann Faulkner, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed informal refund claims within the three-year limitation period of Tax Law § 1087.

FINDINGS OF FACT

1. Petitioner, Burnside Coal & Oil Co., Inc. ("Burnside"), filed CT-13-A tax returns for petroleum businesses taxable under Article 13-A and prepaid the respective gross receipts taxes along with the balance due with the return in the following amounts:

<u>Return Period</u>	<u>Return and Payment Filed</u>	<u>Amount of Tax per Period</u>
7/1/83 - 4/30/84	1/22/85	\$228,435.09
5/1/84 - 4/30/85	10/21/85	\$189,932.71
5/1/85 - 4/30/86	9/03/86	\$154,956.41
5/1/86 - 4/30/87	10/23/87	\$145,312.50

2. Petitioner filed four claims for refund or credit, dated February 21, 1995, of the gross receipts taxes reported in the four returns for the respective amounts stated above.

3. The Division of Taxation ("Division") issued a Notice of Disallowance, dated April 25, 1995, denying the four refund claims. In that notice, the Division stated that the refund claims were time barred because they were filed on February 28, 1995, more than three years from the time the returns were filed or two years from the time the tax was paid as required by Tax Law § 1087(a). The Division further stated that under Tax Law § 1087(f) the Tax Appeals Tribunal could have determined an overpayment or underpayment of taxes due on a prior petition filed by Burnside for redetermination of a deficiency for the period July 1, 1983 through April 30, 1984, but that because the Tribunal did not make such a determination on that prior petition, no refund was due for that period.

4. Burnside filed a request for a conciliation conference to review the Notice of Disallowance for the period July 1, 1983 through April 30, 1984. By letter dated June 29, 1995, the conciliation conferee denied Burnside's request for a conference stating that pursuant to Tax Law § 1089(c)(2), a taxpayer may file a petition for refund if the taxpayer had not previously filed a timely petition for the same taxable year. The conferee concluded that because the matter was previously conferenced and a conciliation order issued on January 22, 1988 on a prior petition filed by Burnside, no further action would be taken.

5. Burnside also filed a request for a conciliation conference for review of the Notice of

Disallowance for the period May 1, 1984 through April 30, 1987. By conciliation order dated June 28, 1996, the conferee sustained the Notice of Disallowance.

6. Burnside filed a petition, dated July 14, 1995, challenging the denial of its refund claim for the period July 1, 1983 through April 30, 1987 (DTA No. 814079) and a petition, dated August 7, 1996, challenging the denial of its refund claim for the period May 1, 1984 through April 30, 1987 (DTA No. 815259). In those petitions, Burnside noted the Tax Appeals Tribunal's decision in Matter of Burnside Coal & Oil Co., Inc. (September 29, 1994, DTA No. 805376), which affirmed an Administrative Law Judge's determination (June 3, 1993), holding that Burnside was not a petroleum business and therefore not subject to the gross receipts tax for the period July 1, 1983 through April 30, 1984. In that case, Burnside was challenging a Notice of Deficiency issued by the Division for the period in question. Relying on the Tribunal's decision in Burnside, petitioner argued that the Division was on notice that Burnside contested the Division's position that Burnside was a petroleum business liable for the Article 13-A gross receipts taxes; that until the Tribunal decided the fundamental issue of whether petitioner was a petroleum business, it could not apply for any refunds; and that the statute of limitations on refund applications did not begin to run until the taxes became "payable" and that because the taxes for this period were never "payable" by Burnside, petitioner was entitled to a full refund of taxes plus interest.

7. The Division filed two answers, dated October 23, 1996, affirmatively stating that the refund claims were filed more than three years from the date of filing and more than two years from the date the tax was paid.

8. The Division filed a motion to dismiss the petition pursuant to 20 NYCRR 3000.9(a)(i), or in the alternative, for summary determination pursuant to 20 NYCRR 3000.9(b). In its motion papers, the Division argues that petitioner's claims for refund have been time barred because they were filed more than three years from the filing dates of the tax returns for those tax periods; and that neither the petition filed by Burnside in the prior case nor the Tribunal decision or Administrative Law Judge determination in that case make any

reference to a refund claim by Burnside for the tax periods in question. The Division contends that if there had been an informal claim for refund contained in the petition in the prior case, petitioner would have also listed the refund amount, along with the deficiency amount, in the petition as the amount in controversy. The Division also points out that the prior Burnside proceeding is limited to the period July 1, 1983 through April 30, 1984 and that petitioner's argument that the prior proceeding served as notice to the Division of its refund claims does not support petitioner's claims for the period after April 30, 1984.

9. Petitioner filed a response in opposition to the motion arguing that the sole support for the motion for summary determination was an affidavit from John E. Matthews who has no personal knowledge of the facts in the case; that there are material issues of fact in dispute requiring a trial, specifically, whether a 1987 letter written on behalf of petitioner to the Division, and other circumstances, adequately apprised the Division of petitioner's informal refund claim; that in the 1987 letter petitioner claimed it was not a petroleum business, and therefore it must follow that petitioner was also claiming it was not subject to the requirements of Article 13-A, including the payment of the gross receipts tax; that the statute of limitations was tolled by petitioner's 1987 letter and did not commence until the Tribunal decision in Burnside which held that petitioner was not a petroleum business subject to the gross receipts tax; that any formal application for refund would have been premature prior to the Tribunal decision in Burnside, and that the Division's motion to dismiss based on documentary evidence must fail.

10. The 1987 letter, to which petitioner referred, was from Burnside to the Division and was dated November 19, 1987. In that letter petitioner stated that:

"In accordance with our phone conversation with you on November 12, 1987, we wish to advise you that we have received a new certificate of registration under Article 13-A, valid November 1, 1987.

As we told you last week, when we completed the questionnaire concerning re-registration under Article 13-A, we indicated that we are not in the business of importing or causing to import petroleum products into New York State. Accordingly, we believe that we should no longer be classified as a taxpayer subject to the Article 13-A requirements."

Burnside's registration under Article 13-A was terminated effective January 15, 1988.

CONCLUSIONS OF LAW

A. Motions to dismiss must be based on the grounds specified in the statute whereas motions for summary determination are available on any ground sufficient to dispose of all or part of the case (see, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:8, at 18). Judicial records, such as the Tax Appeals Tribunal's decisions or orders, qualify as "documentary" evidence (see, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3211:10, at 20-21). However, reference to the Tribunal's decision alone in Matter of Burnside Coal & Oil Co., Inc. (supra) is not dispositive of the issue on the motion to dismiss -- whether the refund claims are time barred by statute. Therefore, a motion to dismiss does not lie.

B. With respect to the Division's motion for summary determination, Tax Law § 1087(a) provides that refund claims "shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such period expires the later" In this case, petitioner filed the last tax return and paid the tax for the last tax period in question on October 23, 1987 and did not file formal refund claims until February 28, 1995. These facts are not in dispute. The only issue in dispute is whether petitioner filed a timely "informal" refund request. Petitioner argues that it gave the Division adequate notice of the refund claim in its November 19, 1987 letter and in its litigation in the prior Burnside case.

C. The 1987 letter does not qualify as an informal request for a refund. Informal refund claims must be in writing and must provide sufficient information to begin an investigation as to the claim. In determining whether there is sufficient information to begin an investigation, it is necessary to examine not only the informal claim itself, but the surrounding circumstances, including the tax at issue (see, Matter of Greenburger, Tax Appeals Tribunal, September 8, 1994).

In the November 19, 1987 letter, petitioner advised the Division that when it completed the questionnaire for re-registration under Article 13-A, it indicated that petitioner was not in

the business of importing or causing to import petroleum products into New York State, and accordingly, Burnside believed that it "should no longer be classified as a taxpayer subject to the Article 13-A requirements." Based on the reference in the letter to re-registration and the statement that Burnside should "no longer" be classified as a petroleum business subject to Article 13-A requirements, this letter cannot be construed as a refund claim. Clearly, the letter is challenging Burnside's status on re-registration and does not challenge its status in the past or its past payment of the gross receipts tax (compare, Matter of Greenburger, supra [handwritten statement "Paid under Protest" on checks in payment of tax constitutes an informal refund claim of that tax]).

D. With regard to petitioner's claim that it gave adequate notice of its refund claim in the course of its litigation in Burnside, it is necessary to review the facts and procedural history of Burnside as found in the Tribunal's decision. In Burnside, the Division issued to petitioner a Notice of Deficiency on April 10, 1986 for a deficiency in gross receipts tax for the period July 1, 1983 through April 30, 1984. Burnside filed a petition challenging the deficiency. The Tax Appeals Bureau received this petition on July 2, 1986. In that petition, Burnside alleged that the deficiency related to its sale of fuel oil to the City of New York, with whom Burnside was engaged in a court action for the City's nonpayment of the gross receipts tax. The dispute between Burnside and the City concerned the terms of the contract bid for the sale of fuel oil and whether the contract sale price included or excluded the payment of the gross receipts tax. The Appellate Division held that the gross receipts tax could not be passed on by Burnside to the City. In 1988, the motion for leave to appeal that decision was denied (Burnside Coal & Oil Co., Inc. v. City of New York, 71 NY2d 890, 527 NYS2d 771, rearg denied 72 NY2d 841, 530 NYS2d 556).

A conciliation conference was held on October 6, 1987. By conciliation order dated January 22, 1988, the conciliation conferee cancelled the penalties but sustained the deficiency plus interest. Burnside subsequently filed a petition with the Division of Tax Appeals challenging the tax deficiency and interest. The Division brought a motion for summary

determination on the ground that Burnside failed to state a cause for relief in its petition. The Administrative Law Judge denied the motion for summary determination finding that petitioner raised the issue of whether it was a petroleum business for the audit period in question in its March 16, 1988 petition to the Division of Tax Appeals. The Tribunal affirmed the order of the Administrative Law Judge denying the Division's motion for summary determination. The Tribunal agreed with the Administrative Law Judge that the petition did raise the issue of Burnside's status as an Article 13-A taxpayer. The Tribunal ultimately held that the facts in the case showed that petitioner did not import or cause to be imported any petroleum products and was not a petroleum business under Article 13-A for the period July 1, 1983 through April 30, 1984.

In the current motion for summary determination, the Division included in its supporting papers a copy of the petition Burnside filed on July 2, 1986 in the prior Burnside case, as well as a copy of the petition filed on March 16, 1988. In comparing the two petitions, the first 55 paragraphs in both petitions are identical. The latter petition contains 67 paragraphs, the last 12 of which contain information updating events since the filing of the first petition (e.g., the results of the conciliation conference and the lawsuit against the City). In paragraph three of both petitions, Burnside stated that it purchased petroleum products in New York State from corporations that "were or should have been either § 182-a oil companies or Article 13-A petroleum businesses and resold these petroleum products to The City of New York ('The City') and other purchases [sic]." Therefore, as found by the Administrative Law Judge and affirmed by the Tribunal on the motion for summary determination in Burnside, the 1986 petition challenging the deficiency alerted the Division that petitioner was claiming it was not a petroleum business for the year in question.

The question is whether the 1986 petition may serve as an informal refund claim. A valid informal refund claim must have a written component that identifies the year in question and contains enough information to alert the taxing authority of the nature of the taxpayer's claim. The written claim does not have to have the word "refund" on it to qualify as a valid informal

claim (see, Matter of Rand, Tax Appeals Tribunal, May 10, 1990). "The purpose of the claim for refund is to notify the Department of the taxpayer's position so that the Department, if it so chooses, can investigate and determine the merits of the taxpayer's claim at a point in time reasonably close to the tax year for which the claim is made" (Matter of Rand, supra, citing Furst v. U.S., 678 F2d 147; American Radiator and Standard Stationary Corp. v. U.S., 318 F2d 915; Newton v. U.S., 163 F Supp 614).

In this case, not only did the petitions in Burnside alert the Division of the nature of its claim that it was not a petroleum business, the Tax Appeals Tribunal ultimately determined the merits of the claim and resolved it in petitioner's favor for the period July 1, 1983 through April 30, 1984. The fact that the petition did not contain the word "refund" on it or specifically request the return of the money paid with the tax return in question did not disqualify the petition as an informal claim (see, Matter of Greenburger, supra; Matter of Rand, supra). Accordingly, inasmuch as the initial petition in Burnside was filed on July 2, 1986 and the return for the period July 1, 1983 through April 30, 1984 was filed on January 1, 1985, the informal refund claim for that period was filed within the three-year limitations period as required by statute.

However, notwithstanding that the 1986 petition may serve as an informal refund claim tolling the limitations period until the claim is perfected, Tax Law § 1087(f) prevents any refund for that tax period. Section 1087(f) authorizes the Tax Appeals Tribunal, on a timely petition of a notice of deficiency, to determine that the taxpayer has made an overpayment of taxes for the same tax period. In this case, there was no such determination. Section 1087(f) also provides that absent a Tribunal determination of overpayment, no separate refund claim for the same tax period shall be filed or allowed after a Tribunal determination on the deficiency. Thus, although the 1986 petition may serve as an informal refund claim for the purpose of tolling the statute of limitations until the refund claim is subsequently perfected, in these circumstances, section 1087(f) prevents the perfection of that separate refund claim once there is a Tribunal determination on the notice of deficiency. Accordingly, contrary to petitioner's

assertion, a formal application for refund was not premature prior to a Tribunal decision in Burnside; but in fact, should have been filed prior to the Tribunal's decision in the Burnside proceeding.

E. With respect to the refund claim for the period May 1, 1984 through April 30, 1987, the 1986 petition in Burnside may not serve as an informal refund claim for tax periods after April 30, 1984. As noted above, an informal tax claim must specify the date of the tax period in dispute (see, Matter of Rand, *supra*). Even though the same ground may be asserted in two refund claims, a taxpayer cannot rely on the filing of an informal claim for a different tax period to toll the statute of limitations for the other claim (see, Matter of Crispo, Tax Appeals Tribunal, April 13, 1995; Matter of Rand, *supra*).

F. Petitioner argues that there are triable issues of fact to defeat the Division's motion for summary determination on the issue of the timeliness of the refund claims. In order to defeat a motion for summary determination, the general rule is that bare allegations, conjecture or suspicion are insufficient to create a genuine issue of fact (see, Shaw v. Time-Life Records, 38 NY2d 201, 379 NYS2d 390, 395-396; State Bank of Albany v. McAuliffe, 97 AD2d 607, 467 NYS2d 944, 945). A party opposing the motion "must establish the existence of material facts of sufficient import to create a triable issue" (Shaw v. Time-Life Records, *supra*, 379 NYS2d at 396). Here, petitioner referred only to the 1987 letter and its litigation in the Burnside case as evidence of its informal refund claim. Petitioner also made reference to "other circumstances" or Division employees, other than John Matthews, with personal knowledge indicating that the Division was apprised of petitioner's informal refund claim. As noted above, informal refund claims must be in written form. Petitioner's vague references to "other circumstance" and other Division employees with personal knowledge of an informal refund claim are insufficient to create a genuine issue of fact to defeat the Division's motion for summary determination with respect to the tax period May 1, 1984 through April 30, 1987 (DTA No. 815259). The Division has established, and petitioner does not dispute, the dates the returns were filed and the taxes paid, and that the formal refund claims were filed in 1995. Therefore, inasmuch as petitioner

has not established that there are genuine issues of fact to defeat the Division's motion, the Division is entitled to summary determination for this tax period.

G. The Division of Taxation's motion for summary determination with respect to DTA No. 814079 and DTA No. 815259 is granted, and the petitions of Burnside Coal & Oil Co., Inc. are denied.

DATED: Troy, New York
May 15, 1997

/s/ Marilyn Mann Fualkner
ADMINISTRATIVE LAW JUDGE