STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SUMITOMO MITSUI BANKING CORP.	:	
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.	:	DETERMINATION DTA NO. 820097

Petitioner, Sumitomo Mitsui Banking Corp., 277 Park Avenue, 6th Floor, New York, New York 10172, filed a petition 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.

A hearing was held before, Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 11, 2005 at 10:30 A.M., with all briefs to be submitted by December 17, 2005, which date began the six-month period for the issuance of this determination. Petitioner appeared by Deloitte Tax LLP (Russell W. Banigan, CPA). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Jennifer L. Baldwin, Esq., of counsel).

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 against the bank's U.S. effectively connected income and deducted on

its Federal and New York tax returns, should be included in the denominators of its New York payroll factors as "everywhere wages."

FINDINGS OF FACT

1. 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.

2. 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%

3. 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%
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:

[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.

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%

4. 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 later in this determination in Finding of Fact "8".

5. 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.

6. 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

7. 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 3/13/1994
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

[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).

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

8. 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 higher New York payroll factors and lowers the amounts now claimed for refund, as specified in Finding of Fact "4".

IRS Audit

9. As a result of an 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]).

10. 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 in Finding of Fact "4", 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 in Finding of Fact "5".

11. Petitioner and the Division entered into a stipulation dated May 9, 2005 by petitioner and May 11, 2005 by the Division, of which relevant portions have been incorporated into the findings of fact.

SUMMARY OF THE PARTIES' POSITIONS

12. Petitioner maintains that it should be allowed to modify Sumitomo's tax returns for the years at issue so as to include in the payroll factor denominator, "Sumitomo's head office, wages, salaries and other personal service compensation (exclusive of that paid to general executive officers), the expenses of which were taken into account in determining Sumitomo's alternative entire net income" (petitioner's reply brief, p. 3). According to petitioner, the original reason provided by the Division of Taxation for denying its refund claims, that Sumitomo's U.S. trade or business was a separate legal entity from Sumitomo itself, is an unsupportable notion. Petitioner complains that the Division is now attempting to engineer other reasons for denying its refund claims. Petitioner maintains that it has established the amount and character of Sumitomo's head office expenses which it has apportioned against U.S. effectively connected income by the use of reasonable ratios based on assets and head counts. Petitioner points to the acceptance by the IRS of such apportioned amounts of head office employee compensation. Further, by utilizing Japanese Ministry of Finance reports and Sumitomo's accounting for its general and administrative expenses reflected in its books and records and annual reports, petitioner contends that it has isolated out the compensation of Sumitomo's general executives as required by New York law. Petitioner argues that Sumitomo's general and administrative expenses shown on its financial statements include its "*entire worldwide employee compensation expenses*" (petitioner's reply brief, p. 22 [emphasis in original]) and are not "some type of nondescript general and administrative expenses" (petitioner's reply brief, p. 31) . Even so, there is no exclusion from the payroll factor for personal services compensation expenses of employees performing general and administrative functions (other than the exclusion for compensation paid to general executive officers). Further, the use of ratios to apportion such

expenses to U.S. effectively connected income "does not alter the character of [such] expenses, [and] the apportioned expenses remain personal service compensation expenses . . ." (petitioner's reply brief, p. 26). Finally, petitioner contends that denial of its refund claims violates the U.S.-Japan Income Tax Treaty and the Commerce Clause of the U.S. Constitution.

Petitioner maintains that its refund claims were timely filed, rejecting the Division's contention that the period for filing refund claims closed on December 15, 1995, December 15, 1996 and December 1997, respectively, pointing to the Division's ability "to assess[3] additional taxes [for its 1993 and 1994 fiscal years] on January 13, 1999, a date which is respectively 25 months and 13 months *after* the dates the Division claimed the statute of limitations closed for those taxable years" (petitioner's reply brief, p. 40). Therefore, according to petitioner, the Division failed to sustain its burden of proving that the period of limitations for refund claims had expired. In the alternative, petitioner contends that its claim for refunds for its fiscal years 1992 and 1993 were timely because they "were well within the time period for claiming a tax refund with respect to the taxes assessed and paid on CT-3360 returns filed . . ." (petitioner's reply brief, p. 37). Petitioner maintains that it could properly modify Sumitomo's payroll factors in calculating the refunds claimed due even though the Federal government did not make a change to Sumitomo's employee compensation expenses because Tax Law § 1087(c) does not prohibit a refund claim based on a modification of a business allocation percentage if the tax is self assessed and paid. Petitioner argues that Tax Law § 1087(c) "only applies to situations where the particular federal changes to be reported generate the New York tax refund claim"

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[3] A review of the documents included as Appendix G to the parties' stipulation shows that the Division issued a "Revised Consent to Field Audit Adjustment" dated January 13, 1999, which summarized additional tax totaling $334,006.00 plus interest for the years at issue, based upon the following:
"Unexplained variation adjustment to Everywhere deposits reversed for 1993 and 1995 (Schedule C-3).
The "Foreign banks current account with us" account has been added back as a deposit to New York and Everywhere deposits (Schedule C-3)."

(petitioner's reply brief, p. 47). Petitioner maintains that it self assessed and paid the tax due with its filing of a CT-3360 return which reported the Federal changes.

13. The Division argues that the refund claims are barred by the statutes of limitations:

> No matter when the statutes of limitations begin to run, be it with the filing of petitioner's reports of federal changes or the filing of its original franchise tax returns, petitioner's claims for refund are not timely. Further, petitioner's attempt to circumvent the statutory restrictions against altering its allocation of income by filing its refund claims one day after it filed its reports of federal changes must fail (Division's brief, p. 11).

The Division emphasizes that the refund claims were based upon a change of the allocation of Sumitomo's income to New York by increasing the denominator of its payroll factors. According to the Division, Tax Law § 1087(c) prohibits any refunds of tax resulting from changes to Federal taxable income which are based upon a "change of the allocation of income or capital upon which the taxpayer's return (or any additional assessment) was based . . . ." The Division maintains it is "irrelevant" that the changes reported on petitioner's forms CT-3360 resulted in petitioner's being assessed additional New York State franchise tax and that the refund claims filed *one* day later represent "petitioner's attempt to sidestep the statute" (Division's brief, p. 12). In the alternative, the Division contends that if the refund claims are *not* in response to the changes made to its Federal taxable income, then they are "undoubtedly untimely" pursuant to the general refund provision of Tax Law § 1087(a). The Division emphasizes that ***Matter of McDonnell Douglas*** (Tax Appeals Tribunal, January 8, 1998) provides no support for petitioner's position because "the changes the IRS made with respect to [Sumitomo's] federal taxable income had nothing whatsoever to do with the changes petitioner requests in its refund claims" (Division's brief, p. 15). Finally, the Division points out that for the taxable year ended March 31, 1994, petitioner reported an *overpayment* of New York franchise tax paid with its original tax return. Therefore, Tax Law § 1087(a), which limits

refunds of tax to tax paid during either the two or three years immediately preceding the filing of the refund claim, bars a refund claim since no tax was paid with the report of Federal changes for such year.

On the merits, the Division argues that indirect head office personnel expenses may not be included in Sumitomo's payroll factors because they do not constitute wages, salaries, or other personal service compensation. Rather, "to determine those expenses to be allocated to Sumitomo's U.S. branches, petitioner must apply a complicated, to say the least, formula comprised of at least five ratios" (Division's brief, p. 20). Such expenses do "not have the element of compensation for personal services rendered" and were not included on Federal tax returns as "salaries and wages" (Division's brief, p. 21).

CONCLUSIONS OF LAW

A. The reason provided by the Division for rejecting petitioner's refund claims, as detailed in Finding of Fact "6," is difficult to decipher:

> 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.

In response, petitioner took great efforts to establish the nature of Sumitomo's indirect home office expenses, which consisted of personnel, facilities and "other expenses," and how such expenses were allocable to Sumitomo's U.S. effectively connected income for the years at issue. Since the record is clear that Sumitomo did not operate in the United States by a subsidiary, the Division's use of the terminology "our taxpayer," as distinct from the Japanese banking corporation which does business in New York, is hard to understand. Consequently, petitioner's frustration was palpable when the Division in its answer raised, for the first time, the timeliness of its refund claims after it had expended much time and effort in its attempt to demonstrate the

merits of its claims. Nonetheless, the Division may properly raise the timeliness of the refund claims in its pleading and may not be limited only to the basis for the denial of the refund claims provided by the audit bureau. The fact that petitioner's refund claims were considered on their merits by the audit bureau does not estop the Division from raising the timeliness issue. It is noted that petitioner's failure to allocate Sumitomo's home office personnel expenses effectively connected to its U.S. income to the denominators of the payroll factors in the computation of its New York business allocation percentages on its *original* New York tax returns was not the result of any reliance upon the advice or legal interpretation provided by the Division's audit bureau (***see, Matter of Vanderveer***, Tax Appeals Tribunal, August 18, 1994 [errors or misinterpretation of employees of the Division of Taxation were not binding on the Division if no reasonable reliance]). As a result, the merits of petitioner's refund claims may not be addressed unless it is concluded that such claims were timely filed.

B. Pursuant to Tax Law § 1468, the provisions of Article 27, Corporate Tax Procedure and Administration (Tax Law §§ 1080-1097), "shall apply to the provisions of this article" (Article 32, Franchise Tax on Banking Corporations).

C. Tax Law § 1087(a), as in effect during the period at issue and up to October 7, 2003, the effective date for a rewriting of this provision not relevant to this determination, sets forth the following general limitations on claims for refund of overpayment of tax:

> Claim for credit or refund of an overpayment of tax under article nine, nine-a, nine-b or nine-c 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 periods expires the later . . . . If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return. If the claim is not filed within the three year period, but is filed within the two year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim . . . . For special restriction in a

> proceeding on a claim for refund of tax paid pursuant to an assessment made as a result of . . . (ii) an increase or decrease in federal taxable income or federal tax, . . . see paragraph (7) of subsection (c) of section one thousand eighty-three.[4]

D. In the first instance, the Division has sustained its *initial* burden of establishing that the refund claims were not filed timely based upon the above general limitations provision (***see, Matter of Jencon, Inc.,*** Tax Appeals Tribunal, December 20, 1990). As noted in Finding of Fact "3," Sumitomo's tax returns for its fiscal years 1992, 1993 and 1994 were filed December 15, 1992, December 15, 1993 and December 15, 1994, respectively. Under the general limitations on claims for refund of overpayment of tax, refund claims were required to be filed on or before December 15, 1995, December 15, 1996 and December 15, 1997, respectively. As noted in Finding of Fact "4", the refund claims were not filed until August 27, 2002, years later. Consequently, since the Division "has satisfied this initial burden, the burden of going forward with the evidence shifts to the [other party] to demonstrate that the bar of the statute is not applicable" (***Matter of Jencon, supra***). Petitioner's contention that the Division had the burden to explain why it continued to audit Sumitomo's tax filings for the years at issue after the running of the three-year period of limitations for refund and, in fact, issued a letter[5] dated January 13, 1999 setting forth a summary of additional tax due for audit periods ended December 31, 1993, December 31, 1994 and December 31, 1995 is rejected. Although puzzling,[6] it was petitioner's burden to introduce evidence to establish that the general

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[4]Tax Law § 1083(c)(7) provides:

> "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 paragraph 3 [Report of changed or corrected federal income] . . . ."

[5] Petitioner incorrectly referred to this letter in its brief as an "assessment" as detailed in Footnote "3".

[6] The record does not disclose whether a consent to extend the period of limitations for assessment had been executed by the taxpayer.

limitations period for filing refund claims had not, in fact, expired and its refund claims filed August 27, 2002 were timely once the Division met its initial burden as noted above. Pursuant to Tax Law § 1089(e), the burden of proof "shall be upon the petitioner" except for four specified situations not applicable here.[7] It is noted that William Emslie, the Division's tax auditor who wrote the letter dated January 13, 1999 summarizing additional tax due, was present at the hearing in this matter and was not called to testify by petitioner.

E. As noted in Finding of Fact "10," for the fiscal year ended March 31, 1994, an *overpayment* of New York franchise tax and MTA surcharge was reported. As a result, petitioner has not contended, as summarized in paragraph "12", that for such fiscal year the refund claim was timely on the basis that it was "well within the time period for claiming a tax refund with respect to the taxes assessed and paid on CT-3360 returns filed." Consequently, it is concluded that petitioner's refund claim for the fiscal year ended March 31, 1994 was untimely based upon the general three-year period of limitations specified in Tax Law § 1087(a). With regard to the two other fiscal years for which additional tax was paid, the analysis is more complicated.

F. As noted in Findings of Fact "9" and "10", as a result of an IRS audit, changes were made to Sumitomo's corporate taxable income for the years at issue. Consequently, reports of changes in Federal taxable income were required to be filed under Tax Law § 1462(e), which provides as follows:

> If the amount of taxable income . . . for any year of any taxpayer . . . as returned to the United States treasury department is changed or corrected by the

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[7] In the following four limited situations, the burden of proof is on the Division: (i) whether the petitioner has been guilty of fraud with intent to evade tax; (ii) whether the petitioner is liable as the transferee of property; (iii) whether the petitioner is liable for any increase in a deficiency where the increase is asserted initially after a notice of deficiency was mailed (unless it results from a change in Federal taxable income and other related situations); (iv) whether a penalty for aiding in the giving of fraudulent returns should be imposed.

> commissioner of internal revenue . . . , such taxpayer shall report such change 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 . . . .

As noted in Finding of Fact "10", forms CT-3360, Federal Changes to Corporate Taxable Income, were filed to report changes made by the IRS to Sumitomo's taxable income for the years at issue. Here, petitioner reported increases in Federal taxable income for the taxable years ended March 31, 1992 and March 31, 1993 and paid additional franchise tax. Yet, one day later refunds were requested for those taxable years based upon the inclusion of personnel expenses contained in Sumitomo's allocated head office expenses in the denominator of Sumitomo's payroll factors. This is a change to petitioner's allocation of income and is prohibited by Tax Law § 1087(c), which provides in relevant part the following limitation on credit or refund 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-
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> (1) shall be computed without change of the allocation of income or capital upon which the taxpayer's return (or any additional assessment) was based . . . . (Emphasis added.)

This limitation applies to claims for refund of "any resulting overpayment of tax" including claims for refund filed one day later, as detailed in Finding of Fact "10". To interpret this statutory provision to allow refund claims based on a change of the allocation of Sumitomo's income to New York more than a decade after the years at issue would lead away from the true intent and purposes for this provision (***cf., Matter of Diamond Terminal Corp. v. Department of Taxation and Finance***, 158 AD2d 38, 557 NYS2d 962, ***lv denied*** 76 NY2d 711, 563 NYS2d 767). Moreover, as noted in Footnote "4", the same limitation is imposed upon the Division's

ability to *assess additional tax*. Therefore, by establishing the same limitations on the issuance of notices of deficiency and the filing of claims for refund, the Tax Law provides both the State of New York and its taxpayers with the financial stability and security that comes from knowing that a specific tax year is closed. Furthermore, the complicated accounting involved in determining the business allocation percentages of a corporate taxpayer based in Japan should not be subject to continuing audit and analysis years after the fact, in this case more than a decade later. All parts of a statute must be harmonized with each other as well as with the general intent of the whole statute (***see, Matter of Chanry Communications***, Tax Appeals Tribunal, March 7, 1991, ***confirmed Matter of Henry v. Wetzler***, 183 AD2d 57, 588 NYS2d 924, ***affd***, 82 NY2d 859, 609 NYS2d 160, ***cert denied*** 511 US 1126, 128 L Ed 2d 863). Petitioner's interpretation would lead to the inconsistent result that the Division would be foreclosed from seeking additional tax due based upon a change in the allocation of income to New York after the three- year period of limitations had run, while a taxpayer would not be so impeded in seeking a refund of tax. In sum, the above limitation on changing the allocation of income to New York is properly applied to the refund claims which were filed one day after the tax was paid since they were the direct result of the payment of additional tax with the report of Federal changes. But for such Federal changes, such refund claims would have been years late under the general limitations period of three years specified at Tax Law § 1087(a). Accordingly, the limitation on credit or refund specified at Tax Law § 1087(c), as detailed above, should be applied in this case since it is encompassed by the statutory language of "any resulting overpayment of tax." Finally, it is observed that the Tax Appeals Tribunal decision in ***Matter of McDonnell Douglas*** (***supra***) does not require a contrary result. The Federal changes reported by

the taxpayer in that case had a direct impact on the corporation's allocation percentage unlike the situation at hand, as emphasized in Finding of Fact "9".

G. The petition of Sumitomo Mitsui Banking Corp. is denied, and the disallowance of the refund claims dated August 27, 2002 is sustained.

DATED: Troy, New York
March 2, 2006

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE