

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

B. A. LEASING CORPORATION

DECISION

for Redetermination of a Deficiency or for
Refund of Corporation Franchise Tax under
Article 9-A of the Tax Law for the Year 1975.

Petitioner, B. A. Leasing Corporation, 555 California Street, 22nd Floor, San Francisco, California 94104, 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 1975 (File No. 35114).

By its duly authorized representative, Michael G. DeAngelis, Esq., petitioner waived a hearing and submitted its case for decision by the State Tax Commission based upon the entire file, including briefs to be submitted by April 17, 1986. After due consideration, the Commission renders the following decision.

ISSUES

I. Whether petitioner's claim for refund of tax paid for the year 1975 is barred by operation of the statute of limitations.

11. Whether the Audit Division waived its right to assert the statute of limitations as a defense to petitioner's claim.

111. Whether petitioner's claim for refund should, in any event, be granted pursuant to Tax Law section 1096(d).

FINDINGS OF FACT

1. Petitioner, B. A. Leasing Corporation, filed its 1975 New York State tax return on Form CT-3 (New York State Corporation Franchise Tax Report

belief that it was not legally subject to tax as a bank under Tax Law Article 32, but was instead subject to tax as a business corporation under Tax Law Article 9-A.

2. The above-noted Form CT-3 was signed and dated June 14, 1976 and was stamped as received by the Department of Taxation and Finance on June 22, 1976.¹

3. Subsequently, petitioner filed a Claim for Credit or Refund of Corporation Tax Paid (Form CT-8), seeking refund or credit for \$108,649.00 in taxes it paid for 1975, upon the assertion that petitioner's filing under Article 9-A on Form CT-3 (see Finding of Fact "1") was erroneous and that petitioner was properly subject to tax under Article 32.

4. Petitioner's refund claim was signed and dated June 19, 1979 and was stamped as received by the Department of Taxation and Finance on June 27, 1979.

5. For 1976, petitioner filed its return in the same manner as for 1975 (i.e. on Form CT-3) and, subsequently, filed a Claim for Credit or Refund (Form CT-8) identical in basis to the refund claim filed for 1975. The 1976 refund claim (Form CT-8) was signed and dated June 21, 1979 and bore the same stamped date of receipt by the Department of Taxation and Finance as did the refund claim for 1975, namely June 27, 1979. Both the 1975 and 1976 refund claims were signed by the same individual on behalf of petitioner.

6. By a letter dated October 1, 1979, the Audit Division of the Department of Taxation and Finance denied both of petitioner's refund claims on the basis that petitioner could not properly file as subject to tax under Article 32.

1 Petitioner's return for 1975 was due to be filed in light of a three

7. Petitioner, by letters dated September 16, 1981 and stamped as received by the Department of Taxation and Finance on September **23**, 1981, petitioned the denial of its refund claims for 1975 and 1976.

8. At a pre-hearing conference, the Audit Division advised petitioner that its refund claims for 1975 and 1976 were being disallowed as set forth hereinabove, and also advised petitioner that its refund claim for 1975 was being disallowed for the additional reason that such claim was not timely filed.

9. By its May **9**, 1984 answer to the petitions for 1975 and 1976, the Audit Division asserted the denial of petitioner's refund claims for such years was proper upon the grounds previously described, including, specifically, the affirmative statement that petitioner's claim for 1975 was not allowable since it had not been timely filed.

10. By a letter dated November 30, 1984, petitioner was advised that the Audit Division would follow the substantive ruling in the court's decision in Matter of B. A. Leasing Corp. v. Comm. of Finance of the City of New York, 191 **N.Y.L.J.** No. 84, p. 6 (Supreme Court, New York County, May 1, 1984),² resulting in the allowance of petitioner's refund claim for 1976 (and **for** other years not at issue herein). However, petitioner's claim for 1975 remained disallowed as not timely filed.

11. On March 10, 1986, petitioner, by its duly authorized representative, waived a hearing and submitted its case for decision based on the contents of the case file and upon the parties' briefs.

2 In short, the Audit Division acquiesced to the position that petitioner was a banking corporation subject to tax under Article 32 rather than

12. Neither petitioner's 1975 return nor its refund claim for such year were mailed by certified or registered mail. The envelopes in which such documents were mailed are not in the case file and apparently were not retained, thus leaving no evidence as to either postmark dates or petitioner's method of mailing (i.e., metered mail versus direct United States Postal Service mailing).

13. Submitted by petitioner in support of its position that the 1975 refund claim was timely filed were two affidavits, as follows:

a) An affidavit by Harry F. Schadek, who signed the 1975 claim on petitioner's behalf, stating that he signed such claim on Tuesday, June 19, 1979 and that in the due course of petitioner's routine office procedure, said claim would be delivered, on the same or next business day after it was signed, by messenger from Mr. Schadek's fourth floor office to petitioner's Tax Department on the twenty-second floor of the same building (to wit on **or** before June 20, 1979).

b) An affidavit by William G. Henn, who was a group tax manager for petitioner during 1979, stating that under petitioner's routine office procedure, the claim in question for 1975 would have been mailed no later than June 21, 1979.

14. It is petitioner's position that the claim for 1975 was, in fact, timely filed. Petitioner also asserts, in the alternative, that the Audit Division waived the issue of timeliness by not asserting such issue until the pre-hearing conference. Finally, petitioner requests the Commission to exercise its authority under Tax Law section 1096(d) 'and grant the requested refund for 1975.

CONCLUSIONS OF LAW

A. That petitioner, as a calendar year filer for 1975, was required to file its 1975 return on or before March 15, 1976 (Tax Law section 211.1). By obtaining a three month extension, petitioner extended such due date to June 15, 1976. Petitioner's 1975 return was signed June 14, 1976 and was received by the Audit Division on June 22, 1976.

B. That in order to have been timely, petitioner's refund claim for 1975 had to have been filed within the later of three years from the time the return was filed or two years from the time the tax was paid [Tax Law section 1087(a)]. Since here the tax was paid with the return, the three year period **is** the later and, hence, appropriate period within which the refund claim had to have been filed in order to be timely.

C. That pursuant to Tax Law section 1091(a), certain documents, including, ~~inter alia~~, tax returns and claims for credit or refund, are deemed timely filed if the envelope they are mailed in bears a United States Postal Service postmark falling on or before the due date for the given document. Here, evidence of the relevant postmarks, i.e. the envelopes in which the return and the claim were mailed, is not available, nor did petitioner take the precaution of filing by registered or certified mail, the usage of which would have left evidence of mailing. Thus, resolution of the issue of timeliness turns upon the evidence available.

D. That even assuming logically consistent facts most favorable to petitioner, the refund claim is nonetheless untimely. More specifically, even if the return and the refund claim were mailed via the United States Postal Service on the day that each is dated, i.e. June 14, 1976 and June 19, 1979, respectively, the elapsed period exceeds three years. Similarly, if the

stamped dates of receipt for such documents, i.e. June 22, 1976 and June 27, 1979, respectively, are used (resulting in a late-filed return), petitioner does not meet the three year limitation. Petitioner apparently wishes to have the claim be held timely by comparing the return's in-date of June 22, 1976, with either (a) the date shown as the signing date for the refund claim, June 19, 1976, or (b) the June 21, 1976 latest alleged mailing date for the return. However, petitioner advances no basis for choosing the in-date for the return while choosing the alleged mailing date for the claim, other than that such comparison makes the claim timely. Given the evidence available, it is most reasonable to follow the path of consistency and compare using like standard. Thus, the claim was properly rejected as untimely.

E. That the Audit Division was not precluded from raising the issue of timeliness, nor was such issue waived because it was not asserted by the Audit Division until the pre-hearing conference (see Matter of Tao, State Tax Comm., April 30, 1985; Matter of Thomas Wolfstich, State Tax Comm., May 27, 1983).

F. That Tax Law section 1096 provides, in part, as follows:

"(d) Special refund authority. - Where no question of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts, the tax commission at any time, without regard to any period of limitations, shall have the power, upon making a record of its reasons therefor in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certificate to the comptroller." (emphasis added).

G. That petitioner's filing for 1975 under Article 9-A and its payment of tax with such filing was not a case of payment under a mistake of facts nor an illegal or erroneous collection of moneys by the Audit Division. It was not




until after the noted litigation (see Finding of Fact "10") that the issue of petitioner's legal taxable status was settled. There appears no reason or circumstance which would have precluded petitioner from filing a protective claim for credit or refund, or otherwise amending its 1975 return, within the three years following the filing of such return. Accordingly, under the circumstances presented, exercise of the special refund authority contained in Tax Law section 1096(d) is not warranted.

H. That the petition of B. A. Leasing Corporation **is** hereby denied and the Audit Division's denial of petitioner's claim for credit or refund is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 19 1986


PRESIDENT

COMMISSIONER

COMMISSIONER