

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GLOBE WHOLESALE TOBACCO	:	DECISION
DISTRIBUTORS, INC.	:	DTA NO. 826617
	:	
for Revision of a Determination or for Refund of Tobacco	:	
Products Taxes under Article 20 of the Tax Law for the	:	
Period August 1, 2011 through April 30, 2012.	:	

Petitioner, Globe Wholesale Tobacco Distributors, Inc., filed an exception to the determination of the Administrative Law Judge issued on November 2, 2017. Petitioner appeared by Hutton & Solomon, LLP (Stephen L. Solomon, Kenneth I. Moore and Roger S. Blane, Esqs., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Brian D. Evans, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard in New York, New York on October 25, 2018. The parties also filed successive supplemental briefs at the Tribunal's request. The six-month period for the issuance of this decision began on May 28, 2019, the date petitioner's supplemental reply brief was received.

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

ISSUES

- I. Whether the Division of Tax Appeals has jurisdiction to consider petitioner's refund claim.
- II. Whether petitioner filed a timely refund claim for the period in issue.
- III. Whether petitioner is entitled to relief under Tax Law § 3004-a.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 6, 9, 11, 13, 14, 16 and 19. We have made these changes to more fully reflect the record. The Administrative Law Judge's findings of fact and the modified findings of fact appear below.

1. Petitioner, Globe Wholesale Tobacco Distributors, Inc., is a licensed New York State wholesaler and distributor of tobacco products located at 5406 3rd Avenue in Brooklyn, New York. Petitioner supplies cigarettes, tobacco products, candy, grocery items, paper goods and various sundries to convenience stores and other retail outlets located primarily in the greater New York metropolitan area and Long Island.

2. On December 9, 2011, the Division of Taxation (Division) contacted petitioner's president, Leonard Schwartz, by telephone and informed him that the Division would conduct an audit of petitioner's books and records for the period May 1, 2009 through April 30, 2012.

3. During that telephone conversation, Mr. Schwartz requested that the Division schedule any field audit appointment for a date in March of 2012 because he was unavailable during the months of January and February of that year. Mr. Schwartz agreed to execute a consent extending period of limitation for assessment of tobacco products taxes under article 20 of the

Tax Law (waiver) to protect the Division from the expiration of the statute of limitations for any periods under audit.

4. On January 5, 2012, the auditor prepared a waiver and mailed it to Mr. Schwartz. This waiver extended the time within which to assess any additional tax for the periods May 1, 2009 through March 31, 2010 to on or before April 20, 2013. On January 17, 2012, the Division received a fully executed waiver from petitioner's former representative.

5. On May 11, 2012, the Division sent a letter to petitioner scheduling a field audit appointment for June 11, 2012, at 1:00 P.M., at petitioner's place of business. The letter included a request for books and records in order to complete a detailed audit of the business.

6. In response to the request for records, petitioner provided some purchase invoices and other documentation. The auditors reviewed what was provided and determined that petitioner had used the purchase prices on its invoices to calculate the wholesale prices for cigars as reported on its forms MT-203 (distributor of tobacco products tax returns). The auditors determined that a substantial number of invoices were missing and that petitioner's records were generally inadequate to determine if it had reported the proper amount of tax due. Due to the inadequacy of petitioner's books and records, the Division sent third-party requests to petitioner's suppliers to obtain records of its purchases. At no point during the audit did the auditors propose that petitioner compute its wholesale price for tobacco products using an alternative method, such as an industry standard adjustment ratio.

7. Based on its review of petitioner's records, the Division determined that petitioner had made several errors in preparation of its returns. For instance, the Division found that petitioner had not separated sales of snuff products, which have a separate tax rate from sales of cigars,

cigarettes and other tobacco products. The Division also found that petitioner failed to report some purchases subject to tax, failed to account for credits for tax paid on tobacco purchases, erroneously reported cigarette purchases as tobacco purchases, and made number transposition and computational errors.

8. After receiving the requested third-party information, the auditors reconciled petitioner's purchase invoices with the third-party suppliers' information, corrected errors and reconciled their audit findings with petitioner's MT-203 monthly reports. Based on the audit, the Division determined that petitioner owed additional tax of \$55,965.08, plus interest, for the audit period. Subsequently, on January 3, 2013, the Division issued a statement of proposed audit adjustment for tobacco products tax to petitioner proposing to assess the additional tax found due on audit.

9. On February 20, 2013, the Division received a power of attorney form from petitioner's current representative. On that day, during a telephone conversation with the auditors, petitioner's representative indicated that he had been working with the Division to determine an alternative method of computing the wholesale price used to report tax on cigars and other tobacco products by using an industry standard of markups when distributors purchase cigars from an intermediary and the manufacturer's price is not available. He further indicated that the auditor would be receiving additional information as it pertained to petitioner's audit. To protect the statute of limitations for assessment, a second waiver was executed to extend the period within which to assess any additional tax due for the periods May 1, 2009 through July 31, 2010, to on or before August 20, 2013. Petitioner's representative subsequently requested that the Division use an industry standard of markups to compute petitioner's wholesale price for

tobacco products. The auditor subsequently advised petitioner's representative that petitioner would need to file a refund claim if it wished to compute its tobacco products tax in such a manner.

10. On July 5, 2013, the Division issued a notice of determination, assessment ID# L-039597217, to petitioner assessing additional tax in the amount of \$55,965.08, plus interest for the tax period August 1, 2011 through April 30, 2012. The notice of determination assessed additional tax against petitioner for the last nine months of the audit period only. No additional tax was due for any other months of the audit period.

11. On December 5, 2013, the Division issued a technical memorandum (TSB-M-13[12]M) that provided guidance with respect to determining a distributor's wholesale price of cigars. In this memorandum, the Division set forth an alternative method that distributors of tobacco products may use to determine the wholesale price of cigars for purposes of calculating tobacco products tax due. The alternative method as set forth in the memorandum established an industry standard adjustment ratio of 38% to be applied to the distributor's purchase price for cigars where such distributor has purchased cigars from an intermediary (i.e., a non-manufacturer).

12. Thereafter, on December 19, 2013, the Division received a letter from petitioner's representative entitled "Application For Credit or Refund of Tobacco Products Taxes." The letter indicated that petitioner wished to claim a refund "for all open periods through November 2013," but did not specify a refund amount nor was any documentation submitted in support of its claim.

13. Petitioner timely requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) to protest the assessment. By conciliation order, CMS No. 259197, dated August 15, 2014, BCMS sustained the notice of determination. Thereafter, a timely petition, dated November 7, 2014, was filed with the Division of Tax Appeals. The petition indicates that petitioner sought a redetermination of the July 5, 2013 notice of determination and makes the following allegation of error: “The Commissioner erred in failing to adjust the protested assessment, or to credit the taxpayer for overpayments, due to the erroneous calculation of ‘wholesale price’ for taxpayer’s purchases of tobacco products.”

14. At the hearing, the Division presented the testimony of the auditor who supervised the audit, in support of its assertion that petitioner’s refund claim was properly denied. The auditor explained that the Division found that petitioner owed additional tax only for the last nine tax periods of the audit period. The auditor testified that for months where no tax was assessed, the Division applied credits due to petitioner to offset any additional tax due. The auditor further testified that the audit was limited to correcting mathematical errors made by petitioner in its preparation of returns and verifying that prices and inventory amounts reported on the returns corresponded to what was reflected in petitioner’s records. The audit did not consider any alternative method of calculating petitioner’s reported wholesale price for any tobacco products, such as the use of an industry standard of markups for cigar purchases.

15. The auditor testified that the protective refund claim was filed by petitioner on December 19, 2013 for tax periods before December 1, 2013. It is from this filing date that the auditor determined the two-year statute of limitations for refund on tobacco taxes. Therefore, the

Division concluded that the open periods pursuant to this protective claim for refund were the periods November 2011 through April 2012.

16. Following the issuance of the notice of determination, the parties worked together to develop revised calculations of petitioner's article 20 tax liability for the period at issue using the industry standard adjustment ratio as set forth in the technical memorandum to calculate petitioner's wholesale price for cigars. The parties stipulated to the calculations and the numbers reflecting tax due for the last nine periods of the audit as represented in the record's exhibit E.

These numbers are as follows:

Tax Period	Division's Proposed Tax Due after applying the wholesale price industry standard in TSB-M-13(12)M	Total Tax Paid	Difference	Refund Requested	Refund Paid
August 2011	\$45,448.53	\$ 56,245.28	\$10,796.75	\$10,796.75	\$ 0
September 2011	\$80,679.81	\$147,525.79	\$66,845.98	\$66,845.98	\$ 0
October 2011	\$32,466.76	\$ 25,837.40	(\$ 6,629.36)	\$ 0	\$ 0
November 2011	\$48,148.74	\$ 81,843.23	\$33,694.49	\$33,694.49	\$33,694.49
December 2011	\$44,486.02	\$ 58,426.85	\$13,940.83	\$13,940.83	\$13,940.83
January 2012	\$46,616.61	\$ 70,179.92	\$23,563.31	\$23,563.31	\$23,563.31
February 2012	\$41,902.37	\$ 76,779.65	\$34,877.28	\$34,877.28	\$34,877.28
March 2012	\$43,424.42	\$ 47,763.68	\$ 4,339.26	\$ 4,339.26	\$ 4,339.26
April 2012	\$47,256.87	\$ 78,686.00	\$31,429.13	\$31,429.13	\$31,429.13

17. Based on the adjusted wholesale price industry percentage utilized from the technical memorandum, the above table shows that petitioner overpaid tobacco products tax for the tax

periods August, September, November and December 2011, and January, February, March and April 2012. For the period October 2011, petitioner did not purchase or pay tax on any cigars and reported its snuff purchases as tobacco in error, resulting in additional tax due for that period.

18. The auditor testified that the Division granted the refunds for the November 2011 through April 2012 tax periods, but denied such refunds for August and September 2011, because the statute of limitations for refund claims had expired. The Division concedes that for the nine tax periods at issue, petitioner has no outstanding tax liability nor is the Division seeking any additional monies for tax owed in relation to those tax periods since the adjusted wholesale price industry standard computations resulted in credits offsetting those deficiencies listed on the notice of determination issued to petitioner dated July 5, 2013.

19. On or about July 2, 2015, petitioner filed a second claim for refund that encompassed the entire audit period and perfected the protective claim filed on December 19, 2013. Petitioner attached to its claim amended returns that reported wholesale prices for cigars in accordance with the industry standard adjustment ratio as set forth in the technical memorandum. The Division subsequently issued a refund claim determination notice (document locator number AM1509007167)¹ dated September 29, 2015, allowing a partial refund for the entire audit period May 1, 2009 through April 30, 2012, which overlaps with the following months that are the subject of this proceeding: November 2011 through April 2012. Therefore, there is no dispute

¹ Petitioner filed a petition protesting that portion of the refund claim determination notice for which it was denied refunds. That petition was assigned DTA# 827386 and was the subject of a determination dated November 15, 2018, wherein the Administrative Law Judge determined that the December 19, 2013 protective refund claim was filed beyond the two-year limitations period for refund claims under article 20 and was therefore time-barred. The Administrative Law Judge also found that petitioner failed to show entitlement to relief under Tax Law § 3004-a. The petition was thus denied and the refund claim determination notice sustained. The November 15, 2018 determination did not address the August and September 2011 reporting periods because such periods were the subject of the November 2, 2017 determination in the instant matter. Petitioner did not take an exception to the November 15, 2018 determination.

concerning the periods of November 2011 through April 2012, as refunds were already issued to petitioner for these periods.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that the petition in this matter protests the July 5, 2013 notice of determination. The Administrative Law Judge further noted that the present dispute also concerns whether petitioner is entitled to refunds claimed for the months of August and September 2011. The Administrative Law Judge observed that the applicable limitations period for the filing of a refund claim under article 20 of the Tax Law is two years from the date the tax was paid. The Administrative Law Judge further observed that petitioner's protective refund claim was filed on December 19, 2013 and that, accordingly, petitioner's refund claim was timely for any taxes paid on or after December 19, 2011. The Administrative Law Judge thus determined that, as petitioner's (presumably timely filed and paid) August and September 2011 returns fall outside the two-year time frame, the refund claim with respect to those periods must be denied.

The Administrative Law Judge found that the Division's technical memorandum (*see* finding of fact 11), which sets forth an alternative method for determining a distributor's wholesale price of cigars and is the legal basis of petitioner's refund claims, contains language indicating that this alternative method was to be given a prospective application. The Administrative Law Judge thus concluded that the technical memorandum did not affect the period of limitations for petitioner's refund claim.

The Administrative Law Judge also rejected petitioner's contention that it was entitled to relief under Tax Law § 3004-a. As explained by the Administrative Law Judge, that section requires the Division to disclose to a taxpayer any overpayments discovered by the Division in the

course of an audit and further provides an additional period of time during which a taxpayer may file a refund claim for the disclosed overpayment. The Administrative Law Judge found that petitioner failed to show that the Division discovered any overpayment during the course of the audit and that, accordingly, Tax Law § 3004-a was not applicable herein.

ARGUMENTS ON EXCEPTION

Petitioner contends that the Division discovered potential overpayments of its tobacco products taxes for the monthly periods ended August 31, 2011 and September 30, 2011 during the course of its audit of petitioner for the period May 1, 2009 through April 30, 2012. Specifically, petitioner asserts that the Division's auditor became aware, during the audit, that petitioner's tobacco products tax returns reported petitioner's purchase price of tobacco products from intermediaries (as opposed to manufacturers) as its wholesale price for tobacco products. Considering that intermediaries' prices are generally higher than manufacturers, and that tobacco products tax is calculated as a percentage of the reported wholesale price, petitioner contends that the auditor was necessarily aware that petitioner had overpaid its tobacco products taxes during the audit period. Petitioner argues that this discovery triggered the Division's obligation to notify petitioner of such overpayments pursuant to Tax Law § 3004-a and that the Division failed to do so. Petitioner further contends that the discovery of such overpayments extended the period of limitations in accordance with Tax Law § 3004-a. That is, petitioner contends that where an overpayment is discovered during an audit, the period of limitations for a refund is extended to match the three-year limitations period for assessment. Petitioner thus argues that it is entitled to a refund of tobacco products taxes as claimed for the monthly periods ended August 31, 2011 and September 30, 2011.

Petitioner makes no argument in opposition to the Administrative Law Judge's conclusion that its December 19, 2013 refund claim was filed more than two years from the date of payment of its tobacco products tax for the August and September 2011 periods.

The Division asserts that the Administrative Law Judge correctly determined that the two-year period of limitations for tobacco products tax refunds in Tax Law § 476 applies to petitioner's protective refund claim and that, accordingly, such claim must be denied with respect to the August and September 2011 periods.

The Division also asserts that the Administrative Law Judge properly found that Tax Law § 3004-a provides no relief to petitioner under the present circumstances. The Division agrees with the Administrative Law Judge that petitioner failed to prove that, during the audit, the auditor discovered that petitioner had overpaid its tobacco products tax. The Division asserts that it could not have discovered any such overpayments until after petitioner filed its December 19, 2013 refund claim and the parties subsequently worked together to complete the refund schedule (*see* finding of fact 16).

The Division contends that the auditor simply sought to verify petitioner's reported wholesale price for cigars. The Division rejects petitioner's assertion that it could have determined a manufacturer's selling price for cigars and thus would have known that petitioner was overpaying its tobacco products tax. The Division contends that petitioner is shifting blame to the Division for its own failure and further contends that petitioner had the burden to establish its wholesale price.

The Division also rejects petitioner's contention that Tax Law § 3004-a extends the two-year statute of limitations for refunds allowed under Tax Law § 476 to the last day of the three-year statute of limitations for tobacco products tax assessments under Tax Law § 478. The

Division contends that Tax Law § 3004-a does not create a three-year statute for refunds; nor does it reopen a closed statute of limitations. The Division also contends that, even if it had discovered overpayments of tobacco products tax, it was under no obligation to notify petitioner of such overpayments for periods in which the two-year statute of limitations for refunds had expired.

ARGUMENTS IN RESPONSE TO ISSUE RAISED BY TAX APPEALS TRIBUNAL

During our deliberations in this matter, we identified the threshold issue of whether this Tribunal has jurisdiction to consider whether petitioner is entitled to its claimed refund where the petition, dated November 7, 2014, was filed in protest of the July 5, 2013 notice of determination and not the September 29, 2015 refund claim determination notice. The parties filed briefs on this issue in response to our request.

Similar to its argument in its main brief on exception, petitioner asserts that the Division was aware during the audit that petitioner had overpaid its tax liability. Petitioner further asserts that, although the issue of using an industry standard to calculate petitioner's wholesale price for tobacco products had been discussed during the audit, the Division chose not to consider it and thus chose not to recompute petitioner's tax liability for the entire audit period using such an industry standard. Petitioner contends that the Division's conduct was intended to obstruct petitioner's efforts to obtain a proper resolution of this matter. Petitioner asserts it should not be penalized for the Division's inappropriate conduct in this matter. Petitioner notes that the Division's Publication 131 (Your Rights and Obligations Under the Tax Law [11/13]) provides that audits are conducted to verify that the correct amount of tax was paid. Petition asserts that the Division intentionally failed to ascertain petitioner's correct liability in its conduct of the audit in the present matter. Accordingly, petitioner argues that the subject notice of determination

should be considered a notice of determination for the entire 36-month audit period and provide for a refund as claimed.

The Division notes that the jurisdiction of the Division of Tax Appeals is limited by statute and that our jurisdiction in the present matter is limited to a consideration of the statutory notice under protest; here, the notice of determination. The Division notes that petitioner protested the notice of determination by a request for conciliation conference and, following the issuance of a conciliation order sustaining the notice, filed the petition on November 7, 2014. Noting that the refund claim determination notice was not issued until September 29, 2015, the Division asserts that petitioner could not have contemplated a statutory notice (the refund claim denial) that had yet to be issued when the petition was filed. The Division thus contends that this Tribunal lacks jurisdiction to consider petitioner's refund claim for the monthly periods ended August 31, 2011 and September 30, 2011.

OPINION

Preliminarily, we observe that it was appropriate for this Tribunal to raise a subject matter jurisdiction issue on exception. Such an issue may be raised, sua sponte, at any point in a proceeding, so long as the parties are given notice and an opportunity to be heard (*Matter of New York State Dept. of Taxation & Fin. v Tax Appeals Trib.*, 151 Misc 2d 326, 332-333 [Sup Ct Alb Cty 1991]; Tax Law § 2006 [5]; 20 NYCRR 3000.9 [a] [6]). A defect in subject matter jurisdiction cannot be waived (*Strina v Troiano*, 119 AD2d 566, 567 [2nd Dept 1986]; *see also* Siegel and Connors, NY Prac § 8 [6th Ed 2019]).

The jurisdiction of the Division of Tax Appeals is limited (*Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *vacated on other grounds sub nom Matter of New York State Dept. of Taxation & Fin. v Tax Appeals Trib.*). Our authority to adjudicate disputes is

exclusively statutory (*id*). We cannot extend our authority to areas not specifically delegated to us (*Matter of Meltzer*, Tax Appeals Tribunal, March 29, 2018).

All proceedings in the Division of Tax Appeals “shall be commenced by the filing of a petition . . . protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency, a determination of tax due, a denial of a refund or credit application, . . . or any other notice which gives a person a right to a hearing” (Tax Law § 2008 [1]). The jurisdiction of the Division of Tax Appeals is thus premised on the filing of a petition protesting a particular kind of written notice. As a consequence, the scope of our jurisdiction is necessarily confined by the notice and the petition of that notice.

The petition in the present matter, dated November 7, 2014, was filed in protest of the July 5, 2013 notice of determination (*see* finding of fact 13). The amounts asserted as due in the notice of determination were reduced to zero by the Division (*see* finding of fact 18) and the notice was canceled by the Administrative Law Judge. Hence, the notice of determination is no longer in dispute.

Although the petition was not filed in protest of the later-issued refund claim determination notice, the parties argued below, and on exception, apparently presuming jurisdiction, whether petitioner is entitled to a refund of tobacco products tax for the periods August and September 2011.²

A petition filed prior to the issuance of a notice of determination or deficiency does not meet the requirement in Tax Law § 2008 (1) that a petition must be filed in protest of such a

² As previously noted, petitioner filed a separate petition in protest of the refund claim denial (*see* footnote 1). Because the determination in the present matter had addressed the merits of the refund claim for the August and September 2011 periods, the determination in the other matter did not address those periods.

notice (*see Matter of Winners Garage, Inc. v Tax Appeals Trib. of the State of N.Y.*, 89 AD3d 1166, 1169 [3rd Dept 2011], *lv denied* 18 NY3d 807 [2012]; *Matter of West Mtn. Corp. v State of New York Dept. of Taxation & Fin.*, 105 AD2d 989, 990 [3rd Dept 1984], *affd* 64 NY2d 991 [1985]). Such a petition is properly dismissed as premature (*Matter of Yegnuikian*, Tax Appeals Tribunal, March 22, 1990). The plain language of Tax Law § 2008 (1) compels the same result with respect to a petition filed prior to the issuance of a notice of refund claim denial.

The Tax Law does contain exceptions to the requirement in Tax Law § 2008 (1) that a petition claiming a refund must protest a written refund claim denial. For example, article 22 (personal income tax) and article 27 (corporate tax procedure) contain provisions at Tax Law §§ 689 (b) and 1089 (b), respectively, that allow a taxpayer to assert a refund claim in a petition of a notice of deficiency, notwithstanding the lack of a formal refund claim or notice of disallowance, so long as the asserted refund claim is for the same period as the notice of deficiency. The tobacco products tax does not contain a similar provision (*cf.* Tax Law § 478). Articles 22 and 27 also contain provisions permitting the filing of a petition asserting a refund claim, without a written denial thereof, where six months have expired since the taxpayer filed their claim with the Division (*see* Tax Law §§ 689 [c] [3] and 1089 [c] [3]). There is no such deemed denial provision in the tobacco products tax (*cf.* Tax Law § 476).

Accordingly, given the general rule that a petition must protest a written statutory notice and the absence of any exception to that rule applicable here, we find that the petition in the present matter, filed almost 11 months before the refund claim determination notice, does not confer jurisdiction upon the Division of Tax Appeals with respect to the refund claim. We may not consider, therefore, whether the Division's denial of petitioner's refund claim for the August 2011 and September 2011 periods was proper.

As our ruling on the subject matter jurisdiction issue is dispositive, we need not examine the substantive issues addressed in the Administrative Law Judge's determination. Considering, however, that no exception was taken to the determination in DTA# 827386 (*see* footnote 1), we are aware that this ruling effectively forecloses any Tribunal review of petitioner's substantive claim for refund for the August and September 2011 periods. Hence, petitioner's "discovery of overpayments" argument under Tax Law § 3004-a will not receive an airing before this Tribunal. Under such circumstances, and in order to provide a complete record, we briefly address those substantive issues now. First, the Administrative Law Judge correctly determined that petitioner's refund claim was barred by the two-year statute of limitations under Tax Law § 476. We note that petitioner's exception does not contest this conclusion. The Administrative Law Judge also correctly determined that Tax Law § 3004-a offers no relief to petitioner under the present circumstances. That provision requires the Division to disclose to a taxpayer any overpayment of tax discovered by the Division during an audit (Tax Law § 3004-a [a]). Here, the claimed overpayment is the difference in tobacco products tax liability resulting from petitioner's use of invoice prices to calculate its wholesale price of cigars on its tobacco products tax returns during the audit period as opposed to using an industry standard adjustment ratio. The distributor's invoice price, however, is one of several alternative definitions of wholesale price contained in Tax Law § 470 (6). Indeed, in the absence of evidence of a manufacturer's price, the invoice price is, in essence, the default definition "unless [inter alia] . . . any industry standard of markups . . . shall be established." At the time of the audit, however, an industry standard of markups, later embodied in the technical memorandum, had not yet been established. Accordingly, in the absence of an established industry standard, we cannot find that petitioner's use of a statutory

definition of wholesale price in reporting its tobacco products liability resulted in an overpayment of such tax for purposes of Tax Law § 3004-a.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Globe Wholesale Tobacco Distributors, Inc. is denied;
2. The determination of the Administrative Law Judge is modified, in that we dismiss rather than deny petitioner's claim for refund;
3. The petition of Globe Wholesale Tobacco Distributors, Inc. is granted to the extent that the notice of determination dated July 5, 2013 is canceled, but is dismissed to the extent that petitioner claims a refund; and
4. The notice of determination is canceled.

DATED: Albany, New York
November 7, 2019

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner