

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GLOBE WHOLESALE DISTRIBUTORS, INC. : DETERMINATION
 : 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 Distributors, Inc., filed a petition for a 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.

A hearing was held before Donna M. Gardiner, Administrative Law Judge, in New York, New York, on May 25, 2016 at 10:00 A.M., with all briefs to be submitted by May 3, 2017, which date began the six-month period for the issuance of this determination. Petitioner appeared by Hutton & Solomon, LLP (Stephen L. Solomon, Esq. and Kenneth I. Moore, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Brian D. Evans, Esq., of counsel).

ISSUES

- I. Whether petitioner filed a timely refund claim for the period in issue.
- II. Whether petitioner is entitled to relief under the Taxpayer Bill of Rights of article 41, § 3004-a of the Tax Law.

FINDINGS OF FACT

1. Petitioner, Globe Wholesale 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 purchase prices on its invoices to calculate the wholesale prices shown 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.

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 and 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.

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 the tax due.

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 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 was filed with the Division of Tax Appeals.

14. At the hearing, the Division presented the testimony of the auditor who supervised this audit, in support of its assertion that petitioner’s refund 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 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.

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. The parties stipulated to the calculations and the numbers reflecting tax due for the last nine periods of the audit as represented in 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. The Division 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 concerning the periods of November 2011 through April 2012, as refunds were already issued to petitioner for these periods.

CONCLUSIONS OF LAW

A. Tax Law § 476 states, in pertinent part, that:

“whenever the commissioner of taxation and finance shall have determined that any tax imposed by this article shall have been paid in error, the agent, dealer or tobacco products distributor, as the case may be, shall be entitled to a refund of the actual amount of tax so paid, *provided application therefor is filed with the commissioner of taxation and finance within two years after . . . the tax was paid upon such tobacco products, except if an agreement under the provisions of section four hundred seventy-eight (extending the period of determination of tax imposed by the article) is made within the two-year period for the filing on an application for refund provided for in this section, the period for filing an application for refund shall not expire prior to six months after the expiration of the period within which a determination may be made pursuant to the agreement or any extension thereof*” (emphasis added).

B. In this case, petitioner is protesting a notice of determination that assessed additional tax for the periods August and September 2011 and November 2011 through April 2012. As a

¹ Petitioner filed a petition protesting that portion of the refund claim determination notice for which it was denied refunds. This petition was assigned DTA#827386 and that case is proceeding through the Division of Tax Appeals.

result of the technical memorandum issued by the Division in December of 2013, petitioner filed a protective claim for refund by letter that was received by the Division on December 19, 2013. As noted by the auditor, this letter merely stated it was claiming a refund for the audit period without providing any documentation or theory upon which it asserts its claim.

As set forth in the statutory language of Tax Law § 476, petitioner, as a distributor of tobacco products, had two years within which to file a claim for refund from the date the tax was paid. Since petitioner filed its letter on December 19, 2013, petitioner is entitled to a refund of tax for any taxes paid on or after December 19, 2011. As set forth in the aforementioned table, petitioner was entitled to and was granted refunds for the audit periods November 2011 through April 2012.

C. It is also important to note that the technical memorandum, TSB-M-13(12)M, set forth an alternative method for determining a distributor's wholesale price of cigars. There is no language within the memorandum that states this alternative method was to be given a retroactive application. The language set forth states that the adjustment ratio was "[e]ffective for cigars imported into New York on or after December 1, 2013." Therefore, it is concluded that the two-year statute of limitations set forth in Tax Law § 476 applies to the refund claim filed by petitioner. Since both August and September 2011 returns fall outside of the two-year time frame, the refund claim with respect to these two months must be denied.

D. Next, petitioner claims that it is entitled to relief under the Taxpayer Bill of Rights pursuant to section 3004-a contained in article 41 of the Tax Law. Tax Law § 3004-a addresses the disclosure of overpayment to a taxpayer, in pertinent part, as follows:

“(a) The department shall disclose to a taxpayer all instances of overpayment of tax by such taxpayer discovered by the department during the course of an audit, assessment, collection or enforcement proceeding.

(b) The time within which a taxpayer may apply for a refund or claim a credit for an overpayment of tax disclosed pursuant to this section shall be one hundred twenty days from the date that notice of disclosure is given to such taxpayer by the department. Failure to apply for a refund or credit within the one hundred twenty days shall result in the loss of the right to apply for a refund or credit. . . .

(c) Nothing in this section shall be construed as requiring or permitting the giving of notice or the payment of a refund or granting of a credit with respect to a period which, at the time such overpayment is discovered by the department, is not open for assessment or refund by virtue of any period of limitations provided for in any tax.”

Clearly, petitioner has not shown that the department discovered any overpayment during the course of the audit that falls within the meaning and intent of Tax Law § 3004-a. Primarily, as testified to by the auditor, petitioner made many errors in its preparation of its MT-203 returns. During the audit, the Division corrected all errors, finding additional tax owed and allowable credits. This resulted in the issuance of an assessment for only the last nine periods of the audit. It was only after the audit was concluded that the Division issued TSB-M-13(12)M and worked with petitioner to provide for certain refunds, despite the prospective nature of the memorandum. Therefore, petitioner has failed to demonstrate that any overpayments were discovered by the Division during the audit for which it seeks an additional refund. Thus, petitioner is not entitled to relief under Tax Law § 3004-a.

E. The petition of Globe Wholesale Distributors, Inc., is granted to the extent that Notice of Determination, L-039597217, dated July 5, 2013 is canceled. Moreover, petitioner was granted refunds for the tax periods November 2011 through April 2012, but the remainder of its claim for refund is denied.

DATED: Albany, New York
November 2, 2017

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE