STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ARROW PARK, INC.	:	DETERMINATION DTA NO. 826879
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Tax Years 2005 through 2012.	:	

Petitioner, Arrow Park, Inc., 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 tax years 2005 through 2012.

On February 3, 2016 and February 8, 2016, respectively, petitioner, appearing by Grim, Biehn & Thatcher (Daniel J. Paci, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Bruce D. Lennard, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs submitted by May 31, 2016, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether any portion of the Notice of Deficiency issued to petitioner should be canceled because the assertion of additional MTA surcharges under Tax Law § 209-B is barred by the statute of limitations set forth in Tax Law § 1083(a).

FINDINGS OF FACT

The parties entered into a stipulation of facts, dated February 4, 2016, which has been incorporated into the Findings of Fact below.

1. During the tax years ended December 31, 2005 through December 31, 2012 (audit period), Arrow Park, Inc. (Arrow), a New York corporation incorporated on May 1, 1948, was involved in the summer resort industry and maintained its operations at a resort and vacation facility located at 1061 Orange Turnpike, Monroe, New York.

2. During the audit period, Arrow's mailing address stated on all its tax returns was P.O. Box 465, 1061 Orange Turnpike, Monroe, New York 10950, located in Orange County.

3. Arrow filed a timely General Business Corporation Franchise Tax Return (form CT-3) for the tax year ended December 31, 2002 that identified Arrow as being located in Monroe, New York. Arrow did not file a Metropolitan Transportation Business Tax Surcharge (MTA surcharge) return or make payment. Arrow erroneously reported on its CT-3 that the company did not do business, employ capital, own or lease property or maintain an office in the Metropolitan Commuter Transportation District (MCTD), which included Orange County. The return was signed by Arrow's president on March 10, 2003.

4. On April 26, 2005, the Division of Taxation (Division) sent Arrow a letter in which it informed the company that it had conducted a desk audit of Arrow's 2002 franchise tax return and found additional tax due, which was attributed to an MTA surcharge of $5,788.00 plus penalty and interest. The letter contained a computation of the surcharge that indicated Arrow had neither reported nor paid any MTA surcharge for 2002.

5. On or about May 16, 2005, Arrow filed an amended 2002 General Business Corporation MTA Surcharge Return (form CT-3M/4M), in which it reported its correct computation of the MTA surcharge. The return was signed by Arrow's president on May 10, 2005.

6. On March 13, 2006, Arrow filed a form CT-4, short form franchise tax return, for the tax year ended December 31, 2005, stating the same address but once again failing to file the MTA surcharge return or pay the surcharge. The tax return stated that Arrow did not do business, employ capital, own or lease property or maintain an office in the MCTD during 2005. The return was signed by Arrow's president on May 10, 2006.

7. On March 8, 2007, Arrow filed a CT-4 for the tax year ended December 31, 2006, stating the same Monroe, Orange County, New York, address, but failing to include the MTA Surcharge Return or payment. The return once again informed the Division that Arrow did not do business, employ capital, own or lease property or maintain an office in the MCTD during 2006. The return was signed by Arrow's president on May 5, 2007.

8. On or about September 17, 2008, Arrow filed a CT-4 for the tax year ended December 31, 2007, stating the same Monroe, Orange County, New York, address, but failing to include the MTA Surcharge Return or payment. The return once again informed the Division that Arrow did not do business, employ capital, own or lease property or maintain an office in the MCTD during 2007. The return was signed by Arrow's president on September 17, 2008.

9. In or about August 2009, Arrow executed and filed its original CT-3 for the tax year ended December 31, 2008, again failing to include the MTA surcharge return or payment. The return once again informed the Division that Arrow did not do business, employ capital, own or lease property or maintain an office in the MCTD during 2008. The return was signed by Arrow's president on August 28, 2009.

10. By letter dated October 30, 2013, the Division informed Arrow that it had performed a desk audit of Arrow's tax returns for the period January 1, 2005 through December 31, 2012 that resulted in an increased tax liability of $114,927.00, including penalty and interest. The letter included an attachment that explained the additional tax asserted, which set forth the following:

Year Ended	Additional Tax	Penalty	Interest	Total
12/31/2005	$485.00	$121.00	$430.00	$1,036.00
12/31/2006	$164.00	$100.00	$117.00	$381.00
12/31/2007	$55.00	$55.00	$30.00	$140.00
12/31/2008	$65,197.00	$16,299.00	$28,598.00	$110,094.00
12/31/2009	$924.00	$231.00	$304.00	$1,459.00
12/31/2010	$606.00	$151.00	$138.00	$895.00
12/31/2011	$330.00	$100.00	$45.00	$475.00
12/31/2012	$329.00	$100.00	$18.00	$447.00
TOTAL	$68,090.00	$17,157.00	$29,680.00	$114,927.00

11. In Schedule A to the October 30, 2013 letter, the Division offered the following explanation for the additional tax, penalty and interest:

> "1. New York State Tax Law Section 209-B provides for a tax surcharge to be imposed upon every corporation in the Metropolitan Commuter Transportation District (MCTD) and subject to tax under Article 9-A. The MCTD includes the counties of New York, Bronx, Queens, Kings, Richmond, Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester.
>
> The surcharge is imposed for the privilege of exercising its corporate franchise, or of doing business, owning or leasing property, employing capital or maintaining an office in the MCTD, for all or any part of its taxable year. Therefore, you are subject to the MTA surcharge for each period noted above if any of the above are true for the years in question. Accordingly, we have computed the MTA Surcharge for these periods, resulting in a balance due.
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> * * *

2. Interest is computed as required by Section 1084(a) of the New York State Corporation Tax Law.

3. Penalty is imposed for failure to file return. Section 1085(a)(1) of the New York State Tax Law."

12. On January 10, 2014, the Division issued a Notice of Deficiency to Arrow, asserting additional MTA surcharges for the years 2005 through 2012 in the sum of $68,090.00 plus penalty and interest. Arrow paid the surcharges, penalties and interest asserted due on the Notice of Deficiency for the years 2009 through 2012, but not the amounts asserted for the years 2005, 2006, 2007 and 2008, the only tax years that remain in issue.

13. Arrow's 2005, 2006, 2007 and 2008 general business corporation franchise tax returns were prepared by Wesley G. Pericone, CPA PC.

SUMMARY OF THE PARTIES' POSITIONS

14. Petitioner contends that the Notice of Deficiency should be canceled for the tax years 2005 through 2008 because the notice was issued beyond the statute of limitations. Petitioner believes that, because it filed its franchise tax returns for the years 2005 through 2008, the Division had the information necessary to assess the MTA surcharge but failed to do so in a timely manner. Further, petitioner maintains that the fact that it was assessed for the 2002 MTA surcharge placed the Division on notice that it was due and every succeeding return provided the same information on its location within the MCTD. Therefore, petitioner contends that the Division could have timely asserted the additional tax due but failed to do so.

15. The Division argues that the additional tax was timely assessed since the three-year statute of limitations is not applicable in this case because no return for the MTA surcharge was ever filed. Besides the Tax Law and regulations, the Division relies on ***Matter of Kaiser Aerospace & Electronics Corp.*** (Tax Appeals Tribunal, January 16, 1997), which it believes

supports its position, distinguishing the nonprecedential administrative law judge determination in the same case cited by petitioner.

CONCLUSIONS OF LAW

A. Tax Law § 209(1) provides that every domestic corporation shall pay an annual franchise tax for the privilege of doing business, employing capital, owning or leasing property in New York, or maintaining an office in New York for all or part of the corporation's calendar year. Tax Law § 209-B imposes on every corporation subject to tax under Tax Law § 209 a tax "[f]or the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in a corporate or organized capacity, or of maintaining an office, or of deriving receipts from activity in the metropolitan commuter transportation district . . ." (Tax Law § 209-B[1]).

Tax Law § 211(1) provides that every corporate taxpayer file a report to the tax commission annually setting forth such information as the tax commission may prescribe, along with such other reports, facts and information required in the administration of Article 9-A. (20 NYCRR 6-3.1.) In accordance with Tax Law § 209-B(5), the provisions with respect to reports to be filed under Tax Law § 211 apply to reports required by Tax Law 209-B. Two of the reports prescribed by the tax commission pursuant to Tax Law § 211(1) were the franchise tax return and the MTA Surcharge Return.

B. The Division may issue an assessment within three years of the time a return was filed (Tax Law § 1083[a]). However, if no return was filed, the Division may assess at any time (Tax Law §§ 211[1]; 1083[c][1][A]; see ***Matter of Kaiser Aerospace***). Petitioner concedes that no MTA surcharge returns were filed for the tax years 2005 through 2008 and that it was subject to the MTA Surcharge, but contends that the filing dates of the CT-3s and CT-4s began the three-

year time period for assessment of the MTA surcharge for the years in issue. The last of the returns filed by Arrow, for tax year 2008, was filed in August 2009, and the amended return for that year was filed on August 23, 2010. Since the Division's Notice of Deficiency was not issued until January 10, 2014, petitioner reasoned that the notice was issued beyond the statutory period for assessing additional tax.

Further, petitioner maintains that all the information necessary for the Division to determine that the MTA surcharge was due and the amount thereof was clearly stated on the face of the CT-3s and CT-4s filed for the years 2005 through 2008. Therefore, petitioner believed it was incumbent on the Division to recognize Arrow's obligation to file an MTA surcharge return for the years left in issue and assess accordingly in a timely manner.

This argument directly contradicts the Tax Appeals Tribunal's decision in ***Matter of Kaiser Aerospace***, where the Tribunal said:

> "The plain language of Tax Law § 1083(c)(1)(A) provides that the Division may assess at any time when a return is not filed. In this case, petitioner did not file CT-3Ms for the years in issue. Petitioner's assertion that the MTA Surcharge is not a separate tax from the corporate franchise tax imposed under Tax Law § 209, while not totally unfounded, does not excuse petitioner's failure to file a MTA Surcharge return as prescribed under Tax Law §§ 209-B(5) and 211(1). '[O]mission to file a prescribed return cannot be supplied by reference to a return filed for another purpose' (Hewitt v. Bates, 297 NY 239, 78 NE2d 593, 596)."

Although petitioner believes the facts of ***Kaiser Aerospace*** are so different that it offers little precedential value herein, the legal reasoning and statutory interpretation by the Tribunal is both sound and applicable herein. The salient similarities are that neither Arrow nor Kaiser Aerospace filed returns required pursuant to Tax Law §§ 209-B(5) and 211(1), i.e., the CT-3Ms and CT-4Ms. The Tax Law is clear that said returns were due on the prescribed dates, in the case of the CT-3M and CT-4M two and a half months after the end of Arrow's reporting period.

The fact that the instructions for the CT-3M/4M speak of the return as an additional return with a specific filing deadline underscores its independent identity and the statutory obligations that attach thereto. Thus, when Tax Law § 1083(c)(1)(A) provides that the Division may assess at any time when a return is not filed, it specifically applies to the CT-3M/4M. The plain language of the statute leaves no room for petitioner's construction, which ignores the independent identity of the CT-3M/4M and suggests that the filing date of the CT-3/CT-4 controls. (McKinney's Cons Laws of NY, Book 1, Statutes § 230.)

C. Petitioner has a long history of not filing the CT-3M/4M. It was audited for the tax year 2002 and found to have neither reported nor paid any MTA surcharge for 2002, even though located within the MCTD. Arrow filed an amended 2002 General Business Corporation MTA Surcharge Return, form CT-3M/4M, in which it reported its correct computation of the MTA surcharge. The return was signed by Arrow's president on May 10, 2005.

However, merely 10 months later, Arrow failed to file the MTA Surcharge Return or pay the surcharge for 2005, a practice that continued until October 2013, when the Division once again informed it of its failures. Arrow stated on the returns that it did not do business, employ capital, own or lease property or maintain an office in the MCTD. The returns were signed by the company's president and prepared by the same accountant. Now, petitioner seeks to use a strained logic to justify its denials of liability for the MTA surcharge by contending that the statute of limitations for the CT-3M/4M is identical to that for the CT-3/CT-4 and that since it set forth its address on the CT-3s/CT-4s, the Division was charged with the obligation to monitor petitioner's filings and assess additional tax in a timely manner. Such an interpretation ignores the plain language of the statutes discussed above, has no basis in the law or regulations and fails

to explain why petitioner did not correct its reporting requirements after the audit for 2002 and persisted in misinforming the Division of its liability for the MTA surcharge.

D. The petition of Arrow Park, Inc. is denied, and the Notice of Deficiency, dated January 10, 2014, is sustained.

DATED: Albany, New York
July 14, 2016

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE