

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**GLOBE WHOLESALE TOBACCO** :  
**DISTRIBUTORS, INC.** : DETERMINATION  
: DTA NO. 827386  
for Revision of a Determination or for Refund of Tobacco :  
Products Taxes under Article 20 of the Tax Law for the :  
Period May 1, 2009 through April 30, 2012. :  
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Petitioner, Globe Wholesale Tobacco 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 May 1, 2009 through April 30, 2012.<sup>1</sup>

A hearing was held before Barbara J. Russo, Administrative Law Judge, in New York, New York, on October 18, 2017 at 10:30 A.M., with all briefs to be submitted by May 27, 2018, which date began the six-month period for the issuance of this determination. Petitioner appeared by Hutton & Solomon, LLP (Stephen L. Solomon, Esq., Kenneth I. Moore, Esq., and Roger S. Blane, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Brian D. Evans, Esq., of counsel).

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<sup>1</sup> Petitioner also filed a separate petition for the period August 1, 2011 through April 30, 2012, raising the same issues as those raised in this petition, seeking a refund for that period, as well as protesting notice of determination number L-039597217. Said petition was assigned DTA number 826617 and a determination was issued on November 2, 2017 denying petitioner's refund claim for the period August 1, 2011 through April 30, 2012 and canceling notice number L-039597217 (*Matter of Globe Wholesale Distribs., Inc.*, Division of Tax Appeals, November 2, 2017). As such, the period August 1, 2011 through April 30, 2012 will not be addressed herein.

***ISSUES***

- I. Whether petitioner filed a timely refund claim for the period May 1, 2009 through July 31, 2011.
- 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 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 (audit period).

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 the 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. This waiver was signed by petitioner's former representative on January 12, 2012 and received by the Division on January 17, 2012.

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 an information document request (IDR) requesting petitioner's books and records for the audit period 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 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 the 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 tobacco products tax returns. Based on the audit, the Division initially determined that petitioner owed additional tax of \$137,037.03, plus interest, for the audit period.

9. On October 22, 2012, the Division issued a statement of proposed audit adjustment for tobacco products tax to petitioner proposing to assess the additional tax of \$137,037.03, plus interest, for the audit period.

10. Petitioner disagreed with the Division's proposed audit adjustment and provided additional information to the Division's auditor. Based on the additional information provided, the Division adjusted the amount of tobacco products tax determined due for the audit period to \$55,965.08.

11. On January 3, 2013, the Division issued a revised statement of proposed audit adjustment for tobacco products tax to petitioner proposing additional tax due in the amount of \$55,965.08 plus interest.

12. 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.<sup>2</sup> To protect the statute of limitations for assessment, a second waiver

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<sup>2</sup> An entry in the Division's tax field audit record dated February 20, 2013 references the telephone conversation and a letter dated April 28, 2011 from Stephen Solomon to Terry O'Neil, Director of the Division's Transaction Field Audit Bureau. The April 28, 2011 letter was not included in the Division's audit file. Petitioner

was executed by petitioner 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. The second waiver was signed on March 18, 2013 and received by the Division on March 19, 2013.

13. On February 21, 2013, the Division's auditor sent a copy of the audit workpapers to Stephen Solomon.

14. 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. The notice of determination was subsequently canceled and is not at issue in this proceeding (*see* footnote 1). No additional tax was due for any other months of the audit period.

15. On July 12, 2013, the Division closed the audit case.

16. The Division's auditor testified that, during the course of the audit, he did not receive any information from petitioner or third-party suppliers that would lead him to believe petitioner had overpaid its tobacco product tax.

17. 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

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included a copy of the letter as an addendum to its post-hearing brief filed on February 15, 2018. Although evidence is not accepted after the record is closed, upon review of the record, it is determined that a copy of the same letter was submitted during the hearing as a portion of the Division's Exhibit K and thus may properly be considered in this determination.

tobacco products may use to determine the wholesale price of cigars for purposes of calculating the tax due.

18. Thereafter, on December 17, 2013, petitioner's representative filed correspondence with the Division entitled "Application For Credit or Refund of Tobacco Products Taxes" (protective claim). The protective claim 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. The Division used the date petitioner filed the protective claim for purposes of determining the statute of limitations for petitioner's refund claim. The Division concluded that the open periods pursuant to this protective claim for refund were the periods ending December 31, 2009 through July 31, 2010 and November 30, 2011 through April 30, 2012.

19. The Division subsequently worked with petitioner's representative to recalculate petitioner's tobacco products tax for the audit period based on TSB-M-13(12)M. Petitioner agreed with the Division's revised calculations but disagreed with the Division's determination that the statute of limitations on refunds had expired for the periods ending May 31, 2009 through November 30, 2009 and August 31, 2010 through October 31, 2011. The Division's calculations for the periods at issue are as follows:

Tax Period	Division's Proposed Tax Due after applying the wholesale price industry standard in TSB-13(12)M	Total Tax Paid	Difference	Refund Requested	Refund Paid
May 2009	\$82,468.90	\$156,829.12	\$74,360.22	\$74,360.22	\$ 0
June 2009	\$45,848.89	\$ 81,999.15	\$36,150.25	\$36,150.25	\$ 0
July 2009	\$62,653.11	\$114,263.82	\$51,610.71	\$51,610.71 <sup>3</sup>	\$ 0
August 2009	\$34,944.45	\$ 58,982.70	\$24,038.25	\$24,038.25	\$ 0
September 2009	\$57,784.41	\$118,325.24	\$60,540.83	\$60,540.83	\$ 0
October 2009	\$66,625.17	\$116,481.88	\$49,856.70	\$49,856.70	\$ 0
November 2009	\$43,070.73	\$ 83,353.26	\$40,282.54	\$40,282.54	\$ 0
December 2009	\$44,273.68	\$ 68,415.65	\$24,141.97	\$24,141.97	\$24,141.97
January 2010	\$41,204.20	\$ 61,446.65	\$20,242.45	\$20,242.45	\$20,242.45
February 2010	\$50,429.11	\$ 72,852.09	\$22,422.98	\$22,422.98	\$22,422.98
March 2010	\$42,382.67	\$ 73,006.89	\$30,624.22	\$30,624.22	\$30,624.22
April 2010	\$58,077.93	\$110,687.07	\$52,609.14	\$52,609.14	\$52,609.14
May 2010	\$35,279.31	\$ 70,316.81	\$35,037.50	\$35,037.50	\$35,037.50
June 2010	\$52,499.53	\$ 77,583.30	\$25,083.76	\$25,083.76	\$25,083.76
July 2010	\$69,718.08	\$131,845.98	\$62,127.90	\$62,127.90	\$62,127.90
August 2010	\$57,614.03	\$ 85,770.88	\$28,156.85	\$28,156.85	\$ 0
September 2010	\$43,645.06	\$ 51,567.77	\$ 7,922.71	\$ 7,922.71	\$ 0
October 2010	\$43,050.55	\$ 68,793.24	\$25,742.69	\$25,742.69	\$ 0

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<sup>3</sup> Petitioner's second refund claim, dated July 7, 2015, states that for the period July 2009, the audited tax due is \$80,227.11, total tax paid is \$114,263.82, and refund requested is \$34,036.71. There was no explanation for the discrepancy.

November 2010	\$55,328.45	\$ 76,695.98	\$21,367.54	\$21,367.54	\$ 0
December 2010	\$26,491.37	\$ 19,524.65	(\$ 6,966.76)		\$ 0
January 2011	\$22,133.55	\$47,924.69	\$ 25,791.13	\$ 25,791.13	\$ 0
February 2011	\$64,394.70	\$ 90,539.19	\$26,144.49	\$26,144.49	\$ 0
March 2011	\$60,593.10	\$ 94,665.56	\$34,072.46	\$34,072.46	\$ 0
April 2011	\$54,556.34	\$ 81,823.71	\$27,267.37	\$27,267.37	\$ 0
May 2011	\$50,317.84	\$ 58,737.26	\$ 8,419.41	\$ 8,419.41	\$ 0
June 2011	\$61,409.12	\$ 86,961.38	\$25,552.26	\$25,552.26	\$ 0
July 2011	\$58,415.51	\$103,943.47	\$45,527.96	\$45,527.96	\$ 0

20. The auditor testified that the Division granted the refunds for the periods ending December 31, 2009 through July 31, 2010 and November 30, 2011 through April 30, 2012, but denied such refunds for the periods ending May 31, 2009 through November 30, 2009 and August 31, 2010 through October 31, 2011, because the statute of limitations for refund claims had expired.

21. On or about July 7, 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) dated September 29, 2015, allowing a partial refund in the amount of \$414,132.63 and denying a refund in the amount of \$676,850.91 for the entire audit period of May 1, 2009 through April 30, 2012. Petitioner protested a portion of the refund denial, for the period August 1, 2011 through April 30, 2012, in a separate proceeding and thus that period is not as issue here (*see* footnote 1).

***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 the refund denial for the periods May 1, 2009 through November 30, 2009 and August 1, 2010 through July 31, 2011. As a result of the technical memorandum issued by the Division in December of 2013, petitioner filed a protective claim for refund on December 19, 2013. As noted by the auditor, the protective claim merely stated it was claiming a refund for the audit period but did not specify a refund amount nor was any documentation submitted in support of 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, except that where a waiver extending the period of limitation for assessment of tobacco products taxes was made within the two-year period for the filing of an application for refund, petitioner had until six months after the expiration of the period pursuant to the waiver or any extension thereof. Petitioner signed two waivers in this matter. The first waiver, signed on January 12, 2012, extended the period of limitation for assessment for the period May 1, 2009 through March 31, 2010 until April 20, 2013. As a result of this waiver, the statute of limitations for refund for periods December 12, 2009 through March 31, 2010 was extended to October 20, 2013. The second waiver, signed on March 18, 2013, extended the period of limitation for assessment for the period May 1, 2009 through July 31, 2010, to on or before August 20, 2013.

As a result of this waiver, the statute of limitations for refund for the period December 12, 2009 through March 31, 2010 was further extended to February 20, 2014. The Division allowed a refund for the periods covered by the waivers where the waivers were entered into within the two-year period for the filing of an application for refund (December 2009 through July 2010).<sup>4</sup> For the period May 2009 through November 2009, the two year statute of limitation for refunds expired before the first waiver was entered on January 12, 2012. For the remaining periods at issue (August 1, 2010 through July 31, 2011) no waivers were entered and as such the two year statute of limitations for refund applies. Petitioner's protective claim, filed on December 19, 2013, was filed more than two years from the time petitioner paid the tobacco products tax for the periods May 1, 2009 through November 31, 2009 and August 1, 2010 through July 31, 2011. As such, the Division properly denied petitioner's refund claim.

C. 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

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<sup>4</sup> Although the Division allowed a refund to the period April 1, 2010 through July 31, 2010, based on the second waiver, it appears that such period would have been beyond the two year statute of limitations for refund at the time the second waiver was signed (March 18, 2013). Nevertheless, neither party disputes the portion of the refund granted for this period.

not open for assessment or refund by virtue of any period of limitations provided for in any tax.”

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. Initially during the audit, upon review of petitioner’s books and records and third party information, the auditor discovered that petitioner made many errors in its preparation of its MT-203 returns. As part of the audit, the Division corrected all errors, finding additional tax owed and allowable credits, resulting in the issuance of an assessment for only the last nine periods of the audit. The auditor testified that during the audit, the Division was not provided with any information from petitioner’s representatives or third parties that would lead the auditor to believe petitioner had overpaid its tobacco products tax. Petitioner presented no evidence to refute this testimony. 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.

It must further be noted that the technical memorandum, TSB-M-13(12)M, which sets forth an alternative method for determining a distributor’s wholesale price of cigars does not contain any language that states this alternative method was to be given a retroactive application. Rather, 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 the tax was paid for the periods May 2009 through November 2009 and August 2010 through July 2011 more than two years prior to the filing of the refund claim, such periods fall

outside of the statute of limitations for refunds, and the refund claim with respect to these periods must be denied.

D. The petition of Globe Wholesale Tobacco Distributors, Inc., is denied and the refund claim determination notice, dated September 29, 2015, is sustained.

DATED: Albany, New York  
November 15, 2018

/s/ Barbara J. Russo  
ADMINISTRATIVE LAW JUDGE