

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
AJIT K. CORPORATION : DETERMINATION
for Revision of Determinations or for Refund of Tobacco : DTA NO. 827471
Products Taxes under Article 20 of the Tax Law for the :
Periods March 1, 2007 through December 31, 2010 and :
March 1, 2011 through November 30, 2011. :
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Petitioner, AJIT K. Corporation, filed a petition for revision of determinations or for refund of tobacco products taxes under article 20 of the Tax Law for the periods March 1, 2007 through December 31, 2010 and March 1, 2011 through November 30, 2011.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, on August 28, 2018 in New York, New York, with all briefs to be submitted by June 6, 2019, which date began the six-month period for 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).

ISSUES

I. Whether the Division of Tax Appeals has jurisdiction to consider petitioner's refund claim for the periods March 1, 2007 through February 29, 2008, and June 1, 2011 through June 30, 2011.

II. Whether petitioner filed a timely claim for refund for the periods March 1, 2007

through February 29, 2008, and June 1, 2011 through June 30, 2011.

III. 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, AJIT K. Corporation, is a licensed New York State distributor of tobacco products located at 944 Central Park Avenue, Yonkers, New York. Petitioner also holds a certificate under article 28 of the Tax Law as a retail dealer of cigarette and tobacco products. It operates a service station located along the New York State Thruway in Yonkers that has a convenience store and a walk-in humidor. Petitioner sells premium cigars, along with the standard tobacco products sold in a typical convenience store.

2. On or about January 26, 2010, the Division of Taxation (Division) commenced a tobacco products tax audit of petitioner for the period March 1, 2007 through November 30, 2009. William Pfeiffer, a Tax Auditor 1 in the Division's Transaction and Transfer Tax Bureau, Capital Region Office - Wade Road, Transaction Field Audit Section, was assigned to conduct this tobacco products tax audit.¹

3. On January 29, 2010, the auditor called petitioner's business location and spoke with Manav Aggarwal, the owner's brother. The auditor informed Mr. Aggarwal that petitioner was under audit for tobacco products tax and sales tax.

4. On February 24, 2010, the auditor received a power of attorney appointing William Starita, an accountant, as petitioner's first representative for both the tobacco products tax and the sales tax audits. Thereafter, petitioner's first representative requested that the Division

¹ Mr. Pfeiffer was also assigned to conduct a sales tax field audit of petitioner for an unidentified period.

schedule the field audit appointment for a date after tax season.

5. On March 2, 2010, the auditor prepared a consent extending the period of limitations for assessment of tobacco products taxes under article 20 of the Tax Law (waiver). This waiver extended the time within which to assess any additional tax for the periods March 1, 2007 through February 29, 2008, to on or before March 20, 2011. The March 2, 2010 waiver was signed by petitioner's president, Raman Aggarwal, on March 12, 2010 and, subsequently, was received and signed by the Division on March 15, 2010.

6. On March 2, 2010, the Division sent a letter to petitioner scheduling a field audit appointment for May 3, 2010 at the office of petitioner's first representative. The letter included a request for petitioner's books and records for the period March 1, 2007 through November 30, 2009 in order to complete a detailed audit of the business. In addition to the records requested list, enclosures included, among other items, the March 2, 2010 waiver.

7. On May 5, 2010, a field audit appointment took place at the office of petitioner's first representative. During that appointment, the auditor and Mr. Starita discussed the preparation of petitioner's distributor of tobacco products tax returns, "which was done" by petitioner, and the scope of the audit. In addition, the auditor was presented with petitioner's tax returns and purchase invoices. At that time, the auditor began his review of the records presented and continued his field review of those records on May 6, 2010. The tax field audit record (audit log) entry for May 6, 2010 indicates that during his field review of the records presented, the auditor found "an error rate of about 4%, mainly from not paying tax on promo products." As a result of his review of the records presented, the auditor determined that the purchase invoices were incomplete and he was unable to determine if petitioner's returns reported the correct amount of tobacco products tax. Therefore, the auditor concluded it was necessary to obtain third party

information from petitioner's suppliers.

8. In conducting the audit, the auditor initially reviewed the Division's internal sales information from two suppliers to ascertain whether petitioner was properly reporting its purchases from those suppliers. The auditor also reviewed the results of petitioner's last tobacco products tax audit. After reviewing the third party sales information and the prior audit results, the auditor found that petitioner under-reported its purchases from both suppliers.

9. During the course of the audit covering the period March 1, 2007 through November 30, 2009, additional waivers were prepared and signed as follows:

(a) On March 17, 2011, petitioner's president executed a second waiver, dated March 14, 2011, to extend the time within which to assess any additional tax for the periods March 1, 2007 through July 31, 2008, to on or before September 20, 2011. This waiver was received by the Division and signed by the auditor's team leader, Richard Tvorak, on March 18, 2011.

(b) On August 6, 2011, petitioner's president executed a third waiver, dated August 4, 2011, to extend the time within which to assess any additional tax for the periods March 1, 2007 through October 31, 2008, to on or before December 20, 2011. This waiver was received by the Division on August 10, 2011 and signed by the auditor's team leader on August 16, 2011.

(c) On December 6, 2011, petitioner's president executed a fourth waiver, dated November 30, 2011, to extend the time within which to assess any additional tax for the periods March 1, 2007 through February 28, 2009, to on or before March 20, 2012. This waiver was received by the Division on December 6, 2011 and signed by the auditor's team leader on December 12, 2011.

10. On December 7, 2011, the Division sent a letter to petitioner's president advising that the audit period was expanded to cover the period March 1, 2007 through November 30, 2011.

The letter included an information document request (IDR) requesting petitioner's books and records for the expanded audit period in order to complete a detailed audit of the business.

11. A March 5, 2012 entry in the audit log indicates that the auditor "received the last 6 months tobacco tax returns from POA," as well as purchase invoices. Thereafter, the auditor began reviewing those returns, and detailing the purchase invoices provided with the same.

12. On March 20, 2012, petitioner's president executed a fifth waiver, dated March 14, 2012, to extend the time within which to assess any additional tax for the periods March 1, 2007 through July 31, 2009, to on or before September 20, 2012. This waiver was received by the Division on March 20, 2012 and signed by the auditor's team leader on March 23, 2012.

13. A July 23, 2012 entry in the audit log indicates that the auditor updated his workpapers to include the extended audit period, and also updated the error rate calculation after reviewing petitioner's purchases from one of its suppliers "for a couple months in 2011." The July 23, 2012 entry also indicates that the auditor prepared proposed audit adjustments to review with his team leader. Subsequently, on July 24, 2012, the proposed audit adjustments were reviewed by the auditor's team leader.

14. On July 25, 2012, the auditor "[p]rinted and mailed third party letters to all known suppliers, including from prior audit."

15. On August 3, 2012, the auditor mailed "proposed audit adjustments and workpapers" to both petitioner and its first representative. The record does not include either the proposed audit adjustments or the workpapers.

16. On August 10, 2012, the auditor received a power of attorney appointing Kanwal Dev Sra, CPA, as petitioner's second representative for both the tobacco products tax and the sales tax audits.

17. On August 10, 2012, petitioner's second representative executed a sixth waiver, dated August 3, 2012, to extend the time within which to assess any additional tax for the periods March 1, 2007 through January 31, 2010, to on or before March 20, 2013. This waiver was received by the Division on August 10, 2012 and signed by petitioner's team leader on August 13, 2012.

18. Beginning on August 17, 2012 and continuing through October 23, 2012, the auditor received third party information from a few of petitioner's suppliers. Over a period of time, the auditor reviewed and entered the third party information received from those suppliers. Subsequently, the auditor made an additional request to a supplier for its third party information, one of its subsidiary's third party information, and third party information for an acquired supplier.

19. On March 18, 2013, petitioner's president executed a seventh waiver, dated March 5, 2013, to extend the time within which to assess any additional tax for the periods March 1, 2007 through August 31, 2010, to on or before September 20, 2013. This waiver was received by the Division on March 19, 2013 and signed by the auditor's team leader on March 19, 2013.

20. During his review of the third party information received from tobacco products suppliers, the auditor discovered that petitioner had not reported purchases from Ashton, Inc. (Ashton), totaling \$56,984.02 for the monthly periods from March 2007 through November 2011.²

21. On July 22, 2013, petitioner's "attorney in fact," Stephen L. Solomon, filed correspondence entitled "Application for Credit or Refund of Tobacco Product Taxes"

² The auditor did not find any unreported purchases from Ashton in the following months: May 2008, January 2010, March 2010, May 2010, September 2010, October 2010, January 2011, February 2011 and August 2011.

(protective claim) with the Division's "TDAB Tobacco Products - Refund Claims W.A. Harriman Campus Albany, New York." The protective claim indicated that petitioner was filing a refund claim for "all open periods through June 2013" due to "the erroneous calculation and reporting of the 'wholesale price.'" The protective claim for refund did not contain any additional information in support of the claim and stated "[b]ecause of the voluminous nature of the documents and other evidence in support of its claim, [petitioner] will submit such documentation and evidence upon the Department's audit of this claim."

22. Entries in the audit log indicate that the auditor sent files to petitioner's second representative for his review prior to a field meeting. On August 28, 2013, the auditor met with petitioner's second representative to review petitioner's records and to discuss the auditor's original findings. During the August 28, 2013 meeting, petitioner presented additional records which indicated that the auditor's "original findings were overstated." The auditor noted in his August 28, 2013 audit log entry regarding the meeting that "there appears to be an unreported vendor that [Mr. Sra] will review with [petitioner] to determine what happened." He further noted that Mr. Sra "agreed to sign new waivers, which were presented to him."

Subsequently, on August 29, 2013, petitioner's president executed an eighth waiver, dated August 28, 2013, to extend the time within which to assess any additional tax for the periods March 1, 2007 through November 30, 2010, to on or before December 20, 2013. This waiver was received by the Division on August 30, 2013 and signed by the auditor's team leader on September 9, 2013.

23. Review of the audit log indicates that the auditor attempted to reach petitioner's second representative regarding the status of his review of the findings of the unreported vendor a number of times. Specifically, the auditor called and left messages for the second

representative on October 1, 2013, October 8, 2013, and November 14, 2013. The second representative never returned the auditor's telephone calls.

24. On December 5, 2013, the Division issued a technical services bureau 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. The memorandum states, in part, that "[e]ffective for cigars imported into New York on or after December 1, 2013, the adjustment ratio is 38% (0.38). . . . To determine the wholesale price of cigars, the distributor multiplies its purchase price by the adjustment ratio. The resulting amount is multiplied by 75% (0.75) to determine tax due." The memorandum further states that "[i]f you believe that the wholesale price is lower than the amount you computed using the adjustment ratio, you must use a manufacturer's invoice or other evidence to establish the lower price."

25. On December 19, 2013, petitioner's president executed a ninth waiver, dated November 14, 2013, to extend the time within which to assess any additional tax for the periods March 1, 2007 through May 31, 2011, to on or before June 20, 2014. This waiver was received by the Division on December 20, 2013 and signed by the auditor's team leader on December 20, 2013. Thereafter, the auditor called petitioner's second representative and left messages on January 15, 2014 and February 4, 2014. Neither telephone call was returned.

26. After reviewing petitioner's books and records, and the third party information he received, the auditor determined that petitioner had not reported its purchases from one of its suppliers, Ashton, on its tobacco products tax returns for the period March 1, 2007 through November 30, 2011. Specifically, the auditor found unreported purchases in all months of the

audit period, except for the months of May 2008, January 2010, March 2010, May 2010, September 2010, October 2010, January 2011, February 2011 and August 2011. As noted in finding of fact 20, the auditor found that petitioner's unreported purchases from Ashton totaled \$56,984.02 for the audit period. To determine the audited tax due in each month in which unreported purchases were found, the auditor multiplied the amount of unreported purchases found for the month by the applicable tax rate for such month, i.e., tax rates of 37%, 46%, and 75% were applied against unreported purchases found in the months of March 2007 through March 2009, the months of April 2009 through July 2010, and the months of August 2010 through November 2011, respectively. Based upon his calculations of audited tax due on unreported purchases, the auditor determined additional tax due in the total amount of \$26,148.99 for the period March 1, 2007 through November 30, 2011.

27. On February 11, 2014, the auditor prepared and issued two statements of proposed audit change for cigarette and tobacco products that reflected his audit findings regarding petitioner's unreported purchases for the audit period. Specifically, the first statement of proposed audit change determined additional tax due in the amount of \$21,237.23, plus interest and penalty, for the period March 1, 2007 through February 28, 2011. The second statement of proposed audit change determined additional tax due in the amount of \$4,911.76, plus interest and penalty, for the period March 1, 2011 through November 30, 2011. Both statements of proposed audit change and supporting schedules were sent to petitioner and its second representative on February 11, 2014. Audit log entries indicate that petitioner disagreed with the audit adjustments reflected in the two statements of proposed audit change.

28. On April 22, 2014, the Division issued a notice of determination, assessment ID# L-041046334, to petitioner assessing additional tobacco products tax in the amount of \$4,911.76,

plus interest and penalty, for tax period March 1, 2011 through November 30, 2011.

On April 23, 2014, the Division issued a notice of determination, assessment ID# L-041051338, to petitioner assessing additional tobacco products tax in the amount of \$21,237.23, plus interest and penalty, for tax period March 1, 2007 through December 31, 2010.

29. On May 2, 2014, the Division closed the audit case.

30. Petitioner timely filed a request for conciliation conference in the Bureau of Conciliation and Mediation Services (BCMS) in protest of notices of determination, notice numbers L-041046334 and L-041051338, issued for the periods March 1, 2007 through December 31, 2010, and March 1, 2011 through November 30, 2011, respectively.

31. In lieu of appearing at a BCMS conciliation conference, petitioner opted to have the matter decided by correspondence. Petitioner was represented by Stephen Solomon, Esq., and the Department was represented by William Pfeiffer, Tax Auditor. By conciliation order, CMS No. 262791, dated November 13, 2015, the conciliation conferee granted the request and cancelled the statutory notices, i.e., notices of determination, notice numbers L-041046344 and L-041051338. At the bottom of the conciliation order, the following notation appears: “* The Audit Division recommends that a refund of \$67,688.35 be granted for the period 3/1/08-5/31/11. The Audit Division recommends that a refund of \$20,884.82 be granted for the period 7/1/11-11/30/11.”

32. At the hearing, the 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 products tax. He also testified that, during the course of the audit, he was never notified that a protective claim for refund had been filed on July 22, 2013.

33. The auditor testified that after the completion of the audit, an unidentified Division

employee notified him that a refund claim had been filed. He could not recall the specific date. The auditor stated that he worked with Peter Spitzer, the supervisor of the Division's registration and bond unit, who was handling petitioner's refund claim. The auditor explained that he assisted Mr. Spitzer by providing him with the waivers necessary to determine which, if any, of the tax periods listed on petitioner's refund schedule were eligible for refund. He further explained that Mr. Spitzer determined which periods were within the two-year statute of limitations and which periods were outside the two-year statute of limitations. Mr. Spitzer provided the auditor with a refund schedule detailing a refund amount for each month in the period March 1, 2007 through November 30, 2011, and whether the refund amount for such period was within the statute of limitations or outside the statute of limitations. The auditor testified that Mr. Spitzer asked him to review the workpapers and verify the numbers on the refund schedule. The auditor also stated that, as part of the BCMS conciliation process, Mr. Solomon's provided him with a copy of petitioner's refund schedule, which had been previously submitted to the registration and bond unit as part of petitioner's refund claim.

34. The record includes an undated refund schedule that Mr. Spitzer created and provided to the auditor. This refund schedule contains a computation of the refund for each month in the period March 1, 2007 through November 30, 2011. For each month, there are separate columns detailing the computation of the claimed refund including, among others items, the cigar adjustment ratio to be applied,³ the reported purchases on line 1 of the tobacco products tax return, unreported purchases, audited line 1, computed line 1 after the adjustment ratio is applied, tax computed, tax paid on the original return, and the claimed refund amount. On this refund

³ Adjustment ratios of 46%, 38%, and 33% were used in the periods March 1, 2007 through July 31, 2010, August 1, 2010 through September 30, 2011, and October 1, 2011 through November 30, 2011, respectively.

schedule, the claimed refund amount column totaled \$111,021.16 for the period March 1, 2007 through November 30, 2011.

In addition to the columns detailing the computation of the claimed monthly refunds on this refund schedule, there are also seven additional columns entitled “Period,” “Refund Status,” “Protective Claim Filed 7/22/13,” “Audit Period 3/1/07 - 11/30/11,” “Period Covered [sic] by Waiver 6/20/14,” “Period Covered 2Y from First Waiver Signed 3/15/10,” and “Approved Refund.” Review of the refund status column indicates “Offset” was listed for the months of March 2007 through February 2008, “full available refund” was listed for each of the months of March 2008 through May 2011, and July 2011 through November 2011, and “out of statute” was listed for the month of June 2011. The “Approved Refund” column lists refund amounts for the months of March 2008 through May 2011, and July 2011 through November 2011, the sum of which totaled \$88,573.17. It is noted that on this refund schedule, the approved refund amount listed for each month is the same amount as is listed in the claimed refund amount column for each such month.

35. Christopher Nikles, a Tax Auditor 4, also testified at the hearing. Mr. Nikles oversees four teams for the Division: the highway use tax team, the data matching team, the audit support team, and the registration and bond unit. He assumed responsibility for the registration and bond unit approximately one year before the hearing in this matter. Mr. Nikles was not involved in the actual calculation and review of petitioner’s refund claim. He stated that he could not find any notes from Mr. Spitzer directly related to Mr. Spitzer’s review of petitioner’s refund claim.

36. Mr. Nikles stated that the Division has not issued a refund with respect to petitioner’s refund claim for the period March 1, 2007 through November 30, 2011. Mr. Nikles further stated that he did not know why the approved refund amounts, totaling \$67,688.35, and

\$20,884.82 for the periods March 1, 2008 through May 31, 2011, and July 1, 2011 through November 30, 2011, respectively, listed on the schedule created by Mr. Spitzer have not been paid. The Division has never issued a refund claim determination notice to petitioner with respect to its refund claim for the period March 1, 2007 through November 30, 2011.

37. In its brief, the Division conceded that petitioner's refund claim for the month of June 2011 was timely filed and petitioner is "owed a refund in the amount of \$1,630.84." The Division, in its brief, also conceded that "petitioner is owed a total refund in the amount of \$90,204.01 (\$88,573.17 + \$1,630.84), which represents those tax periods eligible for refund."

38. Petitioner timely filed a petition in protest of notices of determination, notice numbers L-041046334 and L-041051338. Page 2 of the petition listed "[t]he amount of tax determined was \$26,148.99 and the amount of tax contested is (\$112,699.27)."⁴

In the petition's item 6, petitioner alleged the following:

- “1. The Commissioner issued assessments of tax for the periods 3/1/07 through 12/31/10 in the amount of \$21,237.23 and for the periods 3/1/11 through 11/30/11 in the amount of \$4,911.76, for a total tax of \$26,148.99.
2. The assessments were erroneous in that the Commissioner's computation of the taxpayer's wholesale price was in error.
3. As stated in the Conciliation Order, the Conciliation Conferee cancelled the statutory notices and indicated that the Audit Division recommended a refund of \$67,688.35 for the period 3/1/08 - 5/31/11 and a refund of \$20,884.82 For the period 7/1/11 - 11/30/11.
4. Petitioner claimed a refund of \$84,860.50 for the period 3/1/07 - 12/31/10 and a refund of \$27,838.77 for the period 1/11/11 - 11/30/11.
5. Petitioner submits that the period for refund remained open either by waiver or pursuant to Tax Law § 3004-a.”

A copy of the conciliation order was attached to the petition.

⁴ Because the amount in controversy involved a refund, it was entered in parentheses per the instructions.

CONCLUSIONS OF LAW

A. The Division, in its brief, raised the issue of whether the Division of Tax Appeals has jurisdiction to consider petitioner's refund claim for the periods March 1, 2007 through February 29, 2009, and June 1, 2011 through June 30, 2011. A subject matter jurisdiction 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]).

The Division of Tax Appeals is an adjudicatory body of limited jurisdiction; its powers are limited to those conferred by its authorizing statute (*Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom New York State Dept. of Taxation & Fin. v Tax Appeals Trib.*). Accordingly, a party to a proceeding cannot confer jurisdiction on the Division of Tax Appeals to decide matters outside the scope of its authority (*see Strina v Troiano*, 119 AD2d 566, 567 [1986] [subject matter jurisdiction cannot be conferred by consent or stipulation of the parties, and a defect in subject matter jurisdiction cannot be waived]).

B. Tax Law § 2008 (1) provides:

“All proceedings in the division of tax appeals shall be commenced by the filing of a petition with the division of tax appeals 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 the right to a hearing in the division of tax appeals under this chapter or other law.”

C. In the present matter, the Division issued notices of determination, notice numbers L-041046344 and L-041051338, for the periods March 1, 2007 through December 31, 2010, and March 1, 2011 through November 30, 2011, respectively (*see* finding of fact 28). Subsequently, petitioner timely filed a request for conciliation conference with BCMS in protest of those

notices of determination. By conciliation order, dated November 13, 2015, the conciliation conferee granted the request and cancelled the notices of determination, notice numbers L-041046344 and L-041051338, and noted, at the bottom of the conciliation order that the Audit Division recommended “a refund of \$67,688.35 be granted for the period 3/1/08-5/31/11,” and “a refund of \$20,884.82 be granted for the period 7/1/11-11/30/11.” Thereafter, petitioner filed a petition in protest of notices of determination, notice numbers L-041046344 and L-041051338. In addition, the petition sought a refund of \$112,699.27.

Since the petition filed in this matter protests the two notices of determination that were cancelled by the conciliation order, there are no statutory notices by which petitioner could file a protest in the Division of Tax Appeals (*see* Tax Law § 2008 [1]). With respect to the notation at the bottom of the conciliation order regarding the Audit Division’s recommendations of refunds for the periods March 1, 2008 through May 31, 2011, and July 1, 2011 through November 30, 2011, that notation cannot be construed as a written refund claim determination notice that denied petitioner’s refund claims for the periods March 1, 2007 through February 29, 2008, and June 1, 2011 through June 30, 2011. Petitioner’s request for conciliation conference was filed in protest of the two notices of determination, not a denial of a refund or credit application. “While it is the function of BCMS to provide a conciliation conference to a taxpayer concerning ‘a denial of a refund or credit application’ by the Division, (Tax Law § 170[3-a][a]), it is not the function of BCMS to review an application for refund in the first instance” (*see Matter of Collado*, Tax Appeals Tribunal, October 25, 2001). BCMS issued a conciliation order cancelling the two statutory notices issued in this matter. Since there is no statutory notice giving petitioner rights to a hearing before the Division of Tax Appeals, (Tax Law § 2008 [1]), the petition filed in protest of the cancelled notices of determination must be dismissed.

D. Although the Division has never issued a refund claim determination notice in this matter, the petition also seeks a refund of tobacco products taxes paid in the amount of \$112,699.27 for the period March 1, 2007 through November 30, 2011. Recently, the Tax Appeals Tribunal, in *Matter of Globe Wholesale Tobacco Distributors, Inc.* (Tax Appeals Tribunal, November 7, 2019), addressed the issue of whether a petition filed prior to the issuance of a refund claim determination notice under article 20 of the Tax Law conferred jurisdiction upon the Division of Tax Appeals with respect to the refund claim. The Tribunal, in *Matter of Globe Wholesale Tobacco*, found that the petition filed before the issuance of the refund claim determination notice does not confer jurisdiction upon the Division of Tax Appeals with respect to the refund claim. In reaching that conclusion the Tribunal stated that:

“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 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 Yegnukian*, 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)” (*Matter of Globe Wholesale Tobacco*).

Therefore, given the general rule that a petition must protest a written statutory notice and the absence of any exception to that rule applicable here, I find that the petition in the present matter, filed before a refund claim determination notice has been issued, does not confer jurisdiction upon the Division of Tax Appeals with respect to the refund claim (*id.*).

E. The petition of AJIT K. Corporation is hereby dismissed.

DATED: Albany, New York
December 5, 2019

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE