

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**TRIPIFOODS, INC.** : DETERMINATION  
 : DTA NO. 827489  
for Revision of a Determination or for Refund of Tobacco :  
Products Tax under Article 20 of the Tax Law for the :  
Period October 31, 2007 through November 30, 2013. :

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Petitioner, Tripifoods, Inc., filed a petition for a revision of a determination or for refund of tobacco products tax under article 20 of the Tax Law for the period October 31, 2007 through November 30, 2013.

A hearing was held before Kevin R. Law, Administrative Law Judge, in New York, New York, on August 7, 2018, with all briefs to be submitted by June 6, 2019, 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 October 31, 2007 through November 30, 2013.

II. Whether petitioner is entitled to relief under § 3004-a of the Tax Law.

***FINDINGS OF FACT***

1. Petitioner, Tripifoods, Inc., is a cigarette stamping agent that is a registered New York State wholesaler and distributor of cigarette and tobacco products selling to retailers and other wholesalers. Petitioner also sells candy and other convenience store items to various retailers.

2. In or about June 2010, the Division of Taxation (Division) commenced cigarette tax, sales and use tax, and tobacco products tax audits of petitioner. Following a telephone conversation with petitioner's director of finance, Jim McMahon, the Division's auditor sent a letter to petitioner dated July 20, 2010, scheduling an audit appointment for November 22, 2010, at petitioner's business location in Buffalo, New York. As relevant here, the audit period for the tobacco products tax audit was specified as November 1, 2007 through November 30, 2010 (first audit).

3. On July 28, 2010, Mr. McMahon executed a waiver extending the time within which the Division could assess tobacco products tax for the period November 1, 2007 through November 30, 2009, until December 30, 2012.

4. The tobacco products audit did not actually commence until May 27, 2011, by agreement of petitioner and the Division.

5. During the course of the audit, the Division reviewed petitioner's inventory reports, purchase and sales invoices and monthly summary reports. The audit uncovered a mathematical error the result of which was that tax had been under reported by \$27,293.33. Like the tax originally reported, the tax was computed based upon the purchase price as reflected on the invoices.

6. On February 27, 2012, the Division issued a statement of proposed audit adjustment (statement) asserting tax of \$27,293.33 plus interest. On March 8, 2012, petitioner signed the statement, agreeing to the amount of tobacco products tax determined due by the Division, and remitted full payment.

7. On May 12, 2012, the Division formally closed the first audit of petitioner.

8. On March 6, 2013, the Division received a letter dated February 28, 2013, from James Breen of Tobacco Tax Consultants. The letter provides as follows:

“[Petitioner] has retained the undersigned to represent them in submitting a refund claim for NYS Tobacco Products taxes erroneously paid from November 1, 2007 to date. This letter will serve as a Letter of Protective Claim to stop the statute of limitations expiring for any further periods, while allowing [petitioner] the opportunity to compile the information necessary to support their refund claim. The actual claim will be filed once all the data is compiled.

The refund period is extended back to November 1, 2007 based on a ‘Consent Extending Period of Limitation for Assessment of Tobacco Products tax(es) under Article 20 of the Tax Law’ (AU 1) document signed by the taxpayer and the Department which expired on December 31, 2012. By law, the taxpayer is allowed an additional six months beyond the ending date of the agreed extension in which to file a refund claim. A copy of the AU 1 document is enclosed.

The refund claim will include items for taxes paid in error such as:

- including the federal excise tax on imported cigars when computing the NY otp tax

- computing the otp tax on the purchase price as opposed to a lower wholesale price or industry standard mark up for cigars

- paying the otp tax on the purchase price on product from Republic Tobacco rather than the manufacturers list price as shown on Republic’s invoice

- including the federal excise tax when computing the otp tax on product purchased from Republic Tobacco when the federal excise tax is separately stated on Republic's Invoice.”

9. 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."

10. On January 22, 2014, a formal refund claim was filed by petitioner for the period October 31, 2007 though November 30, 2013. The refund claim stated as follows:

"Please consider this letter as a refund request for Tripifoods, Inc. for taxes paid as a NYS registered distributor for other tobacco products as reported and paid on the 'Distributor of Tobacco Products Tax Return' form MT-203, covering the periods 10/31/2007 through 11/30/2013. The total refund requested is (\$8,471,363).

The refund request is based on the industry standard adjustment ratio. The ratios and refund percentages calculated were determined using the exact method and basis upon which the Department issued TSB-M 13(12)M. Ratios have been determined for the following periods and percentages:

CIGARS

Periods prior to August 1, 2010. . . . . 54% refund  
August 1, 2010 - September 30, 2011 . . . .62% refund  
October 1, 2011 - November 30, 2013. . . .69% refund

OTHER TOBACCO PRODUCTS (Pipe, RYO, Chew, Wraps)

All periods . . . .25% refund

The variance in refund rates on cigars is due to small cigars being taxed the same as large cigars prior to August 1, 2010 and due to the fact that manufacturing of large cigars has been steadily shifted outside the U.S., thus the federal tax would not be included when computing the NYS tax. Mark-up ratios for both cigars and other tobacco products (OTP) remain consistent year to year, explaining why the OTP refund percentage has remained the same as those operations have not moved out of the U.S.

A summary showing the adjustment and refund request by month is included along with amended returns for each period and copies of the original monthly returns.”

11. Following receipt, the Division initiated an audit of petitioner’s refund claim (refund audit). During the course of the refund audit, the overpayment claimed was increased from \$8,471,363.00 to \$9,144,768.08. Of the \$9,144,768.08 refund claimed, \$8,182,942.91 was attributable to overpayments claimed on cigars and the remainder, \$961,825.17, was attributable to overpayments of tobacco products tax claimed on tobacco products other than cigars (OTP).

12. By letter dated December 23, 2014, the Division granted \$5,520,294.00 of petitioner’s claim for refund and denied the remainder (notice of adjusted refund). The notice of adjusted refund states as follows:

“Your claim for refund has been denied in part in the amount of \$3,624,474.00 for the following reason(s):

-The refund was reduced because of an adjustment to the markup percentage from 31% to 33% for cigars for periods between 7/31/2011 and 11/30/2013.

-We disallowed the 25% reduction claimed for other tobacco products (OTP) as there has not yet been a markup percentage determined for OTP.

-Adjustments were made for periods out of statute and with statute limitations.

-Adjustments were made for clerical error(s) on the refund request schedule.

The adjusted refund computations are set forth on the enclosed spreadsheet.”

13. The spreadsheet referred to in the notice of adjusted refund was not attached to the copy included in the record. Other spreadsheets contained in the record indicate that claimed overpayments for the period October 31, 2007 through June 30, 2008, and for the period December 31, 2009 through January 31, 2011, were denied based upon the statute of limitations.

14. Subsequent to the issue of the notice of adjusted refund, petitioner and the Division agreed to an additional refund of 80% of the amount of the claimed overpayment of tax paid on OTP that was not otherwise subject to denial based on the statute of limitations. Although no written settlement agreement is contained in the record, the settlement is documented in the audit file contained in the record and both parties have acknowledged its existence. Petitioner has not taken issue with the other adjustments made by the Division in the notice of adjusted refund or the disallowance of a portion of the refund claimed on OTP, only that part of the denial predicated on the statute of limitations. As a result, petitioner asserts the remainder at issue is \$867,345.00 for the period October 31, 2007 thru June 30, 2008 and \$1,825,266.00 for the period of December 31, 2009 through January 31, 2011. The Division agrees that \$867,345.00 is at issue for the period October 31, 2007 thru June 30, 2008, but asserts that the amount at issue for December 31, 2009 through January 31, 2011 is \$1,755,336.00. According to the Division, the discrepancy for the later period is a result of petitioner’s failure to pay any tax for the August 30, 2010 period as confirmed by a spreadsheet contained in the audit file. There is no evidence in the record that contradicts this finding.

15. Petitioner's representative, Stephen Solomon, Esq., also testified at the hearing in this matter. Mr. Solomon testified about his firm's experience representing Davidoff of Geneva (NY), Inc.,<sup>1</sup> to come up with an industry standard of markups as a way for sellers of tobacco products to determine a distributor's wholesale price of cigars. To this end, petitioner introduced a series of correspondences to various employees of the Division, the first of which is dated December 13, 2007. According to Mr. Solomon, these efforts led to the promulgation of TSB-M-13 (12) M.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 471-b (1) imposes a tax at the of 75% of the wholesale price on all tobacco products, other than snuff,<sup>2</sup> possessed in New York by any person for sale or used in the state by any person. Tax Law § 470 (6) defines "wholesale price" as:

"[t]he established price for which a manufacturer sells tobacco products to a distributor, before the allowance of any discount, trade allowance, rebate or other reduction. In the absence of such an established price, a manufacturer's invoice price of any tobacco product shall be presumptive evidence of the wholesale price of such tobacco product, and in its absence the price at which such tobacco products were purchased shall be presumed to be the wholesale price, unless evidence of a lower wholesale price shall be established or any industry standard of markups relating to the purchase price in relation to the wholesale price shall be established."

B. 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

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<sup>1</sup> Mr. Solomon was the representative in *Matter of Davidoff of Geneva (NY), Inc.*, DTA# 822752 (Div. of Tax App., May 26, 2011), where the Administrative Law Judge has held that statistical data could be used to determine the wholesale price of cigars purchased from third-party wholesale suppliers.

<sup>2</sup> Snuff is taxed at the rate of \$2.00 per ounce.

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).

C. Pursuant to Tax Law § 476, petitioner 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. In this case, petitioner executed a waiver on July 28, 2010 extending the time within which to assess any additional tax for the period November 1, 2007 through November 30, 2009, to on or before December 30, 2012. On July 28, 2010, the statute of limitations for claiming refunds for the period October 31, 2007 thru June 30, 2008 was already closed; thus, the waivers did not extend petitioner's time to file a claim for that period. Meanwhile, for the period, December 31, 2009 through January 31, 2011, no waivers were entered, and as such, the two year statute of limitations for refund applies. Petitioner's protective claim, filed on February 28, 2013, was filed more than two years from the time petitioner paid the tobacco products tax for this period. As such, the Division properly denied petitioner's refund claim.

D. Notwithstanding that refunds for the period October 31, 2007 thru June 30, 2008 and for the period December 31, 2009 through January 31, 2011 are barred by the statute of limitations, petitioner claims that it is entitled to relief under Tax Law § 3004-a, which requires



the Division to disclose to the taxpayer the existence of an overpayment of tax discovered during an audit. Tax Law § 3004-a provides, 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.”

E. Petitioner has not shown that the Division discovered any overpayment during the course of the first audit that falls within the meaning and intent of Tax Law § 3004-a. In support of its argument, petitioner relies upon *Kane ex rel. United States v Healthfirst, Inc.*, 120 F Supp 3d 370 (SDNY 2015), which deals with a healthcare provider’s duty to report and return all overpayments from Medicaid within 60 days of when the overpayments are identified. The court in *Kane* held that an overpayment is identified when it is discovered that an overpayment was likely. Here, the Division was not aware that an overpayment was likely as the controlling statute, Tax Law § 470 (6), specifically provides that in the absence of an established manufacturers price, “the price at which such tobacco products were purchased shall be presumed to be the wholesale price” (see *Matter of Globe Tobacco Distributors, Inc.*, Tax Appeals Tribunal, November 7, 2019 [where the Tax Appeals Tribunal held, in dicta, that “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'']). Petitioner's tax filings reported tax based upon the purchase price as reflected on its purchase invoices which, under the law, is presumed to be the wholesale price. While it is apparent that petitioner could have filed its tobacco products tax returns for the periods under audit using the manufacturer's selling price, or using any industry standard of markups relating to the purchase price in relation to the wholesale price, there is no indication that the Division was privy to the manufacturer's selling price or privy to any industry standard of markups at the time of the first audit; nor is there any indication that petitioner was likewise privy to this information. Petitioner's argument, if accepted, would cast the Division in the role of an advisor or preparer during every audit. The Division is under no obligation to advise a taxpayer how to file its returns such as to maximize a refund or how minimize its tax obligations.

F. The petition of Tripifoods, Inc., is denied and the notice of adjusted refund, dated December 23, 2014, as modified by agreement of the parties (see finding of fact 14), is sustained.

DATED: Albany, New York  
December 5, 2019

/s/ Kevin R. Law  
ADMINISTRATIVE LAW JUDGE