

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
CORE-MARK MIDCONTINENT, INC. : DETERMINATION
 : DTA NO. 827490
for Revision of a Determination or for Refund of Tobacco :
Products Tax under Article 20 of the Tax Law for the :
Period June 1, 2006 through November 30, 2013. :

Petitioner, Core-Mark Midcontinent, 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 June 1, 2006 through November 30, 2013.

A hearing was held before Barbara J. Russo, Administrative Law Judge, in New York, New York, on July 18, 2018, with all briefs to be submitted by January 18, 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 June 1, 2006 through November 30, 2013.

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, Core-Mark Midcontinent, Inc., is a licensed New York State wholesaler and distributor of tobacco products with general business offices at 100 West End Road, Wilkes Barre, Pennsylvania. Petitioner supplies cigarettes and tobacco products to convenience stores and other retail outlets located primarily in New York State.

2. On May 27, 2010, the Division of Taxation (Division) commenced a tobacco products tax audit of petitioner for the period June 1, 2006 through May 31, 2010 (audit period).

3. Petitioner and the Division agreed to a test period audit method and signed a test period audit method election form on May 10, 2012. The test period selected was September 2009 through November 2009.

4. During the audit, petitioner signed three consents extending the period of limitation for assessment of tobacco products tax under article 20 of the Tax Law (waivers). The first waiver, received by the Division on June 22, 2009, extended the time within which to assess any additional tax for the periods June 1, 2006 through May 31, 2007, to on or before June 30, 2010. The second waiver, received by the Division on June 3, 2010, extended the time within which to assess any additional tax for the periods June 1, 2006 through May 31, 2008, to on or before June 30, 2011. The third waiver, received by the Division on April 28, 2011, extended the time within which to assess any additional tax for the periods June 1, 2006 through May 31, 2009, to on or before June 22, 2012.

5. Based on its review of petitioner's records, the Division determined that petitioner owed additional tax in the amount of \$4,300.92 and issued a statement of proposed audit adjustment (statement) dated April 16, 2012. On May 22, 2012, petitioner signed the statement,

agreeing to the amount of tobacco products tax determined due by the Division, and remitted full payment.

6. By correspondence dated December 24, 2010, petitioner filed a protective claim for refund for the period June 1, 2006 through October 31, 2010. This claim stated that “[a]lthough this protective claim is for all taxes paid on Forms MT-203 for the period in question, the exact amount of the claim will be perfected as soon as the matter being litigated in the Division of Tax Appeals is finalized.” The correspondence did not specify a refund amount nor was any documentation submitted in support of the claim.

7. By correspondence dated March 26, 2012, and received by the Division on April 3, 2012, petitioner filed a request for tax refund on other tobacco products for the period June 2006 through December 2011, requesting a refund in the amount of \$1,792,054.09.

8. By letter dated June 7, 2012, the Division requested that petitioner provide additional information to support its refund claim.

9. By correspondence dated July 10, 2012, petitioner filed an amended refund claim and protective claim for the period April 2009 through December 2011, increasing its refund claim by \$585,725.19, for a total refund claim of \$2,592,531.13.

10. The Division began a second audit to review petitioner’s refund claim (refund audit) on May 8, 2013. The first audit (*see* finding of fact 2) was closed on or about April 30, 2013.

11. By letter dated June 21, 2013, the Division requested that petitioner provide additional information to support the refund claims stated in its March 26, 2012 and July 10, 2012 letters.

12. 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."

13. By letter dated January 22, 2014, petitioner filed a fourth refund claim for the period June 30, 2006 through November 30, 2013, which included the claims previously filed plus additional claims, for a total refund amount requested of \$8,056,604.00. The refund claim contained ratios and refund percentages petitioner claimed should apply based on the industry standard adjustment ratio outlined in TSB-M-13(12)M.

14. Petitioner's refund claim subsequently increased to \$8,134,665.00 for the period June 1, 2006 through November 30, 2013.

15. In reviewing petitioner's refund claim, the Division used a test period of August 2011, May 2012, and August 2013. On June 6, 2014, petitioner provided files for the test period. In reviewing the files, the Division determined that additional information was needed and requested the information from petitioner. Petitioner provided additional information to the

Division on June 17 and August 12 and 13, 2014. The Division's auditor reviewed the information submitted by petitioner and completed workpapers for his supervisor's review.

16. Based on a review of petitioner's refund claim and the information provided, the Division issued a refund claim determination notice (notice), dated October 28, 2014, denying a portion of petitioner's claim in the amount of \$1,450,176.00 and allowing a refund of \$6,684,498.00. The notice stated that the partial denial was based on the following:

"The refund was reduced because of an adjustment to the markup percentage from 31% to 33% for cigars for periods between October 2011 and November 2013.

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

An adjustment was made for April 2009 in which 2 rates were used.

Partial credit was allowed for the period 6/2006 thru 5/2007 due to statute issues."

For the period June 1, 2006 through May 31, 2007, the Division allowed a partial refund up to the amount assessed for those periods during the initial audit (*see* finding of fact 5) and denied the remaining balance of the refund claim for those periods as being beyond the statute of limitations for a refund.

17. Subsequently, in April 2015, the Division granted petitioner an additional refund of \$774,643.17 for tobacco products tax paid for the periods June 1, 2006 through November 30, 2013.

18. The parties stipulated at hearing that the amount still in controversy is a refund of \$361,847.42.

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 June 1, 2006 through May 31, 2007. Petitioner filed its first protective claim for refund on December 24, 2010. This correspondence merely stated that petitioner was filing a protective claim for refund for the period June 1, 2006 through October 31, 2010, and did not specify a refund amount nor was any documentation submitted in support of the 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 three waivers in this matter. The first waiver, received by the Division on June 22, 2009, extended the time within which to assess any additional tax for the periods June 1, 2006 through May 31, 2007, to on or before June 30, 2010. As those periods

were already beyond the two-year period for filing an application for refund, the waivers did not extend petitioner's time to file a refund claim.

The second waiver, received by the Division on June 3, 2010, and third waiver, received by the Division on April 28, 2011, were likewise beyond the two-year period for filing an application for refund for the period June 1, 2006 through May 31, 2007 and the waivers did not extend petitioner's time to file a refund claim for that period. Since petitioner's first protective claim was not filed until December 24, 2010, well beyond the two-year statute of limitations for refund claims for the period June 1, 2006 through May 31, 2007, such claims were properly disallowed.

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. . . .

© 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.”

Petitioner has not shown that the Division discovered any overpayment during the course of the initial audit that falls within the meaning and intent of Tax Law § 3004-a.

During the initial audit, based upon review of petitioner's records, the Division determined that petitioner owed additional tobacco products tax in the amount of \$4,300.92. Petitioner agreed to the Division's determination and signed the statement of proposed audit adjustment. There is no evidence in the record indicating that the Division was aware of an overpayment for the period at issue prior to the expiration of the statute of limitations.

It was only after petitioner filed the first protective claim on December 24, 2010 that the Division became aware of petitioner's claim of an overpayment. However, at that time, petitioner did not state the amount of the claimed overpayment or provide any other detail in support of its claimed overpayment. At that point, the Division had no information to enable it to determine whether or not petitioner had overpaid its tobacco products tax. Indeed, the Division made a number of requests for additional information to support petitioner's claim. It was not until August 13, 2014, that petitioner provided complete information to substantiate a lower wholesale price in accordance with the technical services bureau memorandum (TSB-M-13[12]M).

D. It must further be noted that 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 paid for the periods

June 1, 2006 through May 31, 2007 was 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.

E. The petition of Core-Mark Midcontinent, Inc., is denied and the refund claim determination notice, dated October 28, 2014, is sustained.

DATED: Albany, New York
July 11, 2019

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE