STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CITIGROUP JAPAN HOLDINGS CORP., F/K/A NIKKO CITI HOLDINGS INC., AS SUCCESSOR TO NIKKO CORDIAL CORPORATION, F/K/A NIKKO SECURITIES CO., LTD.	:	ORDER DTA NO. 825011
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Articles 9-A and 27 of the of the Tax Law for the Fiscal Years ended March 31, 2006 through March 31, 2008.	:	

Petitioner, Citigroup Japan Holdings Corp., f/k/a Nikko Citi Holdings Inc., as successor to Nikko Cordial Corporation f/k/a Nikko Securities Co., Ltd., filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Articles 9-A and 27 of the Tax Law for the fiscal years ending March 31, 2006 through March 31, 2008.

Petitioner, by its representative, Sidley Austin LLP (Richard A. Leavy, Esq., of counsel), brought a motion, dated April 9, 2013, for summary determination or in the alternative to dismiss the petition pursuant to 20 NYCRR 3000.5 and 3000.9 and Civil Practice Law and Rules § 3211 and 3212. Accompanying the motion was the statement of Richard A. Leavy, Esq., dated April 9, 2013, and attached exhibits supporting the motion. On May 7, 2013, the Division of Taxation, appearing by Amanda Hiller, Esq. (Robert Tompkins, Esq., of counsel), filed a Response to Motion and annexed exhibits in opposition to petitioner's motion. On May 28, 2013, petitioner filed its opposition to the Division of Taxation's application to amend the answer. Petitioner's papers included a reply to the Division of Taxation's amended answer. Based upon the motion

papers and all pleadings associated with this matter, Arthur S. Bray, Administrative Law Judge, renders the following order.

ISSUES

I. Whether the Division of Taxation should be permitted to file an amended answer.

II. Whether the Division of Tax Appeals has jurisdiction to resolve petitioner's claim for additional interest on the basis that letters sent by petitioner's representative constituted an informal claim for refund and, if not,

III. Whether the execution of a consent to a field audit adjustment may be regarded as an informal claim for refund and, in the process, confer jurisdiction upon the Division of Tax Appeals.

IV. Whether the petitioner has established its entitlement to summary determination or in the alternative dismissal of the petition.

FINDINGS OF FACT

1. The Division of Taxation (Division) conducted a field audit of petitioner, Nikko Cordial Corporation (Nikko Cordial), for the fiscal years ended March 31, 2006 through March 31, 2008. In the course of the audit, representatives of Nikko Cordial provided information to the auditors concerning the computation of the receipts factor and contended that Nikko Cordial's tax preparers erroneously computed the receipts factor while drafting the New York State corporation franchise tax returns. On the basis of the new information, Nikko Cordial's representatives requested that the receipts factor be adjusted.

2. Richard A. Leavy, Esq., on behalf of Nikko Cordial, sent the Division a letter, dated January 14, 2011, that set forth a detailed 17-page analysis in support of a claim for refund. Specifically, the first paragraph of the letter stated:

> This letter is provided in support of the corporation franchise tax *refund claims* submitted by Nikko Cordial Corporation ("NCC") under Article 9-A of the Tax Law for the April 1, 2005 through March 31, 2007 period (the "Period"). Specifically, this letter sets forth the legal authority that requires NCC to source the flow-through of partnership receipts derived from the conduct of business by a registered securities and commodities broker and dealer under provisions of section 210(3)(a)(2)(B) of the Tax Law. (Emphasis added.)

3. In May 2011, a teleconference was held between petitioner and the Division wherein additional apportionment issues were discussed. The conference was referred to in a letter dated June 3, 2011 from a Mr. Patrick Crowley to the Division. The letter stated:

> As discussed during our teleconference, we have reviewed the previously reported payroll and property factor amounts for Nikko Cordial Corporation and discovered that there were errors in the original amounts computed due to the failure to include all of the amounts incurred in the Japanese payroll and property reported.

4. In response to this letter, petitioner was asked to provide additional information to support its position. The information was submitted and reviewed by the audit team and, as a result, the Division agreed to additional changes to the business allocation percentage. The change in the business allocation percentage led to a reduction in the amount of income allocated to New York which, in turn, resulted in the overpayments set forth in the Consent to Field Audit Adjustment described below.

5. On or about September 16, 2011, petitioner received a Consent to Field Audit Adjustment (Consent) that delineated an overpayment of tax for the fiscal years ended March 31, 2006 through March 31, 2008 in the total amount of $2,360,623.00. For each audit period and tax amount, the consent stated that interest was to be determined pursuant to Tax Law § 1088(a)(2).

6. On or about September 26, 2011, petitioner's representative returned a signed but annotated version of the consent (annotated consent) to the Division reflecting agreement with

the amount of the overpayment but disagreeing with the asserted failure of the consent to compute interest in accordance with Tax Law § 1088(a)(2). The annotation on the consent stated:

> This is an overpayment identified and determined by the Department of Taxation and the taxpayer is in agreement with the tax overpayment amount as determined, but not the failure to compute interest thereon in accordance with § 1088(a)(2) of the Tax Law. This consent is not intended to be and shall not be treated as a claim for a refund of the overpayment by the taxpayer.

7. A cover letter accompanying the annotated consent explained petitioner's position as follows:

> Please be advised that Nikko Cordial Corporation does NOT agree with the failure of the consent to reflect the amount of interest due on the overpayment of tax from the date of the overpayment until (I) no more than 30 days before the date of the refund check or (ii) if the overpayment is credited, to the date of the amount against which the credit is taken.
>
> * * *
>
> Accordingly, based on the foregoing, we would appreciate it very much if you would please process the annotated Consent to Field Audit Adjustment as an audit initiated overpayment refund with the amount of interest provided for in section 1088(a)(2) of the Tax Law.

8. On March 16, 2012, the Division issued six account adjustment notices. Three of the account adjustment notices pertained to the forms CT-3 and three of the account adjustment notices pertained to the forms CT-3M/4M. The total amount of the refund for six account adjustment notices was $2,380,104.28. The total amount of interest shown in the computation detail of the account adjustment notices as "overpayment interest" was $22,525.72.

9. Each of the account adjustment notices contained the following statements:

> - Interest has been computed and added to your overpayment pursuant to the New York State Tax Law.
>
> - As shown on the Additional credit not reported on return line, we have computed an overpayment or an additional overpayment for this tax period.

Because you did not request a refund of this overpayment, we have applied it to the next tax period. . . . (Emphasis added.)

The account adjustment notices did not provide a detailed explanation of how the interest was calculated or provide any information as to when the interest computation period began or ended.

10. The Division processed the Consent to Field Audit Adjustment as a refund request and the Comptroller of the State of New York issued a refund check to petitioner, dated April 25, 2012, in the amount of $2,380,104.28. The amount of the refund check corresponds with the total of the refund amounts in the account adjustment notices.

11. The Tax Field Audit Record indicates that on two occasions, July 30, 2010 and August 3, 2011, petitioner was advised that, in order to obtain a refund, it would have to file a refund claim. The Division's Report of Audit does not have any notations showing that a refund claim was filed.

SUMMARY OF THE PARTIES' POSITIONS

12. In its reply to petitioner's motion, the Division requested permission to amend its answer. The Division's representative explained that in the course of preparing his response to the motion, he was presented with documents that were not in his files when the answer was drafted. The original answer admitted that the refund was "audit initiated." According to the Division, the documents currently in its possession show that the overpayment resulted from documents offered by the taxpayer during the audit that were treated as a refund claim. The Division submits that the changes requested by the taxpayer were allowed by the Division and resulted in the overpayment in the Consent to Field Audit Adjustment.

13. In response to the request to amend the answer, petitioner contends that the application should not be granted because it is not supported by the facts pled, the facts or documents in the record or the controlling law. With respect to the Leavy letter, petitioner argues that it does not purport to be a claim for refund itself but was submitted in support of previously submitted refund claims. Petitioner states that it is critical to note that the Leavy letter was written to support an apportionment methodology discussed at a previous meeting and has never been treated as a refund claim by the Division. According to petitioner, if the Leavy letter had been treated as a refund claim, then the submission of the refund claim would have been indicated in the tax field audit record or the report of audit. Petitioner states that the Leavy letter cannot be a refund claim because Mr. Leavy was not authorized to sign tax returns on behalf of petitioner. Petitioner offered similar arguments with respect to the Crowley letter.

14. In support of its motion to dismiss the proceeding, petitioner states that it initially commenced a proceeding in the New York State Supreme Court to compel the Division to compute the overpayment interest in a particular manner. Petitioner explains that it filed a petition with the Division of Tax Appeals on a protective basis to preserve its right to an administrative protest while pursing its proceeding pursuant to Article 78 of the Civil Practice Law and Rules. In an order dated September 4, 2012, the proceeding in the New York State Supreme Court was dismissed for failure to exhaust administrative remedies.[1]

15. Petitioner submits that there is no material issue of fact and that it is entitled to summary judgment. In the alternative, petitioner contends that the petition should be dismissed for lack of jurisdiction. In support of this position, petitioner avers that the Division makes the

[1] In the Court proceeding, the Division argued that the consent constituted the claim for refund.

factually and legally inaccurate statement that the consent constituted a refund claim. It is submitted that the section of the law governing petitions, Tax Law § 1089, does not afford petitioner an administrative remedy because the Division has not issued a notice of deficiency and petitioner has not filed a claim for refund. Petitioner posits that the Division, on its own initiative and as a result of its audit, repaid the overpayment of tax identified by the Division. According to petitioner, since the Division repaid the overpayment of tax to petitioner on the basis of its audit, it did not have the opportunity to make a refund claim that if denied could have operated as a jurisdictional basis for a petition. It is noted that Tax Law § 1087 only provides for the making of a claim for refund of an overpayment of tax, and not the computation of interest.

16. In response to petitioner's motion, the Division argues that petitioner submitted sufficient correspondence to constitute a refund claim. In the alternative, the Division argues that the signed consent contains sufficient information to be considered a refund claim.

17. In a reply brief, petitioner argues that the application to amend is not supported by the facts pled, facts or documents in the record or the controlling law. In this regard, petitioner notes that the entries in the Tax Field Audit Record for July 30, 2010 and August 3, 2011 indicate that the Division advised petitioner that in order to claim a refund petitioner would have to file an amended return. However, there is no record that a refund claim was filed. Petitioner argues that: the documents alleged by the Division to be informal refund claims cannot be refund claims, the documents created by the Division demonstrate that a refund claim was not submitted, the Division's audit guidelines misstate the law applicable to refunds, and the allegations in the amended answer are contrary to the Division's actions.

CONCLUSIONS OF LAW

A. Section 3000.4(d)(1) of the Rules of Practice and Procedure provides, in pertinent part, that after the time has passed whereby a party may amend without leave, "a pleading may be amended only by the written consent of the adverse party or by the consent of the supervising administrative law judge or the administrative law judge . . . *Leave shall be freely given upon such terms as may be just*, including the granting of continuances." (Emphasis supplied.) The same section further provides for the filing of a reply to an amended pleading. Here, petitioner's arguments regarding the amendment of the pleading largely pertain to the merits of petitioner's jurisdictional argument or the merits of the case. However, at this stage of the proceeding, the pertinent inquiry on the question of whether the Division should be granted leave to file an amended answer is whether there is prejudice to the opposing party (Siegel, NY Prac § 237, at 409 [5th ed]). Since petitioner has not established that it would be prejudiced by the Division's filing an amended answer, the Division's request for leave to file an amended answer is granted and the amended answer submitted by the Division is considered a part of the record. Petitioner's reply to the Division's amended answer, which was included in its response to the Division, is similarly included in the record.

B. A resolution of the jurisdictional arguments and a resolution of the merits present parallel considerations. This becomes clear by first presenting the applicable law. The Division of Tax Appeals is authorized to "provide a hearing as a matter of right, to any petitioner upon such petitioner's request . . . unless a right to such hearing is specifically provided for, modified or denied by another provision of this chapter " (Tax Law § 2006[4]). As "an adjudicatory body of limited and statutorily created jurisdiction" (***Matter of Scharff***, Tax Appeals Tribunal, October 4, 1990, ***revd on other grounds sub nom Matter of New York State Dept. of Taxation***

& Fin. v. Tax Appeals Tribunal, 151 Misc 2d 326, 573 NYS2d 140 [1991]), there must be a jurisdictional document in order to consider the merits of the proceeding (***id***).

C. Petitioner submits that since it did not receive a notice of deficiency or file a claim for refund, this matter lacks a jurisdictional document upon which to predicate the commencement of a proceeding before the Division of Tax Appeals. In response, the Division contends that certain correspondence from petitioner or the Consent is properly regarded as an informal request for a refund. If the Division's position is accepted, the informal claim for refund provides a basis for jurisdiction.

D. Relying on principles developed by the federal courts, the Tax Appeals Tribunal has recognized that a claim for refund may be informally made (***Matter of Greenburger,*** Tax Appeals Tribunal, September 8, 1994; ***Matter of Glover Bottled Gas Corp.***, Tax Appeals Tribunal, September 27, 1990; ***Matter of Rand***, Tax Appeals Tribunal, May 10, 1990). No single form of a request is required as several different forms of requests have been found to be valid by the Federal courts (***Matter of Rand***). In ***Rand***, the Tribunal recognized the principle that an informal claim only requires a written document that adequately advises the Division that a refund is sought and the tax period in question (***see also Matter of Greenburger***, Tax Appeals Tribunal, September 8, 1994). The ***Rand*** decision also noted that an informal claim is required to contain enough information to permit the Division to initiate an investigation of the matter if it so desires (***see also Matter of Greenburger***).[2]

E. With respect to petitioner's claim for relief, petitioner submits that there are no issues of fact and that judgment may be granted to petitioner as a matter of law. Section 3000.9 of the

[2] It is noted that the informal refund claim that was recognized in ***Rand*** occurred in the context of Article 22 of the Tax Law. However, this matter arises under Article 27 of the Tax Law. Nevertheless, reliance upon ***Rand*** is warranted because the relevant procedural provisions of Article 22 (Tax Law § 689) of the Tax Law closely mirror those of Article 27 of the Tax Law (Tax Law § 1089).

Rules of Practice and Procedure of the Tax Appeals Tribunal provides, in part, that a motion for summary determination may be granted:

> if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

That section further provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR § 3212. "The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (***Winegrad v. New York Univ. Med. Ctr.***, 64 NY2d 851, 853 [1985], ***citing Zuckerman v. City of New York***, 49 NY2d 557 [1980]).

F. Here, the gravamen of petitioner's concern is that the Division did not correctly calculate the amount of interest due on the refund in accordance with Tax Law § 1088(a)(2). The Division responds that it followed the audit guidelines and, in reply, petitioner posits that the audit guidelines are inconsistent with the Tax Law. The resolution of this issue depends upon which paragraph of Tax Law § 1088 is applicable. If the refund was initiated by the Division in the course of the audit, the interest on the overpayment would be calculated from the date the return was filed (Tax Law § 1088[a][2]). However, if the refund was the result of the filing of an informal refund claim or the execution of the consent, then interest would be computed from the date the claim for refund was filed (Tax Law § 1088[a][3]).

G. It is evident from the forgoing that a resolution of both the jurisdictional issue and the merits depend upon whether petitioner filed an informal claim for refund or whether the refund was initiated by the Division. Not surprisingly, the record contains conflicting allegations on this point. In my opinion, the matter should be scheduled for a hearing in order to receive testimony

from those individuals who participated in the audit regarding the genesis of the refund claim. This is a material issue of fact and the conflict in the papers on this point precludes the issuance of a determination as a matter of law in favor of either party.[3]

A second concern arises because the consent provides for the payment of a certain amount of interest but does not set forth any details as to how the interest is to be calculated other than simply list a certain section of the Tax Law. Similarly, the account adjustment notices list a dollar amount for the payment of interest but do not provide any detail regarding how the interest was computed. It is impossible to determine with any certainty which section of the law the Division relied upon in determining the amount of interest without knowing the starting and ending dates of the interest computation. Consequently, evidence should be offered on this point as well.

H. The motion to dismiss the petition or, in the alternative, summary determination is denied. The matter will be referred to the Hearing Support Unit to schedule a conference for the purpose of selecting a date for a hearing.

DATED: Albany, New York
August 8, 2013

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE

[3] Petitioner's contention that neither the Leavy letter nor the Crowley letter can be a refund claim because neither individual was authorized to sign tax returns on behalf of petitioner is unpersuasive. The asserted informal refund claim at issue in this proceeding arose, in part, from letters that were written in the course of an audit. There is no claim that Mr. Leavy or Mr. Crowley did not have authority to represent petitioner during the audit.