STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

DEAN WITTER REYNOLDS, INC. : DECISION
DTA NO. 819917

for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for
the Period September 1, 1991 through November 30, 1998. :

Petitioner Dean Witter Reynolds, Inc., c/o Dean Witter Morgan Stanley, 1221 Avenue of the Americas, 30th Floor, New York, New York 10020 filed an exception to the determination of the Administrative Law Judge issued on November 10, 2005. Petitioner appeared by Lawrence R. Cole & Associates, Inc. (Lawrence R. Cole, CPA). The Division of Taxation appeared by Mark F. Volk, Esq. (Lori P. Antolick, Esq., of counsel).

Petitioner did not file a brief in support of its exception. The Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner's claim for refund was timely filed pursuant to Tax Law § 1139(c) and 20 NYCRR 534.2(b)(1)(iii).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On January 31, 2002, petitioner, Dean Witter Reynolds, Inc., filed with the Division of Taxation ("Division") an Application for Credit or Refund of Sales and Use Tax (Form AU-11) dated January 29, 2002. Petitioner's application sought a refund of $654,671.00 on the overpayment of sales tax on numerous purchases of fixed assets, capital improvements and expenses during the period September 1, 1991 through November 30, 1998. The application lists several hundred purchases categorized by vendor and sets forth the month and amount of the purchase.

By letter dated May 31, 2002 the Division denied petitioner's claim as untimely pursuant to section 534.2(b)(1)(iii) of the Division's regulations.

Prior to petitioner's filing of its application for refund, the Division conducted a sales and use tax audit of petitioner (audit number X286370867). The period under review for the audit was, initially, September 1, 1991 through November 30, 1993. This period was later extended to November 30, 1998. The subject of the Division's review on audit was petitioner's asset and expense purchases. Such purchases were examined by means of statistical sampling for the original audit period and the results of such examination were then projected over the extended period. Petitioner consented to the use of such audit methods. The audit resulted in a finding of tax deficiencies for certain sales tax quarters of the audit period and overpayments of tax for certain other quarters of the audit period.[1] The deficiency quarters totaled $128,968.61 and the

[1]Specifically, the audit determined deficiencies in the sales tax quarters ended 11/30/91, 2/29/92, 5/31/93,

overpayment quarters totaled $244,742.56. The audit thus resulted in a finding of a net overpayment of tax by petitioner of $115,547.94 on its asset and expense purchases during the period September 1, 1991 through November 30, 1998.

During the course of the audit, petitioner filed several applications for refund of sales and use tax. Such claims were reviewed by the Division's auditors and the Division's determination with respect to such claims was included with the audit results. Following its review of these claims, the Division granted a total of $2,595,872.38 in sales and use tax refunds to petitioner.

In May 1998, during the audit, petitioner made a payment of $200,000.00 as a prepayment for any potential sales tax liability arising from the audit. The Division did not, at any time, apply such prepayment to any of the sales tax quarters for which tax deficiencies were determined.

On November 26, 1999, the Division issued to petitioner a Statement of Proposed Audit Change for Sales and Use Tax ("the consent") which set forth in detail the audit results noted above. The consent also referenced the refunds noted above and the $200,000.00 prepayment as an aggregate "refund or credit" of $2,795,872.40. Additionally, the consent set forth the interest due petitioner (computed through December 27, 1999) and indicated that a refund to petitioner totaling $4,311,882.10 would be submitted for processing.

8/31/93, 11/30/93, and 2/28/98 through 11/30/98. The audit determined overpayments in the sales tax quarters ended 5/31/92 through 2/28/93 and 2/28/94 through 11/30/97.

Petitioner agreed to the audit results as set forth on the consent by signature of Frank G. Skubic, first vice president, dated December 2, 1999. By the signature of its corporate officer on the consent, petitioner agreed, in relevant part, as follows:

> I agree to the assessment of tax and penalties and accept any overassessment (decrease in tax and penalties), plus any interest provided by law as determined on this audit. I may consider these findings final unless I hear from the Department to the contrary within 60 days after the receipt of this signed consent.

The Division received petitioner's consent on December 6, 1999.

In January 2000, the Division's auditors advised petitioner that it would be necessary for petitioner to file additional applications for refund with respect to the $200,00.00 prepayment and the $115,547.94 net overpayment as determined on audit. On January 11, 2000, the auditors received such applications from petitioner and transmitted them for processing.

The Division issued a check to petitioner dated March 1, 2000 in the amount of $4,130,129.37. By this check the Division refunded the $115,547.94 net overpayment and the $2,595,872.38 in refunds approved on audit plus interest computed through January 31, 2000. The March 1, 2000 check did not include a refund of petitioner's $200,000.00 prepayment.

In April 2000 the Division issued a check to petitioner in the amount of $228,231.31 refunding the prepayment, plus interest of $28,231.31 accrued through April 10, 2000. This check was cashed on May 3, 2000.

Petitioner signed consents extending the period of limitations for assessment of sales and use taxes (Form AU-2.10) during the course of the audit. The last such consent signed by petitioner is dated November 19, 1999 and extends the limitations period for assessment for the period September 1, 1991 through February 28, 1997 to March 20, 2000.

The Division concedes that petitioner overpaid sales tax in the amount of $654,671.00 as claimed on the subject application for refund.

A written summary of the Division's audit which was received in evidence at the hearing indicates that the subject refund claim, along with another refund claim (which was granted in part by the Division), was handled administratively by the Division as audit number X151177846. The summary also indicates that such other refund claim was later processed under audit number X473832223.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge reviewed the relevant statutory language and the regulations that are applicable to the sales tax quarters at issue herein. The Administrative Law Judge concluded that the applicable period of limitations was the two-year period set forth in Tax Law § 1139(c) (and former [c]) and 20 NYCRR 534.2(b)(1)(iii). The Administrative Law Judge reasoned that since this case involved an audit resulting in a net refund, he determined that the crux of this matter devolves to the meaning of "payment" pursuant to the statute and regulations and when such payment occurred which would begin the tolling of the two-year period of limitations.

As the Administrative Law Judge noted, there is not a statutory definition of payment. Thus, the Administrative Law Judge resorted to the Federal statute and case law to interpret what is meant by payment. The Administrative Law Judge found that Federal courts have held that the crediting of an overpayment of one year against a deficiency of another year is a payment. Yet, on the contrary, a remittance which does not satisfy an asserted tax liability does not qualify as a payment. In applying this reasoning to this case, a payment was deemed made in

accordance with the signed consent to fix tax with respect to those taxable periods for which the audit determined a deficiency on petitioner's asset and expense purchases. However, for those periods where the Division determined that an overpayment was made, there was no asserted tax liability and, as such, no payments were considered to have been made.

In summary, the Administrative Law Judge found that the subject claim must be considered untimely with respect to those taxable periods for which the audit determined an overpayment of petitioner's asset and expense purchases which periods are the quarters ending May 31, 1992 through February 28, 1993 and February 28, 1994 through November 30, 1997.

The next question addressed by the Administrative Law Judge concerned when a payment was deemed made for those periods that he concluded that there was, indeed, payment. The Administrative Law Judge noted that petitioner's representative signed the consent on December 2, 1999. However, the Administrative Law Judge emphasized the language contained in the consent which explains that the tax liability becomes fixed and final if, after 60 days, the Division has not rejected the consent. The facts show that the consent was signed on December 2, 1999 but was not filed with the Division until December 6, 1999. Therefore, using the filing date, the Administrative Law Judge noted that the consent was fixed and final after the expiration of the 60-day period or on February 4, 2000. Applying the two-year statute of limitations, the subject refund claim was filed on January 31, 2002 and, thus, was timely filed with respect to those sales tax quarters where the Division asserted a tax liability with respect to tax on asset and expense purchases.

Petitioner also presented other arguments to the Administrative Law Judge that: the consent was null and void because the payments were not applied properly by the Division, that

the audit is still open which petitioner argued resulted in its claim for refund to be timely filed, that it was denied due process and that it was entitled to costs in this proceeding. The Administrative Law Judge found all of these contentions to be without merit. Thus, the Administrative Law Judge directed that a refund be issued with respect to those sales tax quarters where a payment was made against an asserted tax liability on audit from asset and expense purchases but denied so much of the refund where a remittance was paid on those sales tax quarters where the Division determined an overpayment was made on asset and expense purchases.

ARGUMENTS ON EXCEPTION

Petitioner argues that its refund claim is timely. It appears that petitioner does not agree with the conclusion that the audit resulted in tax deficiencies for some periods and overpayments for other periods. Petitioner states that the audit resulted in tax deficiencies for all quarters. Petitioner seems to indicate that his $200,000.00 prepayment should be ignored and that we must look at the tax liabilities for each quarter as if no payments were made by petitioner. Lastly, petitioner focuses our attention on ***Matter of Lipner*** (Tax Appeals Tribunal, May 13, 2004) in support of its argument that its refund claim is not time barred.

In opposition to the exception, the Division argues that the date on which the consent finally determined the tax to be fixed and final is December 2, 1999, the date that petitioner signed the consent. However, the Division agrees with the end result reached by the Administrative Law Judge and his reasoning which determined which quarters petitioner was entitled to a refund and which quarters the Administrative Law Judge concluded that the refund claim was untimely filed.

OPINION

At the outset, we address the Division's objection to the determination of the Administrative Law Judge that concluded the tax was fixed and final after the 60-day period expired in which the Division could reject the consent. As the Division failed to file an exception in this matter, it did not preserve this issue for review and, thus, we will not address it (***see***, ***Matter of Marsh***, Tax Appeals Tribunal, December 9, 1993; ***Matter of Auriemma***, Tax Appeals Tribunal, September 17, 1992; ***Matter of Klein's Bailey Foods***, Tax Appeals Tribunal, August 4, 1988).

With respect to petitioner's argument, it asserts that the Administrative Law Judge incorrectly interpreted the consent and also misread an exhibit. However, petitioner has not pointed to any case law or statute in support of its position. Petitioner did cite to ***Matter of Lipner*** (***supra***) which is distinguishable from the case here. In ***Lipner***, the case involved personal income tax wherein the taxpayer failed to file changes made by the Internal Revenue Service within the 90-day statutory period set forth in Tax Law § 659. The taxpayer also made an argument of equitable recoupment that was rejected. We fail to see any similarities between the facts in ***Lipner*** and the facts herein.

We affirm the determination of the Administrative Law Judge for the reasons set forth therein. We find that the Administrative Law Judge adequately addressed the issue presented to him and can find no reason to modify his determination in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Dean Witter Reynolds, Inc. is denied;

2. The determination of the Administrative Law Judge is sustained;

3. The petition of Dean Witter Reynolds, Inc. is granted to the extent indicated in conclusion of law “J” of the Administrative Law Judge’s determination, but is otherwise denied; and

4. The claim for refund is granted as modified in accordance with paragraph “3” above.

DATED: Troy, New York
August 24, 2006

/s/Charles H. Nesbitt
Charles H. Nesbitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott
Robert J. McDermott
Commissioner