STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ALLIED AVIATION SERVICE CO. OF N.Y., INC.	:	DECISION
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 December 1, 1975 through November 30, 1980.	:	

Petitioner Allied Aviation Service Co. of N.Y., Inc., 2 Pennsylvania Plaza, New York, New York 10121 filed an exception to the determination of the Administrative Law Judge issued on February 8, 1990 with respect to its petition 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 December 1, 1975 through November 30, 1980 (File No. 800185). Petitioner appeared by Graubard, Mollen, Horowitz, Pomeranz & Shapiro (Allen Greenberg, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Anne W. Murphy, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation submitted a letter in lieu of a brief. At the request of the Tribunal, each party submitted a supplemental brief. Oral argument was heard at the request of petitioner on October 17, 1990.

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

ISSUES

I. Whether the Division's policy of adjusting a vendor's assessment based on the overlapping audit of the vendor's customer limited the amount of the adjustment to no greater than the amount of tax actually paid by the customer after audit.

II. Whether the refunding of the tax paid under protest in connection with the petition of a notice of determination is subject to the time limitation of section 1139(a) of the Tax Law.

III. Whether petitioner's motion to conform the pleadings to the proof should have been granted by the Administrative Law Judge.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "5" and "8" which have been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

Petitioner, Allied Aviation Service Co. of N.Y., Inc. ("Allied"), a subsidiary of Allied Maintenance Corporation, was engaged in the business of providing building cleaning and maintenance services for certain airlines at their terminals at John F. Kennedy International Airport in New York City.

During the period in issue, December 1, 1975 through November 30, 1980, Allied did not charge sales tax on the sales of these services to various airlines under the mistaken belief that such services were exempt from tax pursuant to Tax Law § 1105(c)(5), which excluded from the tax generally imposed on maintaining, servicing and repairing real property "interior cleaning and maintenance services performed on a regular contractual basis for a term of not less than 30 days."

The Division of Taxation performed a field audit of Allied for the period December 1, 1975 through November 30, 1980 which determined that said maintenance services were in fact taxable in the following respective amounts:

	Preventive Maintenance Sales	Sales Tax at 8%
Pan American	$20,846,656.57	$1,667,732.40
Trans Mediterranean Airways	$ 331,157.71	$ 26,492.62
Seaboard World Airways	$ 365,649.61	$ 29,251.97
Braniff International Airways	$ 113,644.88	$ 9,091.59

Delta Airlines	$ 225,506.74	$ 18,040.54
Total Disallowed Sales	$21,882,615.51	$1,750,609.26

On June 10, 1981, the Division issued to Allied two notices of determination and demands for payment of sales and use taxes due. The first was for the period December 1, 1975 through May 31, 1979 setting forth total tax due of $1,128,399.50 with interest of $327,354.21 for a total amount due of $1,455,753.71, and the second setting forth tax due of $622,209.76 and interest of $58,753.60 for a total amount due of $680,963.36 for the period June 1, 1979 through November 30, 1980. As set forth above, the aggregated amount due was $1,750,609.26, plus interest.

Allied timely petitioned these two notices, claiming that (1) the preventive maintenance services were not subject to sales tax and (2) that the tax had previously been paid by its customers on the same services.

With regard to the first ground, Allied was bound by two separate decisions of the New York State Supreme Court, Appellate Division. The first case, Matter of Allied New York Servs. v. Tully (83 AD2d 727, 442 NYS2d 624 [3d Dept 1981]) held that where the parties had not separated out taxable repair services, all nonjanitorial and preventive maintenance was taxable. In the second, Matter of Allied Maintenance Corp. v. New York State Tax Commn. (115 AD2d 143, 495 NYS2d 518 [3d Dept 1985]) it was held that operating maintenance was taxable when performed by operators who received technical training and performed other than simple repairs. Following this second decision, Allied, by letter dated March 4, 1986, relinquished its first ground for relief.

The second ground asserted in its petition concerned the claim for credit based upon tax paid by its customers on the same services. Specifically, Allied claimed that tax had already been paid on services rendered to Seaboard World Airways and Pan American World Airways who

were also audited by the Division of Taxation for many of the same periods within the instant audit period.

We modify finding of fact "5" of the Administrative Law Judge's determination to read as follows:

> By letter dated March 12, 1982, Allied informed the former Tax Appeals Bureau that it was desirous of stopping the further accrual of interest on its assessments and of remitting certain amounts of the sales tax owed for the audit period in issue. However, Allied made it clear that it wished to retain its right to protest and obtain a refund of such taxes if it was ultimately determined that the services upon which the tax was assessed were found nontaxable. The check submitted was payable to the order of "New York State Sales Tax" in the sum of $1,866,491.00. This amount included $1,248,585.00 in tax for the audit period December 1, 1975 through November 30, 1980 and interest calculated to February 25, 1982 of $298,226.00. The check also included a post-assessment period tax of $295,172.00 and interest on that amount calculated to February 25, 1982 in the sum of $24,508.00. Therefore, the unpaid portion for the audit period remained $502,024.26.
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> Notwithstanding the payment of $1,248,585.00, Allied disputes $1,358,995.00 of the assessment relating to Pan American sales and $16,169.87 relating to Seaboard World Airways sales. Petitioner conceded the $26,492.62 assessed on Trans Mediterranean transactions. The Division conceded at hearing that the tax owed on the transactions with Seaboard had been paid by Seaboard pursuant to a field audit and assessment which included the transactions with Allied. Subsequent to said assessment, Seaboard made full payment, thus extinguishing the tax liability on the transactions with Allied. Therefore, the amount in dispute was diminished by the amount of tax owing on the Seaboard transactions.
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> Additionally, both parties agree that a certain amount of tax was due from Allied for a nine-month period, from December 1, 1976 through August 31, 1977 during which period there was no sales tax audit of Pan American. Allied's invoices to Pan American for preventive maintenance services during this period amounted to $2,697,121.74 on which sales tax was calculated to be $215,769.74. Additionally, there was no sales tax audit of Pan American for the last quarter of Allied's audit period, which included the months of September, October and November of 1980. For this period, the tax due on sales of services to Pan American totalled $92,967.30. Therefore, of the $1,667,332.00 of the assessment relating to Pan American sales, $308,737.04 has been conceded by petitioner to be due and owing, leaving the $1,358,995.00 in dispute.[1]

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[1] Finding of fact "5" of the Administrative Law Judge's determination read as follows:

It should be noted that Allied as part of its prepayment of $1,248,585.00 in 1982, paid the sales tax assessed for transactions with Delta and Braniff in full and part of the tax liability on sales to Seaboard and Pan Am. However, no tax was paid on transactions with Trans Mediterranean and therefore the $26,492.62 assessed on transactions with Trans Mediterranean remains unpaid and outstanding to date.

Pan American World Airways, Inc. was audited for the periods December 1, 1973 through November 30, 1976 and September 1, 1977 through August 31, 1980. During the first audit period it was determined that Pan American owed tax on recurring purchases of $48,786.61 and on the same category for the second audit period of $154,014.56. Presumably, these recurring purchases included the expense purchases of services from Allied.

We modify finding of fact "8" of the Administrative Law Judge's determination to read

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> "5. By letter dated March 12, 1982, Allied informed the former Tax Appeals Bureau that it was desirous of stopping the further accrual of interest on its assessments and of remitting certain amounts of the sales tax owed for the audit period in issue. However, Allied made it clear that it wished to retain its right to protest and obtain a refund of such taxes if it was ultimately determined that the services upon which the tax was assessed were found nontaxable. The check submitted was payable to the order of "New York State Sales Tax" in the sum of $1,866,491.00. This amount included $1,248,585.00 in tax for the audit period December 1, 1975 through November 30, 1980 and interest calculated to February 25, 1982 of $298,266.00. The check also included a post-assessment period tax of $295,172.00 and interest on that amount calculated to February 25, 1982 in the sum of $24,508.00.
>
> "Therefore, the unpaid portion for the audit period remained $502,024.26. Of this amount, Allied disputes $459,361.82 in Pan American sales and $16,169.87 in Seaboard World Airways sales. Petitioner conceded the remaining $26,492.62 assessed on Trans Mediterranean transactions (see Finding of Fact "6"). The Division conceded at hearing that the tax owed on the transactions with Seaboard had been paid by Seaboard pursuant to a field audit and assessment which included the transactions with Allied. Subsequent to said assessment, Seaboard made full payment, thus extinguishing the tax liability on the transactions with Allied. Therefore, the amount in dispute was diminished by the amount of tax owing on the Seaboard transactions and left only $459,361.82 in issue.
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> "Additionally, both parties agree that a certain amount of tax was due from Allied for a nine-month period, from December 1, 1976 through August 31, 1977 during which period there was no sales tax audit of Pan American. Allied's invoices to Pan American for preventive maintenance services during this period amounted to $2,697,121.74 on which sales tax was calculated to be $215,769.74. Additionally, there was no sales tax audit of Pan American for the last quarter of Allied's audit period, which included the months of September, October and November of 1980. For this period, the tax due on sales of services to Pan American totalled $92,967.30. Therefore, of the $459,361.82 left in dispute, $308,737.04 has been conceded by petitioner to be due and owing, leaving $150,624.78 in dispute.

We modified this finding of fact to reflect the granting of petitioner's motion to amend its pleading which increased the amounts in issue.

as follows:

> The Pan American audits included an examination of purchases of services from Allied but said purchases, being voluminous, were not examined in their entirety but were estimated using an agreed upon test period from which error rates were developed and applied to the entire audit period. The ultimate amount of tax found due on said purchases was established after such a test was completed and several conferences held with Pan
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> American. Pan American did not pay tax as a result of the last audit, but received a refund instead.[2]

No evidence was introduced which indicated that tax was paid on specific transactions between Allied and Pan American during the Allied audit period. However, due to the fact that the audit periods were overlapping, the Division at hearing and in its brief suggests that the $150,624.78 disputed amount left in controversy be subtracted from the original assessments issued against Allied. Allied, on the other hand, contends that it should be granted a 100% credit for its sales to Pan American, the adjustments stated above for the periods not covered by the Pan Am audits, because, as a result of the audits of Pan American, all tax due on its expense purchases was paid. At hearing, petitioner's representative made a motion to amend the pleadings to conform to the proof and requested a refund of all such taxes paid by Allied on behalf of the Pan Am transactions.

In addition to the facts found by the Administrative Law Judge, we find as follows:

> In its perfected petition filed on July 20, 1987 petitioner stated that only $475,531.69 of the total assessment was being disputed. The remaining $1,275,077.57 of the assessment according to the perfected petition, had been paid and was conceded. The discrepancy between this latter amount and the amount of the payment, $1,248,585.00, that had been designated as assessment period tax, at the time of payment, is not explained. The perfected petition set forth a single contention: that the Division failed to reduce the assessments by amounts that had been paid by two of petitioner's customers after audit, Seaboard World Airways, Inc. and Pan American World Airways. As described in its letter of March 4, 1986 to the Division, the conceded amount was based on the Appellate Division's decision in Matter of Allied New

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[2] We modified the Administrative Law Judge's finding of fact by changing the last words of the second to last sentence to "Pan American" from "petitioner" and adding the last sentence.

York Servs. v. Tully (supra) holding that the maintenance services provided by petitioner were subject to sales tax.

OPINION

The Administrative Law Judge sustained the entire assessment against petitioner, except for those portions that the Division conceded were not due, i.e., $16,169.87 conceded to have been paid by Seaboard World Airways to the Division following an audit and $150,624.78 relating to the audit of Pan American World Airways. The Administrative Law Judge upheld the assessment on the grounds that petitioner did not sustain its burden of proof to establish that it or its customers paid the taxes at issue. Although clearly an issue raised by the parties and the subject of petitioner's motion to amend its petition, the Administrative Law Judge did not address the impact of the Division's policy of allowing a credit against a vendor's assessment where the vendor's customer had also been audited. The Administrative Law Judge did not attempt to define the policy nor to apply it. Nor did the Administrative Law Judge grant or deny petitioner's motion. Because of his conclusion that petitioner had not sustained its burden to prove the assessment erroneous, the Administrative Law Judge determined that petitioner's claim for a refund was moot and it was not necessary to address the statute of limitation issues put forward by the Division.

On exception, petitioner contends that its tax liability should be reduced by $1,358,995.00 on the basis that this amount was assessed against petitioner for sales to its customer Pan American during an audit period for which an audit of Pan American Airlines was also conducted. Petitioner asserts that this adjustment is in accord with the Division policy, as articulated at the hearing. As a result of this adjustment to the notices of determination issued to petitioner, petitioner requests a refund of amounts it has overpaid. Petitioner argues that it reserved its right to this refund because it had raised the issue of the Pan American audit in both its original petition and its perfected petition and that when it made the payment of $1,248,855.00 on March 12, 1982 the payment was made on the condition that the Division not raise any objection to petitioner's rights to a refund under Tax Law § 1139. Further, petitioner argues that the Tribunal is empowered pursuant to section 1138(3)(B) of the Tax Law to reduce

the assessment against petitioner to the correct amount and that the time limitations of section 1139(a) of the Tax Law do not apply here because petitioner is not making an application for a refund.

The Division by resubmitting the brief submitted to the Administrative Law Judge, argues that in its letter dated March 4, 1986 (Exhibit E) petitioner consented to those taxes paid under protest and that the application for refund of such amounts made at the hearing was time barred by section 1139(a) of the Tax Law. With respect to the policy of the Division on the treatment of overlapping audit periods of a vendor and its customer, the Division acknowledges that a policy of allowing an offset exists, but that an offset is limited to only amounts paid after the audit.

At our request, the parties submitted supplemental briefs on whether petitioner's motion at the hearing to conform the pleadings to the proof could be effective to increase the amount in controversy above that stated in petitioner's perfected petition. On this point, petitioner argues that the Tribunal's Rules of Practice that provide for such a motion at 20 NYCRR 3000.4(c) should be liberally construed to allow the amendment of the pleading in this case because the evidence that raises the issue and supports the amendment was introduced without objection at the hearing (in fact, the evidence was introduced by the Division). In such a circumstance, petitioner argues that the Federal courts, including the Tax Court, would allow such a motion.

In response, the Division argues that a motion to conform the petition cannot revive a point in controversy that is barred by the statute of limitations, where the original pleading did not give notice of the issue and affirmatively indicated that such controversy was no longer in issue.

We modify the determination of the Administrative Law Judge.

As we see it, our central task in this case is to determine what was the Division's policy where a vendor and the vendor's customer were audited for sales tax for the same audit periods. Petitioner is not arguing what the Division's policy should have been, but is simply requesting that it be treated in accordance with the Division's policy, as petitioner understands this policy.

We have carefully reviewed all of the evidence in the record describing the Division's policy on overlapping audits. Although all of this evidence was volunteered by the Division, either on the direct examination of its auditor or through the submission of an interoffice memorandum, we see absolutely nothing in this evidence to support the Division's claim that its established policy limited the amount of an adjustment based on overlapping to the amount actually paid after audit.

The overlapping audit policy was initially explained in this series of questions and answers between the Division's attorney and the Division's auditor.

> "Q Could you clarify for me the policy of the Audit Division regarding the following situation:
> "A vendor is audited and assessed a tax due on taxable sales; it's [sic] customer is also audited and assessed a use tax due on the purchase of taxable services; the purchaser entity pays the use tax on those services; is it the policy of the Audit Division to credit the vendors the assessments issued against the vendor if, in fact, the vendor has not paid at that time for the payment by the purchaser?
>
> "A Yes.
>
> "Q In the same factual situation where you're auditing a purchaser who now we're saying may be a vendor for our purpose, for this example is a purchaser, and you performed an expense purchases test, is it possible that the specific purchases of services from the service vendor that you were auditing might not appear or --
>
> "A Oh, it's quite possible.
>
> "Q Notwithstanding that since you were doing a test period you're assumption is that you get a clear picture of expenses on which use tax is due for the whole audit period; is that true?
>
> "A That's correct.
>
> "Q Okay. So then is it the policy of the division to give credit even under the circumstances of the test period?
>
> "A Right" (Tr., pp. 39-40).

To further develop the description of this policy, the Administrative Law Judge asked questions of the auditor resulting in the following exchange:

> "JUDGE PINTO: There was a deficiency in the use tax area on both [Pan American] audits in the area of recurring purchases?
>
> "THE WITNESS: Yes, that's correct.

"JUDGE PINTO: But in either case, do we know whether or not the recurring purchase was specifically the Allied services?

"THE WITNESS: That's true.

"JUDGE PINTO: Now, what was the basis of the reduction in the Allied assessment then based upon?

"THE WITNESS: The test periods coincide. Test periods -- I'm sorry, the audit periods coincide.

"The assumption being that we did an audit of Pan American on the basis of the test period. The liability that they would have incurred on the services provided by Allied should have been picked up from that.

"JUDGE PINTO: It was based upon dates?

"THE WITNESS: Yes.

"JUDGE PINTO: In other words, the date for which the tax was assessed against Allied, when it occurred with a quarter that was audited with Pan Am they were given credit for?

"THE WITNESS: Not solely dates, no. There's dates plus the fact that the tax liabilities were agreed and paid.

"Should the instance, if Pan American had disagreed and they had an issue on expense purchases pending in front of you at a later date, okay, we would not be in a position to make that recognition of that work [sic] period. It would be something that is disputed on both sides.

"In the instance we're talking about here, it was not disputed on that side. The audits were completed they were agreed, there was no agreement at the time of audit to set aside these specific services and say: 'Okay, we're not going to tax those.'

"Those are three things that we really require do [sic] what we have done in this particular instance" (Tr., pp. 41-44).

We agree with petitioner that this testimony indicates that it was the Division's policy to eliminate from the vendor's assessment any tax assessed with respect to transactions with a specific customer during periods for which the purchaser was also audited, even where the customer's audit was a test period audit. We see nothing in any of the auditor's testimony that suggests that the amount of the adjustment is limited to the amount of tax actually paid by the customer after the audit. That the testimony lends itself to petitioner's interpretation is supported by the statement made by the Division's attorney, "I would respectfully request time to

submit some further statement of audit policy or time to check to make sure that the audit policy as we understand it is the audit policy" (Tr., p. 48).

The Division submitted such further evidence of audit policy by attaching to the brief submitted to the Administrative Law Judge a memorandum dated November 4, 1988, from the Sales Tax Audit Administrator to District Office Sales Tax Audit Personnel, captioned "Overlapping Audits." This memorandum indicates that for a vendor to obtain an audit adjustment based on an overlapping audit of the vendor and his customer, the vendor must establish the audit period of the purchaser, that the purchaser agreed to the audit findings and that there was no agreement to exclude the particular transactions at issue from the audit of the customer. As indicated above, the Division's auditor testified that all of these requirements were satisfied in the instant matter. We see nothing in this memorandum which suggests that the amount of the adjustment is limited to the amount of tax actually paid by the customer. The memorandum does not even require that the vendor establish the amount of tax that was paid by the customer after audit.

Based on the record before us, we can only conclude that it was the Division's policy to reduce a vendor's assessment for any amount assessed on sales to a particular customer if the customer was audited and agreed to the audit findings for the same audit period, and the amount of such an adjustment was not limited to the amount actually paid by the customer after audit.[3]

The next issue before us is whether petitioner must be denied the benefit of the Division's policy to the extent the adjustment to which petitioner is entitled exceeds the amount of the assessment unpaid. The Division argues that petitioner may not recover any portion of the amount of the assessments paid on March 12, 1982 because the statute of limitations has expired

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[3]We cannot reconcile the treatment that was afforded petitioner with the policy the Division claims to apply. The first audit period of Pan Am determined a deficiency in the area of recurring purchases of $48,786.61 and the second determined a deficiency of $154,014.56 in this audit area; however, no tax was actually paid with respect to the deficiency on the second audit because it was determined that Pan Am was entitled to a refund (Tr., p. 37). Thus, the amount that was actually paid by Pan Am after its audit in the area of recurring purchases was only $48,786.61, yet the Division is willing to allow an adjustment of $150,624.97. This conceded adjustment is much less than the total deficiency for the two audit periods in the recurring purchase area, $202,801.17, so we fail to perceive any rationale for the conceded adjustment.

under section 1139(a)(ii). The Division's argument is premised on the concept that taxes paid under protest in response to the issuance of a protested notice of determination can only be recovered through an application for a refund. Under this theory, applications for the refund would typically be time barred by the time a final decision was rendered on the petition, since the statute of limitations on refund applications runs from the date the tax was payable (Tax Law § 1139[a]), not from the date the tax was paid. The practical effect of this theory would be to preclude taxpayers from paying an assessment they wished to protest, thus, depriving the State of the revenue and requiring the taxpayer to incur further interest and penalty charges. This theory would also preclude a taxpayer who instituted a successful Article 78 proceeding from recovering tax that was paid, in lieu of a bond, as a condition precedent to instituting the proceeding (Tax Law § 1138[a][4]; 20 NYCRR 535.5[c]). We conclude that such undesirable results do not occur because amounts paid in connection with the protest of a notice of determination need not be the subject of an application for a refund in order to be recovered by the taxpayer.

As petitioner notes, section 1139 sets forth a comprehensive scheme controlling the refund of sales tax. Subdivisions (a) and (b) detail the rules where an application for a refund is required. Section 1139(c) sets forth a series of separate rules that apply where the tax has been paid after a notice of determination has been issued by the Division pursuant to the authority of section 1138 of the Tax Law. Pertinent to our inquiry is the last sentence of section 1139(c) which states:

> "No refund or credit shall be made of a tax, interest or penalty paid after a determination by the commissioner of taxation and finance made pursuant to section eleven hundred thirty-eight unless it be found that such determination was erroneous, illegal or unconstitutional or otherwise improper, by the division of tax appeals pursuant to article forty of this chapter or by the commissioner of taxation and finance of his own motion,
>
> or in a proceeding for judicial review provided for in section two thousand sixteen of this chapter, in which event a refund or credit shall be made of the tax, interest or penalty found to have been over paid."

We agree with petitioner that this sentence means that tax paid pursuant to a notice of determination that on review is held to be erroneous by the Division of Tax Appeals or by the courts is automatically to be refunded to the taxpayer, without the need for an application. Since no application is required, the time limitations of section 1139(a) on such application have no relevance. Thus, we conclude that petitioner is not barred by the limitations of section 1139(a) from recovering any portion of the amount it paid in response to the notice of determination.

The last issue before us is whether petitioner preserved its right to challenge any amount of the notice of determination in excess of $475,531.69 in tax. The Division argues that since petitioner protested only $475,531.69 in its perfected petition and conceded the remainder, no other amount was in issue at the hearing. We disagree.

Following the testimony of the Division's auditor, petitioner made a motion to amend its pleadings to the proof to increase the amount of tax in controversy to cover the entire amount of the adjustment required by the Division's policy (Tr., p. 46). We conclude that such motion should have been granted.

Our rules of practice provide that "The administrative law judge or presiding officer may permit pleadings to be amended before the hearing is concluded to conform them to the evidence, upon such terms as may be just" (20 NYCRR 3000.4[c]).[4] In this case, there are a number of reasons why the amendment should have been allowed.

First, although petitioner may have limited the amount of tax it challenged in its perfected petition, the only issue the petition stated was the request to reduce the assessments due to the audits of petitioner's customers, specifically Seaboard and Pan American. Petitioner simply failed to allocate a sufficient dollar amount to this issue.

Further, the only apparent reason petitioner understated the amount of tax in controversy in its perfected petition was because it was not aware of the Division's policy on overlapping audit adjustments. That petitioner had no reason to know of such policy and its impact on the

[4]Since we have concluded that refund is not time barred, the portion of section 3000.4(c) that provides that no amendment of a pleading can revive a point of controversy which is time barred has no application.

assessment until the Division described the policy at the hearing and that petitioner moved promptly after learning of the policy to amend its pleading, support the conclusion that the amendment should be granted (see, Kelley v. Commissioner, 877 F2d 756, 89-1 USTC 9360).

Finally, we can see no possible harm to the Division by allowing the amendment in this case. As the United States Court of Appeals for the Second Circuit noted when interpreting a similar Federal rule that governed the amendment of pleadings before the Board of Tax Appeals, "if, however, the parties are content to submit issues not covered by the pleadings, and evidence is taken thereon without objection by either party, or by the board itself, what possible ground can there be for a refusal to permit an amendment of the petition to conform to the proofs, presented before briefs have been filed, and not objected to by the respondent" (see, International Banding Mach. Co. v. Commissioner, 37 F2d 660, 2 USTC 461). In our case, not only was the introduction of the evidence not objected to by the Division, it was offered by the Division. In such a situation, it is difficult to conceive of a possible prejudice to the Division, and the Division has not advanced any (see, Henningsen v. Commissioner, 243 F2d 954, 57 USTC ¶ 9637).

That the Division may be affected, if the amount in controversy is increased and petitioner is enabled to recover more money is obvious. However, as the Division notes in its supplemental brief, the prejudice that justifies denying a post verdict motion to amend under the Civil Practice Law and Rules "is not found in the mere exposure of the defendant to greater liability. Instead, there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (Loomis v. Civetta Corinno Constr., 54 NY2d 18, 444 NYS2d 571, 573, rearg denied 55 NY2d 801, 447 NYS2d 436).

The Division argues that the amendment here cannot be permitted because it would confer jurisdiction in excess of that conferred by the original pleading. As we noted in Matter of Shnozz'z, Inc. (Tax Appeals Tribunal, February 22, 1991), the notices of determination are the critical documents that establish our jurisdiction. Here, unlike the petitioner in Shnozz'z,

petitioner clearly included both notices issued to it in its perfected petition. Nor are the instant facts like those in the tax court decisions relied on by the Division. Petitioner has not failed to include a distinct taxable period in the petition which was covered by the assessment (see, Butz v. Commissioner, T.C. Memo 1989-229, 57 TCM 369; Frazee v. Commissioner, T.C. Memo 1988-281, 55 TCM 1166; Hill v. Commissioner, T.C. Memo 1988-198; O'Neil v. Commissioner, 66 T.C. 105). Nor has petitioner failed to include in the petition reference to another assessment (see, Normac, Inc. v. Commissioner, 90 T.C. 142; but see, Truskowsky v. Commissioner, T.C. Memo 1988-319, 55 TCM 1332 [where an amendment to add an assessment covering another year was allowed even though not specifically included in the petition]). The case cited by both parties that is most on point is International Banding Mach. Co. v. Commissioner (supra) where it was held that the Board of Tax Appeals erred in not allowing petitioner to amend his pleadings where the proof introduced at the hearing challenged a much larger portion of the deficiency than the petition originally challenged. Since the amendment at issue does not add petitioners, nor periods, nor notices of determination, but instead simply increases the portion of these notices in controversy, we conclude that it does not confer additional jurisdiction.

For the foregoing reasons, we conclude that petitioner has established its right to have its tax liability reduced by $1,358,995.00, representing tax assessed on sales to Pan American during overlapping audit quarters. Further, petitioner is entitled to a return of tax paid in excess of its remaining liability.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Allied Aviation Service Co. of N.Y., Inc. is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of Allied Aviation Service Co. of N.Y., Inc. is granted; and

4. The Division of Taxation is directed to reduce the notices of determination issued on June 10, 1981 by a total of $1,358,995.00 and to refund all amounts overpaid by petitioners.

DATED: Troy, New York
June 27, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner