STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| **KAISER AEROSPACE & ELECTRONICS CORPORATION** for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Period January 1, 1983 through December 31, 1989. | : | DECISION DTA No. 812828 |

Petitioner Kaiser Aerospace & Electronics Corporation, 950 Tower Lane, Suite 800, Foster City, California 94404, filed an exception to the determination of the Administrative Law Judge issued on November 9, 1995. Petitioner appeared by Martin A. Levy, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioner submitted a brief in support of its exception. The Division of Taxation submitted a brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

## *ISSUE*

Whether the metropolitan transportation business tax surcharge may be assessed at any time where a corporation files timely corporation franchise tax reports on forms CT-3 but does not file metropolitan transportation business tax surcharge reports on forms CT-3M/4M.

## *FINDINGS OF FACT*

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

Petitioner, Kaiser Aerospace & Electronics Corporation ("Kaiser"), manufactures various products for the aeronautics industry. Kaiser filed New York State corporation franchise tax reports for the years 1983 through 1989.

During an audit of Kaiser's returns for the years 1987 through 1989, the Division of Taxation ("Division") discovered that Kaiser had never filed a metropolitan transportation business tax surcharge ("MTA Surcharge") report. It also found that Kaiser employed one person in New York State who worked at a Grumman plant located on Long Island, New York. The Divisioncomputed Kaiser's liability for the MTA Surcharge for the years 1983 through 1989, totalling $65,518.00.

The Division issued to Kaiser a Notice of Deficiency, dated June 29, 1992, asserting corporation franchise tax due under section 209-B of the Tax Law in the amount of $65,518.00. The same notice also asserted interest of $51,482.36, plus penalty in the amount of $14,743.00. According to the Division's field audit report, penalties were asserted pursuant to Tax Law § 1085(a)(1)(A) for failure to timely file the MTA Surcharge reports and under Tax Law § 1085(a)(2) for failure to pay the amount of the surcharge required to be shown on the reports. No taxes were assessed as a result of the audit of Kaiser's corporation franchise tax reports (forms CT-3).

The Division and petitioner stipulated that Kaiser conducted all of its business activity within the Metropolitan Commuter Transportation District during the calendar years 1983 through 1989. They also stipulated that Kaiser never filed a MTA Surcharge report for those years.

The CT-3 form for the years 1988 and 1989 contains this question: "During the taxable year did you do business, employ capital, own or lease property or maintain an office in the Metropolitan Commuter Transportation District?" Kaiser answered this question "No" by checking a box. The same or a similar question was not included on CT-3 forms for earlier years.

Kaiser filed for and received an automatic six-month extension for filing its 1988 General Business Corporation Franchise Tax Return. The return placed in evidence has a date stamp indicating that it was received by the Division on September 15, 1989. Kaiser's 1989

corporation franchise tax return bears a date stamp showing that it was received on September 15, 1990.

***OPINION***

In the determination below, the Administrative Law Judge held that if she were to accept petitioner's arguments, that portion of the assessment relating to the 1988 and 1989 taxable years would not be barred by the statute of limitations because it was issued within three years of the filing of the CT-3 forms for those years. The Administrative Law Judge went on to hold that the Division was not barred from assessing the MTA Surcharge by the three-year statute of limitations because the MTA Surcharge and the corporation franchise tax are separate and distinct taxes. Additionally, the Administrative Law Judge had rejected the Division's assertion that the three-year statute of limitations did not apply for the 1988 and 1989 tax years because petitioner had filed a fraudulent return with the intent to evade tax holding that there was no evidence to suggest fraud on the part of petitioner.

On exception, petitioner asserts that the MTA Surcharge is not a separate tax, but rather is a component of the entire tax a corporate taxpayer must pay for the privilege of doing business in New York. In the alternative, if it is determined that the MTA Surcharge is a separate tax, petitioner contends it is such an ancillary part of the corporate franchise tax that the filing of the CT-3 Corporate Franchise Tax Report will start the running of the statute of limitations for the MTA Surcharge. Petitioner does not take exception to that portion of the Administrative Law Judge's determination which sustained the assessment as it relates to 1988 and 1989, apparently conceding that the assessment for those years was not time barred in any event.

In response, the Division contends that the plain language of Tax Law § 1083(c)(1)(A) allows an assessment at any time because no return was filed and urges that the determination of the Administrative Law Judge be affirmed in all respects.

We affirm the determination of the Administrative Law Judge for the reasons set forth below.

Tax Law § 209-B imposes on every corporation subject to tax under Tax Law § 209 a tax "[f]or the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in a corporate or organized capacity, or of maintaining an office in the metropolitan commuter transportation district . . ." (Tax Law § 209-B[1]). The Division may issue an assessment within three years of the time a return was filed (Tax Law § 1083[a]). However, if no return was filed, the Division may assess at any time (Tax Law § 1083[c][1][A]). Petitioner concedes that no returns were filed and that it is subject to the MTA Surcharge, but contends that the filing of the CT-3s started the three-year time period for assessment. We disagree.

The plain language of Tax Law § 1083(c)(1)(A) provides that the Division may assess at any time when a return is not filed. In this case, petitioner did not file CT-3Ms for the years in issue. Petitioner's assertion that the MTA Surcharge is not a separate tax from the corporate franchise tax imposed under Tax Law § 209, while not totally unfounded, does not excuse petitioner's failure to file a MTA Surcharge return as prescribed under Tax Law §§ 209-B(5) and 211(1). "[O]mission to file a prescribed return cannot be supplied by reference to a return filed for another purpose" (Hewitt v. Bates, 297 NY 239, 78 NE2d 593, 596).

Petitioner asserts that the holdings in Apex Air Freight v. O'Cleireacain (210 AD2d 7, 619 NYS2d 38, lv denied 86 NY2d 712, 635 NYS2d 949) and Airborne Freight Corp. v. Michael (94 AD2d 669, 462 NYS2d 663) dictate the result it desires. We find petitioner's reliance on these cases misplaced. The distinguishing feature between both of these cases and the matter at hand is that the three-year statute of limitations applied because returns had actually been filed. In Apex Air Freight v. O'Cleireacain (supra), the Court found the filing of an activities report sufficient to trigger the running of the statute of limitations even though the actual return had not been filed because such report came within the statutory definition of return for purposes of the statute of limitations. In Airborne Freight Corp. v. Michael (supra), the Second Department found that the City of New York was barred by the statute of limitations from assessing General Corporation Tax against a corporation which had erroneously filed tax

returns as a transportation corporation rather than as a general corporation. The Court held that although there were different components and different rates depending on the nature of the taxpayer, there was only one City Business Tax (Airborne Freight Corp. v. Michael (supra, 462 NYS2d at 665) and, consequently, only one return was required to be filed. Here, two separate returns were required to be filed and petitioner failed to do so.

Petitioner also attempts to analogize the scenario in Revenue Ruling 82-185 to the present situation. There, the Internal Revenue Service ruled that the assessment of self-employment tax would be time barred because the filing of a form 1040 would have started the running of the statute of limitations. The Administrative Law Judge completely and adequately addressed this argument in her determination and we agree with her analysis for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Kaiser Aerospace & Electronics Corporation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Kaiser Aerospace & Electronics Corporation is denied; and
4. The Notice of Deficiency dated June 29, 1992 is sustained.

DATED: Troy, New York
January 16, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

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

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner