STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BURNSIDE COAL & OIL CO., INC.	:	DECISION DTA NOS. 814079
for Revision of a Determination or for a Refund of Petroleum Business Tax under Article 13-A of the Tax Law for the Period July 1, 1983 through April 30, 1987.	:	AND 815259

Petitioner Burnside Coal & Oil Co., Inc., 701 South Columbus Avenue, Mt. Vernon, New York 10550, filed an exception to the determination of the Administrative Law Judge issued on May 15, 1997. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel). Petitioner appeared by Carl S. Levine, Esq.

Petitioner filed a brief in support of its exception. The Division of Taxation did not file a brief in opposition. Oral argument, at petitioner's request, was heard on March 11, 1998 in Troy, New York.

This case comes to us from a determination and order of the Administrative Law Judge granting the Division of Taxation's motion for summary determination. After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Administrative Law Judge properly granted the Division of Taxation's motion for summary determination.

II. Whether petitioner filed informal refund claims within the three-year limitation period of Tax Law § 1087, thereby tolling the period of limitations until petitioner filed formal applications for refund.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "2," "6," "8," "9" and "10" which have been modified. We have also made additional findings of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

We make the following additional finding of fact:

> The Division of Taxation ("Division") filed a motion to dismiss the petitions[1] or, in the alternative, a motion for summary determination in favor of the Division. The motion was dated January 21, 1997. Petitioner Burnside Coal & Oil Co., Inc. ("Burnside") by its attorney, Carl S. Levine, Esq., filed responding papers on February 27, 1997. The determination of the Administrative Law Judge was based upon the motion record.

Burnside filed CT-13-A tax returns for petroleum businesses taxable under Article 13-A and prepaid the respective gross receipts taxes along with the balance due with the return in the following amounts:

Return Period	Return and Payment Filed	Amount of Tax per Period
7/1/83 - 4/30/84	1/22/85	$228,435.09
5/1/84 - 4/30/85	10/21/85	$189,932.71
5/1/85 - 4/30/86	9/03/86	$154,956.41
5/1/86 - 4/30/87	10/23/87	$145,312.50

We make the following additional finding of fact:

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[1]The Administrative Law Judge denied the motion to dismiss the petitions. There being no appeal of the denial of the motion to dismiss, the motion to dismiss is not before us and will not be addressed further.

> Official notice is taken of the decision of the Tax Appeals Tribunal in ***Matter of Burnside Coal & Oil Co.*** (Tax Appeals Tribunal, September 29, 1994) (hereinafter "***Burnside #1***"), where petitioner challenged a Notice of Deficiency asserting gross receipts taxes under Article 13-A of the Tax Law for the period July 1, 1983 through April 30, 1984. The asserted tax deficiency in ***Burnside #1*** arose from petitioner's sales of petroleum products to the City of New York. In ***Burnside #1***, we held that petitioner was not a "petroleum business" for purposes of Article 13-A of the Tax Law for the subject period because the evidence established that Burnside did not, for the subject period, import or cause to be imported into this State petroleum for sale. The petition in ***Burnside #1*** did not seek, or allege entitlement to, a refund and did not relate to the same tax amounts or transactions as are involved in the instant consolidated petitions. However, the tax period in ***Burnside #1*** is also covered in one of the petitions here.

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

> Shortly after the Tribunal's decision in ***Burnside #1***, petitioner filed four claims for refund or credit, dated February 21, 1995, of the gross receipts taxes reported in the four returns for the respective amounts stated above.[2]

The Division issued a Notice of Disallowance, dated April 25, 1995, denying the four refund claims. In that notice, the Division stated that the refund claims were time barred because they were filed on February 28, 1995, more than three years from the time the returns were filed or two years from the time the tax was paid as required by Tax Law § 1087(a). The Division further stated that under Tax Law § 1087(f) the Tax Appeals Tribunal could have determined an overpayment or underpayment of taxes due on the prior petition filed by Burnside for redetermination of a deficiency for the period July 1, 1983 through April 30, 1984, but that

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[2]We modified finding of fact "2" of the Administrative Law Judge's determination in order to more clearly show the relationship in time of our decision in ***Burnside #1*** and the refund applications.

because the Tribunal did not make such a determination on that prior petition, no refund was due for that period.

Burnside filed a request for a conciliation conference to review the Notice of Disallowance for the period July 1, 1983 through April 30, 1984. By letter dated June 29, 1995, the conciliation conferee denied Burnside's request for a conference stating that pursuant to Tax Law § 1089(c)(2), a taxpayer may file a petition for refund if the taxpayer had not previously filed a timely petition for the same taxable year. The conferee concluded that because the matter was previously conferenced and a conciliation order was issued on January 22, 1988 on a prior petition filed by Burnside, no further action would be taken.

Burnside also filed a request for a conciliation conference for review of the Notice of Disallowance for the period May 1, 1984 through April 30, 1987. By conciliation order dated June 28, 1996, the conferee sustained the Notice of Disallowance.

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

> Burnside filed a petition with the Division of Tax Appeals, dated July 14, 1995, challenging the denial of its refund claim for the period July 1, 1983 through April 30, 1984 (DTA No. 814079) and a petition, dated August 7, 1996, challenging the denial of its refund claim for the period May 1, 1984 through April 30, 1987 (DTA No. 815259).[3] Both petitions rely on our decision in ***Burnside #1***.
>
> Both petitions state that the Tribunal held that Burnside was not a petroleum business and, therefore, not subject to the gross receipts tax.

[3]Except for the beginning tax periods covered by these petitions, they are nearly identical.

> The petitions claim that although no formal refund application was filed until 1995, the Division was on notice by virtue of its petition in ***Burnside #1*** that petitioner contested the Division's position that Burnside was a petroleum business liable for the Article 13-A gross receipts taxes. The petitions state that until the Tribunal decided the fundamental issue of whether petitioner was a petroleum business, Burnside could not apply for the refunds in dispute here. Finally, the petitions state that the statute of limitations governing refund applications does not begin to run until the taxes become "payable." That being the case, petitioner asserts, since the taxes here were never "payable" by Burnside, petitioner is entitled to a full refund of taxes it had paid plus interest.[4]

The Division filed two answers, dated October 23, 1996, affirmatively stating that the refund claims were filed more than three years from the date of filing and more than two years from the date the tax was paid.

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

> The Division filed a motion to dismiss the petitions pursuant to 20 NYCRR 3000.9(a)(i) or, in the alternative, for summary determination pursuant to 20 NYCRR 3000.9(b). The Division's motion included several exhibits including petitions, answers, petitioner's tax reports for the subject period filed as a petroleum business taxable under Article 13-A, copies of the refund claims in dispute here and the Division's notice disallowing the refund claims. In its motion papers, the Division argues that petitioner's claims for refund are time barred because they were filed more than three years from the filing dates of the tax returns for those tax periods, and that neither the petition filed by petitioner in ***Burnside #1*** nor the Tribunal decision or Administrative Law Judge determination in that case make any reference to a refund claim by Burnside for the tax periods in question here. The Division contends that if there had been an informal claim for refund contained in the petition in ***Burnside #1***, petitioner would have

[4]We modified finding of fact "6" of the Administrative Law Judge's determination to more clearly reflect the record.

> also listed the refund amount, along with the deficiency amount, in the petition as the amount in controversy. ***Burnside #1***, the Division argues, was premised on taxes that had not been paid, i.e., a deficiency. The Division also points out that ***Burnside #1*** is limited to the period July 1, 1983 through April 30, 1984 and that petitioner's claim that the prior proceeding served as notice to the Division of its refund claims for the period after April 30, 1984 is without merit.[5]

We modify finding of fact "9" of the Administrative Law Judge's determination to read as follows:

> Petitioner filed a response in opposition to the Division's motion. Petitioner's response consisted of the affidavit of petitioner's attorney, Carl S. Levine, Esq., plus three attached exhibits. The first exhibit is a copy of a letter dated November 19, 1987 from Burnside to a Mr. Greco at the Division's Miscellaneous Tax Unit in Albany. This letter stated that:
>
> > In accordance with our phone conversation with you on November 12, 1987, we wish to advise you that we have received a new certificate of registration under Article 13-A, valid November 1, 1987.
> >
> > As we told you last week, when we completed the questionnaire concerning re-registration under Article 13-A, we indicated that we are not in the business of importing or causing to import petroleum products into New York State. Accordingly, we believe that we should no longer be classified as a taxpayer subject to the Article 13-A requirements.
>
> Burnside's registration under Article 13-A was terminated effective January 15, 1988. The second attached exhibit to petitioner's response to the motion was the affidavit of H. Richard Wiles, Vice President of Burnside. This affidavit, executed on

[5]We modified finding of fact "8" of the Administrative Law Judge's determination to more clearly reflect the record.

> July 15, 1988, seems to relate to, and to have been filed in, petitioner's earlier case (***Burnside #1***). Mr. Wiles' affidavit does not directly relate to the merits, or lack thereof, of the motion for summary determination. The third exhibit is the affidavit of Kenneth L. Robinson, Esq., Mr. Levine's former partner. The affidavits of Mr. Levine and Mr. Robinson are not factual statements but, rather, are legal arguments urging that the motion for summary determination be denied.[6]

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

With respect to the Division's motion for summary determination, the Administrative Law Judge noted that Tax Law § 1087(a) provides that refund claims "shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such period expires the later . . . ." In this case, the motion record showed that petitioner filed the last tax return and paid the tax for the last tax period in question on October 23, 1987 and did not file formal refund claims until February 28, 1995. These facts are not in dispute. The Administrative Law Judge noted that the only issue on this motion for summary determination was whether petitioner filed a timely "informal" refund request thereby tolling the period of limitations until a formal refund application was filed. Petitioner claims that it made such an "informal" refund request by sending its November 19, 1987 letter and also by filing its petition in ***Burnside #1*** and, therefore, the Division had adequate notice of its refund claims.

The Administrative Law Judge concluded that the November 19, 1987 letter did not qualify as an informal request for a refund. Informal refund claims, she stated, must be in writing and must provide sufficient information to begin an investigation as to the merits of the claim.

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[6] Much of the substance of finding of fact "9" consisted of legal argument, rather than facts, and has been deleted. We have incorporated the substance of finding of fact "10" into what remains of finding of fact "9."

The Administrative Law Judge pointed out that in determining whether there is sufficient information to begin an investigation, it is necessary to examine not only the informal claim itself, but the surrounding circumstances, including the tax at issue ***(citing, Matter of Greenburger,*** Tax Appeals Tribunal, September 8, 1994). The Administrative Law Judge pointed out that petitioner's November 19, 1987 letter challenges Burnside's status on re-registration; it did not challenge petitioner's status in the past or its past payment of the gross receipts tax. Thus, the Administrative Law Judge concluded that the letter could not be construed as an informal refund claim.

With regard to petitioner's claim that it gave adequate notice of its refund claim in the course of its litigation in ***Burnside #1***, the Administrative Law Judge reviewed the facts set forth in our decision in ***Burnside #1*** and concluded that the 1986 petition challenging the deficiency alerted the Division that petitioner was claiming it was not a petroleum business for the year in question.

However, as the Administrative Law Judge noted, the question herein is whether the 1986 petition served as a valid informal refund claim. The Administrative Law Judge concluded that the fact that the petition in ***Burnside #1*** did not contain the word "refund" or specifically request the return of the money paid with petitioner's tax return for the period July 1, 1983 through April 30, 1984 did not disqualify the petition as an informal claim for the early period ***(citing, Matter of Greenburger, supra***; ***Matter of Rand, supra***). Accordingly, inasmuch as the initial petition in ***Burnside #1*** was filed on July 2, 1986 and the return for the period July 1, 1983 through April 30, 1984 was filed on January 1, 1985, the Administrative Law Judge concluded

that the informal refund claim for the early period was filed within the three-year period of limitations.

However, the Administrative Law Judge continued, notwithstanding that the 1986 petition served as an informal refund claim for the early period, tolling the limitations period until the claim was perfected, Tax Law § 1087(f) prevents any refund for that tax period. Section 1087(f) authorizes the Tax Appeals Tribunal, on a timely petition of a notice of deficiency, to determine that the taxpayer has made an overpayment of taxes for the same tax period. In this case, the Administrative Law Judge noted, there was no such determination. Section 1087(f) also provides that absent a Tribunal determination of overpayment, no separate refund claim for the same tax period shall be filed or allowed after a Tribunal determination on the deficiency. Thus, the Administrative Law Judge concluded, although the 1986 petition served as an informal refund claim for the purpose of tolling the statute of limitations for the early period until the refund claim was perfected, in the circumstances of this case, section 1087(f) bars the perfection of that refund claim once there was a Tribunal decision on the Notice of Deficiency issued for the same tax period. Accordingly, the Administrative Law Judge concluded, contrary to petitioner's argument, that a formal application for refund would not have been premature prior to a Tribunal decision in ***Burnside #1***. Rather, petitioner was required to perfect its claim by filing its refund application prior to the Tribunal's decision in ***Burnside #1.***

With respect to the refund claim for the period May 1, 1984 through April 30, 1987, the Administrative Law Judge concluded that the 1986 petition in ***Burnside #1*** did not serve as an informal refund claim. The Administrative Law Judge concluded that a taxpayer cannot rely on the filing of an informal claim for a different tax period to toll the statute of limitations for the

other claim (***citing, Matter of Crispo***, Tax Appeals Tribunal, April 13, 1995; ***Matter of Rand, supra)***.

With regard to the Division's motion for summary determination, petitioner argued that there were triable issues of fact to defeat the Division's motion on the issue of the timeliness of the refund claims. However, as the Administrative Law Judge noted, petitioner's response to the motion pointed only to its 1987 letter and its petition in ***Burnside #1*** as evidence of its informal refund claim. Petitioner's arguments also alluded to possible "other circumstances" or Division employees, other than John Matthews, who might have personal knowledge indicating that the Division was apprised of petitioner's informal refund claim. The Administrative Law Judge concluded that informal refund claims must be in written form, and petitioner's vague references to "other circumstances" and other Division employees with possible knowledge of an informal refund claim are insufficient to create a genuine issue of fact to defeat the Division's motion for summary determination with respect to the tax period May 1, 1984 through April 30, 1987 (DTA No. 815259).

The Division established, and petitioner did not dispute, the dates the returns were filed and the taxes paid, and that the formal refund claims were filed in 1995. Therefore, the Administrative Law Judge concluded, inasmuch as petitioner had not established that there are genuine issues of fact to defeat the Division's motion, that the Division was entitled to summary determination for this tax period.

ARGUMENTS ON EXCEPTION

Petitioner takes exception to so much of conclusion of law "C" of the Administrative Law Judge's determination as concludes that petitioner's November 1987 letter to the Division

did not qualify as an informal request for refund. Petitioner also takes exception to conclusion of law "E" of the Administrative Law Judge's determination to the extent it concludes that Burnside did not file an informal refund claim for tax periods after April 30, 1984.

Petitioner also takes exception to conclusion of law "D" to the extent it concluded that Tax Law § 1087(f) prevents petitioner from receiving any refund for the early period.

Finally, petitioner objects to conclusion of law "F" of the Administrative Law Judge's determination to the extent it concludes that Burnside has not established that there are issues of fact to defeat the Division's motion for summary determination.

Petitioner argues that its petition in ***Burnside #1*** placed the Division on notice that Burnside contested its status as a petroleum business liable for the Article 13-A gross receipts taxes.

In addition, petitioner argues, the statute of limitations on refund applications did not begin to run until the taxes became "payable" and that, based on our decision in ***Burnside #1*** where we held Burnside was not a petroleum business subject to Article 13-A, the taxes for this period were never "payable" by Burnside. Accordingly, petitioner urges it is entitled to a full refund of taxes it has paid plus interest.

With regard to the motion for summary determination, petitioner argues that the sole support for the motion for summary determination was an affidavit from John E. Matthews who has no personal knowledge of the facts in the case. Further, petitioner states, there are material issues of fact in dispute requiring a trial, specifically, whether the November 19, 1987 letter written by petitioner to the Division, or its petition in ***Burnside #1***, constituted valid informal refund claims. In the 1987 letter, petitioner claimed it was not a petroleum business and,

therefore, petitioner argues, it must follow that petitioner was also claiming it was not subject to the requirements of Article 13-A, including the payment of the gross receipts tax. Petitioner claims that the statute of limitations was tolled by its letter of November 19, 1987 and the statute did not commence to run until we issued our decision in ***Burnside #1*** which, petitioner urges, held that it was not a petroleum business subject to the gross receipts tax. Finally, petitioner urges that any formal application for refund would have been premature prior to our decision in ***Burnside #1*** .

Petitioner also disagrees with the Administrative Law Judge's conclusion that petitioner was not eligible for a refund due to Tax Law § 1087(f). Petitioner argues that this section does not relate to it because it is not a "taxpayer." Secondly, petitioner urges, there was an "overpayment" of tax here because petitioner was not a "taxpayer" so no tax was ever due. Accordingly, petitioner alleges that all of the amounts paid by it constituted an overpayment.

Finally, petitioner argues that we should not view this case as a straight refund case subject to the statute of limitations but, rather, we should look at the equities of the situation. In doing so, petitioner argues we should grant it relief under Tax Law § 1096(d) relating to the special refund authority of the State Tax Commission.

OPINION

Petitioner has premised its four refund applications, and its petitions in this case, on our holding in ***Burnside #1***. Petitioner's arguments are as follows: i) the Tribunal held in ***Burnside #1*** that petitioner was not a petroleum business for purposes of Article 13-A; ii) the statute of limitations did not begin to run until the taxes became "payable"; and iii) since we held in ***Burnside # 1*** that petitioner was not a petroleum business subject to Article 13-A, the taxes

here never became "payable" by Burnside and it is entitled to a full refund of all amounts paid. We admire petitioner's creativity, but the arguments are without merit.

First, petitioner misstates our holding in ***Burnside #1***. In that case, we did not hold petitioner was not a petroleum business for all time; we only held that petitioner was not a petroleum business subject to Article 13-A *for the period in dispute*, i.e., July 1, 1983 through April 30, 1984. That case was decided, and its holding is limited, to the facts presented therein. It did not relate to a claim for refund or to any period other than July 1, 1983 through April 30, 1984.

As an alternative argument, petitioner urges that it could not have filed formal refund applications until this Tribunal concluded, in ***Burnside #1***, that petitioner was not a petroleum business subject to Article 13-A. Contrary to petitioner's argument, there is no reason why petitioner could not have filed a timely refund application prior to our decision in ***Burnside #1***. If such refund claims were denied, petitioner could have filed a petition in the Division of Tax Appeals and petitioner's refund claim would have been preserved. In the alternative, the petition in ***Burnside #1*** could have been amended under our rules to seek a refund of taxes paid for the subject period should it prevail on the ultimate issue of whether it was a petroleum business. This, at the very least, would have preserved the issue for the early period. No such amendment was made.

Next, petitioner urges that we should not view this case as a straight refund case subject to the statute of limitations but, instead, we should look at the equities of the situation. In doing so, petitioner argues we should grant it relief under Tax Law § 1096(d) relating to the special refund authority of the State Tax Commission.

Tax Law § 1096(d) sets forth the special refund powers of the former State Tax Commission and provides, in pertinent part:

> Special refund authority.--Where no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or . . . paid by such taxpayer . . . under a mistake of facts, . . . the tax commission at any time, without regard to any period of limitations, shall have the power . . . to cause such moneys . . . to be refunded . . . .

Petitioner failed to demonstrate that it paid the taxes under a mistake of facts.

. We now address the Division's motion for summary determination.

At the outset, we must address petitioner's claim that the motion should be dismissed because the affidavit in support was not signed by a person with knowledge of the facts. This argument is without merit. The motion includes an affidavit signed by John Matthews, Esq., the Division's attorney, based upon his review of facts in the Division's files. While his knowledge of the facts is based on the review of the Division's records, it nevertheless constitutes "knowledge of the facts" sufficient to support his affidavit. Further, an affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may serve as the vehicle for the submission of acceptable exhibits or attachments which do provide the necessary evidentiary proof (***Zuckerman v. City of New York***, 49 NY2d 557, 427 NYS2d 595). In addition to Mr. Matthews' affidavit, there are numerous documentary exhibits supporting the motion. Therefore, this motion is not based, as petitioner asserts, solely on the affidavit of the Division's attorney, but is supported by additional documentary evidence admissible in the Division of Tax Appeals.

We next address whether the Administrative Law Judge properly granted the motion for summary determination. The threshold issue on the motion is whether or not petitioner filed a timely "informal" refund request(s) thereby tolling the period of limitations for filing the four formal applications for refund in this case.

To obtain summary determination, it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form (***Friends of Animals v. Associated Fur Mfrs***., 46 NY2d 1065, 416 NYS2d 790; 20 NYCRR 3000.9[b]). Since summary determination is the procedural equivalent of a trial, it should not be granted if there is any doubt concerning the existence of a triable issue ***(see, Sternbach v. Cornell Univ.***, 162 AD2d 922, 558 NYS2d 252).

The Division's motion for summary determination argues that the statute of limitations bars the applications for refund in dispute here. Since the statute of limitations had expired by 1995, when the refund applications were submitted to the Division, the Division contends that the petition in this matter challenging the denial of those refunds must also fail and summary determination lies in its favor.

Generally, with exceptions not relevant here, to defeat a motion for summary judgment, the opponent must produce evidence in admissible form sufficient to raise an issue of fact requiring a trial. If the statute of limitations has expired on the refund applications, there could be no "triable issues of fact." Therefore, for petitioner to prevail in defeating the motion here, it had to produce sufficient opposing evidence to establish that a timely informal refund application(s) has been submitted to the Division thereby tolling the period of limitations until

the Division received the four refund applications on February 28, 1995. In this regard, unsubstantiated allegations or assertions are insufficient to raise an issue of fact (***Alvord & Swift v. Stewart M. Muller Constr. Co.,*** 46 NY2d 276, 413 NYS2d 309), and the bare affirmation by counsel is without evidentiary value (***Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp.***, 42 NY2d 496, 398 NYS2d 1004).

In support of its motion, the Division submitted the petitions, the answers, petitioner's replies, and copies of petitioner's filed returns for the subject periods showing the dates filed. The record also establishes that the Division received four separate refund applications from petitioner on February 28, 1995 for the periods July 1, 1983 through April 30, 1984 (DTA # 814079) and May 1, 1984 through April 30, 1985, May 1, 1985 through April 30, 1986 and May 1, 1986 through April 30, 1987 (DTA # 815259). There is no dispute that the dates the subject taxes were paid for each period and filing dates of these returns were the same. Such dates were, respectively, January 22, 1985, October 21, 1985, September 3, 1986 and October 23, 1987. Tax Law § 1087(a) provides, in pertinent part, that a claim for refund must be filed within three years from the date the return was filed or two years from the time the tax was paid whichever period expires later. That being the case, the evidence in support of the Division's motion for summary determination, if unrebutted, would require a determination in favor of the Division on the threshold issue, i.e., the statute of limitations.

In opposition to the Division's motion, petitioner submitted the affidavits of Mr. Levine, Mr. Robinson and Mr. Wiles and a copy of Burnside's November 19, 1987 letter to the Division. The affidavits of Mr. Levine and Mr. Robinson contain legal arguments, not statements of fact. The affidavit of Mr. Wiles, as Vice President of Burnside, attests to certain facts, but none of the

matters to which he attests to relate to the issue of whether petitioner made a timely informal request for refund. Accordingly, none of these three affidavits constitute "evidence" sufficient to defeat the instant motion.

Next, we come to Burnside's November 19, 1987 letter to the Division. This 1987 letter states, in pertinent part:

> As we told you last week, when we completed the questionaire [sic] concerning re-registration under Article 13-A, we indicated that we are not in the business of importing or causing to import petroleum products into New York State. Accordingly, *we believe that we should no longer be classified as a taxpayer subject to the Article 13-A requirements* (emphasis added).

As the Administrative Law Judge noted, this letter challenges petitioner's registration under Article 13-A for periods *after* November 19, 1987. The letter did not allege the overpayment of any tax or request the refund of any tax. We agree with the Administrative Law Judge, for the reasons stated in her determination, that this letter does not rise to the level of an informal request for refund.

That brings us to petitioner's argument that its petition in ***Burnside #1*** constituted an informal request for refund because it gave the Division sufficient notice that petitioner disagreed with the Division's position that it was a petroleum business subject to Article 13-A.

The Administrative Law Judge agreed with petitioner and concluded that the 1986 petition in ***Burnside #1*** constituted an informal refund application for the period July 1, 1983 through April 30, 1984. However, the Administrative Law Judge also concluded that even though ***Burnside #1*** could be interpreted as an informal refund claim for the early period, its claim for refund for that period is barred by Tax Law § 1087(f). We agree.

Tax Law § 1087(f) authorizes the Tax Appeals Tribunal, on a timely petition of a notice of deficiency, to determine that the taxpayer has made an overpayment of taxes for the same tax period. In this case, there was no such determination because, as discussed earlier, petitioner never amended its petition to raise the issue. Section 1087(f) also provides that absent a Tribunal determination of overpayment, no separate refund claim *for the same tax period* shall be filed or allowed after a Tribunal determination on the deficiency. Clearly, our decision in ***Burnside #1*** was such a determination.

As an alternative argument, petitioner claims that it is not subject to the limitations of Tax Law § 1087(f) because it is not a "taxpayer," i.e., a petroleum business subject to Article 13-A of the Tax Law. We disagree.

As noted earlier, we held in ***Burnside #1*** that petitioner was not a petroleum business for the early period only. Petitioner has not established that it was not a petroleum business for any other period. The record before us, however, discloses that for the period May 1, 1984 through April 30, 1987, petitioner was registered under Article 13-A, filed 13-A tax returns and remitted 13-A taxes during that period. Further, we note that Tax Law § 1086(c) provides that if there is no tax liability for a period in which an amount is paid as tax, such amount is considered an overpayment (and refundable pursuant to the provisions of Tax Law § 1087).

Although the 1986 petition in ***Burnside #1*** could be viewed as a valid informal refund claim for the early period, the Administrative Law Judge concluded that it could not serve as an informal refund claim for the tax periods after April 30, 1984. We agree with the Administrative Law Judge for the reasons stated in her determination.

To summarize petitioner's evidence opposing the Division's motion, as we have already noted, the affidavit of Mr. Wiles is not on point and the legal arguments in the affidavits of Mr. Levine and Mr. Robinson are without evidentiary value to establish that petitioner filed a timely informal application for refund. Burnside's November 19, 1987 letter to the Division does not constitute an informal application for refund for any period. The 1986 petition in ***Burnside #1*** constitutes an informal application for refund for the period July 1, 1983 through March 30, 1984, but as to that period any refund claim is now barred by Tax Law § 1087(f). Petitioner, having failed to establish that timely informal refund applications had been filed for the later period, has failed to overcome the Division's evidence that the statute of limitations on the refund claims has expired. Accordingly, there are no triable issues of fact remaining for trial ***(Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp.***, ***supra; Sternbach v. Cornell Univ., supra***), and the Administrative Law Judge properly granted the Division's motion of summary determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Burnside Coal & Oil Co., Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Burnside Coal & Oil Co., Inc. are denied; and

4. The Division's Notice of Disallowance, dated April 25, 1995, denying the four refund claims is sustained.

DATED: Troy, New York
August 27, 1998

/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