

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>VAL-PAK OF WESTERN NEW YORK, INC.</b>	:	DECISION
	:	DTA NO. 818798
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, 1994 through November 30,	:	
1994.	:	

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Petitioner Val-Pak of Western New York, Inc., 580 Cayuga Road, Buffalo, New York 14225 filed an exception to the determination of the Administrative Law Judge issued on June 26, 2003. Petitioner appeared by Hodgson Russ LLP (Christopher L. Doyle, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Cynthia E. McDonough, Esq., of counsel).

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

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

***ISSUE***

Whether petitioner timely filed its claim for refund for the sales tax quarterly period ended November 30, 1994 pursuant to Tax Law § 1139.

***FINDINGS OF FACT***

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

As the result of a sales and use tax field audit spanning the period March 1, 1994 through February 28, 1997, the Division of Taxation (“Division”) issued to petitioner, Val-Pak of Western New York, Inc., a Notice of Determination (Assessment I.D. No. L-016932777) dated September 13, 1999. This notice assessed tax due in the amount of \$88,515.65, plus interest.

Petitioner challenged this notice by filing a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”). Following a conciliation conference, BCMS issued a conciliation order, dated November 24, 2000, which sustained the notice in the reduced amount of \$84,327.06, plus interest. There is no claim or evidence that a petition was thereafter filed with the Division of Tax Appeals for a hearing to challenge the conciliation order and the notice it sustained.

On April 30, 2001, petitioner forwarded a check to the Division in the amount of \$6,552.95 in partial payment of the assessment represented by the notice. Petitioner specified that the payment was to be applied to the sales tax quarterly period ended November 30, 1994.

By a letter dated May 1, 2001, petitioner filed with the Division an Application for Credit or Refund of Sales and Use Tax seeking a refund of its \$6,552.95 payment made against the assessment for the sales tax quarterly period ended November 30, 1994.

On October 22, 2001, the Division issued to petitioner a notice of rejection of the refund claim, citing Tax Law § 1139(c) in support of its position that the Notice of Determination had

become final and binding upon petitioner's failure to protest the BCMS conciliation order. The rejection letter provides, in part, as follows:

The refund request relates to a conciliation order which was issued as the result of a conciliation conference held in September 2000. Since the conciliation order was not protested, the tax due was fixed and properly collected. Under these circumstances, the claim for a refund of sales tax is rejected.

In response to the refund denial, petitioner filed a petition with the Division of Tax Appeals. The petition seeks a refund of the \$6,552.95 amount paid by petitioner, and challenges the bases upon which the Division assessed tax via the notice, to wit, that the Commissioner of Taxation and Finance erroneously assessed:

- (1) sales tax with respect to certain payments petitioner made to its franchisor;
- (2) sales tax with respect to certain transactions which in a prior case were determined not to be subject to sales tax;
- (3) sales tax with respect to certain transactions which constituted advertising; and
- (4) sales tax against petitioner which if payable is properly payable by a third party.

The Division responded to the petition by filing a motion, dated May 15, 2002, seeking dismissal of the petition on the basis that the Division of Tax Appeals lacked jurisdiction of the subject matter of the petition. By an order dated August 15, 2002, the Division's motion to dismiss was denied. This order held that petitioner is, as part of affirmatively exhausting its administrative remedies, entitled to a hearing before the Division of Tax Appeals, at least to determine whether or not its refund claim was timely filed and, if so, to address the merits of such claim for refund.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In order to determine whether the petition in this case was timely filed, the Administrative Law Judge began his analysis focusing on the date that the Notice of Determination for the period March 1, 1994 through February 28, 1997 was issued which was September 13, 1999. The Administrative Law Judge noted that such Notice was challenged by petitioner requesting and having a conciliation conference at BCMS. The conciliation order dated November 24, 2000 reduced the tax due amount slightly and other than such small reduction, it sustained the Notice issued against petitioner. The Administrative Law Judge noted that there was no evidence in the record which established that any further action was taken with respect to this assessment.

Thus, the Administrative Law Judge concluded that the issue devolved to whether petitioner timely filed a claim for refund of the tax that it paid on April 30, 2001 for the quarterly period ended November 30, 1994. Since petitioner was not a registered vendor for sales and use tax purposes, the Administrative Law Judge noted that it was not obligated to file returns and remit tax on either a monthly, quarterly or annual basis as is the requirement for a registered vendor. The Administrative Law Judge stated that petitioner was obligated to file returns and pay tax on its purchases subject to tax directly to the Commissioner of Taxation and Finance pursuant to Tax Law § 1133(c). Furthermore, in analyzing the regulation at 20 NYCRR 531.6(a) and (b), the time period for such payment of tax was 20 days after such taxable purchases.

Applying the law and regulations to the facts herein, the Administrative Law Judge determined that petitioner had 20 days from the end of the quarterly period ended November 30,

1994 within which to pay the taxes over to the Commissioner which date was December 20, 1994. Thus, the Administrative Law Judge concluded that it was from December 20, 1994 that the three-year period of limitations on filing a refund claim pursuant to Tax Law § 1139(a)(ii) was measured. Therefore, the Administrative Law Judge held that petitioner's claim for refund, filed on May 1, 2001, was untimely filed and properly rejected by the Division.

### ***ARGUMENTS ON EXCEPTION***

On exception, petitioner continues to assert the same arguments as made below to the Administrative Law Judge. Petitioner states that the regulation relied on by the Administrative Law Judge in this case is invalid. Petitioner maintains that the 20-day time frame for filing tax returns and remitting any tax owed is an arbitrary time period which differs from the filing times set forth for monthly, quarterly and annual registered vendors pursuant to Tax Law § 1136(a) and (b) and claims that such regulation is invalid in excess of the authority granted the Commissioner under Tax Law § 1133(c).

Petitioner further alleges that since no valid regulation exists which sets forth a filing deadline, petitioner does not have a filing deadline within which to submit its compensating use tax returns. Petitioner argues that the statute of limitations period by which petitioner must file its claim for refund does not expire until three years beyond the assessment date under Tax Law § 1139(a)(ii). Petitioner reasons that: "[u]nless either of these events occur, or an applicable law is promulgated, the statute remains open" (Petitioner's attachment to exception, p. 3, ¶ F).

Thus, petitioner requests that it have the merits of its refund claim considered by the Division of Taxation in this matter and, if necessary, by the Division of Tax Appeals.

In opposition, the Division agrees with the determination of the Administrative Law Judge. The Division states that the Administrative Law Judge correctly held that petitioner's claim for refund was untimely and was barred by the statute of limitations pursuant to Tax Law § 1139(a)(ii).

### ***OPINION***

We begin by noting that there is no dispute herein that petitioner is not a registered vendor and, in fact, is considered to be a customer for sales and use tax purposes. Tax Law § 1133(c) states as follows:

[t]he [commissioner of taxation and finance] may, whenever [he] deems it necessary for the proper enforcement of this article, provide by regulation that customers shall file returns and pay directly to the [commissioner] any tax herein imposed, at such times as returns are required to be filed and payment made by persons required to collect the tax.

In order to determine what filing deadline is applicable to a customer, we focus on the regulation set forth at 20 NYCRR 531.6(a) and (b) which provides for any person who is not a registered vendor to file a report of sales and use tax within 20 days from the date that the purchase of property or services subject to tax and upon which tax was not paid was made.

We agree with the Administrative Law Judge that this regulation applies to petitioner. We find petitioner's argument, that the regulation was in excess of the statutory authority and as such must be declared invalid, untenable. As reasoned by the Administrative Law Judge, for the sales tax quarterly period ended November 30, 1994, petitioner was required to file a return and pay the tax by December 20, 1994. Pursuant to Tax Law § 1139(a)(ii), petitioner had three years within which to file its claim for refund. The refund claim at issue was filed on May 1, 2001

and, thus, was untimely. We affirm the determination of the Administrative Law Judge that since the refund claim was not timely filed, the Division properly denied the claim.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Val-Pak of Western New York, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Val-Pak of Western New York, Inc. is denied; and
4. The Notice of Disallowance dated October 22, 2001 is sustained.

DATED: Troy, New York  
April 29, 2004

/s/Donald C. DeWitt

Donald C. DeWitt  
President

/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner