

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
UNICORP AMERICAN CORPORATION	:	DETERMINATION
for Redetermination of a Deficiency or for	:	DTA NO. 811873
Refund of Franchise Tax on Banking Corporations	:	
under Article 32 of the Tax Law for the Years	:	
1987 through 1989.	:	

Petitioner, Unicorp American Corporation, 100 Jericho Quadrangle, Jericho, New York 11753, filed a petition for redetermination of a deficiency or for refund of franchise tax on banking corporations under Article 32 of the Tax Law for the years 1987 through 1989.

A hearing was held before Marilyn Mann Faulkner, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on April 18, 1994 at 1:15 P.M., with all briefs due by July 21, 1994.

Petitioner, represented by James P. Bressingham (Vice President and Director of Taxation of petitioner), filed a letter brief on May 2, 1994. The Division of Taxation, represented by William F. Collins, Esq. (John O. Michaelson, Esq., of counsel), did not file a brief.

ISSUE

Whether interest should be imposed on a 1989 tax liability asserted as a result of a 1992 audit when petitioner elected an overpayment in 1989 to be credited against future taxes.

FINDINGS OF FACT

In March of 1991,¹ petitioner, Unicorp American Corp. ("Unicorp"), filed a 1989 Combined Franchise Tax Return for Banking Corporations (Form CT-32-A) reporting a total combined tax and tax surcharge of \$95,748.00, plus an installment payment for the next period

¹Apparently, petitioner was given an extended due date for filing the 1989 tax return.

of \$422,816.00. From that amount petitioner subtracted prepayments of \$1,544,221.00, leaving an overpayment of \$1,025,657.00. Petitioner requested that \$500,000.00 of the overpayment be credited to the next period and that the remaining \$525,657.00 be refunded.

In June of 1991, the comptroller issued to petitioner a refund of \$205,208.00, and in September of 1991 petitioner received the \$320,449.00 balance of the refund of \$525,657.00, plus interest in the amount of \$47,199.65.

On its extended due date of March 15, 1991, petitioner also filed its 1989 Metropolitan Transportation Business Tax Surcharge Return (Form CT-32-M) reporting the metropolitan transportation business ("MTB") tax surcharge of \$12,379.00, less prepayments of \$325,000.00, leaving an overpayment of \$312,611.00. Petitioner requested that \$75,000.00 of the overpayment be credited to the next period's MTB tax and the balance of \$237,621.00 be refunded. In June of 1991, the comptroller issued a \$237,621.00 refund to petitioner.

In October of 1991, the Division of Taxation's ("Division") audit unit completed a field audit of petitioner covering the tax years 1987

through 1989. The Division issued a Consent to Field Audit Adjustment indicating additional tax due of \$589,251.00,² plus interest in the amount of \$115,544.00 computed to November 15, 1991.

On or about November 5, 1991, petitioner filed an amended CT-32-A return and an amended CT-32-M return for the tax year 1989. The amended franchise tax return showed a recomputed total combined tax and tax surcharge of \$598,788.00, plus an amended first period installment of \$419,776.00, less amended prepayments of \$1,018,564.00, leaving a balance due of zero. The amended MTB return indicated a recomputed MTB tax surcharge of \$97,927.00, less amended prepayments of \$87,379.00, leaving a balance due of \$10,548.00, plus interest of \$1,793.00. Petitioner paid the total of \$12,341.00.

²According to petitioner's representative, the additional tax for 1989 involved a mortgage recording tax credit carryover, the elimination of which petitioner was unaware.

In a letter dated November 26, 1991, petitioner stated that it agreed with the audited tax liability but disagreed with the assessment of interest. Petitioner requested that the \$500,000.00 and \$75,000.00 overpayments credited from 1989 be applied against the audited tax pursuant to Tax Law § 1084(k) inasmuch as the credit was not needed to satisfy the 1990 combined tax liability because the first period installment for 1989 would cover the 1990 tax due.

Petitioner submitted a check in the amount of \$577,304.00 to cover the balance of the audited tax liability, less the \$12,341.00 paid with the amended MTB tax return. In an accompanying letter dated December 4, 1991,

petitioner noted that although it made the payment, it was not changing its arguments set forth in the November 26, 1991 letter.

The Division issued a Notice of Deficiency, dated February 18, 1992, to petitioner for the tax periods ending December 31, 1987 through December 31, 1989. The amount of tax due for those periods was set forth as follows:

Tax Period Ended	Tax Amount Assessed	Interest Amount Assessed	Penalty Amount Assessed	Assessment Payments/ Credits	Current Balance Due
12-31-87	\$ 402.00	\$ 185.05	\$0.00	\$ 587.05	\$ 0.00
12-31-87	2,364.00	1,090.94	0.00	3,454.94	0.00
12-31-88	380.00	127.64	0.00	507.64	0.00
12-31-88	2,250.00	756.61	0.00	3,006.61	0.00
12-31-89	84,861.00	17,014.86	0.00	101,875.86	0.00
12-31-89	<u>498,994.00</u>	<u>102,626.58</u>	<u>0.00</u>	<u>467,871.90</u>	<u>133,748.68</u>
Totals	\$589,251.00	\$121,801.68	\$0.00	\$577,304.00	\$133,748.68

After a conciliation conference, the conferee issued an order, dated March 26, 1993, sustaining the statutory notice. In a letter dated February 11, 1993, the conferee explained the reasons for denying petitioner's request that the interest be cancelled with respect to its 1989 tax liability. Based on his reading of Tax Law § 1086(a) and (b), the conferee found that once petitioner filed its original 1989 return and credited the \$575,000.00 overpayment to 1990, it could not bring back the \$575,000.00 to offset the 1989 deficiency. The conferee reasoned that to allow the amended return "would not only remove the refunds from its prepayments, but also

the amounts credited to the next period" and that this situation would "again result in the deficiencies determined on audit and interest under section 1084(a) would be applied from the prescribed date (March 15, 1990) to the date the deficiency was paid on December 5, 1991." The conferee therefore concluded that Tax Law § 1084(k) did not apply because there were no "overpayments" within the meaning of Tax Law § 1086 to be credited against the deficiencies.

Unicorp filed a petition, dated May 4, 1993, requesting a refund of the interest paid of \$131,710.00, plus interest. Petitioner argued that Tax Law § 1084(k) applies and that the conferee's reliance on the amendment to Tax Law § 1086(a), effective July 12, 1991, was erroneous inasmuch as the effective date of the amendment was after the years in question. Petitioner contends that Tax Law § 1084(k) provides that if any portion of a tax is satisfied by credit of an overpayment, then no interest shall be imposed. Petitioner notes that if the credit had not been made to the 1990 tax year, interest would have been allowed on the overpayment and that an amended return was filed for the 1989 tax year requesting the tax owed for 1989 be satisfied by payments made for the 1989 tax year.

The Division filed an answer dated June 10, 1993 affirmatively stating that petitioner cannot, "at its whim", reallocate an overpayment generated in 1989 that was credited on the 1990 return.

At hearing, the Division's counsel relied on the conferee's reasoning for the Division's position. In order to clarify that position, the Division's counsel, John O. Michaelson, was questioned as follows concerning his interpretation of the conferee's statements:

ADMINISTRATIVE LAW JUDGE: "There's something that was stated in the conferee's decision, I'm wondering if the parties could clarify this since we're relying so heavily on this decision for the Division's position, on the second to last page of the conferee's decision, the last paragraph, it says, midway through that paragraph --"

MR. BRESSINGHAM: "Which page again?"

ADMINISTRATIVE LAW JUDGE: "It's page 3, the conferee's order, the last paragraph. The conferee says, when filing the amended 1989 returns, the requester would not only remove the refund from the prepayment but also the amount credited to the next period. This would, again, result in the deficiencies determined on audit and interest under Section 1084-A would be applied from the prescribed due date to the date the deficiency was paid on December 5, 1991.

"I'm trying to understand the relevance of this section. My understanding of it is that the conferee would argue that if you remove these funds from the way . . . you had originally elected to have them credited to the next period, that there would be a deficiency in that next period."

* * *

MR. MICHAELSON: "Our argument, and I was going to address it in the letter memo, is, in substance, the way I read that is that, because this amount was credited against the 1990 tax initially that the interest on any underpayment of tax would continue to accrue up until such time as it was credited back or until the time the amount of the deficiency was paid, which in this case was in December of 1991."

ADMINISTRATIVE LAW JUDGE: "Okay."

MR. BRESSINGHAM: "Say that again."

MR. MICHAELSON: "That's the way I interpreted that particular sentence."

ADMINISTRATIVE LAW JUDGE: "So, it doesn't have anything to do with the removing of funds from that 1990, the amount of tax due for 1990. It doesn't have --"

MR. MICHAELSON: "No, not the way I read it. Again, this is a bizarre issue to be actually holding a hearing on. It's much more easily addressed in briefs."

ADMINISTRATIVE LAW JUDGE: "Well, perhaps then you understand my confusion about it. And would you address it in the brief?"

MR. MICHAELSON: "Oh, yes. No doubt." (Tr., pp. 14-16.)

The Division did not submit a brief to explain its position or to clarify further how it interpreted the conferee's explanation of not allowing the overpayment to be applied to the 1989 tax liability.

CONCLUSIONS OF LAW

A. Tax Law § 1084(a) imposes interest on any amount of tax that is not paid on or before the last day prescribed for payment. Petitioner argues that Tax Law § 1084(k) allows it to use the 1989 overpayment, that it elected to be credited to the succeeding tax year, to satisfy its 1989 tax deficiency without accruing any interest liability. Tax Law § 1084(k) provides that:

"If any portion of a tax is satisfied by credit of an overpayment, then no interest shall be imposed under this section on the portion of the tax so satisfied for any period during which, if the credit had not been made, interest would have been allowable with respect to such overpayment."

The conferee³ determined that Tax Law § 1084(k) did not apply because once petitioner requested in its original 1989 returns to credit the overpayments to 1990, section 1086(a) and (b) prevent it from applying that overpayment to offset its 1989 deficiency. The conferee makes this conclusion based on his interpretation of the word "overpayment" in section 1084(k) as it is used in section 1086(a) and (b). In sum, the conferee determined that those sections prevented the application of section 1084(k).

At the time the tax liability was incurred, Tax Law § 1086(former [a]) provided that:

"The tax commission, within the applicable period of limitations, may credit an overpayment of tax and interest on such overpayment against any liability in respect of any tax imposed by the tax law on the taxpayer who made the overpayment"

The conferee noted that the above section was amended effective July 12, 1991⁴ by changing the term "tax commission" to "commissioner of taxation and finance" and by adding the following provision:

"[p]rovided, however, in the case of an overpayment claimed on a return or report, such refund shall be made only if application therefor is made on such return or report. In the absence of such application, the amount of such overpayment with respect to any taxable year shall be credited against, and considered as, a payment of tax liability with respect to such tax for the succeeding taxable year and shall be credited against the estimated tax, if any, for such year (whether or not claimed as a credit in the declaration of estimated tax for such succeeding taxable year). The commissioner shall notify the taxpayer that such overpayment has been so credited, and the taxpayer may, prior to the due date (without regard to extensions) of the taxpayer's return or report for such succeeding taxable year, claim a refund of such overpayment."

The conferee also relied on Tax Law § 1086(b) which provides, in pertinent part:

"If any overpayment of tax is so claimed as a credit against estimated tax for the succeeding taxable year, such amount shall be considered as a payment of the tax under article nine-a, nine-b or nine-c for the succeeding year (whether or not claimed as a credit in the declaration of estimated tax for such succeeding taxable

³Inasmuch as the Division has relied on the conferee's decision without any further explanation, it will be assumed that that decision reflects the Division's only position in this case.

⁴Petitioner argues that the conferee improperly relied on the amended provision inasmuch as it chose to credit the overpayment prior to the effective date of the amendment.

year), and no claim for credit or refund of such overpayment shall be allowed for the taxable year for which the overpayment arises."

Based on these provisions, the conferee determined that once Unicorp filed its original 1989 returns and credited the \$575,000.00 overpayment to 1990, it could not use that amount to offset a 1989 deficiency.

Although Unicorp's position is persuasive on an equitable level, particularly when at the time of its amended 1989 return the overpayment was not needed to cover its 1990 tax liability, section 1086(b) nonetheless requires that once Unicorp elected to apply the overpayment to its 1990 liability, the overpayment was no longer applicable to the 1989 liability. In essence, the election removed the overpayment from the 1989 liability similar to the election of a refund of the 1989 overpayment.

However, petitioner did not elect to apply the 1989 overpayment to its 1990 taxes until the filing of the original return on March 15, 1991. Therefore, until March 15, 1991, the overpayment was available to its 1989 liability. Accordingly, no interest should be charged for the period March 15, 1990 through March 15, 1991.

In conclusion, based on the record and limited arguments before the Division of Tax Appeals, Tax Law § 1084(k) would appear to apply until such time as petitioner elected to have the 1989 overpayment applied to its 1990 tax liability.⁵

B. The petition of Unicorp American Corporation is granted to the extent indicated in Conclusion of Law "A". Except as so granted, the Notice of Deficiency, dated February 18, 1992, is sustained.

DATED: Troy, New York
January 12, 1995

/s/ Marilyn Mann Faulkner

⁵As noted in section 1086(a), in the absence of a taxpayer election to credit an overpayment to the succeeding year, the Commissioner of Taxation and Finance could have credited the overpayment but had to do so on notice to the taxpayer. There is no such notice in this record. Therefore, the 1991 amended provision of section 1086(a) does not apply.

ADMINISTRATIVE LAW JUDGE