STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
KAISER AEROSPACE & ELECTRONICS CORPORATION DETERMINATION	:
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.	: DTA NO. 812828

Petitioner, Kaiser Aerospace & Electronics Corporation, 950 Tower Lane, Suite 800, Foster City, California 94404, filed a petition 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.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York on February 7, 1995 at 9:15 A.M. Petitioner filed a brief at the outset of the hearing. The Division of Taxation filed a brief on March 15, 1995. Petitioner filed no reply brief. The date established for the filing of a reply brief was May 26, 1995 which began the six-month statutory period for the issuance of a determination. Petitioner appeared by Martin A. Levy, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Andrew J. Zalewski, Esq., of counsel).

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

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 Division computed 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.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner claims that the Division's assessment is barred by the three-year statute of limitations of Tax Law § 1083(a). It is petitioner's position that the MTA Surcharge is not a tax separate from the corporation franchise tax, but rather a computational element in computing the corporation franchise tax. In the alternative, petitioner asserts that the MTA Surcharge is an ancillary tax. In either case, petitioner

maintains that the filing of the corporation franchise tax reports on forms CT-3 was sufficient to start the running of the three-year statute of limitations for assessing both the corporation franchise tax and the MTA Surcharge.

The Division takes the position that under Tax Law § 1083(c)(1)(A) it was authorized to assess the MTA Surcharge at anytime because no MTA Surcharge report was filed by petitioner.

At hearing, the Division asserted for the first time that Kaiser falsely responded to the question regarding Kaiser's business operations in the Metropolitan Commuter Transportation District and "that any limitation on assessment was waived by the filing of a false return for 1988 and 1989 pursuant to Tax Law § 1083(c)(1)(B)" (Division's brief, p. 2).

CONCLUSIONS OF LAW

A. Section 209-B of Article 9-A of the Tax Law imposes a tax surcharge, in addition to the tax imposed under Tax Law § 209, on the portion of the corporation franchise tax attributable to business activity carried on within the Metropolitan Commuter Transportation District, which consists of the City of New York, and the counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester (Tax Law § 209-B[1],[2], [6]). Section 209-B(5) generally provides that the provisions concerning corporation franchise tax reports found in Tax Law § 211 shall be applicable to the MTA Surcharge. As relevant, Tax Law § 211(1) provides that "[e]very taxpayer, as well as every foreign corporation having an employee . . . within the state, shall annually . . . transmit to the tax

commission a report in a form prescribed by it . . . ."[1] By regulation, the Commissioner of Taxation and Finance ("Commissioner") has prescribed the report forms to be used by taxpayers in accordance with Tax Law § 211. These include, among others, the CT-3 (Corporation Franchise Tax Report, long form) and the CT-3M/4M (MTA Surcharge Report) (20 NYCRR 6-3.3[b]).

In general, any tax imposed under Article 9-A may be assessed by the Division "within three years after the return was filed" (Tax Law § 1083[a]). There are two relevant exceptions to the three-year period of limitation. Section 1083(c)(1)(A) permits assessment at any time if "no return is filed . . . ." Section 1083(c)(1)(B) permits assessment at any time if "a false or fraudulent return is filed with intent to evade tax . . . ."

Petitioner concedes that it did not file CT-3M's for the years 1983 through 1989, but it claims that the three-year limitation period was triggered by the filing of forms CT-3 where it reported the income and tax which are the basis for calculating the MTA Surcharge. On that basis, petitioner claims that the assessments were barred by the statute of limitations. I disagree and find that the Division was permitted to assess the MTA Surcharge at any time for all years in issue.

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[1]Effective September 1, 1987, references in the Tax Law to the State Tax Commission are deemed to refer to the Commissioner of Taxation and Finance, except where such references relate to the administrative hearing process (Tax Law § 2026).

B. To establish the statute of limitations defense, the party raising it must go forward with a prima facie case showing the date on which the limitations period commenced, the date on which the period expired and receipt or mailing of the notice after the statutory period has expired (see, Matter of The Tides Inn, Tax Appeals Tribunal, April 2, 1992). Here, petitioner asserts that the statutory period began to run with the filing of its corporation franchise tax reports. The date stamps on the face of the 1988 and 1989 CT-3 forms filed by petitioner indicate that the forms were filed on September 15, 1989 and September 15, 1990, respectively. The Notice of Deficiency mailed to petitioner is dated June 29, 1992, indicating that the assessment was made within the three-year period of limitation for both years. Petitioner has not raised any issue regarding the date of mailing or receipt of the Notice of Deficiency. Consequently, petitioner has not made a prima facie showing that the assessments for 1988 and 1989 were barred by the statute of limitations. In fact, it would appear that they were not. With respect to the 1988 and 1989 tax years, the Notice of Deficiency may be sustained on that basis alone.

C. Through the interaction of Tax Law §§ 209-B(5) and 211(1), taxpayers subject to the taxes imposed under Article 9-A are required to file corporation franchise tax reports and MTA Surcharge reports on forms prescribed by the Commissioner. The Commissioner has prescribed the filing of separate reports for the corporation franchise tax and the MTA Surcharge. Tax Law § 1083(c)(1)(A) permits assessment at any time if "no return is

filed . . . ." Since petitioner never filed MTA Surcharge reports, the surcharge could be assessed at any time. Petitioner's arguments to the contrary are unpersuasive.

Petitioner notes that the Internal Revenue Service follows the rule that the filing of a return for one type of tax will not start the running of the period of limitations for a separate and distinct tax, and it also follows the converse of that rule. That is, if two taxes are found not to be separate and distinct taxes, the filing of a return with respect to one of these taxes will "be accepted as the filing of a return with respect to both taxes" (Rev Rul 82-185).

In Revenue Ruling 82-185, cited to by petitioner in support of its position, the taxpayer timely filed a form 1040 reporting all income but failed to attach Schedule SE to report self-employment tax and did not make the appropriate entry for the self-employment tax on the form 1040. The question presented was whether the statute of limitations prevented the Internal Revenue Service from assessing the self-employment tax. It was held that the assessment was not permissible because the two taxes are so closely connected that the filing of a return with respect to the individual income tax starts the running of the statute of limitations for both taxes. Petitioner argues that the corporation franchise tax and the MTA surcharge are similarly connected, and that the same result should obtain. I do not agree.

Revenue Ruling 82-185 cited to three factors to support its conclusion. The first factor is that the individual income

taxes and self-employment taxes are both income taxes imposed under the same subtitle of the code. The corporation franchise tax and the MTA Surcharge are both corporation franchise taxes imposed under Article 9-A of the Tax Law. But there the similarities end. The second factor relied on by the IRS in Revenue Ruling 82-185 -- that both taxes are required to be reported on the same form -- does not exist here. The corporation franchise tax and the MTA Surcharge are not required to be reported on the same form as are the personal income tax and the self-employment tax. Petitioner notes that the CT-3 contains a line which allows a taxpayer to credit an overpayment of corporation franchise tax towards its MTA Surcharge liability. Likewise, the CT-3M/4M has a line which allows a taxpayer to credit an overpayment of corporation franchise tax to its MTA Surcharge liability. However, the taxpayer is not required to report the amount of the MTA Surcharge tax on the CT-3 forms. The tax and the surcharge are required to be reported on separate forms. The third factor mentioned by the IRS in its Revenue Ruling was the legislative history of the self-employment tax which indicated that the the "self-employment tax should be 'handled in all particulars as an integral part of the income tax'" (Rev Rul 82-185, quoting S Rep No. 1669, 81st Cong, 2d Sess 153 [1950]). Petitioner has cited to no comparable legislative history regarding the MTA Surcharge. The New York Legislature left it to the discretion of the Commissioner to prescribe the forms which would be required to report the MTA Surcharge. The Commissioner

prescribed a separate and distinct form for reporting the surcharge, not a line on the CT-3 or a schedule attached to it. Moreover, there is no requirement in the statute that the corporation franchise tax and the MTA Surcharge be treated as integral parts of one tax for reporting purposes.

The court cases cited by petitioner are also distinguishable. In Matter of Airborne Frgt. Corp. v. Michael (94 AD2d 669, 462 NYS2d 663), the Court held that the three-year assessment period barred the issuance of notices of deficiency beyond the three-year period where a taxpayer filed timely New York City business returns that were within the wrong category. The petitioner filed New York City transportation corporation tax returns when it was required to file general corporation tax returns. The court stated:

> "The City Business Tax is composed of a number of separate parts setting forth differing tax rates which are measured on varying bases depending upon the nature of the corporation, but it nonetheless constitutes an integrated corporate tax structure. As such, one statute of limitations is applicable to the entire City Business Tax Law" (Matter of Airborne Frgt Corp. v. Michael, supra, 462 NYS2d at 665; citations omitted).

Certainly, the corporation franchise tax and the MTA Surcharge are parts of an integrated corporate tax structure. However, there is a crucial difference between the City business tax structure discussed in Airborne Freight and the corporation franchise tax structure at issue here. "A corporation which is subject to the Transportation Corporation Tax . . . is not required to pay the General Corporation Tax" (id., 462 NYS2d at 664). Since the taxes are mutually exclusive, a taxpayer is required to file only one return in the proper category. The

corporation franchise tax and MTA Surcharge are not mutually exclusive; that is, a taxpayer subject to the corporation franchise tax may, or may not, be subject to the surcharge as well, depending on where its business activities take place. The Tax Law requires taxpayers subject to the MTA Surcharge to file the MTA Surcharge reports prescribed by the Commissioner, as well as corporation franchise tax reports.

The second case cited by petitioner, Matter of Apex Air Frgt. v. O'Cleireacain (210 AD2d 7, 619 NYS2d 38), is also distinguishable. The issue in that case was whether the statute of limitations barred the issuance of a deficiency notice where the taxpayer, a New Jersey corporation, had annually filed activities reports on a form promulgated by the Commissioner of Finance disclaiming liability for the general corporation tax. The court found that the activities reports were returns for purposes of the exception to the statute of limitations where no return is filed. It stated:

> "Plaintiff followed the procedures prescribed by the Commissioner for disclaiming tax liability using the specific forms so designated, and since the business tax structure is an integration of many parts, the taxpayer should not be penalized by following the rules of one of the parts" (Matter of Apex Air Frgt. v. O'Cleireacain, supra, 619 NYS2d at 39, citing Matter of Airborne Frgt. Corp. v. Michael, supra).

The decision in Apex Air Freight lends no support to petitioner's position since petitioner did not follow the procedures prescribed by the Commissioner and did not file the returns designated by the Commissioner.

In each of the cases cited by petitioner, forms filed by the taxpayer were sufficient to alert the taxing authority to the

taxpayer's liability for the tax or claim of non-liability. The taxpayer who is the subject of Revenue Ruling 82-185 filed a form 1040 reporting all income, including the income subject to the self-employment tax, and the self-employment tax is reported on a form 1040. The taxpayers in Airborne and Apex filed returns disclosing their respective positions concerning liability for the New York City business tax. In Airborne, the taxpayer claimed to be a transportation corporation subject to the transportation corporation tax, and in Apex, the New Jersey corporation claimed not to be subject to the tax at all. Here, petitioner failed to file a required return, but after audit conceded its liability for the surcharge. Thus, petitioner's failure to file deprived the Division of the information necessary for it to determine whether petitioner was subject to the surcharge. For the years 1983 through 1987, the CT-3 form asked for no information which would enable the Division to determine whether a taxpayer was subject to the MTA Surcharge. The Commissioner might have sought such information on a form CT-3. However, it was well within his discretion to require the filing of a separate return instead, which is what he did. Inasmuch as petitioner failed to file that return for the years 1983 through 1989, the three-year period of limitation on assessment did not apply.

D. The Division maintains that, for the years 1988 and 1989, the limitation on assessment was waived by the filing of false returns. Tax Law § 1083(c)(1)(B) provides an exception to the statute of limitations if "a false or fraudulent return is

filed with intent to evade tax" (emphasis added). This ground for sustaining the assessments was raised for the first time at the hearing. A fraud penalty was not assessed against petitioner, and the Division has not asked that such a penalty be imposed. The Division's request to amend its answer in order to raise this issue was granted; however, the Division was advised that having raised the issue for the first time during the course of the hearing, it carried the burden of proof to establish fraudulent intent.

Petitioner concedes that the forms it filed for 1987 and 1988 were incorrect. However, there is no evidence in the record to support a finding that the returns were filed with the intention of evading the MTA Surcharge. Accordingly, the fraud exception to the three-year statute of limitations is not applicable here.

E. The petition of Kaiser Aerospace & Electronics Corporation is denied, and the Notice of Deficiency dated June 29, 1992 is sustained.

DATED: Troy, New York
November 9, 1995

/s/ Jean Corigliano

ADMINISTRATIVE LAW JUDGE