

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**VAL-PAK OF WESTERN NEW YORK, INC.** : DETERMINATION  
 : 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 a petition 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.

The Division of Taxation, appearing by Barbara G. Billet, Esq. (Cynthia E. McDonough, Esq., of counsel), brought a motion to dismiss the petition on the basis that the Division of Tax Appeals lacked jurisdiction of the subject matter of the petition. Petitioner, appearing by Hodgson Russ, LLP (Paul R. Comeau, Esq., of counsel), opposed the motion. By an Order dated August 15, 2002, the motion to dismiss was denied and the matter was to be scheduled for a hearing. The issues to be addressed at hearing were the timeliness of a claim for refund filed by petitioner and, if timely, the substantive merits of such claim.

On August 29, 2002, the parties waived a hearing on the issue of the timeliness of the claim for refund, and agreed to submit the matter for determination with respect to such timeliness issue (only) based upon documents and briefs to be submitted by January 13, 2003, which date commenced the six-month period for issuance of this determination. The parties

further agreed that if the timeliness issue is resolved in petitioner's favor, a hearing will then be scheduled with respect to the substantive merits of the claim for refund. After due consideration of the documents and arguments submitted in this matter, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

***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***<sup>1</sup>

1. 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-01693277) dated September 13, 1999. This notice assessed tax due in the amount of \$88,515.65, plus interest.

2. 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.

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<sup>1</sup> The Findings of Fact herein include those facts set forth in the August 15, 2002 Order issued in this matter.

3. 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.

4. 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.

5. 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.

6. 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.

7. 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.

***SUMMARY OF THE PARTIES' POSITIONS***

8. The Division asserts that petitioner's claim for refund was not timely filed and that there is thus no jurisdiction to address the merits of such claim. Specifically, the Division maintains that petitioner was not a registered vendor required to file sales and use tax returns and pay tax it collected on a recurring periodic basis, to wit, on a monthly, quarterly or annual basis, per Tax Law §§ 1131(1), 1136(a) and (b). Rather, the Division points out, petitioner's filing status was that of a customer. As such, petitioner was obligated to report and pay tax on its purchases subject to tax, and to do so via the filing of a return within 20 days after such purchases, per Tax Law § 1133(c) and 20 NYCRR 531.6(a) and (b). The Division goes on to assert that for the sales tax quarterly period ended November 30, 1994 (the period for which petitioner is seeking a refund of tax it paid), petitioner was obligated to file the requisite return and pay tax by December 20, 1994 (i.e., 20 days after November 30, 1994). In turn, the Division posits that in order to be considered timely, petitioner's refund claim had to have been filed within three years after December 20, 1994, per Tax Law § 1139(a)(ii), and that since such claim was not filed until May 1, 2001 it was clearly untimely and was properly rejected.

9. Petitioner maintains, in contrast, that the Division misplaces reliance on 20 NYCRR 531.6(a) and (b) for the proposition that a customer such as petitioner, who may have made purchases subject to tax, must file a return reporting such purchases and pay tax within 20 days thereof. In this regard, petitioner notes that the Division relies for support on Tax Law § 1133(c), which provides 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 time as returns are required to be filed by persons required to collect the tax.

10. Petitioner maintains that the foregoing provision only entitles the Commissioner to promulgate regulations which require customers, such as petitioner, to file returns and pay tax on their purchases, at the same times as returns are to be filed and tax remitted by vendors (i.e., “persons required to collect the tax”), to wit, either monthly, quarterly or annually. Hence, petitioner asserts that the 20-day filing and payment requirement imposed by the subject regulation at 20 NYCRR 531.6(a) and (b) is arbitrary and beyond the scope of the statute, and that in the absence of any applicable law or valid regulation, no tax is due until assessed. Petitioner maintains, in turn, that the period of limitations within which a refund claim may be filed does not expire until three years after either the date on which tax is assessed or the date on which tax is paid. In this case, petitioner posits that since the tax was assessed 90 days after the November 24, 2000 date of the conciliation order (when the right to challenge such order expired for lack of the filing of a petition), and since the tax was paid on April 30, 2001, the refund claim in question, filed on May 1, 2001, falls within three years of either of such dates and is thus clearly timely.

11. The Division argues that even if the starting date for the period of limitations on a refund claim is properly measured by the latest filing date for a registered vendor, i.e., an annual filer, petitioner's claim would still not be timely. That is, for an annual filer the latest possible date that tax would have been due for purchases relative to the sales tax quarterly period ended November 20, 1994, would have been June 20, 1995 (Tax Law § 1136[b]; 20 NYCRR 533.3[d][3]). The Division notes that petitioner's claim, filed on May 1, 2001, falls well beyond the June 20, 1998 limitations date which would be imposed pursuant to Tax Law § 1139(a)(ii), and thus concludes that under no scenario (including the annual filer "worst case" example) would petitioner's claim be timely.

#### ***CONCLUSIONS OF LAW***

A. There is no dispute that petitioner initially challenged the September 13, 1999 Notice of Determination, which assessed tax for the period March 1, 1994 through February 28, 1997, by filing a request for a conciliation conference with BCMS. Further, there is no dispute that a conciliation conference was held on September 5, 2000. The record herein includes a copy of a conciliation order dated November 24, 2000, which order reduces the amount of tax on the notice from \$88,515.65 to \$84,327.06 and sustains the Notice of Determination as so reduced. In turn, however, the record includes no evidence of any further protest against such notice (i.e., via the filing of a petition for a hearing with the Division of Tax Appeals), and petitioner, in fact, makes no claim to have filed any further protest against the notice as sustained by the conciliation order.

B. Without any evidence of a protest having been filed and, more importantly, with no claim by petitioner that it filed such a protest at any time up to the present, it follows that there is no timeliness issue to be addressed with respect to such conciliation order, nor is there any

burden upon the Division to establish the date and fact of issuance of such order. Simply put, the timeliness of a protest is not an issue where, as here, there is no claim that a protest was made. Instead, the issue at hand involves only the question of whether petitioner timely filed a claim for refund of the tax it paid on April 30, 2001, totaling \$6,552.95, with respect to the sales tax quarterly period ended November 30, 1994. This issue of the timeliness of the refund claim comes on for resolution herein as the result of the Division's denial of such claim as untimely, followed by petitioner's filing of a petition to contest such denial, and the August 15, 2002 order which concluded that petitioner, in affirmatively exhausting its administrative remedies, was entitled to be heard on the issue of the timeliness of its refund claim rather than to have the same summarily rejected.

C. The August 15, 2002 order issued in this matter held that since the record did not establish petitioner's filing status, it was not possible to establish the date from which the statute of limitations on petitioner's refund claim commenced to run and thus, as a consequence, to establish whether or not such claim was timely filed. Therefore, in order to resolve the issue of the timeliness of such claim, it is necessary to discern petitioner's filing status, from which the applicable period of limitations and, ultimately, the timeliness of the refund claim may be determined. Neither party disputes, and indeed it is axiomatic, that a timely refund claim is a jurisdictional predicate to obtaining the relief (refund) sought.

D. With respect to the issue of petitioner's filing status for sales and use tax purposes, there is no dispute that petitioner was not a registered vendor for sales and use tax purposes (*see* Tax Law § 1101[b][8]; § 1134). Accordingly, petitioner was not obligated to file returns and remit tax on an ongoing periodic (i.e., monthly, quarterly or annual) basis as is the case with a registered vendor (Tax Law § 1136[a],[b]). Rather, petitioner, as a customer who may have

made purchases subject to tax without paying the tax to a vendor, was obligated to file returns and pay tax on its purchases subject to tax directly to the Commissioner of Taxation and Finance (Tax Law § 1133(c)). Contrary to petitioner's arguments, the time period for filing such returns and paying tax (i.e., petitioner's "filing status") was properly set by the Commissioner of Taxation, per 20 NYCRR 531.6(a) and (b), at 20 days after such purchases.

E. Petitioner contends that the regulation at 20 NYCRR 531.6(a) and (b) is invalid and in excess of the grant of authority afforded by Tax Law § 1133(c), since such regulation provides for an allegedly arbitrary 20-day filing time which differs from the monthly, quarterly and annual filing times set for vendors per Tax Law § 1136(a) and (b). This contention is rejected. Specifically, petitioner's position overlooks Tax Law § 1136(c), which provides a broad grant of authority with regard to filing dates, as follows:

[t]he [Commissioner of Taxation and Finance] may permit or require returns to be made covering other periods and upon such dates as [he] may specify. If the [Commissioner of Taxation and Finance] deems it necessary in order to insure the payment of the taxes imposed by this article, [he] may require returns to be made for shorter periods than those prescribed pursuant to the foregoing subdivisions of this section, and upon such dates as [he] may specify.

Given the authority granted under Tax Law § 1136(c), it is clear that the regulation at 20 NYCRR 531.6(a) and (b), and its 20-day filing and payment requirement for customers (such as petitioner) who may make taxable purchases without the payment of tax, is valid. That is, Tax Law § 1136(c) allows the Commissioner to impose a 20-day filing and payment requirement on vendors, and Tax Law § 1133(c) allows the Commissioner to provide by regulation that customers shall file returns and pay tax at the same times as returns and payment *may* be required of vendors. It follows, therefore, that the Commissioner has the same authority to impose the subject 20-day requirement upon a customer, such as petitioner, as upon a vendor.

F. Under the facts of this case, petitioner has specified that the payment of tax for which refund is sought pertains to the sales tax quarterly period ended November 30, 1994. Hence, it must be presumed that the allegedly taxable purchases giving rise to tax were made during such quarterly period, and thus the 20-day filing and payment requirement under 20 NYCRR 531.6(b) is properly measured therefrom. Accordingly, the filing and payment date for such period would be December 20, 1994 (Tax Law § 1137[a]), and the tax remitted by petitioner on April 30, 2001 was properly payable on such December 20, 1994 date. In turn, it is from such December 20, 1994 date that the three-year period of limitations on filing a claim for refund under Tax Law § 1139(a)(ii) is measured. Petitioner's refund claim, filed May 1, 2001, is therefore clearly untimely and was thus properly rejected by the Division.

G. The foregoing conclusion is also consistent with the grant of authority set forth at Tax Law § 1133(b), which provides as follows:

[W]here any customer has failed to pay a tax imposed by this article to the person required to collect the same, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the customer directly to the [Commissioner of Taxation and Finance] and it shall be the duty of the customer to file a return with the [Commissioner of Taxation and Finance] and to pay the tax to [him] within twenty days of the date the tax was required to be paid.

Under this provision, the customer (such as petitioner) is required to file a return and pay over, to the Commissioner, the tax due on its purchases within 20 days after the such tax was due for payment by the vendor. That is, since the tax initially was to be paid by the customer to the person required to collect the tax (i.e., the vendor), then such tax would be due for payment to the Commissioner according to the vendor's filing requirement (i.e., monthly, quarterly or annually). Assuming a vendor was an annual filer, tax due on purchases for the sales tax

quarterly period ended November 30, 1994 would be due at the latest 20 days after the close of an annual filer's period, to wit, by June 20, 1995 (*see* Tax Law § 1136[b]).<sup>2</sup>

H. As noted in Conclusions of Law "A" and "B", the petition herein challenges the denial of petitioner's refund application and is not (directly) a challenge to the Notice of Determination. With no evidence or claim by petitioner that a protest was filed against the notice as sustained by the conciliation order, the notice simply represents a fixed and outstanding assessment subject to collection, and the Division properly applied petitioner's payment against such liability. However, the Division has stated that petitioner's payment and refund claim apparently represents an attempt to challenge a fixed and final assessment by making a payment and thereafter filing a refund claim within two years after such payment (in this case, one day after such payment). This contention will be addressed below.

I. Under Tax Law § 1138 and Tax Law former § 1139(c), a tax determined pursuant to Tax Law § 1138 (i.e., assessed via a Notice of Determination) became a fixed and final assessment not subject to review, and hence not subject to refund, where "all opportunities for administrative and judicial review . . . have been exhausted with respect to such determination." That is, the failure to file a timely protest against a tax determined pursuant to Tax Law § 1138 foreclosed the opportunity to challenge such tax, whether by payment and claim for refund thereof, or otherwise. In contrast, Tax Law § 1139(c), as currently in effect, allows for a credit or refund of an overpayment of sales tax where a claim is made therefor within three years from

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<sup>2</sup> Returns are to be filed and tax paid by annual filers within 20 days after the last day of May (that is, by June 20) of each year, per Tax Law § 1136(b). This circumstance is the latest date for filing and payment and is described by the Division in its brief as the "worst case" scenario. In contrast, it might be described from a taxpayer's perspective as the "best case" scenario. Nonetheless, under the facts of this case, as described, petitioner's refund claim, dated May 1, 2001, falls well beyond three years after the June 20, 1995 latest filing and payment date for an annual filer with respect to taxes pertaining to the sales tax quarterly period ended November 30, 1994.

the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within two years from the time the tax was paid. This provision, which essentially mirrors the personal income tax refund provisions of Tax Law Article 22 (*see* Tax Law § 687[a]), was enacted by amendment and was made applicable to tax years beginning on and after January 1, 1997 (*see*, L 1996, ch 267, eff July 2, 1996).<sup>3</sup> Under current law, then, petitioner could pay its outstanding assessment and file a claim for refund of such payment (at least insofar as the payment pertained to tax periods starting on or after January 1, 1997) within two years thereafter. In turn, a denial of such claim could be protested and heard on the merits. Unfortunately, such “pay and file” provision is not available in this instance, since the November 30, 1994 sales tax quarterly period at issue was prior to January 1, 1997. For such periods prior to January 1, 1997, a claim for refund of tax had to have been filed within three years from the date the tax was payable, per Tax Law § 1139(a)(ii).

J. The petition of Val-Pak of Western New York, Inc. is hereby denied and the Division’s October 22, 2001 denial of petitioner’s claim for refund is sustained.

DATED: Troy, New York  
June 26, 2003

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE

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<sup>3</sup> Under such provisions, the failure to file either a timely request for a conciliation conference or a petition for a hearing to challenge a tax assessment by the Division does not leave a taxpayer without recourse. Instead, a taxpayer may pay the tax, thereafter file a claim for refund within two years after such payment and, upon denial of such claim, file a petition for a hearing (*see e.g., Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).