STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
VAL-PAK OF WESTERN NEW YORK, INC.	:	ORDER 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.	:	

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 on the grounds that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition. Together with its notice of motion, the Division of Taxation submitted an affirmation in support of its motion, with attachments. Petitioner, appearing by Paul R. Comeau, Esq., submitted an affirmation and an amended affirmation in opposition to the Division of Taxation's motion, with attachments. Petitioner's response was received by the Division of Tax Appeals on June 19, 2002, which date began the 90-day period for the issuance of this order.

Upon review of the pleadings, the affirmation and other documents submitted in support of the Division of Taxation's motion, and the pleadings, affirmation and other documents submitted

by petitioner in opposition to the motion, Daniel J. Ranalli, Administrative Law Judge, renders the following order.

ISSUES

I. Whether the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition.

II. Whether petitioner timely filed its refund claim within the meaning and intent of Tax Law § 1139(a)(ii).

FINDINGS OF FACT

1. As the result of a sales and use tax field audit, the Division of Taxation ("Division") issued to petitioner, Val-Pak of Western New York, Inc., a Notice of Determination dated September 13, 1999 for the period March 1, 1994 through February 28, 1997. The notice alleged tax due of $88,515.65, plus interest.

2. In response to petitioner's request, a conciliation conference was held by the Bureau of Conciliation and Mediation Services ("BCMS") on September 5, 2000. Following the conference, BCMS issued a conciliation order, dated November 24, 2000, which reduced the sales and use tax due to $84,327.06, plus interest.

3. On April 30, 2001, petitioner forwarded a check in the amount of $6,552.95 to the Division in partial payment of the assessment. According to the letter of petitioner's representative which accompanied the check, the payment was to be applied to the quarter ended November 30, 1994.

4. By letter dated May 1, 2001, petitioner's representative filed with the Division a sales tax refund claim for the same amount of the payment, $6,552.95, for the quarter 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 timely protest the BCMS Conciliation Order. The 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 with the Division of Tax Appeals a petition for hearing in the amount of the refund claim. The Division of Tax Appeals acknowledged receipt of the petition by letter dated November 6, 2001, and the Division filed its answer to the petition for hearing with the Division of Tax Appeals on January 10, 2002.

7. The petition filed by petitioner for hearing before the Division of Tax Appeals alleges that the Commissioner of Taxation erroneously asserted (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 was 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.

CONCLUSIONS OF LAW

A. Tax Law former § 1139(c), as effective for the period at issue, provided that:

> A person shall not be entitled to a refund or credit under this section of a tax, interest or penalty which had been determined to be due pursuant to the provisions of section eleven hundred thirty-eight where all opportunities for administrative and judicial review as provided in article forty of this chapter have been exhausted with respect to such determination. . . . No refund or credit shall be made of a tax, interest or penalty paid after a determination by the commissioner made pursuant to section eleven hundred thirty-eight unless it be found that such determination was erroneous, illegal or unconstitutional or otherwise improper, by the division of tax appeals pursuant to article forty of this

> chapter or by the commissioner of taxation and finance of his own motion, or in a proceeding for judicial review provided for in section two thousand sixteen of this chapter, in which event a refund or credit shall be made of the tax, interest or penalty found to have been overpaid.

Tax Law former § 1139(c) came into existence as a result of amendments contained in section 11 of chapter 401 of the 1987 Session Laws.

B. Prior to the 1987 amendments, Tax Law § 1139(c) provided, in relevant part, that:

> [a] person shall not be entitled to a refund or credit under this section of a tax, interest or penalty which had been determined to be due pursuant to the provisions of section eleven hundred thirty-eight where he has had a hearing or an opportunity for a hearing, as provided in said section, or has failed to avail himself of the remedies therein provided.

The 1987 amendments deleted the language which denied a refund claim where the taxpayer had "an opportunity for a hearing" and replaced it with language which indicated that a refund would be denied unless the Division of Tax Appeals had decided that such determination of tax due was erroneous, illegal, unconstitutional or otherwise improper.

C. The Division of Taxation contends that as petitioner failed to avail itself of further administrative proceedings before the Division of Tax Appeals following the conciliation conference and the issuance of the conciliation order, the revised assessment became final and binding on petitioner. Prior to the 1987 amendments, when Tax Law § 1139(c) provided that no refund would be allowed if the taxpayer had an opportunity for a hearing, the position of the Division would be correct, as petitioner had the opportunity to file a petition with the Division of Tax Appeals following the issuance of the conciliation order but failed to do so. However, the 1987 amendments clearly indicate that the Legislature intended to effectuate a material change in the statute by removing the language referring to an opportunity for a hearing and replacing it with language that requires that all opportunities for administrative and judicial review be exhausted (***see***, McKinney's Cons Laws of NY, Book 1, Statutes § 193), a change in the statute

which requires an affirmative exhaustion of available remedies rather than a failure to take advantage of them. Therefore, petitioner is entitled to a hearing before the Division of Tax Appeals.

D. The Division further contends that petitioner's refund claim is improper because it was filed beyond the applicable three-year statute of limitations provided by Tax Law § 1139(c)(ii). This provision provides that "in the case of a tax, penalty or interest paid by the applicant to the tax commission, [a refund may be made] within three years after the date when such amount was payable." The Division contends that the tax at issue herein was payable December 20, 1994 (***see,*** Tax Law §§ 1136 and 1137), and that the three-year statute of limitations period for applying the refund in question expired December 20, 1997. According to the Division, since the refund claim was filed by petitioner on May 1, 2001, the refund was untimely since the statute of limitations had expired under Tax Law § 1139(a)(ii).

There is nothing in the record to establish the filing status of petitioner, and without such evidence, the Division has failed to establish a date from which the statute of limitations began to run. Therefore, the Division has failed to prove that petitioner's application for refund was not timely filed (***Matter of Phone Programs, Inc.,*** Tax Appeals Tribunal, April 6, 2000).

E. Accordingly, the Division of Taxation's motion to dismiss is denied, and it is ordered that this matter proceed to hearing.

DATED: Troy, New York
August 15, 2002

/s/ Daniel J. Ranalli
ADMINISTRATIVE LAW JUDGE