STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DEAN WITTER REYNOLDS, INC.	:	DETERMINATION DTA NO. 819917
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, 1991 through November 30, 1998.	:	

Petitioner, Dean Witter Reynolds, Inc., c/o Morgan Stanley, 1221 Avenue of the Americas, 30th Floor, New York, New York 10020, 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, 1991 through November 30, 1998.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on December 2, 2004 at 10:30 A.M., with all briefs to be submitted by May 16, 2005, which date began the six-month period for the issuance of this determination. Petitioner appeared by Lawrence R. Cole, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Lori P. Antolick, Esq., of counsel).

ISSUE

Whether petitioner's claim for refund was timely filed pursuant to Tax Law § 1139(c) and 20 NYCRR 534.2(b)(1)(iii).

FINDINGS OF FACT

1. On January 31, 2002, petitioner, Dean Witter Reynolds, Inc., filed with the Division of Taxation ("Division") an Application for Credit or Refund of Sales and Use Tax (Form AU-11) dated January 29, 2002. Petitioner's application sought a refund of $654,671.00 on the overpayment of sales tax on numerous purchases of fixed assets, capital improvements and expenses during the period September 1, 1991 through November 30, 1998. The application lists several hundred purchases categorized by vendor and sets forth the month and amount of the purchase.

2. By letter dated May 31, 2002 the Division denied petitioner's claim as untimely pursuant to section 534.2(b)(1)(iii) of the Division's regulations (20 NYCRR 534.2[b][1][iii]).

3. Prior to petitioner's filing of its application for refund, the Division conducted a sales and use tax audit of petitioner (audit number X286370867). The period under review for the audit was, initially, September 1, 1991 through November 30, 1993. This period was later extended to November 30, 1998. The subject of the Division's review on audit was petitioner's asset and expense purchases. Such purchases were examined by means of statistical sampling for the original audit period and the results of such examination were then projected over the extended period. Petitioner consented to the use of such audit methods. The audit resulted in a finding of tax deficiencies for certain sales tax quarters of the audit period and overpayments of tax for certain other quarters of the audit period.[1] The deficiency quarters totaled $128,968.61 and the overpayment quarters totaled $244,742.56. The audit thus resulted in a finding of a net

[1] Specifically, the audit determined deficiencies in the sales tax quarters ended 11/30/91, 2/29/92, 5/31/93, 8/31/93, 11/30/93, and 2/28/98 through 11/30/98. The audit determined overpayments in the sales tax quarters ended 5/31/92 through 2/28/93 and 2/28/94 through 11/30/97.

overpayment of tax by petitioner of $115,547.94 on its asset and expense purchases during the period September 1, 1991 through November 30, 1998.

4. During the course of the audit, petitioner filed several applications for refund of sales and use tax. Such claims were reviewed by the Division's auditors and the Division's determination with respect to such claims was included with the audit results. Following its review of these claims, the Division granted a total of $2,595,872.38 in sales and use tax refunds to petitioner.

5. In May 1998, during the audit, petitioner made a payment of $200,000.00 as a prepayment for any potential sales tax liability arising from the audit. The Division did not, at any time, apply such prepayment to any of the sales tax quarters for which tax deficiencies were determined.

6. On November 26, 1999, the Division issued to petitioner a Statement of Proposed Audit Change for Sales and Use Tax ("the consent") which set forth in detail the audit results noted in Finding of Fact "3." The consent also referenced the refunds noted above in Finding of Fact "4" and the $200,000.00 prepayment as an aggregate "refund or credit" of $2,795,872.40. Additionally, the consent set forth the interest due petitioner (computed through December 27, 1999) and indicated that a refund to petitioner totaling $4,311,882.10 would be submitted for processing.

7. Petitioner agreed to the audit results as set forth on the consent by signature of Frank G. Skubic, first vice president, dated December 2, 1999. By the signature of its corporate officer on the consent, petitioner agreed, in relevant part, as follows:

> I agree to the assessment of tax and penalties and accept any overassessment (decrease in tax and penalties), plus any interest provided by law as determined on this audit. I may consider these findings final unless I hear from the Department to the contrary within 60 days after the receipt of this signed consent.

8. The Division received petitioner's consent on December 6, 1999.

9. In January 2000, the Division's auditors advised petitioner that it would be necessary for petitioner to file additional applications for refund with respect to the $200,00.00 prepayment and the $115,547.94 net overpayment as determined on audit. On January 11, 2000, the auditors received such applications from petitioner and transmitted them for processing.

10. The Division issued a check to petitioner dated March 1, 2000 in the amount of $4,130,129.37. By this check the Division refunded the $115,547.94 net overpayment and the $2,595,872.38 in refunds approved on audit plus interest computed through January 31, 2000. The March 1, 2000 check did not include a refund of petitioner's $200,000.00 prepayment.

11. In April 2000 the Division issued a check to petitioner in the amount of $228,231.31 refunding the prepayment, plus interest of $28,231.31 accrued through April 10, 2000. This check was cashed on May 3, 2000.

12. Petitioner signed consents extending the period of limitations for assessment of sales and use taxes (Form AU-2.10) during the course of the audit. The last such consent signed by petitioner is dated November 19, 1999 and extends the limitations period for assessment for the period September 1, 1991 through February 28, 1997 to March 20, 2000.

13. The Division concedes that petitioner overpaid sales tax in the amount of $654,671.00 as claimed on the subject application for refund.

14. A written summary of the Division's audit which was received in evidence at the hearing indicates that the subject refund claim, along with another refund claim (which was granted in part by the Division), was handled administratively by the Division as audit number X151177846. The summary also indicates that such other refund claim was later processed under audit number X473832223.

SUMMARY OF THE PARTIES' POSITIONS

15. Both parties agree that the crediting of an overpayment of sales tax for one quarter against a sales tax deficiency for another quarter as occurred in the instant matter constitutes a payment of tax. The parties further agree that the date of such payment commenced the period of limitations for refund herein pursuant to Tax Law § 1139(c) and 20 NYCRR 534.2(b)(1)(iii). The parties disagree, however, as to the date of such payment. The Division asserts that payment occurred upon petitioner's execution of the consent on December 2, 1999. The Division thus contends that the subject refund application, filed on January 31, 2002, was filed more than two years from the date of payment and was therefore untimely pursuant to Tax Law § 1139. Petitioner contends that payment occurred on March 1, 2000, the date the Division issued the net refund check to petitioner. According to petitioner, then, the refund claim was timely.

16. Additionally (and apparently in the alternative), petitioner contends that the consent was "null and void." Accordingly, petitioner asserts, since no revised consent was issued, "the audit is still open" and the refund claim must be deemed timely filed. Petitioner offers several rationales in support of this proposition. First, petitioner asserts that the Division failed to properly apply the $200,000.00 prepayment and that such misapplication resulted in higher interest charges to petitioner. Petitioner also contends that the Division's request for an additional refund claim with respect to the $200,000.00 prepayment (***see***, Finding of Fact "9") and the removal of the prepayment from the March 1, 2000 check (***see***, Finding of Fact "10") necessitated the issuance of a revised consent form.

17. Petitioner further claims that the Division failed to establish that it had, in fact, issued a check in repayment of the $200,000.00 prepayment and that, accordingly, the audit must be considered open and the consent invalid.

18. Petitioner also asserts that the Division denied it due process by not issuing a new consent when it requested a new refund claim with respect to the $200,000.00 prepayment and removed the prepayment from the March 1, 2000 check.

19. Additionally, petitioner contends that since the Division's audit summary shows another audit related to the subject refund, the statute of limitations must still be open because petitioner never received any closing document for this audit.

20. Finally, petitioner claims that the Division's auditor caused unnecessary representation expense and seeks appropriate remedies for such claimed unnecessary expense.

CONCLUSIONS OF LAW

A. Tax Law § 1139(a) provides in relevant part:

> In the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission . . . or (ii) in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article . . . .

B. For the period at issue prior to January 1, 1997, Tax Law § 1139(former [c]) provided:

> [A] person filing with the commissioner of taxation and finance a signed statement in writing, as provided in subdivision (c) of section eleven hundred thirty-eight, before a determination assessing tax pursuant to subdivision (a) of section eleven hundred thirty-eight is issued, shall, nevertheless, be entitled to apply for a refund or credit pursuant to subdivisions (a) and (b) of this section, as long as such application is made within the time limitation set forth in such subdivision (a) or within two years of the date of payment of the amount assessed in accordance with the consent filed, whichever is later, but such application shall be limited to the amount of such payment.

C. For taxable years commencing on or after January 1, 1997, pursuant to Laws of 1996 (ch 267, § 2), Tax Law § 1139(c) deleted the language referenced above and added the following relevant language to subsection (c):

> Claim for credit or refund of an overpayment of sales tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later . . . . If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return. If the claim is not filed within the three year period, but is filed within the two year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim.

D. Throughout the period at issue, 20 NYCRR 534.2(b)(1) provided, in relevant part, the following time limitations for the filing of sales and use tax refunds:

> (i) where the tax was paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable to the Department of Taxation and Finance by the person who collected the tax from the applicant, as provided in section 1137 of the Tax Law; or
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> (ii) where the tax, penalty or interest was paid by the applicant to the Department of Taxation and Finance, within three years after the date the tax, interest or penalty was payable directly to the Department of Taxation and Finance by the applicant as provided in sections 1137 and 1145 of the Tax Law;
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> (iii) where the tax was paid by the applicant pursuant to a signed statement of consent to the fixing of tax as provided in subdivision (c) of section 1138 of the Tax Law, (*a*) within the time limitations stated in subparagraphs (i) and (ii) of this paragraph, or (*b*) within two years of the date of payment of the amount assessed in accordance with the consent filed whichever is later. However, the application described in clause (*b*) of this subparagraph is limited to the amount of such payment . . . .

E. As both parties acknowledge, the applicable period of limitations in this matter is the two-year period set forth in former and current subdivision (c) of Tax Law § 1139 and section 534.2(b)(1)(iii) of the Division's regulations.[2] These provisions provide for a two-year period

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[2] It is clear that none of the other limitations period for refunds provided for in the Tax Law and regulations are applicable herein. As to the three-year limitations periods, there is no dispute in the instant matter that the refund claim was filed more than three years after petitioner paid the tax at issue to vendors and that the claim was filed more than three years after the date such tax was payable by such vendors to the Division. The claim was thus untimely under Tax Law § 1139(a) and section 534.2(b)(1)(i) and (ii) of the Division's regulations. The subject refund claim was also untimely pursuant to Tax Law §1147(c) and section 534.2(b)(2) of the regulations, which provide that where a taxpayer consents in writing to an extension of the limitations period for assessment, the

following payment of the tax in which to file a refund claim. As the instant matter involves an audit resulting in a net refund, the controversy herein centers on what constitutes a "payment" pursuant to the above-cited provisions and when such "payment" occurred, thereby triggering the two-year period of limitations.

F. The term "payment" is not defined in the relevant statute or the regulations. Section 1139(c) of the Tax Law, however, is modeled after section 6511(a) of the Internal Revenue Code.[3] In other instances where a provision of the Tax Law has been patterned after an Internal Revenue Code provision, the Tax Appeals Tribunal has looked to the Federal courts' interpretation of the parallel IRC provision for guidance (***see***, ***e.g.***, ***Matter of Dattilo***, Tax Appeals, May 11, 1995; ***Matter of Sipam Corporation***, Tax Appeals Tribunal, March 10, 1988).

G. The Federal courts have held that the crediting of an overpayment of one year against a deficiency of another year constitutes a "payment" for purposes of IRC § 6511(a) (***see***, ***Kingston Products Corp. v. United States***, 368 F2d 281, 287). Applying such reasoning to the instant matter, it follows that the crediting of an overpayment of sales and use tax for one sales tax quarter against a sales tax deficiency for another quarter constitutes a payment for purposes of Tax Law § 1139(c) and section 534.2(b)(iii) of the Division's regulations. Accordingly, a payment was made in accordance with the subject consent with respect to those periods for

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limitations period for the filing of a refund claim remains open until six months after the last day of the extended period, notwithstanding that other time limitations may have expired. Here, the last consent executed by petitioner extended the limitations period for assessment of tax for the period September 1, 1991 through February 28, 1997 to March 20, 2000. The limitations period for filing a refund claim for that period thus expired September 20, 2000 under Tax Law §1147(c) and section 534.2(b)(2) of the regulations.

[3] IRC § 6511(a) provides, in relevant part:

> Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within two years from the time the tax was paid.

which the audit determined a deficiency on petitioner's asset and expense purchases. As noted in Footnote "1," such periods are the sales tax quarters ended 11/30/91, 2/29/92, 5/31/93, 8/31/93, 11/30/93, and 2/28/98 through 11/30/98.

H. The Federal courts have also held that "a remittance which does not satisfy an asserted tax liability should not be treated as the 'payment' of a tax" (***Lewyt Corp. v. Commr.***, 215 F2d 518, 522, ***affd in part and revd in part on other grounds*** 349 US 237). That is, where a taxpayer incurs no tax deficiency for a given year, it has no liability to be discharged, and the application of any credit to that year does not constitute a payment of tax for purposes of IRC § 6511(a) (***see***, ***Consolidated Edison v. United States***, 941 F Supp 398).

Again applying the Federal reasoning to the instant matter, it follows that there was no "payment" for purposes of Tax Law § 1139(c) and section 534.2(b)(1)(iii) of the Division's regulations for those sales tax quarters for which an overpayment was determined on the audit of petitioner's asset and expense purchases. Absent such a payment, the two-year period of limitations for refund under Tax Law § 1139(c) and 20 NYCRR 534.2(b)(1)(iii) is inapplicable with respect to claims for refund of tax paid during such quarters. Accordingly, the subject claim must be considered untimely with respect to claims for refund of tax paid during all sales tax quarters for which the audit determined an overpayment on petitioner's asset and expense purchases. As noted in Footnote "1," such periods are the sales tax quarters ended 5/31/92 through 2/28/93 and 2/28/94 through 11/30/97.

I. Having concluded that a payment occurred with respect to those quarters for which the audit found a deficiency on petitioner's asset and expense purchases, it next must be determined when such payment occurred in order to resolve whether the subject refund claim is timely with respect to such periods. As noted previously, the Division asserts that payment occurred upon

petitioner's execution of the consent on December 2, 1999, while petitioner contends that payment occurred as of March 1, 2000.

Logically, the crediting of overpayment quarters against deficiency quarters could not have occurred until petitioner's tax liability was fixed and final. In order to fix its tax liability, petitioner signed the consent, dated December 2, 1999, pursuant to Tax Law § 1138(c) and 20 NYCRR 535.2(c)(2), which permit a taxpayer to have its tax liability finally and irrevocably fixed upon the filing of a signed consent with the Division. As the statute expressly refers to the "filing" of such a signed consent, it is clear that the execution of the consent, by itself, i.e., without filing, is insufficient to fix tax liability. The Division's assertion that payment for purposes of the relevant statute and regulations occurred upon petitioner's execution of the consent is thus rejected.

The consent expressly allowed the Division 60 days after its receipt thereof to reject the proposed terms of settlement. By its own terms, then, the consent was not binding upon the Division and petitioner's liability was not fixed until the expiration of such 60-day period (***cf.***, ***Adirondack Steel Casting v. State Tax Commn.***, 121 AD2d 834, 504 NYS2d 265). Accordingly, payment for purposes of triggering the two-year period of limitations for the filing of a refund claim could not logically commence before the expiration of this 60-day period. Since the consent was received by the Division on December 6, 1999, the 60-day period ended on February 4, 2000. The subject refund claim, filed on January 31, 2002, was thus filed within two years of payment for purposes of Tax Law § 1139(c) and section 534.2(b)(1)(iii) of the Division's regulations.[4]

[4] This determination concludes that the earliest date payment could have occurred was the date petitioner's liability became fixed, i.e., February 4, 2000. Since the refund claim was filed within two years of this date, it is not necessary to determine whether such payment occurred on February 4, 2000 or on the date the refund check was

J. Pursuant to the foregoing discussion, petitioner's refund application is denied to the extent that such application seeks refund of tax paid on purchases made during those quarters for which the audit determined an overpayment of tax on asset and expense purchases (***see***, Conclusion of Law "H"). Petitioner's application is granted to the extent that such application seeks refund of tax paid on purchases made during those quarters for which the audit determined a deficiency on asset and expense purchases (***see***, Conclusions of Law "G" and "I"). It should be noted, however, that the amount of refund payable with respect to each of such deficiency quarters is limited to the amount of the payment, i.e., the amount of the tax deficiency, attributable to each such quarter (***see***, Tax Law § 1139[c]; 20 NYCRR 534.2[b][1][iii]).

K. Petitioner's argument set forth in Paragraph "16" that the consent was "null and void" is rejected. Petitioner's contentions regarding the proper application of the $200,000.00 prepayment and the proper calculation of interest on the deficiency quarters contest the proper amount of interest payable by petitioner and therefore the net amount due from petitioner, but do not in any way challenge petitioner's ultimate sales and use tax liability as listed on the consent. Any improprieties in the application of payments thus do not invalidate the consent. Petitioner's objections to the Division's administrative handling of the matter, such as requesting a refund claim for the $200,000.00 prepayment and separating the refund of the prepayment from the net refund check, relate to neither petitioner's tax liability nor even to the net amount due and thus have no logical relation to the validity of the consent.

Furthermore, with respect to the portion of the period at issue commencing January 1, 1997, amendments to Tax Law § 1139(c) deleted references to a consent in Tax Law

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issued, March 1, 2000.

§ 1139 (former [c]) (***see***, Conclusions of Law "B" and "C"). The validity of the consent would thus appear immaterial for the January 1, 1997 through November 30, 1998 period.

L. As to petitioner's contention that "the audit is still open," it is noted that the period of limitations for assessment for the audit period has long since expired (***see***, § Tax Law 1147[b]; Finding of Fact "12"). Thus, even if the consent were "null and void," the audit is no longer open. The expiration of the limitations period for assessment also undermines petitioner's argument noted in Paragraph "19."

M. Petitioner's contention noted in Paragraph "17" is refuted by Finding of Fact "11." The evidence in the record clearly establishes that the check refunding the prepayment was issued and cashed. However, even if the record did not establish that the Division had refunded the prepayment, there is no dispute that the Division conceded that a refund of the prepayment was payable. Accordingly, a failure to make such a refund is a payment issue and would not invalidate the consent.

N. Petitioner did not elaborate on its claim that the Division denied it due process by not issuing a new consent when it requested a new refund claim with respect to the $200,000.00 prepayment and removed the prepayment from the March 1, 2000 check (***see***, Paragraph "18"). Considering that such action by the Division caused no detriment to petitioner, there not would appear to be any due process violation.

O. Petitioner's claim for costs (***see***, Paragraph "20") is premature as petitioner has not yet exhausted its administrative remedies (***see***, Tax Law § 3030[b][1]).

P. The petition of Dean Witter Reynolds, Inc. is granted to the extent indicated in Conclusion of Law "J." The petition is in all other respects denied. The Division of Taxation is

directed to compute and to issue to petitioner a refund in accordance with Conclusion of Law "J," plus interest as allowable under the Tax Law.

DATED: Troy, New York
November 10, 2005

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE