

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
AMSTERDAM TOBACCO, INC. : DETERMINATION
for Revision of a Determination or for Refund of Tobacco : DTA NO. 827790
Products Taxes under Article 20 of the Tax Law for the :
Period September 1, 2008 through March 31, 2011. :

Petitioner, Amsterdam Tobacco. Inc., filed a petition for a revision of a determination or for refund of tobacco products taxes under article 20 of the Tax Law for the period September 1, 2008 through March 31, 2011.

A hearing was held before Winifred M. Maloney, Administrative Law Judge on October 17, 2018 in New York, New York, with all briefs to be submitted by May 21, 2019, which date began the six-month period for issuance of this determination. Petitioner appeared by Hutton & Solomon, LLP (Stephen L. Solomon, Esq., Kenneth I. Moore, Esq., and Roger S. Blane, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Brian D. Evans, Esq., of counsel).

ISSUES

I. Whether petitioner filed a timely refund claim for the period September 1, 2008 through March 31, 2011.

II. Whether petitioner is entitled to relief under the Taxpayer Bill of Rights of article 41, § 3004-a of the Tax Law.

FINDINGS OF FACT

1. Petitioner, Amsterdam Tobacco, Inc., is a licensed New York State wholesaler and distributor of tobacco products located at 1614 Amsterdam Avenue, New York, New York. Petitioner sells tobacco products, cigarettes, and a variety of confections to retailers located in New York State.

2. On or about March 18, 2011, the Division of Taxation (Division) commenced a tobacco products tax audit of petitioner for the period September 1, 2008 through March 31, 2011. Owen McLean, a tax auditor in the Division's Transaction Field Audit Bureau, Metropolitan District Office, was assigned to conduct this tobacco products tax audit.

3. On May 12, 2011, the Division sent a letter to petitioner scheduling a field audit appointment for May 19, 2011 at 9:30 a.m. at petitioner's place of business. The letter included a request for books and records for the audit period in order to complete a detailed audit of the business. A May 23, 2011 entry in the tax field audit record (audit log) indicates that the field audit appointment was scheduled for June 2, 2011, but no explanation for the new appointment date appears in the audit log.

4. On June 2, 2011, a field audit appointment took place at petitioner's place of business. During that appointment, the auditor and Marvin Gutlove, petitioner's president, discussed, among other topics, petitioner's "overall operation, its recordkeeping and the purpose of the audit." In addition, the auditor examined and audited petitioner's purchase invoices for the entire month of March 2011. Then, the auditor compared the audited results "to the wholesale price of the total tobacco products purchased and reported" on petitioner's distributor of tobacco products tax return, form MT-203, for the period March 1, 2011 through March 31, 2011, and the "difference was considered immaterial."

5. On May 23, 2011, the auditor prepared a consent extending the period of limitations for assessment of tobacco products taxes under article 20 of the Tax Law (waiver). This waiver extended the time within which to assess any additional tax for the periods September 1, 2008 through September 30, 2009, to on or before October 20, 2012. The May 23, 2011 waiver was signed by petitioner's president on June 2, 2011 and, subsequently, was signed by the auditor's team leader, Stephen Alade, on June 7, 2011.

6. In order to conduct a detailed audit of petitioner's tobacco products purchases for the period September 1, 2008 through March 31, 2011, the auditor determined it was necessary to obtain information from petitioner's suppliers. The auditor sent a letter, dated October 3, 2011, to petitioner's president requesting a list of names and addresses of each of petitioner's suppliers of "tobacco products, such as cigars and snuffs," for the audit period. Subsequently, the list of suppliers was furnished by petitioner. Thereafter, the auditor sent third-party requests to petitioner's suppliers to obtain records of its purchases. While some of petitioner's suppliers provided the requested information immediately, the auditor made multiple requests to other suppliers for information regarding petitioner's tobacco products purchases.

7. On September 19, 2012, petitioner's president executed a second waiver, dated September 12, 2012, to extend the time within which to assess any additional tax for the periods September 1, 2008 through November 30, 2010, to on or before December 20, 2013. This waiver was received by the Division on September 19, 2012 and signed by petitioner's team leader on October 1, 2012.

8. On January 18, 2013, petitioner's "attorney in fact," Stephen L. Solomon, filed correspondence entitled "Application for Credit or Refund of Tobacco Product Taxes" (protective claim) with the Division's Miscellaneous Tax Unit located in Albany, New York.

The protective claim indicated that petitioner was filing a refund claim for “all open periods through December 31, 2012” due to “the erroneous calculation and reporting of the ‘wholesale price.’” The protective claim did not contain any additional information in support of the claim and stated “[b]ecause of the voluminous nature of the documents and other evidence in support of its claim, [petitioner] will submit such documentation and evidence upon the Department’s audit of this claim.” A power of attorney appointing Stephen L. Solomon, Esq., as petitioner’s representative¹ was enclosed with the protective claim for refund.

9. After receiving the requested purchase information from petitioner’s tobacco products suppliers, the auditor audited the third-party purchase information. The auditor then compared the tobacco products purchases as reported on petitioner’s returns to the audited third-party purchase information, found under-reported purchases of tobacco products, snuff and little cigars, and determined additional tax due in the total amount of \$309,676.71 for the period September 1, 2008 through March 31, 2011.

The auditor prepared three statements of proposed audit change for cigarette and tobacco products, each dated August 12, 2013, that reflected his audit findings regarding tobacco products, snuff, and little cigars for the period September 1, 2008 through March 31, 2011. Specifically, the statements of proposed audit change determined additional tax due in the total amounts of \$280,983.82 (plus interest and penalty), \$7,817.24 (plus interest and penalty), and \$20,875.65 (plus interest and penalty), for tobacco products, snuff, and little cigars, respectively, for the period September 1, 2008 through March 31, 2011.

¹ The power of attorney also appointed Kenneth I. Moore, Esq., and Roger S. Blane, Esq., as petitioner’s representatives.

10. By letter dated August 19, 2013, the auditor transmitted the three statements of proposed audit change and supporting schedules to petitioner's president for his review.

11. On September 13, 2013, the auditor sent petitioner's representative, Mr. Solomon, copies of the two waivers and the suppliers' information for cigar purchases for September 2008. Subsequently, on October 3, 2013, schedules for audited tobacco products, including cigars and snuff, and a summary of tax due were provided to petitioner's representative. On October 15, 2013, summary schedules for the audited number of cigar purchases and the wholesale prices for three suppliers were provided to Mr. Solomon.

12. On October 29, 2013, petitioner's president executed a third waiver, dated October 18, 2013, to extend the time within which to assess any additional tax for the periods September 1, 2008 through March 31, 2011, to on or before June 20, 2014. This waiver was received by the Division and signed by petitioner's team leader on October 31, 2013.

13. On December 5, 2013, the Division issued a technical services bureau memorandum (TSB-M-13[12]M), that provided guidance with respect to determining a distributor's wholesale price of cigars. In this memorandum, the Division set forth an alternative method that distributors of tobacco products may use to determine the wholesale price of cigars for purposes of calculating the tax due. The memorandum states, in part, that "[e]ffective for cigars imported into New York on or after December 1, 2013, the adjustment ratio is 38% (0.38). . . . To determine the wholesale price of cigars, the distributor multiplies its purchase price by the adjustment ratio. The resulting amount is multiplied by 75% (0.75) to determine tax due." The memorandum further states that "[i]f you believe that the wholesale price is lower than the amount you computed using the adjustment ratio, you must use a manufacturer's invoice or other evidence to establish the lower price."

14. An audit log entry for January 2, 2014 indicates that after a telephone conversation between the auditor's team leader and petitioner's representative, the auditor was advised to issue an assessment. However, no such assessment was issued. Rather, on May 6, 2014, the auditor revised his workpapers and schedules by applying the TSB-M-13(12)M industry standard adjustment ratio of 38% to the wholesale price of cigars. As a result of such application, the auditor computed a net credit, including tax on little cigars and snuff, in the amount of \$180,500.00 for the period September 1, 2008 through March 31, 2011. The auditor provided his revised workpapers to petitioner's representative for review with the understanding that the schedules would require further revisions if petitioner provided additional information.

15. On October 1, 2014, a conference was held to review the auditor's schedules for audited tobacco products tax (credit) due and the wholesale prices of cigars. In attendance at this conference were the auditor, his team leader, petitioner's representative and one of petitioner's employees. During the conference, the auditor reviewed petitioner's schedule of total wholesale prices for one of petitioner's suppliers, and identified variations in the "wholesale prices per the invoices, as reported per the tax returns and per audit." Petitioner's representative also suggested tax rates for cigars and other tobacco products at this conference. Subsequently, on October 16, 2014, the auditor and his team leader made revisions to the "schedule for the proposed audited tax (refund) on tobacco products/cigars," which revisions were the result of adjustments to the wholesale prices of cigars purchased from two of petitioner's suppliers.

16. On January 15, 2015, Mr. Solomon met with the auditor, his team leader, and section head Sean Nolan, to discuss, among other things, the percentages petitioner was to apply to its calculations of the wholesale prices of tobacco products and cigar products for the audit period as

well as Mr. Solomon's responsibility for establishing which tax rates applied for the tax periods under audit.

17. The auditor's team leader, Stephen Alade, sent a letter, dated February 10, 2015, to Mr. Solomon regarding the audit of petitioner for the period September 1, 2008 through March 31, 2011. In his letter, Mr. Alade wrote, in relevant part, as follows:

“Enclosed are our workpapers in connection with the audit of [petitioner]. We have determined that taxpayer is entitled to a net refund of \$150,656.10. The rates used to compute the adjusted wholesale price of cigars in columns 6 and 10 of our spreadsheet are those provided to us by our Albany office.

You will need to prepare amended returns for each month in the audit period.”

The record does not include either the workpapers or the spreadsheet enclosed with this letter.

18. On April 17, 2015, Mr. Solomon sent an email to Mr. Alade with an attached spreadsheet of petitioner's wholesale price computations. On the same date, Mr. Alade forwarded this spreadsheet to the auditor and directed him to “begin the case closing process.” On June 12, 2015, the auditor, his team leader and section head reviewed those wholesale price computations, and based upon that review, the auditor made some recommended changes to petitioner's wholesale computations. Thereafter, the auditor prepared a revised schedule of audited tobacco products tax (refund) due entitled schedule B, in which he applied the wholesale price percentages and the tobacco products tax rate agreed upon by petitioner's representative and the Division. Specifically, a 46% rate was applied to the wholesale price of cigars purchased by petitioner in tax periods September 2008 through July 2010, and a 38% rate was applied to the wholesale price of cigars purchased by petitioner in tax periods August 2010 through March 2011. In addition, an 80% rate was applied to the wholesale price of tobacco products other than cigars, little cigars and snuff. The auditor's schedule B shows a total adjusted credit of

\$227,749.20, less additional taxes on little cigars and snuff of \$18,270.00 and \$7,817.24, respectively, for a net credit in the amount of \$201,661.96 for the period September 1, 2008 through March 31, 2011. A table of pertinent detailed computational information contained in schedule B follows.

Period	Recomputed TOB Prod Tax	Tax Paid on Cig & TOB Prod's	Adj TOB Prod's Tax (Credit)	Add'l Tax Little Cigars	Add'l Tax Snuff	Net TOB Prod's Tax (Credit)
09/2008	\$17,432.42	\$27,724.48	(\$10,292.06)		\$48.31	(\$10,243.75)
10/2008	24,402.67	37,886.50	(13,483.83)			(\$13,483.83)
11/2008	17,772.96	38,726.48	(20,953.52)		65.27	(\$20,888.25)
12/2008	9,483.15	15,857.79	(6,374.64)		2034.77	(\$4,339.87)
01/2009	20,952.37	26,624.85	(5,672.48)		1594.25	(\$4,078.23)
02/2009	22,120.62	36,849.03	(14,728.41)		926.37	(\$13,802.04)
03/2009	29,053.67	48,385.53	(19,331.86)			(\$19,331.86)
04/2009	27,244.75	38,099.97	(10,855.22)		713.29	(\$10,141.93)
05/2009	24,473.30	39,922.98	(15,449.68)			(\$15,449.68)
06/2009	17,242.96	32,466.15	(15,223.19)			(\$15,223.19)
07/2009	5,944.70	13,999.97	(8,055.27)			(\$8,055.27)
08/2009	21,181.21	34,614.45	(13,433.24)			(\$13,433.24)
09/2009	20,520.97	25,402.12	(4,881.15)			(\$4,881.15)
10/2009	12,385.38	18,082.20	(5,696.82)			(\$5,696.82)
11/2009	17,195.71	25,710.16	(8,514.45)			(\$8,514.45)
12/2009	23,626.04	29,969.08	(6,343.04)		1400.51	(\$4,942.53)
01/2010	21,087.78	34,206.56	(13,118.78)			(\$13,118.78)
02/2010	13,364.36	16,637.07	(3,272.21)		159.52	(\$3,113.19)
03/2010	13,592.68	17,414.97	(3,822.29)		349.44	(\$3,472.85)
04/2010	21,548.57	28,512.29	(6,963.72)			(\$6,963.72)

05/2010	11,922.62	17,452.10	(5,529.48)		312.15	(\$5,217.33)
06/2010	17,269.85	19,497.24	(2,227.39)			(\$2,227.39)
07/2010	24,732.72	30,024.69	(5,291.97)			(\$5,291.97)
08/2010	(1,716.45)	3,861.07	(5,577.52)			(\$5,577.52)
09/2010	(385.32)	(4,252.34)	3,867.02			\$3,867.02
10/2010	17,863.73	20,562.81	(2,699.08)			(\$2,699.08)
11/2010	14,432.64	25,261.33	(10,828.69)			(\$10,828.69)
12/2010	8,970.06	4,584.55	4,385.51	2,610.00		\$6,995.51
01/2011	7,601.69	7,963.18	(361.49)		213.36	(\$148.13)
02/2011	13,079.59	5,317.37	7,762.22			\$7,762.22
03/2011	21,743.57	26,525.55	(4,781.98)	15,660.00		\$10,878.02
	\$516,140.98	\$743,890.18	(\$227,749.20)	\$18,270.00	\$7,817.24	(\$201,661.96)

In preparing schedule B, the auditor did not identify which periods were within the two-year statute of limitations period for refunds of tobacco products tax and which periods were outside the two-year statute of limitations period.

19. On July 16, 2015, the auditor faxed the revised schedules of the proposed tobacco products tax refund, i.e., schedule B and the supporting schedules, to petitioner’s representative for review.

20. On or about July 28, 2015, the Division advised petitioner’s representative that petitioner needed to submit amended returns and a corresponding refund claim for the period September 1, 2008 through March 31, 2011.

21. Petitioner’s representative sent a letter, dated August 6, 2015, to the Division’s Audit Division-TDAB Cigarette Unit that requested a refund of taxes paid on cigars and other tobacco

products for the period September 1, 2008 through March 31, 2011 in the total amount of \$201,668.00. Supporting summary schedules accompanied this first refund claim.

22. On August 28, 2015, copies of the auditor's schedule B spreadsheet showing a refund due of \$201,661.96 and supporting workpapers were sent by the auditor's section head to Peter Spitzer, supervisor of the Division's registration and bond unit, for use in his review of petitioner's refund claim.

23. Prior to the close of the audit, the auditor prepared and signed a field audit narrative sheet - misc. tax (narrative sheet)² that included detailed information on, among other items, the audit results and recommendations. In the narrative sheet, the auditor noted that

“the audit resulted in a credit of \$201,661.96 in the entire audit period, which includes additional tax due on little cigars and snuff totaling \$18,270.00 and \$7,817.24, respectively. See Schedule B. However, based on the waivers signed, the first nine months in the audit period are out of statute for credit purposes.”

The auditor, in the narrative sheet, also recommended that “the case is to be closed subject to the proper amended tobacco products tax returns being filed, with a total credit of \$89,902.53 to be credited to the taxpayer for the period from 06/2009 to 03/2011.”

24. On December 1, 2015, the auditor's section head issued to petitioner a letter (closing letter) which stated that the audit of petitioner's tobacco products tax returns and records for the period September 1, 2008 through March 31, 2011 was completed and a credit was found to be due as a result of errors made in tobacco products wholesale prices and tobacco products tax paid. This closing letter further stated that “[b]ased on our review of the records that were provided, as of 11/12/2015,” petitioner is due a credit in the amount of \$89,902.53 “subject to filing the proper amended returns for the period covering June 2009 to March 2011.”

² The auditor signed the narrative sheet on November 20, 2015.

25. By correspondence, dated March 9, 2016, petitioner's representative filed a second refund claim with the Division's Audit Division-TDAB Cigarette Unit. This refund claim requested a refund in the amount of \$201,666.00 for the period September 1, 2008 through March 31, 2011.³ Summary schedules showing the refund requested by month were included with this refund claim, along with amended returns for each of the months from September 2008 through March 2011. Each of the amended returns was signed by Mr. Solomon, as petitioner's legal representative, and bore the date of September 21, 2015.

26. Petitioner's claim for refund in the amount of \$201,661.96 for the period September 1, 2008 through March 31, 2011 was reviewed by Mr. Spitzer. Subsequently, the Division issued to petitioner a refund claim determination notice (Document locator number AM1604021031), dated May 10, 2016, denying a portion of petitioner's claim in the amount of \$111,759.93 and allowing a refund in the amount of \$89,902.03 for the period September 1, 2008 through March 31, 2011. The "Explanation" section of the refund claim determination notice stated, in pertinent part, that "[t]he amount denied is based upon the disallowing of the refund for the periods 9/2008 to 5/2009 as being out of statute."

27. At the hearing, the auditor testified that his primary focus during the course of the audit was to compare the accuracy of the purchases listed on the suppliers' invoices with what petitioner reported on its tobacco products tax returns. He also testified that during the audit, he was unaware of whether petitioner's suppliers were wholesalers, manufacturers or distributors. The auditor explained that after reviewing the purchase invoices, petitioner's tobacco products

³ The difference between the net refund amount of \$201,661.96 listed in schedule B and the second refund claim amount of \$201,666.00 is due to computational rounding done by petitioner's representative in the preparation of petitioner's amended returns for each of the months from September 2008 through March 2011 and the supporting summary schedules.

returns and the third-party purchase information, he determined that additional tax was due for tobacco products, little cigars and snuff. As a result of that initial determination, the auditor issued to petitioner three statements of proposed audit change for the period September 1, 2008 through March 31, 2011. The auditor further explained that his supervisors gave him the wholesale price and industry standard adjustment ratio percentages to apply to the periods under audit, which percentages had been agreed to by the Division and petitioner's representative, Mr. Solomon.

28. The auditor testified that schedule B reflected his application of the agreed upon adjustments ratios, 46% and 38% to the wholesale price of cigars and 80% to the wholesale price of other tobacco products, and his calculations on schedule B indicated that petitioner may have overpaid its tobacco products tax in the amount of \$201,661.96 for the period September 1, 2008 through March 31, 2011. The auditor further testified that after his supervisor reviewed and approved schedule B, the auditor faxed his workpapers and schedule B to petitioner's representative for review on July 16, 2015.

29. According to the auditor, the Division's procedures require that in instances where an auditor discovers that a taxpayer has made an overpayment, the auditor is required to submit the overpayment information to his supervisor for review prior to the Division issuing any credit or refund to a taxpayer for such overpayment.

30. Christopher Nikles, a Tax Auditor 4, also testified at the hearing. Mr. Nikles oversees four teams for the Division: the highway use tax team, the data matching team, the audit support team, and the registration and bond unit. He assumed responsibility for the registration and bond unit approximately one year before the hearing in this matter. Mr. Nikles did not have any involvement in audit of petitioner's refund claim. In preparation for the hearing, Mr. Nikles

reviewed the paperwork used by Mr. Spitzer in the issuance of the refund claim determination notice to petitioner.

31. The registration and bond unit processes the cigarette tax or tobacco tax refund claims submitted to the Division. Upon receipt of a refund claim, the registration and bond unit reviews it for general accuracy and also makes sure that all schedules and supporting documentation are in order. Thereafter, the refund claim is reviewed for the statute of limitations period, and then the proper refund amount is paid.

32. Mr. Nikles explained that the statute of limitations for refund claims for tobacco products is two years. In determining which tax periods in a refund claim are eligible for refund, the registration and bond unit would look at the date on which the Division received the refund claim, and go back two years from that date. Any waivers that may have been signed would be reviewed to ascertain whether the period may have been extended. The oldest waiver would be reviewed for the date on which it was signed and the date the waiver expired. According to Mr. Nikles, if the date of receipt of the refund claim was within six months of the end of that waiver period, the registration and bond unit would go back two years from the date that the waiver was signed.

33. The record includes a schedule entitled Amsterdam Timeline (timeline schedule) that was created by Mr. Spitzer in conjunction with his review of petitioner's refund claim for the period September 1, 2008 through March 31, 2011. This timeline schedule shows, among other things: (i) the amounts the Division determined petitioner overpaid in tobacco products tax; (ii) which tax periods were covered by either the signed consents or the January 18, 2013 protective

claim; and (iii) the tax periods within and outside the two-year statute of limitations.⁴ On this timeline schedule, Mr. Spitzer determined that nine tax periods, the months of September 2008 through May 2009, were beyond the statute of limitations for refund purposes.

34. Mr. Nikles testified that Mr. Spitzer used the timeline schedule to issue the refund claim determination notice that disallowed a refund for tax periods September 2008 through May 2009, and granted a refund for the tax periods June 2009 through March 2011. Based upon his review of the paperwork, Mr. Nikles testified that Mr. Spitzer's computation was incorrect and only eight tax periods were beyond the statute of limitations for refund purposes. According to Mr. Nikles, using the June 7, 2011 date on which the first waiver was signed and going back two years to June 7, 2009, the month of May 2009 would be within the two-year statute of limitations, because the May 2009 tax return was not due until June 20, 2009. Since the month of May 2009 was still open for refund purposes, Mr. Nikles stated that petitioner's refund claim in the amount of \$15,449.68 should have been allowed for such month. Mr. Nikles further testified that he did not find any other errors in Mr. Spitzer's computations.

35. In its brief, the Division conceded that petitioner is entitled to an additional refund in the amount of \$15,449.68 for the month of May 2009.

36. Petitioner's representative, Mr. Solomon, testified at the hearing. Mr. Solomon stated that he became involved in the audit shortly after the three statements of proposed audit changes were issued. Thereafter, Mr. Solomon and the auditor engaged in discussions regarding the wholesale price information for some of petitioner's suppliers. Mr. Solomon explained that after the auditor completed the refund schedule in May 2014, using the industry standard adjustment

⁴ Although this timeline schedule references a protective claim #2 filed on March 7, 2014, the record does not include a copy of such protective claim.

ratio of 38%, the parties negotiated the rates. Once the applicable percentages were agreed upon, the auditor computed schedule B that showed a total adjusted credit of \$227,749.20, less additional taxes on little cigars and snuff of \$18,270.00 and \$7,817.24, respectively, for a net credit in the amount of \$201,661.96 for the period September 1, 2008 through March 31, 2011. Mr. Solomon stated that petitioner agreed to those numbers, but he and Mr. Spitzer had discussions regarding the filing of petitioner's amended returns for the period September 1, 2008 through March 31, 2011. With respect to the amended returns prepared by petitioner's representative, Mr. Solomon explained that it was agreed that the number would remain the same; however, the information dealing with snuff and little cigars would be excluded. According to Mr. Solomon, the numbers on the amended returns "agree to the schedule, but do not include the numbers for those items."

CONCLUSIONS OF LAW

A. Tax Law § 476 states, in pertinent part, that:

"whenever the commissioner of taxation and finance shall have determined that any tax imposed by this article shall have been paid in error, the agent, dealer or tobacco products distributor, as the case may be, shall be entitled to a refund of the actual amount of tax so paid, *provided application thereof is filed with the commissioner of taxation and finance within two years after . . . the tax was paid upon such tobacco products, except if an agreement under the provisions of section four hundred seventy-eight (extending the period of determination of tax imposed by the article) is made within the two-year period for the filing on an application for refund provided for in this section, the period for filing an application for refund shall not expire prior to six months after the expiration of the period within which a determination may be made pursuant to the agreement or any extension thereof*" (emphasis added).

B. In this case, petitioner is protesting the refund denial for the period September 1, 2008 through May 31, 2009. Petitioner filed its first protective claim for refund on January 18, 2013. This correspondence merely stated that petitioner was filing a protective claim for refund for "all

open periods through December 31, 2012,” and did not specify a refund amount nor was any documentation submitted in support of the claim.

As set forth in the statutory language of Tax Law § 476, petitioner, as a distributor of tobacco products, had two years within which to file a claim for refund from the date the tax was paid, except that where a waiver extending the period of limitation for assessment of tobacco products taxes was made within the two-year period for the filing of an application for refund, petitioner had until six months after the expiration of the period pursuant to the waiver or any extension thereof. Petitioner signed three waivers in this matter. The first, signed by the Division on June 7, 2011, extended the period of limitation for assessment for the period September 1, 2008 through September 30, 2009, until October 20, 2012. As a result of this waiver, the statute of limitations for refund for the period May 1, 2009 through September 30, 2009 was extended to April 20, 2013. The second waiver, received by the Division on September 19, 2012, extended the period of limitation for assessment for the period September 1, 2008 through November 30, 2010, to on or before December 20, 2013. As a result of this waiver, the statute of limitations for refund for the period May 1, 2009 through September 30, 2009 was further extended to June 20, 2014. The third waiver, received by the Division on October 31, 2013, extended the period of limitation for assessment for the period September 1, 2008 through March 31, 2011, to on or before June 20, 2014. As a result of this waiver, the statute of limitations for refund for the period May 1, 2009 through September 30, 2009 was further extended to December 20, 2014. The Division allowed a refund for period June 1, 2009 through March 31, 2011. For the period September 1, 2008 through April 30, 2009, the two year statute of limitations for filing an application for refund expired before the first waiver was

entered on June 7, 2011. As such, the Division properly denied petitioner's refund claim for the period September 1, 2008 through April 30, 2009.

With respect to the period May 1, 2009 through May 31, 2009, the first waiver extended the statute of limitations for filing an application for refund until April 30, 2013. The Division has conceded that petitioner's refund claim for the period May 1, 2009 through May 31, 2009 was timely filed, and petitioner is entitled to a refund in the amount of \$15,449.68 for the period May 1, 2009 through May 31, 2009 (*see* finding of fact 35). Accordingly, the Division is directed to issue to petitioner a refund in the amount of \$15,449.68 for the period May 1, 2009 through May 31, 2009.

C. Petitioner claims that it is entitled to relief under the Taxpayer Bill of Rights pursuant to section 3004-a contained in article 41 of the Tax Law. Tax Law § 3004-a addresses the disclosure of overpayment to a taxpayer, in pertinent part, as follows:

“(a) The department shall disclose to a taxpayer all instances of overpayment of tax by such taxpayer discovered by the department during the course of an audit, assessment, collection or enforcement proceeding.

(b) The time within which a taxpayer may apply for a refund or claim a credit for an overpayment of tax disclosed pursuant to this section shall be one hundred twenty days from the date that notice of disclosure is given to such taxpayer by the department. Failure to apply for a refund or credit within the one hundred twenty days shall result in the loss of the right to apply for a refund or credit. . . .

(c) Nothing in this section shall be construed as requiring or permitting the giving of notice or the payment of a refund or granting of a credit with respect to a period which, at the time such overpayment is discovered by the department, is not open for assessment or refund by virtue of any period of limitations provided for in any tax.”

D. Petitioner contends that the Division failed to provide it with notice of potential overpayments discovered for the period September 1, 2008 though April 30, 2009 as required by

Tax Law § 3004-a. It further contends that the Division's failure to provide such notice kept the period for the filing of refunds open.

The record in this matter shows that the Division provided petitioner with notice of potential overpayments on a number of occasions during the course of its audit for the period September 1, 2008 through March 31, 2011. At the June 2, 2011 field audit appointment, the auditor examined and audited petitioner's purchase invoices for the March 1, 2011 through March 31, 2011, and compared those results to the wholesale price of the total tobacco products purchased and reported on petitioner's tax returns for the period March 1, 2011 through March 31, 2011. The auditor found the difference to be immaterial. In order to conduct a detailed audit of petitioner's tobacco products purchases for the period September 1, 2008 through March 31, 2011, the auditor obtained third-party purchase information from petitioner's suppliers. The auditor compared the third-party purchase information to the tobacco products purchases reported on petitioner's returns, found under-reported purchases of tobacco products, snuff and little cigars and determined additional tax due in the total amount of \$309,676.71 for the period September 1, 2008 through March 31, 2011. As a result of this initial determination, in August 2013, statements of proposed audit change were issued asserting additional tax due in the total amounts of \$280,983.82, \$7,817.24, and \$20,875.65 for tobacco products, snuff, and little cigars, respectively, for the period September 1, 2008 through March 31, 2011. Petitioner's representative became involved with the audit shortly after the issuance of the three statements of proposed audit changes. On December 5, 2013, the Division issued technical services bureau memorandum, TSB-M-13(12)M, that provided an alternative method for calculating the wholesale price of cigars imported into New York State on or after December 1, 2013 through the use of an industry standard adjustment of 38%. Subsequently, on May 6, 2014, the auditor

revised his workpapers and schedules by applying the TSB-M-13(12)M industry standard adjustment ratio of 38% to the wholesale price of cigars. As a result of such application, the auditor computed a net credit, including additional tax due on little cigars and snuff, in the amount of \$180,500.00 for the period September 1, 2008 through March 31, 2011. The auditor provided his revised workpapers to petitioner's representative for review with the understanding that the schedules would require further revisions if petitioner provided additional information. It is noted that by May 6, 2014, the two-year statute of limitations for refund of tax paid on tobacco products had already expired for the period September 1, 2008 through April 30, 2009. Thereafter, discussions between the auditor and petitioner's representative took place in October 2014 and January 2015 regarding the wholesale prices for some of petitioner's suppliers, and the tax rates for cigars and other tobacco products. Subsequently, rates for use in computing the adjusted wholesale price of cigars were provided by the Albany office. After applying those rates, audit workpapers showed a net refund of \$150,656.10 for the period September 1, 2008 through March 31, 2011. A letter, dated February 10, 2015, from the auditor's team leader advised petitioner's representative of the determination that petitioner was entitled to a net refund of \$150,656.10 and the need to file amended returns for each of the months in the audit period. On April 17, 2015, petitioner's representative provided a spreadsheet of petitioner's wholesale price computations for the auditor to review. Based upon his application of the adjustments ratios agreed upon the Division and petitioner's representative, i.e., 46 % and 38% to the wholesale price of cigars and 80% to the wholesale price of other tobacco products, the auditor issued schedule B that showed a total adjusted credit of \$227,749.20, less additional taxes due on little cigars and snuff of \$18,270.00 and \$7,817.24, respectively, for a net credit in the amount of \$201,661.96 for the period September 1, 2008 through March 31, 2011. Schedule B and the

supporting workpapers were faxed to petitioner's representative on July 16, 2015. On or about July 28, 2015, the Division advised petitioner's representative that petitioner needed to submit amended returns and a corresponding refund claim for the period September 1, 2008 through March 31, 2011. On August 6, 2015, petitioner's first refund claim in the amount of \$201,668.00 for the period September 1, 2008 through March 31, 2011 was filed. Petitioner's representative and Mr. Spitzer had discussions regarding the filing of petitioner's amended returns for the period September 1, 2008 through March 31, 2011. After the auditor closed out the audit, the Division issued a closing letter, dated December 1, 2015, which disclosed that based upon its review of records that petitioner provided, petitioner was due a credit in the amount of \$89,902.53 for the periods June 2009 through March 2011, subject to the filing of the proper amended returns for such periods. Clearly, this closing letter was the notice of disclosure required by Tax Law § 3004-a. On March 9, 2016, petitioner's second refund claim in the amount of \$201,666.00 for the period September 1, 2008 through March 31, 2011 was filed, along with amended returns for each of the months of September 2008 through March 2011 and supporting schedules. Based upon its review of petitioner's refund claims, the schedule B and the waivers executed during the audit, the Division issued the refund claim determination notice, dated May 10, 2016, denying petitioner's refund claims for the periods September 2008 through April 2009.⁵ Petitioner's refund claims for the periods September 2008 through April 2009 were denied because the two-year statute of limitations for refund of tobacco taxes paid had already expired at the time the first waiver was signed by the Division on June 7, 2011.

⁵ In conclusion of law B, it was determined that the Division improperly denied a refund for the month of May 2009.

E. Petitioner claims that the Division improperly denied refunds for the periods September 2009 through April 2009. It maintains that the period of limitations for assessment for the period September 1, 2008 through April 30, 2009 remained open until June 20, 2014, as a result of the three waivers executed during the audit. Petitioner further maintains that the Division first knew about the potential refund on May 6, 2014 at which time the auditor prepared revised workpapers applying the TSB-M-13(12)M industry standard ratio to the wholesale price of cigars. Petitioner argues that Tax Law § 3004-a requires that if the periods are open for assessment when the overpayment is discovered, the Division is required to disclose the overpayment to a taxpayer, such as petitioner.

Petitioner's argument is rejected. The interpretation advanced by petitioner is not in accordance with the intent and meaning of the statute. Tax Law § 3004-a (c) clearly states that the Division is not required or permitted to give notice of or the payment of a refund with respect to a period, which at the time the overpayment is disclosed by the Division is not open for "assessment or refund by virtue of any period of limitations provided for in any tax." Tax Law § 476 provides that an application for refund of tobacco products tax must be filed within two years after the tax was paid on such tobacco products, except if an agreement (waiver) under Tax Law § 478 (extending the period for the assessment of tax) is made within the two-year statute of limitations period for an application for refund, then the period for filing an application for refund does not expire prior to six months after the expiration of the assessment period as extended by the waiver or any extension thereof. The first waiver, signed by the Division on June 7, 2011, extended the period for assessment for the period September 1, 2008 through September 30, 2009 until October 20, 2012. However, the two-year statute of limitations period for applying for a refund for the periods September 2008 through April 2009 had expired before

the waiver was signed on June 7, 2011. As such, the Division properly denied petitioner's refund claim for the period September 1, 2008 through April 30, 2009.

F. The petition of Amsterdam Tobacco, Inc., is granted to the extent indicated in conclusion of law B, but in all other respects is denied. The Division of Taxation's refund claim determination notice, dated May 10, 2016, as modified in accordance with conclusion of law B, is sustained.

DATED: Albany, New York
November 21, 2019

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE