New York City Tax Appeals Tribunal

In the Matter of	:	
	:	ORDER
AMERICAN BANKNOTE CORPORATION;	:	
AMERICAN BANK NOTE CORP.;	:	TAT (E) 03-31 (GC)
AMERICAN BANK NOTE CO., INC. AND	:	TAT (E) 03-32 (GC)
COMBINED AFFILIATES	:	TAT (E) 03-33 (GC)
	:	
Petitioners.	:	
	:	

In response to an Exception taken by American Bank Note Company and American Banknote Corporation ("AB Corp.") in its own name and as successor-in-interest to USBC Holdings, Inc. ("Holdings") (collectively "Petitioners") to a Determination of an Administrative Law Judge (the "ALJ") dated May 30, 2007 (the "ALJ Determination"), this Tribunal issued a Decision dated November 14, 2008, (the "Decision").[1] The Decision reversed the ALJ Determination, which held that USBC and Holdings could not be included in Petitioners' combined New York City General Corporation Tax ("GCT") returns for the tax years ending December 31, 1990, 1991 and 1992 (the "Tax Years") and upheld three Notices of Determination (the "Notices") issued by the New York City Department of Finance (the "Department") that asserted a net GCT deficiency against Petitioners for the Tax Years. The Decision also cancelled the Notices "except to the extent [the Notices] reflect

[1] American Banknote Corporation and the entity identified in the caption as "American Bank Note Corp." are the same entity. During the years in question, American Banknote Corporation was known as United States Banknote Corporation ("USBC"). American Bank Note Company is identified in the caption as American Bank Note Co., Inc. The history of Petitioners during the years in question is more fully described in the Decision.

undisputed Audit adjustments that would apply to Petitioners' combined GCT returns for the Tax Years." Decision at 25.

Petitioners filed a Notice of Motion dated August 5, 2010, for an Order pursuant to §1-05 of the Rules of Practice and Procedure of the New York City Tax Appeals Tribunal (the "Tribunal Rules") directing the Commissioner of Finance of the City of New York ("Respondent" or "Commissioner") to refund $24,262.10 in GCT as described in Exhibit C to the Affirmation in Support of Petitioner's[2] Motion (the "Affirmation in Support"), plus interest, and requesting "such other and further relief as this Tribunal deems just and proper." Affirmation in Support at 7.

In an Affirmation in Opposition to Petitioner's Motion, dated August 24, 2010, (the "Affirmation in Opposition") Respondent requests that this Tribunal issue an order directing Petitioners to pay $11,875.37 in GCT, plus interest,[3] or to remand this matter to the Administrative Law Judge Division to resolve the factual disagreements between the Parties. Respondent further requests that if the Tribunal determines that Petitioners are entitled to a refund, then the order direct interest to be calculated "from the date of Petitioner's first communication of a refund claim." Affirmation in Opposition at 3.

We will treat Respondent's Affirmation in Opposition as a cross-motion to the extent Respondent is requesting affirmative relief from this Tribunal. Petitioners' motion and Respondent's cross-motion are referred to herein as the "Motions."

[2] This Order refers to the Petitioners in the plural although certain of the Parties' submissions refer to Petitioner in the singular.

[3] Including interest, the total amount due would exceed $44,000. *See* Schedule A-1 to the Affirmation in Opposition.

Petitioners are represented by Kenneth I. Moore, Esq. and Stephen L. Solomon, Esq. of Hutton & Solomon LLP, and Respondent is represented by Martin Nussbaum, Esq., Assistant Corporation Counsel, New York City Law Department.

Petitioners assert that the Department's auditor, Ira Elias, Field Audit Group Supervisor (the "Auditor"), recalculated Petitioners' combined GCT liability for the Tax Years taking into account the "undisputed Audit adjustments" referred to in the last sentence of the Decision (the "Recalculation") and advised Petitioners' representatives that the Recalculation resulted in a GCT deficiency in the principal amount of $11,875.37. Exhibit B to the Affirmation in Support. After reviewing the Recalculation, Petitioners' representatives advised the Auditor that his Recalculation did not appear to include a required adjustment to eliminate the investments of members of Petitioners' combined group in other members of the combined group (the "intercompany eliminations") for the Tax Years. The Auditor prepared a revised recalculation of Petitioners' combined GCT liability for the Tax Years to reflect the intercompany eliminations (the "Revised Recalculation"). The Revised Recalculation showed that Petitioners had made overpayments of GCT in the amounts of $5,021.29 for the Tax Year ending December 31, 1990, $19,195.81 for the Tax Year ending December 31, 1991, and $45 for the Tax Year ending December 31, 1992, for a total principal overpayment amount of $24,262.10. Exhibit C to the Affirmation in Support. The Auditor's workpapers for both the Recalculation and the Revised Recalculation bear the notation "These workpapers are subject to review."

Respondent does not dispute the above facts regarding the Recalculation and the Revised Recalculation. However, based on an affidavit of the Auditor dated June 9, 2010, submitted with the Affirmation in Opposition, Respondent asserts that the Revised Recalculation reflected a correction of a mistake made by Petitioners on their original combined GCT returns for the Tax Years that should not be included in any recalculation of

Petitioners' combined GCT liability to reflect the "undisputed Audit adjustments". Respondent also asserts that any refund based on the Revised Recalculation is now time-barred.

We disagree with Respondent's assertion that a GCT deficiency is due because any refund claim for the Tax Years based on the intercompany eliminations is time-barred. The well-established doctrine of equitable recoupment allows Petitioners to assert the intercompany eliminations as a defense to an asserted GCT deficiency for the Tax Years even if a separate refund claim based on the intercompany eliminations is time-barred. National Cash Register Co. v. Joseph, 299 N.Y. 200 (1949); Matter of Dresser Industries, Inc., New York State Tax Appeals Tribunal (August 14, 1997). In the matter before us, regardless of whether a separate refund claim based on the intercompany eliminations is time-barred, applying the doctrine of equitable recoupment to the Revised Recalculation, which was prepared by and not disavowed by Respondent, shows that there is no GCT deficiency on Petitioners' combined GCT returns for the Tax Years when the "undisputed Audit adjustments" and intercompany eliminations are taken into account.

We note that the doctrine of equitable recoupment only allows an item that could have been the basis for a time-barred refund claim to be asserted as a defense to reduce or eliminate any deficiency of the same tax for the same period.[4] The doctrine does not extend the limitations period for claiming a refund or credit for the amount of any overpayment of tax based on that item. For Petitioners to be entitled to a refund of any overpayment of GCT for the Tax Years, Petitioners must show either that the Commissioner's special refund authority under §11-687.4 of the Administrative Code of the City of New York (the "Code"),

[4] Similarly, the doctrine of equitable recoupment allows an item that could have been the basis for a time-barred deficiency to be asserted as a defense against a refund claim for the same tax for the same period. *See infra* note 8.

discussed below, applies or that a refund claim for any overpayment is not otherwise time-barred.

Under Code §11-678.1, a claim for refund or credit of GCT must be filed within the later of three years following the filing of the return or two years from the payment of the tax in question. There is no question that those time limits have expired in the case before us. However, Code §11-678.6 provides that where a timely petition is filed with the Tribunal protesting a GCT deficiency, the Tribunal can determine whether the petitioner has made an overpayment for the tax year in question and that no separate refund claim is required. Code §11-678.6 further provides that no refund or credit of the same tax for the same period is permitted, except:

> (a) as to overpayment determined by a decision of the tax appeals tribunal which has become final; and
> (b) as to any amount collected in excess of an amount computed in accordance with the decision of the tax appeals tribunal which has become final; and
> (c) as to any amount collected after the period of limitation upon the making of levy for collection has expired; and
> (d) as to any amount claimed as a result of a change or correction [of Federal or New York State income or other tax base].

In the case before us, the only payments of GCT made by Petitioners for the Tax Years were made voluntarily; Respondent has not collected any amount of GCT from Petitioners for the Tax Years. Therefore, clauses (b) and (c) quoted above do not apply to this case. Clause (d) also does not apply, so it remains to be considered whether a final decision of the Tribunal determined that an overpayment was made.

Subdivision (3) of section 171 of the New York City Charter provides that a decision of the Tribunal "shall finally and irrevocably decide all the issues raised in the proceedings before it, unless the petitioner who commenced the proceeding seeks judicial review of any such decision" under Article 78 of the CPLR[5] within four months after notice of the decision is given. Petitioners did not request judicial review of the Decision under Article 78 of the CPLR within the required time period and the Parties did not contact the Tribunal regarding the Recalculation or Revised Recalculation until after that four-month period expired. Petitioners' Notice of Motion was dated more than twenty months after notice of the Decision was given. Therefore, the Decision was final when the Motions were filed.

We note that, while the Notices, in the aggregate, asserted a net deficiency against Petitioners, Respondent's Notice of Determination dated December 18, 2001, issued to American Banknote Corp. [AB Corp.] f/k/a/ United States Banknote Corp. [USBC], the common parent listed on Petitioners' combined GCT returns for the Tax Years (the "USBC Notice"), showed overpayments of GCT for the Tax Years on a separate filing basis in the following principal amounts: $6,385.26 for the Tax Year ending December 31, 1990; $10,395.69 for the Tax Year ending December 31, 1991 and $1,655.24 for the Tax Year ending December 31, 1992, plus interest.[6] Therefore, the issue of overpayments of GCT, to the extent of those amounts for each of the Tax Years, appeared in the record. However, Petitioners did not raise the issue of a possible GCT refund based on their combined GCT returns at the hearing before the ALJ or with the Tribunal Commissioners and neither the ALJ nor the Tribunal Commissioners made any legal or factual findings regarding any GCT overpayments on Petitioners' combined GCT returns for the Tax Years in the ALJ Determination or the Decision. Therefore, no refund claim may be made at this late date under Code §11-678.6(a) and, therefore, a refund claim based on the intercompany

[5] The New York Civil Practice Law and Rules.

[6] The Department subsequently increased those overpayment amounts in a letter dated November 1, 2005, to $6,385.26 for 1990, $16,601.86 for 1991 and $1,794.28 for 1992.

eliminations is time-barred unless the Commissioner's special refund authority under Code §11-687.4, discussed below, applies.

Petitioners argue that the Tribunal can grant their refund claim by exercising Respondent's authority under Code §11-687.4, which provides:

> Where no questions of fact or law are involved and it appears from the records of the commissioner of finance that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts . . . the commissioner of finance at anytime, without regard to any period of limitations, shall have the power, upon making a record of his or her reasons therefor in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded.

Petitioners cite Mobil Oil Corp. v. Commissioner, 101 A.D.2d 723 (1st Dept. 1984), to support their assertion. In that case, the time-barred overpayment was discovered during an audit of the taxpayer's 1974 GCT return. The hearing officer[7] found that an overpayment had been made but a refund or credit of that amount was time-barred. There was no question of law or fact regarding the existence or amount of the overpayment. The court found that exercise of the Commissioner's discretionary special refund authority under the predecessor to Code §11-687.4 was required to prevent the inequity of allowing the Commissioner to pursue a deficiency while barring the taxpayer from pursuing a refund of the same tax for the same period where no question of law or fact existed.

Mobil Oil Corp. v. Commissioner, *supra*, is distinguishable from the present case. In that case, the existence and amount of the time-barred overpayment were determined at or

[7] During the years in question in the case, protests of Department notices were heard initially by the Department's Hearings Bureau, which was discontinued in 1992.

before the initial hearing on the deficiency notice whereas in the present case, although the USBC Notice showed an overpayment on a separate filing basis, the existence and amount of any overpayment of GCT on Petitioners' combined GCT returns for the Tax Years was not addressed at the hearing before the ALJ or with the Tribunal Commissioners. The Tribunal cannot consider Petitioners' claim for refund under Code §11-687.4 where the Commissioner has not acted on Petitioners' refund claim in a manner so as to give us jurisdiction over it. Matter of Leecy, New York State Tax Appeals Tribunal (September 3, 1998). However, Petitioners are not precluded from pursuing a refund claim under Code §11-687.4 with Respondent.

We next consider Respondent's request for a remand to the Administrative Law Judge Division for further proceedings to resolve any factual disputes between the Parties. Tribunal Rule §1-05(a) allows parties before the Tribunal to make "a motion to the tribunal for an order that is appropriate in a proceeding governed by the CPLR." The post-decision motions allowed under the CPLR are motions to renew, reargue or resettle. Neither Petitioners nor Respondent have identified the nature of their Motions. A motion to reargue must allege that in rendering its decision, the court overlooked or misapprehended the facts or applicable law, CPLR 2221(d), while a motion to renew must either allege new facts that would alter the outcome of the matter and provide "reasonable justification" for failing to present those facts earlier, or "demonstrate that there has been a change in the law that would change the prior determination." CPLR 2221(e). The Tribunal will consider motions to renew or reargue where appropriate. Matter of RCA International Development Corp., TAT(E)93-32 (GC)MR (August 29, 1997).

Neither Party has asserted that the Tribunal overlooked or misapprehended either the facts below or the applicable law. At no time during the hearing on Petitioners' petition or during the Tribunal Commissioners' consideration of Petitioners' Exception, were any issues

relating to the computation of Petitioners' combined GCT liability presented. Nor has either Party alleged new law that would alter the Decision. To the extent the Parties may be considered to be alleging new facts in connection with the Recalculation or Revised Recalculation, they have not explained why they did not raise those facts below. Although the primary focus of the Department's audit of Petitioners was whether USBC and Holdings could be included in Petitioners' combined GCT returns for the Tax Years, the Parties have not offered any evidence that, after the Department's audit of Petitioners was complete, Petitioners could not recompute their combined GCT liability for the Tax Years to reflect the undisputed Audit adjustments, which might have alerted them to the possibility of an overpayment. Therefore, neither of the Motions can be considered or granted as a motion to renew or reargue.

The CPLR permits a motion to resettle "to correct errors or omissions as to form, or for clarification" of a previous order or decision. Foley v. Roche, 68 A.D.2d 558, 566 (1st Dept. 1979). In that case, the court denied a motion to resettle an order because the moving party was requesting that an earlier order of attachment be vacated and that the matter be dismissed for lack of jurisdiction. The court denied the motion and held that a resettlement motion cannot be used to "effect a substantive change in or to amplify the prior decision." *Id.*

The New York Supreme Court Appellate Division First Department has held that a motion to resettle is appropriate where the original order dismissed a claim against a fourth party to clarify that the order was not intended to preclude separate litigation relating to the same accident, Lindgren v. NYC Housing Authority, 269 A.D.2d 299 (1st Dept. 2000), and, where the original order barred the payment of funds out of an escrow account, to clarify that the order also applied to the interest earned on the account. Ansonia Associates v. Ansonia Tenants Coalition, 171 A.D.2d 411 (1st Dept. 1991). Although the Motions are not

identified as motions to resettle, the Motions appear to request clarification of the last sentence of the Decision cancelling the Notices "except to the extent they reflect undisputed Audit adjustments that would apply to Petitioners' combined GCT returns for the Tax Years." Based on the Revised Recalculation and applying the doctrine of equitable recoupment, Respondent has not established that the "undisputed Audit adjustments" result in a GCT deficiency on Petitioners' combined GCT returns for the Tax Years. We therefore, deny Respondent's request for a remand.

The question of a refund of any overpayment on Petitioners' combined GCT returns is not related to the "undisputed Audit adjustments" but to the effect of the intercompany eliminations on Petitioners' combined GCT liability. For the Tribunal to address the latter issue would require a substantive modification or amplification of the Decision, which cannot be requested in a motion to resettle. Foley v. Roche, 68 A.D.2d 558, 566 (1st Dept. 1979).

We have previously concluded that the requirements of Code §11-678.6(a), which might have permitted the Tribunal to consider a refund claim under that section, have not been met. Moreover, under the facts and circumstances of the case before us, we cannot exercise Respondent's special refund authority under Code §11-687.4 to grant Petitioners a refund based on the Revised Recalculation, although Petitioners are not precluded from pursuing a refund claim under that section with Respondent.[8]

[8] We note that the doctrine of equitable recoupment would allow Respondent to assert additional adjustments for which a separate deficiency otherwise would be time-barred as a defense against any refund claim made by Petitioners. Matter of Dresser Industries, Inc., New York State Tax Appeals Tribunal (August 14, 1997) *citing* Lewis v. Reynolds, 284 U.S. 281 (1932) and Stone v. White, 301 U.S. 532 (1937).

Therefore, on Petitioners' Notice of Motion, the Affirmation in Support and the Affirmation in Opposition, we hereby clarify the last sentence of the Decision to provide that the Notices are cancelled in full. In all other respects, the Motions hereby are denied.

IT IS SO ORDERED.

Dated: December 3, 2010
New York, New York

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GLENN NEWMAN
President and Commissioner

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ELLEN E. HOFFMAN
Commissioner