BEFORE THE TAX APPEAL BOARD OF THE STATE OF DELAWARE

KAYO OIL COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket Nos. 600 and 607
	)	
DIRECTOR OF REVENUE,	)	
	)	
Respondent.	)	

Before: Maurice A. Hartnett, III, Esquire, Chairman; Cyric W. Cain, Jr., Rhett McCliff, and Nettie C. Reilly, members; Joseph S. Yucht, Esquire, Vice-Chairman, absent.

Leonard S. Togman, Esquire for Petitioner.

John P. Fedele, Esquire for Respondent.

DECISION AND ORDER
(REVISED)

Maurice A. Hartnett, III, Esquire, Chairman: The pertinent facts are uncontroverted.

A Notice of Assessment for unpaid retail merchants license taxes alleged to be due for the tax years ending June 30, 1970, 1971, 1972, 1973, and 1974 was mailed to Petitioner by Respondent on March 17, 1974. Retail license taxes were based on the amount of Petitioner's purchases for resale. Petitioner paid some of the assessments and filed a petition for redetermination of the deficiencies.

The Petitioner claims that the assessments are erroneous for the following reasons:

1. In computing the license taxes, Petitioner is entitled to a $20,000 quarterly exclusion for each of the stores it operates in Delaware rather than one $20,000 quarterly exclusion.

II. Petitioner relied upon a ruling of the Director of Revenue advising Petitioner that it was entitled to a $20,000 quarterly exclusion for each of its stores in Delaware.

III. The assessments for the tax years ending June 30, 1970 and June 30, 1971 are barred by the Statute of Limitations, although Petitioner executed a written waiver of the limitation.

I

Petitioner's claim that it is entitled to a $20,000 quarterly exclusion for each of its stores in Delaware instead of but one $20,000 exclusion is denied.

This argument was disposed of by the Board in The Great Atlantic and Pacific Tea Company v. Director of Revenue dated March 12, 1975 Docket No. 534 et al.

The Superior Court upheld the decision of the Board upon appeal. The Great Atlantic and Pacific Tea Company v. Director of Revenue (#5091 CA 1975, 9/8/75 Unreported).

The Board and the Court held that a retailer such as Petitioner is entitled to but one $20,000 quarterly exclusion in computing its retail merchants license tax regardless of the number of retail outlets it may operate in Delaware.

II

We deny the second contention of Petitioner that Respondent must allow Petitioner multiple $20,000 quarterly exclusions in computing the amount of retail merchants license tax due because Respondent's notification to Petitioner that Petitioner was entitled to a $20,000 quarterly exclusion for each of its retail outlets.

On November 17, 1969 Petitioner wrote to Respondent's predecessor to inquire as to whether each of its branch stores in Delaware

was entitled to the quarterly exclusion.

The Deputy Tax Commissioner by letter dated November 17, 1969, advised Petitioner that "...each of the four Delaware outlets (of Petitioner) is allowed the $25,000 exclusion provided under Section 2901" (of Title 30, Delaware Code). The $25,000 exclusion was subsequently reduced to $20,000 by Act of the General Assembly (57 Del. Laws Ch. 389).

It should be noted that 30 Del. C. §2901 referred to in the letter is a misnomer. The correct reference should have been §2905.

After the letter of the Tax Commissioner, 30 Del. C. §2905 was subsequently amended in 1970 (57 Del. Laws Ch. 389).

Petitioner relies heavily on the analogy to the rulings promulgated by the Internal Revenue Service and to the IRS Revenue Procedures which at least imply that the Internal Revenue Service will not revoke a ruling and apply it retroactively except in "rare or unusual circumstances". See I.R.S. Rev. Proc. 62-28, 1962-2C. B. 505.

We feel that the procedures adopted by the Internal Revenue Service by administrative ruling are not controlling here, desirable as a system of rulings might be.

Respondent has, for good or bad, not adopted a rule or administrative procedure providing for rulings.

Petitioner has cited no law stating that a state tax collection agency is bound by informal letters advising a taxpayer of the tax law.

The procedures adopted by the Internal Revenue Service just do not apply to the Respondent, laudable as they may be.

Since however, Petitioner relied on the erroneous information furnished by Respondent we hold that Petitioner is not liable for any interest or penalty because of its late payment of the retail merchants license tax due. Petitioner, is therefore, entitled to refund of any interest or penalty already paid.

III

We hold that Respondent is barred from collecting from Petitioner any additional mercantile license taxes due for the taxable years ending June 30, 1970 or June 30, 1971, because Respondent now desires to recomputate the license taxes based on a single quarterly exclusion instead of a quarterly exclusion for each store of Petitioner.

It is agreed that Respondent did not assess or notify Petitioner of any such assessment of the taxes in controversy within 3 years from August 1, 1971.

Ordinarily that fact would preclude any later assessment of taxes due for the years ending June 30, 1970 or June 30, 1971. Petitioner did, however, on July 25, 1974, at the request of Respondent, sign a consent extending the period of assessment for these taxes to August 1, 1975.

Petitioner contends that there is no statutory authority for time limitation waivers.

Respondent argues that 30 Del. C. §114 and 30 Del. C. §2103(b) grants such authority to the Secretary of Finance through his rule making authority. No specific rule is cited however.

We do not need to decide that issue.

At the time Petitioner executed the purported waiver it was in possession of the letter from Respondent dated November 17, 1969 advising Petitioner that it was allowed a $25,000 quarterly

exclusion for each of the retail outlets of Petitioner. Respondent had not revoked that letter.

Surely Petitioner was in part relying on that misinformation when it executed the waiver, at the request of Respondent.

It would be inequitable, in our opinion, to allow Respondent to rely upon a waiver which was entered into while Petitioner was mislead by Respondent to believe that it was entitled to four $25,000 (or $20,000) quarterly exclusions instead of one quarterly exclusion.

We, therefore, hold that Respondent shall not be permitted to collect any additional retail merchants license taxes due for the tax years ending June 30, 1970 or June 30, 1971, because Respondent now desires to recomputate the license taxes based on a single quarterly exclusion instead of a quarterly exclusion for each store of Petitioner.

Respondent may, however, collect the license taxes due for the tax years ending June 30, 1972, 1973, and 1974 computed on the basis of but one quarterly exclusion.

SO ORDERED.

Revised: 8/5/76

SYNOPSIS

DOCKET NOS. 600 and 607

TAX SEGMENT: LICENSE TAX (Retail-Wholesale)

ISSUE: (1) Whether Petitioner is entitled to a $20,000 quarterly exclusion for retail merchants' license fee imposed by 30 Del. C. § 2905 (b) for each of the branch stores in Delaware.

(2) Whether Division of Revenue is bound by informal decision rendered in letter dated November 17, 1969 from Deputy Tax Commissioner which advised in part --- "each of the four Delaware outlets (of Petitioner) is allowed a $25,000 exclusion provided under Section 2901---".

(3) Whether assessments made for tax years June 30, 1970 and June 30, 1971 are barred by statute of limitations although Petitioner executed waiver on time limitations.

TAB DECISION: (1) Petitioner's claim that he was entitled to a $20,000 quarterly exclusion for each of its stores in Delaware instead of but one $20,000 exclusion was denied by the Tax Appeal Board.

(Decision rendered in the case of the Great Atlantic and Pacific Tea Company, Docket No. 534, et al, dated March 12, 1975 and upheld by Superior Court 5091 CA 1975, dated September 8, 1975)

(2) Petitioner's claim that state tax collection agencies are bound by informal advice to taxpayers of tax laws as related in IRS Rev. Proc 62-28 1962-2C B505 was denied as there is no authority Delaware statute nor administrative position of the Division in these instances. However, due to erroneous information furnished by Respondent, Petitioner is not liable for interest and penalty for late payment and; therefore, entitled to a refund of such payment already paid.

(3) The Tax Appeal Board held that it was inequitable to allow Respondent to rely on Petitioner's executed waiver entered into while mislead on statute

provisions and ruled that Respondent shall not be permitted to collect additional retail merchants' license taxes due for tax years ending June 30, 1970 and June 30, 1971 due to Respondent's desire to recompute license taxes based on a single quarterly exclusion instead of a quarterly exclusion for each store.

Respondent may, however, collect license taxes due for tax years ending June 30, 1972, 1973 and 1974 computed on the basis of but one quarterly exclusion.

NOTE: Chapter 24, Laws 1975 replaced $20,000 quarterly exclusion with $10,000 monthly exclusion.

DECISION: For Respondent

DECISION DATE: August 5, 1976