

**NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION**

In the Matter of the Petition :
: **DETERMINATION**
: **of** :
: **TAT(H) 10-7(BT)**
: **DEUTSCHE BANK AG** :
: _____ :
:

Hauben, C.A.L.J.:

Petitioner, Deutsche Bank AG filed a corrected Petition for Hearing with the New York City (City) Tax Appeals Tribunal (Tribunal) seeking redetermination of the Commissioner of Finance's (Commissioner or Respondent) failure to pay interest with respect to an undisputed refund of City Financial Corporation Tax under Chapter 6 of Title 11 of the City Administrative Code (Administrative Code) for the tax year 2003 (the Tax Year).

Respondent previously brought a motion for summary determination pursuant to the Tribunal Rules of Practice and Procedure (Rules), ([20 RCNY] § 1-05[d]) for an order dismissing the Petition on the basis that Petitioner's claim for interest in a letter dated February 5, 2009 was a second refund claim that was untimely filed. Petitioner opposed the motion. By Order dated September 22, 2011, (See, Appendix) the undersigned denied Respondent's motion.

Subsequently, on January 17, 2012, Respondent issued a Withdrawal of Notice to Petitioner withdrawing a February 20, 2009 Notice of Disallowance issued to Petitioner which denied Petitioner's request for interest. Now Respondent brings this motion to dismiss the Petition on the grounds that the Tribunal lacks jurisdiction to consider a claim for overpayment interest.

Petitioner was represented by Kenneth I. Moore, Esq. And Stephen L. Solomon, Esq., of Hutton and Solomon, LLP. Joshua Wolf, Esq., Assistant Corporation Counsel, of the City Law Department, represented the Commissioner.

ISSUE

Whether the Tribunal has jurisdiction to hear a Petition for overpayment interest that is provided for in Administrative Code § 11-679.

FINDINGS OF FACT

Petitioner filed its Financial Corporation Tax Return for the Tax Year on March 3, 2005 (the Return). The Return showed a net overpayment of \$47,968,910. The Return indicated that \$17,968,910 was to be applied as a credit to Petitioner's 2004 estimated tax and that the balance of \$30,000,000 was to be refunded to Petitioner.

Respondent's first motion papers indicate that it accepted Petitioner's refund claim; credited \$17,968,910 to Petitioner's 2004 tax liability and, on or about June 8, 2005, mailed check number 982172 to Petitioner for \$29,999,999.90 (the Check). Respondent claims that it mailed the Check to the address listed on Petitioner's Form NYC-1 in accordance with established procedures. Petitioner acknowledges that \$17,968,910 was credited to its account. However, Petitioner claims that it did not receive the Check.

On or about December 2, 2008, approximately three years and nine months after it filed the Return, Petitioner called a

Department of Finance employee, Kamal Sharma, and told her that it had not received \$30,000,000 of its \$47,968,910 overpayment for 2003. On December 23, 2008, Respondent issued a replacement check to Petitioner in the amount of \$29,999,999.90 as payment of the Refund for the Tax Year. Petitioner received and negotiated the replacement check.

By letter dated February 5, 2009, Petitioner requested interest on the amount received in the replacement check from the original due date of the Return. Petitioner did not indicate in the letter the amount of interest that it claimed. On February 20, 2009, Respondent issued a Notice of Disallowance (the Notice) denying Petitioner's "refund" claim stating that there is "[n]o interest due on replacement refunds." The Notice states that the original refund check was issued on June 8, 2005.¹ The Notice advised Petitioner that if it disagreed "with this notice, you have the right to file a request for a Conciliation Conference . . . or a Petition for Hearing within 2 (two) years from the date of this notice."

Over a year later, Petitioner filed a Petition dated March 12, 2010 requesting allowance of the "refund/credit" that was denied in the February 20, 2009 Notice.² In the Petition, Petitioner claimed that Respondent erred in denying "Petitioner's claim for interest due on late payment of refund;" that the "original refund check was never tendered to Petitioner;" and that interest was required by statute. Respondent filed an Answer to the Petition and brought a motion for summary determination (the "First Motion") on the

¹ There would have been no overpayment interest due on the original refund check.

² Petitioner requested a "Refund" of \$9,017,279. Respondent disputes Petitioner's calculations in the event that Petitioner is entitled to interest.

grounds that Petitioner's claim for interest was a refund claim that was made after the statute of limitations had expired. Petitioner opposed the motion. By Order dated September 22, 2011, Respondent's motion was denied. The Order found that Petitioner's February 5, 2009 letter requesting interest was not a new claim for refund, finding:

Where a taxpayer has not paid interest, a claim, request or demand for overpayment interest is not a new claim for refund of an overpayment as it does not seek return of any amount previously paid.

The Order found that the letter was a pursuit of the right to overpayment interest, applicable in certain circumstances, as provided by Administrative Code § 11-679. The Order went on to determine the appropriate limitations period for such a claim on the presumption that there was jurisdiction.

After the Order was issued, Respondent informed the Tribunal and Petitioner that it intended to raise the issue of whether the Tribunal has jurisdiction to hear claims for overpayment interest. On January 17, 2012, Respondent issued a Withdrawal of Notice (the Withdrawal) to Petitioner. The Withdrawal stated that the Department had treated Petitioner's February 5, 2009 letter as a claim for refund of interest, disallowed the refund claim and "purported to provide you with the right to petition the [Tribunal] for a hearing." The Withdrawal then referred to the Order in which the undersigned had found that the Letter was not a refund claim because it did not seek return of "any amount previously paid," and was instead a separate claim for interest. The Withdrawal went on to state that "the February 20, 2009 notice was issued in error, under a misapprehension of the nature of the request . . . and without any statutory authority. Such notice is therefore a nullity without any legal force or effect, should be disregarded in

its entirety, and, for the avoidance of any doubt, is hereby retroactively withdrawn as of the date of its issuance." The Withdrawal concluded that with respect to petitioner's request for interest, "[t]he Department of Finance's determination denying such request was final as of the date you received a replacement refund check without any interest included. . . ."

POSITIONS OF THE PARTIES

Petitioner contends that its original claim for refund includes a request for interest that may be due on the overpayment and that the Tribunal has jurisdiction to determine such overpayment interest. Petitioner argues that having issued the Notice, which provided that Petitioner could petition the Tribunal that Respondent is estopped from arguing that the Tribunal does not have jurisdiction in this matter. Respondent argues that there is no provision in the Code permitting claims for overpayment interest to be pursued administratively and that the Code has no provision giving the Tribunal jurisdiction to consider claims for overpayment interest. Respondent argues that estoppel cannot be asserted against the Department in this matter.

CONCLUSIONS OF LAW

A motion for summary determination may be granted pursuant to Rules Section 1-05[d] where:

upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party.

"The proponent of a summary determination motion must make a prima facie showing of entitlement to judgment as a matter of law" (*Winegrad v. New York*, 49 NY2d 557, 851, 852 [1985]).

In this matter, Petitioner seeks interest on an undisputed refund that it argues was paid more than three months after the refund claim. Respondent denies that the refund was paid late and brings this motion to dismiss the Petition, asserting that the Tribunal lacks jurisdiction to consider the claim for overpayment interest. There are no material facts in dispute with respect to the question of jurisdiction. Prior to this motion Respondent had brought a motion to dismiss the Petition arguing that the request for interest was a second refund claim that was barred by the statute of limitations. That motion was denied. (See, Appendix.)

The Commissioner of Finance has the authority, within the applicable period of limitations, to credit or refund overpayments of tax and interest on overpayments. [Administrative Code § 11-677.] Administrative Code § 11-678.1 (as relevant here) provides that a taxpayer must file a claim for credit or refund of an overpayment within three years of the time the return was filed and limits the amount that can be refunded to the amount that was paid during the three years preceding the claim, plus the periods of any extensions for filing the return. Administrative Code § 11-678.5 provides that no refund shall be allowed or made "after the applicable period of limitation specified in this subchapter, unless a claim for credit or refund is filed by the taxpayer within such period." Administrative Code § 11-678.5 also provides that "[n]o period of limitations specified in any other law shall apply to the recovery by a taxpayer of moneys paid in respect of taxes under the named subchapters."

Administrative Code § 11-679.1 provides that "interest shall be allowed and paid" on overpayments. Interest is to be paid from the date of the overpayment to a date "preceding the date of a refund check by not more than thirty days whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer." No interest is due on an overpayment if the Commissioner of Finance credits or refunds an overpayment within three months of the time that the return claiming the refund was filed. [Administrative Code § 11-679.3.] Administrative Code § 11-679 does not provide any time limits or procedures for claiming interest or disputing the amount of interest that may be due on an overpayment.

Section 11-680 of the Administrative Code provides for the filing of petitions under the City Business Tax law. A taxpayer may file a petition for amounts asserted in a claim for refund if it has filed a timely claim for refund and either six months have elapsed since the claim was filed or within two years from the date Respondent mailed to the taxpayer a notice of disallowance of such claim in whole or in part. [Administrative Code § 11-680.3.]

As found in the Order denying Respondent's first motion, where a taxpayer has not paid interest, a claim, request or demand for overpayment interest is not a new claim for refund of an overpayment as it does not seek return of any amount previously paid. Petitioner's February 5, 2009 request for interest is the pursuit of the right provided for in Administrative Code § 11-679 to compensate a taxpayer for the "loss of use of his money between the time that he paid the tax and the time that he received the refund." (*E.W. Scripps Co. v. United States*, 2002 WL 31477137 [SD Ohio 2002], 90 AFTR2d 2002-6835, (order denying motion to dismiss), *Trustees of the Bukeley School v. United States*, 628 F Supp 802 [D

Conn 1986])). Petitioner's request for interest is not a refund claim. Nor does the original refund claim include a potential claim for overpayment interest.

The Tribunal has "jurisdiction to hear and determine cases initiated by the filing of petitions protesting notices issued by the commissioner of finance, which give a person the right to a hearing . . ." [New York City Charter Section 168(a)].³ Under this Charter provision, the jurisdiction of the Tribunal is specifically limited to review of petitions filed by taxpayers that protest notices for which the Code explicitly provides a right to hearing. (*Matter of Hillary David Corp.*, TAT(E) 96-141(GC) [New York City Tax Appeals Tribunal, January 9, 2002]).

The Administrative Code provides for overpayment interest in certain circumstances. However, the Administrative Code's provisions regarding how a taxpayer files claims with the Department over taxes, and regarding how to protest administrative denials of taxpayer claims, fails to include an explicit provision for directly claiming overpayment interest from the Department or protesting the failure to pay overpayment interest (or the calculation of such interest) under Administrative Code § 11-679.

The Commissioner may issue a notice of disallowance when a refund is denied in whole or in part. A taxpayer may protest the denial of a claim for refund as provided in Administrative Code § 11-680.3. The Order established that this matter concerns overpayment interest only; there is no refund at issue. There is

³ The Charter and Code provide that a taxpayer who has not received a notice denying a claim for refund under Chapter 6 of the Code within six months of the claim for refund shall be deemed to have been issued a notice denying the refund and may file a petition. [New York City Charter §§ 168, 170, Administrative Code § 11-680.3.]

no authority in the Administrative Code for Respondent to issue a notice with regard to a claim for overpayment interest under Administrative Code § 11-679. Nor does the Administrative Code provide petition rights with respect to claims for overpayment interest.

The Administrative Code's silence regarding taxpayer claims for overpayment interest and Respondent's withdrawal of the Notice, leaves this matter with no petitionable notice and no claim that may be pursued administratively.

The Tribunal has limited jurisdiction. A taxpayer seeking interest or additional interest on an overpayment must bring an Article 78 proceeding after the final action by the Department on the refund. (*ABC Radio Network*, 294 AD2d 213 [1st Dept 2002]). In *ABC Radio*, the taxpayer received a refund and overpayment interest. It then brought an action for a judgment pursuant to CPLR 3001 for additional overpayment interest. The New York State Department of Taxation and Finance (State) argued that the taxpayer had failed to exhaust its administrative remedies and also that the taxpayer's action was untimely. The Appellate Division ruled that the action, which was brought more than four months after the taxpayer had been notified of and received the refund, was untimely.

It is well settled that the four-month statute of limitations for CPLR article 78 proceedings begins to run from the date the agency's determination becomes "final and binding upon the petitioner" . . . Here, when ABC received its refund check . . . [the State] had arrived at a definitive final position on the issue and ABC had suffered an actual loss in accrued interest . . . [T]he essential nature of a proceeding may not be changed, thereby lengthening the statute of limitations, merely by denominating it as something other than what it actually is . . . [This is] an action cognizable under CPLR 7803(3) . . . *ABC Radio, supra*, at 214.

The Legislature or City Council has explicitly set forth procedures in the Administrative Code for how to address interest in certain circumstances. Administrative Code § 11-675.6 concerning "Interest treated as tax" provides that underpayment interest is to be paid upon notice and demand and assessed in the same manner as tax. Administrative Code § 11-676.8 concerning "additions treated as tax" also provides that such additions are part of the tax, assessed in the same manner as tax and goes on to specify what interest may be asserted in a notice of determination issued under Administrative Code § 11-672. The Administrative Code treats underpayment interest, under certain circumstances, as separate from the tax so that taxpayers disputing such interest have no right to a hearing. See *Hillary David, supra*, where interest and penalties asserted by the Department were subject to the Administrative Code's notice and demand provisions which did not include administrative hearing rights.

Petitioner argues that having issued a Notice of Disallowance which included information on where and the time within which to appeal, Respondent is estopped from arguing that the Tribunal does not have jurisdiction. Generally, estoppel cannot be asserted against the government. (*Turner Construction Company v. State Tax Commission*, 57 AD2d 201 [3rd Dept 1977], *Schuster v. Commissioner of Internal Revenue*, 312 F2d 311 [9th Cir 1962]). A government agency may be estopped from asserting a defense of the statute of limitations where it has issued a notice which includes incorrect information regarding the time to protest or appeal. (*Miller v. United States*, 500 F.2d 1007 [2d Cir 1974].)

However, a party cannot through estoppel, confer jurisdiction on an adjudicative body with limited jurisdiction where none

exists. Respondent's issuance of an erroneous notice cannot confer jurisdiction on the Tribunal in this matter. That Respondent issued a notice that informed Petitioner that it could appeal to the Tribunal does not mean that the Tribunal has jurisdiction. A notice issued by Respondent can confer no greater rights than that provided by the Administrative Code. There is no reason to apply estoppel in this matter. Moreover, even if Petitioner relied on the Notice, such reliance was not reasonable in light of *ABC Radio, supra*. Whatever Respondent's reason for issuing the Notice, error as it claims, or administrative practice at the time, the fact remains that the procedure for pursuing overpayment interest was set forth in *ABC Radio, supra*. Petitioner must pursue overpayment interest in an Article 78 proceeding after the last administrative action in this matter.

There is no authority in the Administrative Code or Charter granting the Tribunal jurisdiction to hear petitions regarding overpayment interest under Administrative Code § 11-679.

ACCORDINGLY, Respondent's motion to dismiss the Petition for lack of jurisdiction is granted and the Petition of Deutsche Bank AG requesting interest on an overpayment of tax for the tax year 2003 is denied.

DATED: February 19, 2013
New York, New York

Warren P. Hauben
Chief Administrative Law Judge

APPENDIX

**NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION**

In the Matter of the Petition

of

DEUTSCHE BANK AG

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ORDER

TAT(H) 10-7(BT)

Hauben, C.A.L.J.:

Deutsche Bank AG ("Petitioner") filed a corrected Petition for Hearing, dated March 12, 2010 ("Petition"), requesting redetermination of the disallowance by the Commissioner of Finance (Commissioner or Respondent) of a claim for refund of New York City ("City") Financial Corporation Tax ("BT") pursuant to Chapter 6 of Title 11 of the City Administrative Code ("Code") for the tax year 2003 (the "Tax Year").

Respondent brought a motion for summary determination pursuant to the Tax Appeals Tribunal ("Tribunal") Rules of Practice and Procedure ("Rules"), 20 RCNY §1-05(d) for an order dismissing the Petition on the basis that Petitioner's claim for interest was a second refund claim that was untimely filed. Petitioner opposed the motion. Both parties filed initial and reply memoranda of law. Kenneth Moore, Esq. of Hutton and Solomon LLP, represented the Petitioner. Joshua Wolf, Esq., Assistant Corporation Counsel, of the City Law Department represented the Commissioner.

Petitioner filed its BT Return for the Tax Year on March 3, 2005 (the "Return"). The Return showed a net overpayment of

\$47,968,910. The Return indicated that \$17,968,910 was to be applied as a credit to Petitioner's 2004 estimated tax and that the balance of \$30,000,000 was to be refunded to Petitioner.

Respondent's motion papers indicate that it accepted Petitioner's refund claim; credited \$17,968,910 to Petitioner's 2004 tax liability and, on or about June 8, 2005, mailed check number 982172 to Petitioner for \$29,999,999.90 (the "Check"). Respondent claims that it mailed the Check to the address listed on Petitioner's Form NYC-1 in accordance with established procedures. Petitioner acknowledges that \$17,968,910 was credited to its account. However, Petitioner claims that it did not receive the Check.

On or about December 2, 2008, approximately three years and nine months after it filed the Return, Petitioner called a Department of Finance employee, Kamal Sharma, and told her that it had not received \$30,000,000 of its \$47,968,910 overpayment for 2003. On December 23, 2008, Respondent issued a replacement check to Petitioner in the amount of \$29,999,999.90 as payment of the Refund for the Tax Year. Petitioner received and negotiated the replacement check.

By letter dated February 5, 2009, Petitioner requested interest on the amount received in the replacement check from the original due date of the Return. Petitioner did not indicate in the letter the amount of interest that it claimed. On February 20, 2009, Respondent issued a Notice of Disallowance (the "Notice") denying Petitioner's "refund" claim stating that there is "[n]o interest due on replacement refunds." The Notice states that the

original refund check was issued on June 8, 2005.⁴ The Notice advised Petitioner that if it disagreed "with this notice, you have the right to file a request for a Conciliation Conference . . . or a Petition for Hearing within 2 (two) years from the date of this notice."

Petitioner filed a Petition dated March 12, 2010 requesting allowance of the "refund/credit" that was denied in the February 20, 2009 Notice.⁵ In the Petition, Petitioner claimed that Respondent erred in denying "Petitioner's claim for interest due on late payment of refund;" the "original refund check was never tendered to Petitioner;" and that interest was required by statute. Respondent filed an Answer to the Petition and brought this motion for summary determination.

A motion for summary determination may be granted pursuant to Rules Section 1-05(d) where:

upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party.

"The proponent of a summary determination motion must make a prima facie showing of entitlement to judgment as a matter of law" *Winegrad v. New York*, 49 NY2d 557, 851, 852 (1985).

⁴ While not stated in the Notice, no interest would be due if interest was based on the original check.

⁵ Petitioner requested a "Refund" of \$9,017,279. Respondent disputes Petitioner's calculations in the event that Petitioner is entitled to interest.

Code §11-677 gives the Commissioner of Finance the authority, within the applicable period of limitations, to credit or refund overpayments of tax and interest on overpayments. Code §11-678.1 (as relevant here) provides that a taxpayer must file a claim for credit or refund of an overpayment within three years of the time the return was filed and limits the amount that can be refunded to the amount that was paid during the three years preceding the claim, plus the periods of any extensions for filing the return. Code §11-678.5 provides that no refund shall be allowed or made "after the applicable period of limitation specified in this subchapter, unless a claim for credit or refund is filed by the taxpayer within such period." Code §11-678.5 also provides that "[n]o period of limitations specified in any other law shall apply to the recovery by a taxpayer of moneys paid in respect of taxes under the named subchapters."

Code §11-679.1 provides that "interest shall be allowed and paid" on overpayments. Interest is to be paid from the date of the overpayment to a date "preceding the date of a refund check by not more than thirty days whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer." Code §11-679.3 provides that no interest is due on an overpayment if the Commissioner of Finance credits or refunds an overpayment within three months of the time that the return claiming the refund was filed. Code §11-679 does not provide any time limits or procedures for claiming interest or disputing the amount of interest that may be due on an overpayment.

Section 11-680 of the Code provides for the filing of petitions under the City Business Tax law. Code §11-680.3 provides that a taxpayer may file a petition for amounts asserted in a claim for refund if a timely claim for refund has been filed and either six months have elapsed since the claim was filed or two years from

the date Respondent has mailed to the taxpayer a notice of disallowance of such claim in whole or in part.

On this motion, neither party claims that the Tribunal does not have jurisdiction.⁶ Respondent only pursues the affirmative defense of the statute of limitations. Respondent disallowed Petitioner's request for interest by issuing a Notice of Disallowance which informed Petitioner that it had the right to protest within two years from the date of the Notice. It is assumed on this motion that this was the appropriate vehicle to respond to Petitioner's request.⁷

Respondent's motion is based on the premise that Petitioner's request for interest is a second refund claim, separate from Petitioner's original claim for refund of an overpayment, that was not submitted within the applicable period of limitations set forth in Code §11-678, i.e., three years from the due date of the Return. (Mot. P. 5)

⁶ However, the City has indicated that it may challenge the Tribunal's jurisdiction if its statute of limitations argument fails.

Section 168 of the New York City Charter provides in pertinent part:

The Tribunal shall have jurisdiction to hear and determine cases initiated by the filing of petitions protesting notices issued by the commissioner of finance, which give a person the right to a hearing, including *but not limited to* any notice of determination of tax due, of a tax deficiency, of a denial of a refund or credit application . . . [emphasis added].

⁷ Respondent does not claim that the Notice of Disallowance was issued in error or under a misapprehension of Petitioner's request. It has not withdrawn the Notice or claimed that a different notice should have been issued to deny a claim for overpayment interest. It does not claim that denial of overpayment interest is a final administrative action where Petitioner's recourse is an Article 78 proceeding. See, *ABC Radio Network v. State of New York Dept. Of Taxation and Finance*, 294 A.D.2d 213 (1st Dept., 2002).

In order to secure a refund of its overpayment, Petitioner was required to file a request for refund. Petitioner made such request on the Return. Respondent does not dispute the overpayment claimed on the Return and has credited or refunded the overpayment. Respondent's February 20, 2009 Notice did not disallow Petitioner's refund claim for the overpayment. It only denied that interest was owed on the replacement check. While the parties disagree as to whether Respondent tendered a refund on or about June 8, 2005, the parties agree that Respondent tendered a refund check for \$29,999,999.90 in December 2008 that was negotiated by Petitioner in January 2009.

Where a taxpayer has not paid interest, a claim, request or demand for overpayment interest is not a new claim for refund of an overpayment as it does not seek return of any amount previously paid.⁸ Accordingly, Petitioner's February 5, 2009 request for interest is not a new refund claim. It is the pursuit of the right provided for in Code §11-679 to compensate a taxpayer for the "loss of use of his money between the time that he paid the tax and the time that he received the refund." *E.W. Scripps Co. v. United States*, 2002 WL 31477137 (S.D. Ohio), 90 A.F.T.R.2d 2002-6835, (order denying motion to dismiss), *Trustees of the Bukeley School v. United States*, 628 F.Supp. 802 (D.Conn. 1986).⁹

⁸ Where interest has been paid it is considered part of the amounts that may be claimed as an overpayment within three years of filing a return or two years of payment of the tax. *Gen. Instrument Corp. v. United States*, 33 Fed.Cl. 4 (1995).

⁹ In *Scripps* and *Bukeley*, the Federal District Courts took jurisdiction over claims for overpayment interest on the theory that it is part of the claim for refund. On this motion it is not necessary to decide whether the decisions in *Scripps* and *Bukeley* are persuasive so that a claim for refund under the Code includes a claim for interest that was not paid.

As relevant on this motion, overpayment interest is due without any requirement that a taxpayer must claim overpayment interest in order to receive it. Overpayment interest is limited by Code §679(3) to instances where Respondent does not tender refund of the overpayment within 3 months of the claim for refund.¹⁰ Respondent seeks to impose the limitations period provided in Code §11-678 on Petitioner's request for overpayment interest. However, Code §11-678, only provides periods of limitation for taxpayer claims for refunds of amounts paid.

It is thus necessary to determine the appropriate statute of limitations for claiming overpayment interest and whether Petitioner's claim was timely. Overpayment interest is an important part of any government's statutory provisions for overpayments. However, governments at all levels, provide detailed law and rules for the treatment of overpayments, but often provide only a right to overpayment interest, without a procedure or time limit to pursue the right. Accordingly, the courts have looked to other procedures and statutes of limitation to apply to a claim for overpayment interest. See, *Barnes v. United States*, 137 F.Supp. 716 (Ct.Cl. 1956), where the Court of Claims stated:

¹⁰ If Respondent could delay refunds and not pay interest because of the statute of limitations, the whole purpose of Code §679 would be defeated. Where there is no dispute about the lateness of a refund, presumably Respondent pays statutory interest without requiring that a taxpayer demand it. However, in this matter, it seems to be Respondent's position either that interest must always be demanded or that where the Commissioner exercises discretion, (i.e., deciding that interest is not due) that interest must be demanded, and that any demand must be within the time limits for filing a claim for refund. It is noted that some claims for refunds are made on or near the last day for doing so. Respondent's position would make it necessary for taxpayers to file a protective claim for interest with every claim for refund. This would require Respondent to issue a notice denying interest, even though, in the vast majority of cases, refunds are allowed and paid within the three-month period of Code §11-679.3. It is also noted that many claims for refund, are made on tax returns, where there is no line for claiming interest.

A statute of limitations on a suit for interest in not specifically covered by the Internal Revenue Code. Therefore, a suit for interest is founded on this court's general jurisdiction and is governed by our six-year statute of limitations. *Id.*, at p. 718.

As in *Barnes*, the limitations period provided by Code §11-678 for filing claims for refunds of overpayments does not apply to a claim for overpayment interest under Code §11-679. Also, as Petitioner does not seek to recover any amount that it paid, the Code §11-678 prohibition on the application of other periods of limitation to the recovery of moneys paid does not apply.

Subchapter 5 of Chapter 6 of Title 11 of the Code, including Code §11-679, is silent on the procedure to be followed to pursue a claim for overpayment interest where the refund is not in dispute but the Commissioner and the taxpayer disagree as to whether overpayment interest is due or as to the amount of overpayment interest that may be due. Respondent has not issued Regulations or provided any guidance concerning when overpayment interest will be paid.¹¹

Under these circumstances resort to another statute of limitations to pursue a claim for statutory interest is necessary in order to provide a viable remedy for the right provided by Code

¹¹ The Federal government has issued procedures and guidance for overpayment interest. With respect to replacement checks the Internal Revenue Service has issued a Chief Counsel Advice that states in part:

In situations in which the Service sends a taxpayer a replacement check the question arises whether interest allowed . . . is based on the original check or the replacement check. . . . [I]nterest is allowed based on the replacement check where the Service is at fault for delaying the refund . . . [I]f a refund check is lost through no fault of the Service [no interest is allowed] for the period of the delay . . . The Service considers these situations on a case by case basis. *Chief Counsel Advice*, Issue: July 27, 2001, June 19, 2001.

§11-679. CPLR Sec. 213.1 provides for a six-year statute of limitations period where no statute of limitations is provided.¹² Petitioner must have made a claim for interest within six years of the time that its cause of action for overpayment interest accrued. As Petitioner claimed interest in its February 2009 letter, Petitioner's cause of action for overpayment interest must have accrued after February 2003. Petitioner's cause of action for overpayment interest accrued when its claim for refund was allowed. *Barnes, supra*, at p. 718. It does not matter that Petitioner was not aware that the refund claim was allowed by the Commissioner or his designee. *Gen. Instrument Corp., supra*, at p. 8. Whether the date that the refund was allowed is the date when Respondent credited part of Petitioner's overpayment to Petitioner's 2004 tax liability as requested in the 2003 return that was filed in March 2005 or when Respondent approved Petitioner's refund check on or about June 8, 2005, Petitioner's claim for overpayment interest was timely.

I have considered all other arguments made upon this motion and have found them to be without merit.

Accordingly, Respondent's motion for summary determination is denied. The matter will be scheduled for conference.

DATED: September 22, 2011
New York, New York

Warren P. Hauben
Chief Administrative Law Judge

¹² The parties have not suggested any other statute of limitations that might apply in the event that the statute of limitations provided in Code §11-678 did not apply.