STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN SMYTHE	:	ORDER DTA NO. 822160
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1997 through February 28, 1999.	:	

Petitioner, John Smythe, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1997 through February 28, 1999.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (James Della Porta, Esq., of counsel), brought a motion filed November 3, 2008, seeking dismissal of the petition in the above-captioned matter pursuant to Tax Law § 2006(5). Petitioner appeared in opposition to the motion by his representative, Timothy P. Noonan, Esq. The parties completed their submissions by December 17, 2008, which date began the 90-day period for issuance of this order.

After due consideration of the motion, the supporting affirmation of James Della Porta, Esq., and the exhibits attached thereto, the Division's Memorandum of Law, the affirmation of Timothy P. Noonan, Esq., petitioner's Memorandum of Law in Opposition to the Motion, and all the pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Tax Appeals lacks subject matter jurisdiction of the petition in this matter warranting a dismissal of the petition pursuant to Tax Law § 2006(5)(ii).

FINDINGS OF FACT

1. On May 3, 2001, the Division of Taxation issued a Notice of Determination, number L-019348032, to petitioner as a person responsible for the collection and payment of sales and use taxes on behalf of Showtime Entertainment, Inc., for the period December 1, 1997 through February 28, 1999, in the sum of $68,409.02 plus penalty and interest. The notice stated that taxes had been determined to be due from Showtime Entertainment, Inc., in accordance with Tax Law § 1138(a).

2. Petitioner filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) on December 2, 2004. The conference was held on January 10, 2005 and an Order was issued on March 25, 2005 sustaining the statutory notice. Petitioner did not file a petition with the Division of Tax Appeals to challenge the order within 90 days or at any time thereafter.

3. The Division issued satisfactory evidence that the conciliation order was issued by BCMS on March 25, 2005 to petitioner and to petitioner's representative, Leonard Fritzen, the latter's conciliation order sent to "534 Broadhollow Road - Suite 4, Melville, NY 11747-3621," as indicated in the Division of Taxation's mail log. Mr. Fritzen's address as set forth on the power of attorney form filed with BCMS on December 3, 2004 was "534 Broadhollow Road - Suite 440, Melville, NY 11747."

4. On May 15, 2007, the Division of Taxation sold at public auction a vehicle it had seized from petitioner. Subsequently, on July 20, 2007, the Division seized assets from petitioner's

account at Citibank North America, which, in combination with the seizure of the automobile on May 15, 2007, satisfied the liabilities asserted in the Notice of Determination referenced above.

5. On November 9, 2007, petitioner timely filed a request for refund pursuant to Tax Law § 1139(c) seeking repayment of the moneys seized by the Division of Taxation in satisfaction of Notice of Determination L-019348032.

6. By letter, dated December 7, 2007, the Division denied the refund application in full, stating that Tax Law § 1139(c) was the reason for the denial, without further elaboration.

7. On March 4, 2008, petitioner filed a timely petition for an administrative hearing with the Division of Tax Appeals to contest the Division's denial of the refund application. The Division answered the petition on May 7, 2008 and subsequently brought this motion.

CONCLUSIONS OF LAW

A. Section 3000.9(a)(1)(ii) of the Rules of Practice and Procedure states that "[a] party may move to dismiss a petition on the grounds that (ii) the division of tax appeals lacks jurisdiction of the subject matter of the petition." The Division contends that petitioner is bound by the conciliation order issued on March 25, 2005, which was not petitioned and became a fixed and final assessment from which no further appeal is permitted. For the reasons stated below, it is concluded the Division was in error.

B. Tax Law § 1138(a)(1) provides that a notice of determination shall be an assessment of the tax specified in the notice unless the taxpayer applies to the Division of Tax Appeals for a hearing. Tax Law § 170(3-a)(a) provides that within the Division of Taxation there shall be a BCMS which shall provide conferences at a taxpayer's option when said taxpayer receives a notice which gives rise to a right to a hearing. Tax Law § 170(3-a)(b) provides that a request for such a BCMS conference suspends the running of the period of limitations for filing a petition to

protest the notice and request a hearing. Conferees are empowered to hold informal conferences at which they receive testimony and evidence deemed necessary to reach a fair and equitable result and are cloaked with the power and authority delegated from the Commissioner of Taxation and Finance to waive or modify a penalty, interest and additions to tax. (Tax Law § 170[3-a][c].)

Observed from the vantage point of Tax Law § 170(3-a), the conciliation conference procedure is not, as the Division argues, a second option to protest a sales tax notice of determination, but a brief, albeit important, statutorily provided detour on the path to a hearing in the Division of Tax Appeals provided for in Tax Law § 1138(a). Tax Law § 170(3-a) states that the conference procedure is an informal one, where a Division of Taxation employee, acting in the place of the Commissioner, can review testimony and evidence in an effort to reach an equitable result and even modify penalty, interest and additions to tax. It was not designed to replicate or replace a hearing in the Division of Tax Appeals and should not be confused with providing taxpayers an opportunity to fully litigate all the issues presented in an audit, e.g., a legal issue in a case of first impression.

In this context, it does not logically follow that the provision of Tax Law § 170(3-a)(e), which states that a conciliation order shall be binding on the Department and the person who requested the conference unless a petition for hearing is filed within 90 days of the issuance of the order *notwithstanding any other provision of law to the contrary*, precludes the payment of the tax pursuant to that order and application for a refund. In fact, Tax Law § 1139(c) contains just such a contrary provision of law.

C. A taxpayer may file a claim for refund of sales tax within two years of the time the tax was paid and the refund amount can not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim. Further,

> [n]o refund or credit shall be made of tax, interest or penalty paid after a determination by the commissioner made pursuant to section eleven hundred thirty-eight unless it be found that such determination was erroneous, illegal or unconstitutional or otherwise improper, *by the division of tax appeals* pursuant to article forty of this chapter . . . . (Emphasis added.)

The Division of Taxation argues that petitioner's failure to timely protest the conciliation order within 90 days resulted in a fixed and final tax assessment and that no refund may be granted. This conclusion is unsupported by the statutory language of Tax Law § 1139 (as amended by L 1996, ch 267) cited above. The statute expressly provides for the consideration of a refund claim by the *Division of Tax Appeals* following a determination by the "commissioner" pursuant to Tax Law § 1138. Thus, by its own terms, Tax Law § 1139(c) clearly grants the Division of Tax Appeals the jurisdiction to review the underlying liability upon which the tax was paid.

In this instance, BCMS, acting as the commissioner's delegate (Tax Law § 170[3-a][c]) issued an order after an informal review of the determination which restarted the statute of limitation which had been tolled by the filing of the request for conference. Failure to protest the conciliation order within 90 days of its issuance did not make the notice of determination any more fixed and final than it would have been had petitioner never protested the notice. In fact, within the statutory framework, the two circumstances are identical, and petitioner was entitled to have its refund claim reviewed by the Division of Tax Appeals, not the Division of Taxation.[1]

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[1]Tax Law § 170(2) provides that "there shall be in the department of taxation and finance a division of taxation, a division of the treasury, a division of the lottery and a division of tax appeals. Tax Law § 1139(c) provides that only the Division of Tax Appeals pursuant to article forty has the authority to find that the

The most recent amendment to Tax Law § 1139(c) (***see*** L 1996, ch 267) omitted the following sentence from former section 1139(c):

> A person shall not be entitled to a refund or credit under this section of a tax, interest or penalty which had been determined to be due pursuant to the provisions of section eleven hundred thirty-eight where all opportunities for administrative and judicial review as provided in article forty of this chapter have been exhausted with respect to such determination.

In omitting this language, the legislature chose to permit refunds even where a taxpayer's administrative remedies have been exhausted, such as where a taxpayer fails to file a protest within 90 days of the issuance of a notice of determination, or, as in the instant matter, the conciliation order.

D. The Division's contention that petitioner is seeking a "second bite of the apple" is in error. Petitioner is seeking to have the assessment reviewed for the first time by the Division of Tax Appeals on his protest of the refund denial. He has not had the opportunity to fully litigate the issues emanating from the notice of determination which is contemplated by Tax Law § 1139(c). The Division's argument that a conciliation conference afforded petitioner his only chance for consideration of the issues has no statutory support. In addition, its assertion that a BCMS settlement form (found to preclude a taxpayer from paying the tax agreed to and then filing a petition for review with the Division of Tax Appeals) is tantamount to a conciliation order is incorrect. The settlement form referred to by the Division and discussed in the ***Matter of Bartsch*** (Tax Appeals Tribunal, November 4, 2004), specifically contained a waiver of hearing rights, distinguishing it from a conciliation order.

E. The Division of Taxation also argues that the Division of Tax Appeals has no authority to review "activities undertaken by the Division of Taxation to collect unpaid sales tax after

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commissioner's determination of tax is erroneous, illegal, unconstitutional or otherwise improper.

assessments become fixed and final." Since this order has determined that the Division of Tax Appeals has express authority to consider the refund claim, any objection or argument to what petitioner might raise during those proceedings is premature and will be addressed at hearing.

F. Petitioner raised the issue of proper mailing in its response to the motion, attacking the Division of Taxation's proof of mailing on the basis of an error in petitioner's representative's address. But the argument that the Division's proof of mailing of the conciliation order "suggests" that the conciliation order was not properly mailed to petitioner's representative is incorrect. The fact that Mr. Fritzen's suite number was incorrectly stated as "4" on the certified mailing to Mr. Fritzen instead of "440" is deemed inconsequential.

Although the Tax Law does not specifically provide for the service of a statutory notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer's representative is not served with the statutory notice (***see Matter of Kushner***, Tax Appeals Tribunal, October 19, 2000; ***Matter of Multi Trucking***, Tax Appeals Tribunal, October 6, 1988, ***citing Matter of Bianca v. Frank***, 43 NY2d 168, 401 NYS2d 29).

There was a small discrepancy between the taxpayer's representative's address as indicated on the power of attorney and the address on the subject Conciliation Order. However, given the absence of any evidence to show that petitioner's representative at the time the conciliation order was mailed did not actually receive the subject order, it is concluded that such difference is inconsequential (***see Matter of Combemale***, Tax Appeals Tribunal, March 31, 1994).

G. The Division of Taxation's Motion to Dismiss pursuant to Tax Law § 2006(5)(ii) is denied, and a hearing will be scheduled in due course.

DATED: Troy, New York
March 16, 2009

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE