

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
SAK SMOKE SHOP, INC. : DECISION
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 March 1, 1984 through :
November 30, 1986. :

Petitioner, Sak Smoke Shop, Inc., 2174 Hempstead Turnpike, East Meadow, New York 11554 filed an exception to the order of the Administrative Law Judge issued on June 3, 1988 with respect to its 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 March 1, 1984 through November 30, 1986 (File No. 804911). Petitioner appeared by Joseph A. Giordano, Esq. The Division of

Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq. of counsel).

Petitioner did not file a brief on exception. The Division submitted a letter in lieu of a brief.

Neither party requested oral argument. After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner is entitled to a hearing for revision of a determination or for refund of sales and use taxes.

FINDINGS OF FACT

We find the facts as stated in the order of the Administrative Law Judge and such facts are incorporated herein by this reference. We also find one additional fact.

To summarize these facts, on April 6, 1987, petitioner, by its president, filed a written, signed statement consenting to fixing tax due for the period March 1, 1984 through November 30, 1986 in the amount of \$26,110.36 plus penalty and interest. On the same date, petitioner executed a consent to payment of an "omnibus" penalty (a penalty asserted pursuant to Tax Law § 1145, as amended by L 1985, ch 65, § 86) in the amount of \$1,432.09.

On June 3, 1987, the Division of Taxation issued to petitioner a Notice and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1984 through November 30, 1986 in the amount of \$26,110.36 plus penalty and interest. On the same date, the Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing a penalty in the amount of \$1,432.09 for the period March 1, 1984 through November 30, 1986.

On September 17, 1987, the Bureau of Conciliation and Mediation Services ("BCMS") received from petitioner a request for a conciliation conference. The request was dated September 15, 1987. On October 16, 1987, BCMS issued an order denying petitioner's request for a conference on the ground that the request was not filed within 90 days of the statutory notice.

On December 15, 1987, petitioner filed with the Division of Tax Appeals a petition for a hearing.

We find as an additional fact that petitioner has paid only a portion of the tax due, including penalties and interest.

OPINION

The Administrative Law Judge issued an order denying petitioner's request for a hearing because petitioner was not entitled to a hearing to challenge the tax and penalty assessed in accordance with the consent. The Administrative Law Judge also concluded that, in any event, the petitioner had not filed a timely request for a conciliation conference or for a hearing.

We affirm the order of the Administrative Law Judge. On exception, petitioner urges us to consider its signed statement of April 6, 1987 fixing tax due for the period applicable herein a nullity because (1) the officer signing on petitioner's behalf, Sajida Khanas president, allegedly could neither read, write nor understand the English language, (2) the auditor was under an affirmative duty to have detected and known Mrs. Khan's inability to understand the purpose of the documents fixing the tax due, and (3) the auditor was under an affirmative duty to, at least, suggest to Mrs. Khan that she seek the advice of counsel before agreeing to irrevocably fix the tax due. Petitioner asserts that had Mrs. Khan received such advice the request for a conciliation conference would have been timely. Neither petitioner nor Mrs. Khan has excepted to the June 3, 1987 notice of determination and demand, in particular that Mrs. Khan had any difficulty in being able to read or understand the assessment it prescribes.

Finally, petitioner asserts that it has paid in excess of \$10,000 in partial payment of tax and penalty due.

First, we will not address petitioner's claims that Mrs. Khan could not read or write the English language well enough to know the meaning of the consents fixing tax and penalty and that the Division had the responsibility to suggest that petitioner seek the advice of counsel before signing such documents. We need not address such claims because even if the consents

were a nullity, petitioner did not file a timely request for a conciliation conference or for a hearing and thus is not entitled to a hearing.

Effective September 1, 1987, a taxpayer's petition for revision of a determination is to be filed with the Division of Tax Appeals (Tax Law § 2008). Among the functions, powers and duties of the Tax Appeals Tribunal is the following:

"To provide a hearing as a matter of right, to any petitioner upon such petitioner's request, pursuant to such rules, regulations, forms and instructions as the tribunal may prescribe, unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter. Where such a request is made by a person seeking review of taxes determined or claimed to be due under this chapter, the liability of such person shall become finally and irrevocably fixed, unless such person, within ninety days from the time such liability is assessed, shall petition the division of tax appeals for a hearing to review such liability," (Tax Law § 2006.4.)

Tax Law section 1138(a)(1) provides an administrative hearing as a matter of right if an application for hearing is made within 90 days of the issuance of a notice of determination of tax due.

As an alternative to petitioning for a hearing in the Division of Tax Appeals, the taxpayer "may request a conciliation conference by filing a written request, and one conformed copy, with the Bureau of Conciliation and Mediation Services" (20 NYCRR 4000.3[a]). BCMS is responsible for providing the conferences which had been conducted by the State Tax Commission (Tax Law § 170.3-a). Tax Law section 170.3-a provides, in part, that BCMS shall provide a conference at the option of the taxpayer where the taxpayer has received:

"any written notice of a determination of tax due, a tax deficiency, a denial of a refund or credit application, a cancellation, revocation or suspension of a license, permit or registration, a denial of an application for a license, permit or registration or any other notice which gives rise to a right to a hearing under this chapter if the time to petition for such a hearing has not elapsed."

The filing of a written request, and one conformed copy, with the BCMS "suspends the running of the period of limitations for the filing of a petition for a hearing" (20 NYCRR 4000.3[c]).

Pursuant to these provisions petitioner had 90 days from the date the assessments were issued (June 3, 1987) to either request a conciliation conference or file a petition for a hearing, but failed to do either by that date. Thus even assuming, arguendo, that petitioner's signed statement of April 6, 1987 was a nullity, the fact remains that no proof was offered (e.g., a receipt of timely mailing by certified or registered mail) that a petition or a conciliation request in response to the June 3 notices was filed within 90 days as prescribed by the Tax Law (see, Matter of Sipam Corporation, Tax Appeals Tribunal, March 10, 1988; Matter of Harron's Electric Service, Inc., Tax Appeals Tribunal, February 19, 1988).

Petitioner's only avenue for obtaining a review of its tax liability is found in Tax Law section 1139(c) which provides:

"[A] person filing with the tax commission a signed statement in writing, as provided in subdivision (c) of section eleven hundred thirty-eight, before a determination assessing tax pursuant to subdivision (a) of section eleven hundred thirty-eight is issued, shall, nevertheless, be entitled to apply for a refund or credit pursuant to subdivisions (a) and (b) of this section, as long as such application is made within the time limitation set forth in such subdivision (a) or within two years of the date of payment of the amount assessed in accordance with the consent filed, whichever is later, but such application shall be limited to the amount of such payment. No refund or credit shall be made of a tax, interest or penalty paid after a determination by the tax commission 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 tax commission after a hearing". (Tax Law § 1139[c].)

Applying these provisions to the instant facts, we conclude that petitioner is not entitled to claim a refund until it has paid in full the amounts assessed in accordance with the consents. When payment has been made in full, petitioner will have two years from the date of the final payment to file a claim for a refund for the entire amount assessed in accordance with the

consents. In the alternative, petitioner will have three years from the date each quarterly portion of its assessment was payable to apply for a refund of that portion of the assessment (Tax Law § 1139[a]). The timeliness of petitioner's refund claim will be determined by whichever of these dates is the later. Since petitioner has not yet paid the entire amount due, the claim for a refund is premature.

Accordingly, it is, ORDERED, ADJUDGED and DECREED that:

1. The exception of Sak Smoke Shop, Inc. is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Sak Smoke Shop, Inc. is dismissed.

Dated: Albany, New York
JAN 0 6 1989

John P. Dugan
President

Francis R. Koenig
Commissioner
