

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ALBERT CALDIERO : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 816477
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period December 1, 1986 through November 30, 1989. :

Petitioner, Albert Caldiero, 278 William Street, West Hempstead, New York 11552-1445, 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, 1986 through November 30, 1989.

The Division of Taxation appearing by Barbara G. Billet, Esq. (Christina L. Seifert, Esq., of counsel) brought a motion for summary determination pursuant to 20 NYCRR 3000.5 and 3000.9(b) on the grounds of lack of jurisdiction since petitioner waived any right to a hearing with the Division of Tax Appeals. The Division of Taxation submitted a Notice of Motion dated May 3, 2001 and the affidavit of Christina L. Seifert, Esq., with attachments, in support of its motion. Petitioner did not respond to the motion as permitted by June 4, 2001, which date began the 90-day period for issuance of this determination.

Upon review of the pleadings, and the affidavit and documents submitted in support of the motion of the Division of Taxation, Gary R. Palmer, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation is entitled to an order granting summary determination in its favor on the grounds that petitioner has waived his right to a hearing in the Division of Tax Appeals.

FINDINGS OF FACT

1. On or about May 15, 1990, a Notice of Determination (Notice number L-006569129) was issued to petitioner imposing sales and use tax in the sum of \$41,745.42 plus penalty and interest for the period December 1, 1986 through November 30, 1989.
2. On February 5, 1998, petitioner filed a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services ("BCMS") of the Department of Taxation and Finance relative to Notice number L-006569129.
3. By Conciliation Order dated February 27, 1998, BCMS denied petitioner's Request for a Conciliation Conference on the grounds that the Request was not filed within 90 days of the date of issuance of the Notice of Determination.
4. On April 20, 1998, petitioner filed a petition with the Division of Tax Appeals in protest of the Conciliation Order relating to Notice number L-006569129.
5. On May 28, 1998, BCMS, for reasons not appearing in the record, rescinded the Conciliation Order dismissing the Request and granted petitioner a conciliation conference on the timeliness issue.
6. On October 21, 1998, petitioner signed and filed with BCMS a written consent form setting forth tax due in the sum of \$18,645.00, plus penalty and interest relating to Notice number L-006569129. This consent form contained the following language just above the

signature line: “I hereby agree to waive any right to a hearing in the Division of Tax Appeals concerning the above notice.”

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6]).

In reviewing a motion for summary determination, an administrative law judge is constrained by the following guidelines:

The motion shall be granted if, 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 motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006 [6]).

A party moving for summary determination must show that there is no material issue of fact (20 NYCRR 3000.9[b][1]). Such a showing can be made by “tendering sufficient evidence to eliminate any material issue of fact from the case” (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595). If material facts are in dispute, or if contrary inferences may reasonably be drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

B. 20 NYCRR 4000.5(c) reads, in part, as follows:

(3) (i) After reviewing the testimony, evidence and comments, the conciliation conferee will serve on the requester a proposed resolution in the form of a consent.

(ii) Where the proposal is acceptable to the requester, the requester shall have 15 days to execute the consent and agree to waive any right to petition for hearing in the Division of Tax Appeals concerning the statutory notice.

C. It is the contention of the Division that it is entitled to summary determination in its favor because petitioner effectively waived his right to a hearing before the Division of Tax Appeals when he signed the consent form. The consent form signed by petitioner constitutes a valid waiver of petitioner's hearing rights which form evinced petitioner's acceptance of the terms of the consent.

D. Inasmuch as there are no material and triable issues of fact, the Division of Taxation's motion for summary determination is granted as to Notice of Determination (Notice number L-006569129) dated May 15, 1990.

E. The petition of Albert Caldiero is dismissed.

DATED: Troy, New York
July 5, 2001

/s/ Gary Palmer
ADMINISTRATIVE LAW JUDGE