

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
<b>GALBATO REALTY, INC.</b>	:	DETERMINATION
		DTA NO. 817515
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, 1990 through November 30, 1994.	:	

---

Petitioner, Galbato Realty, Inc., 6161 East Lake Road, Auburn, New York 13021, 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 March 1, 1990 through November 30, 1994.

The Division of Taxation, appearing by Barbara G. Billet, Esq. (Georgia F. Nucci, Esq., of counsel), brought a motion to dismiss the petition or for summary determination on the ground that petitioner filed an untimely claim for refund and therefore the Division of Tax Appeals lacks subject matter jurisdiction in this matter.

The Division of Taxation submitted a Notice of Motion and the affirmation of Georgia F. Nucci, Esq., with attachments, in support of its motion. Petitioner, appearing *pro se*, filed a responsive affirmation which was received on August 2, 2000, which date began the 90-day period for the issuance of this determination.

Upon review of the pleadings, the affidavit and other documents submitted in support of the motion of the Division of Taxation and the affidavit submitted in response thereto, Roberta Moseley Nero, Administrative Law Judge, renders the following determination.

## ***ISSUES***

I. Whether the petition must be dismissed for lack of subject matter jurisdiction because petitioner's claim for refund was filed beyond the applicable statute of limitations.

II. Whether, if the petition is not dismissed, summary determination may be granted because no material and triable issue of fact is presented.

## ***FINDINGS OF FACT***

1. Petitioner filed a refund claim for sales and use taxes for the period March 1, 1990 through November 30, 1996<sup>1</sup> in the amount of \$3,471.17. The basis of petitioner's claim was that sales tax collected from its customers had been included on its filed sales tax returns in its gross sales and service figure and its taxable sales and service figure.

2. The Division of Taxation ("Division"), by letter dated January 25, 1999, granted in part and denied in part petitioner's refund claim. The claim was granted in the amount of \$1,082.60 plus interest where applicable for the period March 1, 1995 through November 30, 1996. The claim was denied in the amount of \$2,388.57 which was the claim for the period March 1, 1990 through November 30, 1994. The Division's basis for denying the claim was that no refund could be granted for any taxes due prior to March 1, 1995 because the claim for such taxes was required to be filed by March 20, 1998 (i.e., within three years from when the tax was payable). According to the Division's letter petitioner's claim had not been filed until June 10, 1998 and was therefore late.

---

<sup>1</sup>For each of the years in question claims were filed for the quarterly sales tax periods ending May 31, August 31 and November 30. No claims were filed for any year for the sales tax quarterly period ending February 28 (or February 29). Apparently petitioner filed quarterly returns for three sales tax quarters and no returns for the fourth quarter because it conducted some type of seasonal business.

3. Petitioner requested a conciliation conference to protest the Division's denial of its refund claim and such conference was held on September 13, 1999. By Conciliation Order dated October 22, 1999 the denial of the refund claim was upheld. The order indicated that it was for the period March 1, 1990 through May 31, 1994. It also indicated that it was for the "REFUND DENIAL DATED JANUARY 25, 1999."

4. A petition contesting the conciliation order was filed with the Division of Tax Appeals on January 16, 2000. Petitioner alleged in the first paragraph of section six of the petition "that it overpaid its sales tax for the period of March 31, 1990 to November 30, 1994 totalling [sic] \$2,408.57."

5. The Division served its answer to the petition on March 16, 2000. Paragraph one of the answer admits that petitioner overpaid its sales tax for the period of March 31, 1990 to November 30, 1994 by \$2,408.57. In paragraph five of its answer the Division stated that it denied petitioner's refund claim for the same period in the amount of \$2,388.57.

### ***CONCLUSIONS OF LAW***

A. It is first necessary to clarify both the period at issue in this matter and the amount of the refund at issue. Petitioner asserts that the Conciliation Order it is protesting does not address the period June 1, 1994 through November 30, 1994. The Conciliation Order dated October 22, 1999 does state that it covers the period March 1, 1990 through May 31, 1994, leaving out the later period now questioned by petitioner. However the order also clearly states that it covers the Division's January 25, 1999 refund denial, which included the entire period at issue. Furthermore, the petition filed in this matter was for the entire period at issue. Finally, petitioner has not alleged any prejudice resulting from the error in the order. Under these circumstances, it

is determined that the Conciliation Order included the entire period of March 1, 1990 through November 30, 1994.

Petitioner's refund claim for the period March 1, 1990 through November 30, 1994 was in the amount of \$2,388.57. This matches the amount listed by the Division in its refund denial letter to petitioner for the same time period. The petition filed in this matter alleges that petitioner overpaid its sales taxes by \$2,408.57 (\$20.00 more than the amount listed in petitioner's refund claim or the Division's denial of petitioner's refund claim) for the period at issue. The greater amount alleged in the petition is disregarded as it is in direct conflict with the remainder of the documentary evidence. Therefore the amount of petitioner's refund is \$2,388.27.

B. The Division's motion for dismissal of the petition based on lack of subject matter jurisdiction pursuant to 20 NYCRR 3000.9(a)(1)(i) is denied. Petitioner filed a timely petition with the Division of Tax Appeals contesting the Conciliation Order which sustained the Division's denial of petitioner's refund claim. The subject matter of the petition is the issue of whether the Division properly denied petitioner's refund claim based upon the applicable statute of limitations.<sup>2</sup> Therefore, the Division of Tax Appeals has jurisdiction over the subject matter of the petition.

C. In the alternative, the Division requested that summary determination be granted in its favor. 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

---

<sup>2</sup>This is the only issue in the present matter since the Division admitted that petitioner overpaid its sales taxes for the period in question.

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].)

Petitioner's first objection to the Division's motion is that the Division did not submit with its Notice of Motion a copy of the petition as required by these regulatory and statutory provisions. While the Division did not supply a copy of the petition in support of its motion, the Division's motion may still be "supported" by the petition since it is a part of the record of these proceedings (*see*, 20 NYCRR 3000.19[a][1]). Therefore, petitioner's objection is not a basis for denial of the Division's motion.

D. 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. (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006 [6].)

A motion for summary determination made before the Division of Tax Appeals is "subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR." (20 NYCRR 3000.9[c]; *see also*, *Matter of Service Merchandise, Co.*, Tax Appeals Tribunal, January 14, 1999.) Summary determination is a "drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (*Moskowitz v. Garlock*, 23 AD2d 943, 259 NYS2d 1003, 1004; *see*, *Daliendo v. Johnson*, 147 AD2d 312, 543 NYS2d 987, 990). Because it is the "procedural equivalent of a trial" (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d

177, 179), undermining the notion of a “day in court,” summary judgement must be used sparingly (*Wanger v. Zeh*, 45 Misc 2d 93, 256 NYS2d 227, 229, *affd* 26 AD2d 729). It is not for the court “to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist” (*Daliendo v. Johnson, supra*, 543 NYS2d at 990). If any material facts are in dispute, if the existence of a triable issue of fact is “arguable,” or if contrary inferences may be reasonably drawn from undisputed facts, the motion must be denied (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 94; *Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881). In considering a motion for summary determination the evidence must be viewed in a manner most favorable to the party opposing the motion (*Rizk v. Cohen*, 73 NY2d 98, 103, 538 NYS2d 229, 231; *Museums at Stony Brook v. Village of Patchogue Fire Dept., supra*; *see also, Weiss v. Garfield*, 21 AD2d 156, 249 NYS2d 458, 461).

E. Tax Law § 1139(a) required that petitioner’s claim for refund be made within three years of when the tax was payable (*Matter of Nierenstein*, Tax Appeals Tribunal, April 21, 1988). As the party raising the statute of limitations, the Division must show the date on which the statutory period commences, the day on which it expires and the receipt of the document in question after that date (*see, Matter of Jencon*, Tax Appeals Tribunal, December 20, 1990). In this case the date on which the statutory period commences is imposed by statute and is the date the taxes were payable, or March 20, 1995.<sup>3</sup> The date the period expires is also imposed pursuant to Tax Law § 1139(a) and is three years from the date the taxes were payable or March 20, 1998. The only factual question presented is when petitioner filed its claim for refund.

---

<sup>3</sup>This is the due date for the sales tax quarterly period immediately proceeding the earliest period for which a refund was granted. For the remainder of the periods at issue in this matter the date the taxes would have been payable would have been prior to March 20, 1995.

I have no definitive answer to that question. The Division contends in Ms. Nucci's affirmation that the refund claim was filed on July 10, 1998. In her affidavit, Ms. Nucci states that she has knowledge of the facts of this case based on her review of the Division's files. Thus, she has no personal knowledge of the facts, and her affirmation can be given no more weight than the documents she submitted (*see, Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595, 598; *Jabs v. Jabs*, 221 AD2d 704, 633 NYS2d 616, 617; *see also, Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). In support of its contention that the claim was filed on July 10, 1998 the Division submitted a copy of a claim for refund form (Form AU-11) with an in-date stamp of June 10, 1998, a copy of the front of the envelope containing the claim which bears an illegible postmark, and a copy of the back of the same envelope which has an in-date stamp of July 10, 1998. Obviously these conflicting dates do not prove what date the refund claim was filed on. The refund claim itself bears the notation "Please see attached letter. Amended Returns Mailed Previously." The Division submitted with the form itself a copy of a two-page letter from R.C. Accounting and Tax Services dated May 27, 1998, which sets forth the amounts petitioner claims it overpaid and the periods it overpaid them and referencing attached amended returns. This document, and the Division's failure to submit the amended returns mentioned in support of its motion, are pointed to by petitioner as evidence of unresolved factual questions requiring that the motion for summary determination be denied.

Petitioner is correct that it is impossible to determine the date its refund claim was made. However, assuming that the claim for refund was filed on May 27, 1998, which is the earliest date petitioner alleges the refund claim was filed (*see, Rizk v. Cohen, supra; Museums at Stony Brook v. Village of Patchogue Fire Dept., supra; see also, Weiss v. Garfield, supra*), petitioner's claim for refund was filed approximately two months after the statute of limitations expired on March

20, 1998. There being no possible construction of the facts that would make petitioner's refund claim timely, the Division's motion for summary determination must be granted (*see, Rizk v. Cohen, supra*, 73 NY2d at 105, 538 NYS2d at 233).

F. Petitioner argues that the imposition of the statute of limitations under the circumstances of this case is unconstitutional. Specifically petitioner argues that its rights to equal protection were violated because the Division required it to produce its corporate tax returns and certain other documents for the period from 1982 until 1995, yet disallowed its refund claim for the periods prior to March 1, 1995 based upon the statute of limitations. Other than petitioner's assertion that it was required to produce certain books and records for the Division, there is no evidence in the record regarding this issue. Based upon this lack of evidence it is not even possible to determine whether petitioner is arguing that Tax Law § 1139(a) is unconstitutional on its face, or unconstitutional as applied to petitioner in this instance. Since this is a jurisdictional question, in that the Division of Tax Appeals does not have the jurisdiction to determine the facial constitutionality of a statute but must presume its constitutionality at the administrative level (*see, Matter of Phelps*, Tax Appeals Tribunal, November 2, 1989; *Matter of Fourth Day Enterprises*, Tax Appeals Tribunal, October 27, 1988), petitioner's argument must fail.

Finally, while petitioner's concerns regarding the fact that it will never recover the sales taxes it paid by mistake are understandable, this is the result of a legislative determination to impose a statute of limitations on sales tax refunds. As previously explained by the Tax Appeals Tribunal:

Statutes of limitations are matters of law, enacted by the State Legislature for the purpose of guiding all persons who are, or may become parties to a legal proceeding, with respect to the timely filing of the various documents necessary to the particular program or proceeding involved.

The statute of limitations here is three years. Its purpose is to allow a reasonable time for taxpayers who have erroneously filed or paid taxes to realize their error and



make application for refund. The State is thus put on notice that there is this three year period during which it may be liable for such claims. At the end of the period, the matter is settled. Anything less than this degree of certainty would make the financial operation of government difficult, if not impossible. In short, the statute of limitations at issue here is a balance between the needs of the State with regard to the protection of its financial resources and the rights of taxpayers to correct their errors. (*Matter of Nierenstein, supra.*)

G. Accordingly, the motion of the Division of Taxation to dismiss the petition is denied and the motion of the Division of Taxation for summary determination is granted. The denial of the refund dated January 25, 1999 is sustained and petitioner's claim for refund is denied.

DATED: Troy, New York  
September 28, 2000

/s/ Roberta Moseley Nero  
ADMINISTRATIVE LAW JUDGE