

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GEORGE V. MCKENNA, JR., D.V.M. : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 817518
Use Taxes under Articles 28 and 29 of the Tax Law for the
Period January 1, 1994 through November 30, 1995. :

Petitioner, George V. McKenna, Jr., D.V.M., 15202 E. Barre Road, Albion, New York 14411, 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 January 1, 1994 through November 30, 1995.

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*, did not file a response. Petitioner's response was due on September 14, 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, 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's business is a veterinary practice. Petitioner filed a refund claim for sales and use taxes for the period January 1, 1994 through December 31, 1998 in the amount of \$4,544.55. The basis of petitioner's claim was that he paid sales tax when purchasing certain large animal products which were then sold to farmers with no sales tax collected because no sales tax was due. The refund claim was dated February 9, 1999 and contained a Division of Taxation ("Division") in-date stamp of February 19, 1999.

2. The Division, by letter dated April 20, 1999, granted in part and denied in part petitioner's refund claim. The claim was granted in the amount of \$2,246.58, plus interest where applicable, for the period December 1, 1995 through December 31, 1998. The claim was denied in the amount of \$2,297.97 which was the claim for the period January 1, 1994 through November 30, 1995. The Division's basis for denying the claim was that no refund could be granted for any taxes due prior to December 1, 1995 because the claim for such taxes was required to be filed by December 21, 1998 (i.e., within three years from the date the tax was payable). According to the Division's letter, petitioner's claim had not been filed until February 19, 1999 and was therefore late.

3. Petitioner requested a conciliation conference to protest the Division's denial of his refund claim and such conference was held on September 15, 1999. By Conciliation Order dated October 15, 1999, the denial of the refund claim was upheld.

4. A petition contesting the conciliation order was filed with the Division of Tax Appeals on January 10, 2000.

5. The Division served its answer to the petition on March 16, 2000. The answer states the lateness of the claim for refund as the sole basis for the denial of the refund.

CONCLUSIONS OF LAW

A. 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.¹ Therefore, the Division of Tax Appeals has jurisdiction over the subject matter of the petition.

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

¹This is the only issue in the present matter since the Division has advanced no other legal basis for its denial of the refund claim.

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).

C. Petitioner did not respond to the motion of the Division for summary determination. Therefore, petitioner is deemed to have conceded that the facts as presented in the affirmation and evidence submitted by the Division are correct (*see*, *Kuehne & Nagel v. Baiden*, 36 NY2d 539, 369 NYS2d 667, 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). However, in determining 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). Such evidence in this matter includes the copy of the refund claim submitted by the Division.

D. 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 December 20, 1995.² 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 December 21, 1998.³ The only factual question presented is when petitioner filed his claim for refund.

I have no definitive answer to that question. The Division contends in Ms. Nucci's affirmation that the refund claim was filed on February 9, 1999. In her affirmation, 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

²This 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 December 20, 1995.

³December 20, 1998 was the date the refund claim was required to be filed by. However, since December 20, 1998 was a Sunday, the claim was required to be filed by Monday, December 21, 1998 (*see*, Tax Law § 691[c]; General Construction Law §§ 20, 25-a; *Matter of American Express Co.*, Tax Appeals Tribunal, July 3, 1991).

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 February 9, 1999 the Division submitted a copy of a claim for refund form (Form AU-11) dated February 9, 1999 with an in-date stamp of February 19, 1999. The record does not contain a copy of the envelope that contained the refund claim. Obviously these conflicting dates do not prove what date the refund claim was filed on. However, assuming that the claim for refund was filed on February 9, 1999, which is the earlier date (*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 seven weeks after the statute of limitations expired on December 21, 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).

E. Finally, while petitioner's concern that it is not just for the Division to be able to retain funds that rightfully belong to petitioner, is understandable, this outcome 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.*)

F. 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 April 20, 1999 is sustained and petitioner's claim for refund is denied.

DATED: Troy, New York
October 12, 2000

/s/ Roberta Moseley Nero
ADMINISTRATIVE LAW JUDGE