

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
PAUL D. BELLIN : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 817843
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period June 30, 1998 through August 30, 1998. :

Petitioner, Paul D. Bellin, HCR#1 Box 138, Malone, New York 12953, 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 June 30, 1998 through August 30, 1998.

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 the Division of Tax Appeals lacks subject matter jurisdiction in this matter and that there is no authority in law for the granting of the refund sought.

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 affirmation and other documents submitted in support of the motion of the Division of Taxation, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the petition must be dismissed for lack of subject matter jurisdiction.

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. On March 25, 1999, petitioner, Paul D. Bellin, filed a claim for refund of sales and use taxes for the period “January 1998 through March 1999” in the amount of \$192.78 in which he sought a refund of the sales and use taxes paid upon the purchase of an electric generator. The basis of petitioner’s claim was that he and his family do not receive service from the electric utility company. Petitioner asserted that the cost of a connection to the electric utility company is \$58,274.48 which is unaffordable. The electricity obtained from the generator provides light for preparing homework as well as power for the washer, dryer, kitchen appliances and entertainment devices. Petitioner submits that the sales tax is refundable because his wife and four children are entirely dependent upon this unit for electrical power.

2. The Division of Taxation (“Division”) mailed a letter, dated June 18, 1999, which denied petitioner’s refund claim. The Division’s basis for denying the claim was that the purchase of the generator is considered to be the purchase of tangible personal property which is subject to sales and use tax. The Division also explained that while there is an exemption from sales and use taxes imposed on the purchase of, among other things, electricity used for residential purposes, the exemption does not apply to the purchase of equipment used in connection with the utility.

3. Petitioner requested a conciliation conference to protest the Division’s denial of its refund claim and in lieu of appearing at a conciliation conference, petitioner opted to have the

matter decided by correspondence. By a Conciliation Order dated March 17, 2000, the denial of the refund claim was upheld.

SUMMARY OF THE PARTIES' POSITIONS

4. A petition contesting the conciliation order was filed with the Division of Tax Appeals on May 30, 2000. The petition alleged that New York State is complicit in the denial of electric service because: the provision of electric service is controlled by a monopoly; a review board has stated that it is not in the utilities' best interest to offer electric power to his residence; the Department of Taxation and Finance allegedly rebates sales tax and motor fuel tax on gasoline used as fuel for generators; and the residence in question has been in existence for more than 150 years. Petitioner notes that the residence is on a direct route to the center of the county seat and is on a school bus route. He also pointed out that New York has not offered a hearing on his case against Niagara Mohawk Corporation. Petitioner submitted that the State of New York is not entitled to tax his effort to provide electric power for his family. Lastly, petitioner submitted that the value of the residence was not increased by the purchase of the generator.

5. The Division served its answer to the petition on August 3, 2000. Among other things, the answer states that the receipt from every retail sale of tangible personal property is subject to sales tax and that there is no provision in the law allowing for a refund of sales tax on the purchase of tangible personal property used to produce electricity for self use.

CONCLUSIONS OF LAW

A. The Division's motion for dismissal of the petition based on lack of subject matter jurisdiction 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 claim for a refund of sales and use tax. The resolution of this issue is clearly within the jurisdiction of the Division of Tax Appeals (Tax Law §§ 1139, 2000).

B. 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 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].)

C. 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].)

D. Here, petitioner did not respond to the Division's motion; he is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325, 326). Moreover, petitioner did not offer any evidence to contest the facts alleged in the affirmation of Georgia F. Nucci, Esq.; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173).

E. In general, Tax Law § 1105(a) imposes a sales tax on the receipts from every retail sale of tangible personal property such as the generator at issue on this motion. Although the Tax Law provides for certain exemptions from the imposition of the sales tax (*see, e.g.*, Tax Law § 1115), it does not provide for an exemption from sales tax for the purchase of tangible personal property used to generate electricity in the home. Since this is the only issue presented, it is concluded that the Division's determination to deny the refund was correct. The arguments raised in the petition do not authorize the Division to grant a refund which is not provided for in the law. Since no issues of fact are presented, the motion for summary determination should be granted.

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 March 25, 1999 is sustained and petitioner's claim for refund is denied.

DATED: Troy, New York
October 19, 2000

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE