

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JAMES JOHNSON	:	
for Revision of a Determination or for Refund of Sales	:	DETERMINATION
and Use Taxes under Articles 28 and 29 of the Tax Law	:	DTA NO. 821027
for the Period September 1, 2001 through May 31, 2004.	:	

Petitioner, James Johnson, 4 Chevhill Circle, Penfield, New York 14526, 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 September 1, 2001 through May 31, 2004.

The Division of Taxation, by its representative, Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated August 18, 2006, seeking summary determination in this matter pursuant to Tax Law § 2006(6) and 20 NYCRR 3000(9)(b) on the grounds that petitioner executed a consent to a reduced assessment by which he waived his right to further review before the Division of Tax Appeals. Petitioner filed no response to the motion. Accordingly, the 90-day period for the issuance of this determination began on September 17, 2006, 30 days from the date of filing of the motion. After due consideration of the affidavit and documents presented by the Division, Frank W. Barrie, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner waived his right to further review of an assessment before the Division of Tax Appeals by his execution of a consent to a reduced assessment so that summary determination in favor of the Division of Taxation is properly granted as a matter of law.

FINDINGS OF FACT

1. Petitioner, James Johnson, filed a request dated October 3, 2005 for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) seeking a review of a Notice of Determination dated August 1, 2005 (assessment L-025872492) on the basis that his former business partner, in relevant part:

[S]tole a large sum of money from us. We believe some of what he stole was the sales tax money we thought had gone to the state. However, we don’t believe the amount you calculated is correct. . . . We would also like to ask that the interest and penalty be waved [sic]. We are suing [sic] . . . for what he stold [sic].

The Notice of Determination dated August 1, 2005 issued against petitioner asserted sales and use taxes due for the period September 1, 2001 through May 31, 2004 in the total amount of \$51,417.31 plus penalty of \$19,940.22 and interest of \$19,136.54 for a balance due of \$90,494.07 as of the date of the notice. This notice was issued against Mr. Johnson as “an Officer/Responsible Person of PJR Enterprises, LLC.”

2. In the course of his proceeding in the Bureau of Conciliation and Mediation Services, petitioner executed a consent dated June 15, 2006, whereby he accepted the following “final disposition of the Notice of Determination at issue,” which reduced the assessment of tax from \$51,417.31 shown above in Finding of Fact “1” to \$41,311.80. Further, under this “final disposition,” penalty and penalty interest were abated so that only interest in the amount of \$11,030.88, was also due, if payment was received on or before June 22, 2006.

3. Petitioner filed a petition dated March 17, 2006 by which he sought review of the Notice of Determination dated August 1, 2005 (assessment L-02587292). Although the caption of the petition lists the three names of PJR Enterprises, LLC, James Johnson and Randy Orlando, the body of the petition references only James Johnson as the “petitioner.” In addition, although the petition, in the section outlining the errors made by the Commissioner of Taxation and Finance, references two other assessments, L-025870167 and L-02582554, the only Notice of Determination attached to the petition was the one detailed in Finding of Fact “2”, i.e., assessment L-025872492.¹ Moreover, the petition dated March 17, 2006 does not include the signature of any individual on behalf of the corporate entity or the signature of Mr. Orlando. The only signature on the petition is that of Mr. Johnson in his individual capacity.

CONCLUSIONS OF LAW

A. A motion for summary determination may 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 (20 NYCRR 3000.9[b][1]).

Here, petitioner did not respond to the Division’s motion, and he is therefore deemed to have conceded that no question of fact exists which would require a hearing to resolve (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325, *appeal dismissed* 62 NY2d 942).

B. Since petitioner specifically waived his right to a hearing in this matter by executing a consent to the reduced assessment as detailed in Finding of Fact “2”, his only remaining remedy is to pay the tax assessment as agreed and file for a refund of the tax as provided for in Tax Law

¹ In addition, attached to the petition is a copy of a Conciliation Order dated January 6, 2006 denying the request of “PJR Enterprises, LLC Spin Caffe” which references a statutory notice for assessment L025870167.

§ 1139(c) (*see, Matter of Brewsky's Goodtimes Corp.*, Tax Appeals Tribunal, February 22, 2001). Therefore, the Division's motion for summary determination, on the basis that petitioner executed a consent to a reduced assessment by which he waived his right to further review of the assessment at issue before the Division of Tax Appeals, is properly granted.

C. It is further concluded that the petition dated March 17, 2006 was not properly completed and executed so as to include either Randy Orlando or PJR Enterprises, LLC, as an additional petitioner to petitioner, James Johnson (*see*, 20 NYCRR 3000.3[b][7] [which specifically requires the signature of the petitioner or the petitioner's representative on the petition]); *see also, Matter of Crispo* (Tax Appeals Tribunal, April 13, 1995 [wherein the Tribunal reversed the administrative law judge who had concluded that a request for conference by a co-owner covered a petitioner, who had not signed the request but had been referenced in the co-owner's request]). As noted in Finding of Fact "3", the petition does not include the signature of any individual on behalf of PJR Enterprises, LLC, or the signature of Mr. Orlando. Neither did a properly authorized representative sign the petition on Mr. Orlando's behalf or the corporation's behalf. Consequently, the petition is properly restricted to petitioner, James Johnson.

D. The petition is denied, and the Notice of Determination dated August 1, 2005 against James Johnson is sustained except to the extent modified by the final disposition specified in the consent dated June 15, 2006.

DATED: Troy, New York
December 14, 2006

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE