

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BATH & BODY WORKS, LLC, AS SUCCESSOR- IN-INTEREST TO BATH & BODY WORKS, INC.	:	DETERMINATION DTA NO. 823475
	:	
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods December 1, 2001 through February 28, 2002 and December 1, 2005 through February 28, 2006.	:	

Petitioner, Bath & Body Works, LLC, as successor-in-interest to Bath & Body Works, Inc., 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 periods December 1, 2001 through February 28, 2002 and December 1, 2005 through February 28, 2006. Petitioner appeared by Morrison & Foerster (Amy F. Nogid, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Marvis A. Warren, Esq., of counsel).

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 633 Third Avenue, New York, New York, on March 6, 2012 at 10:15 A.M., with all briefs to be submitted by November 12, 2012, which date commenced the six-month period for the issuance of this determination.

ISSUES

- I. Whether petitioner's claims for refund were barred by the statute of limitations.
- II. Whether the Division of Tax Appeals has the authority to grant petitioner a refund of erroneously paid taxes where it failed to file a timely refund claim.

III. Whether the Division of Taxation is estopped from denying the claims for refund.

FINDINGS OF FACT

1. On December 6, 2004, the Division of Taxation (Division) mailed a letter to petitioner, Bath & Body Works, Inc. (BBW), scheduling a field audit of its New York State sales tax returns for the period March 1, 2002 through November 30, 2004. The letter stated that “[a]ll books and records pertaining to the sales and use tax liability, for the audit period, must be available on the appointment date.” A schedule of books and records to be produced was attached to the letter.

2. In response, petitioner provided books and records for the audit period. Although the auditor did not request books and records for any part of the quarter ended February 28, 2002, because petitioner maintains its sales tax records in binders by calendar year, the records it provided for 2002 included the financial statements and sales summaries from January 2002 through December 2002.

3. It was the auditor’s practice to accept, rather than verify, the starting amounts in an audit period. If a different practice were followed, verifications would lead to additional verifications for periods prior to the audit period. The auditor’s practice is consistent with her training to audit only within the audit period.

4. In the course of the audit, the auditor and Rick Johnson, the individual in charge of the audit of BBW, discussed the possibility of BBW executing a consent to extend the statute of limitations, and a form consenting to a waiver was faxed to Mr. Johnson. Later that day, the auditor received an e-mail stating that due to its corporate policy, BBW would not be signing the waiver of the statute of limitations. BBW believed that its policy kept the auditor “on task” and would lead to a timely completion of the audit. Since BBW would not consent to extend the

statute of limitations, the Division issued an estimated assessment for the first quarter of the audit period.

5. The audit led the Division to conclude that there was additional sales tax due on both sales and expenses. The asserted sales deficiency arose from an error in applying the appropriate tax rate and from the failure to collect the proper amount of tax during the sales tax holidays. The review of expense records also revealed additional purchases that were subject to tax. The amount of tax assessed in the estimated assessment was adjusted to reflect the amount of tax found due within the audit period. Penalties were imposed on the portion of the audit concerning expenses because there were prior audits that raised the same issue. Petitioner regarded the amount of tax found due of \$63,242.89 as a relatively small amount compared with the total amount of taxes paid by BBW during the audit period of approximately \$22,500,000.00. BBW agreed with the Division's findings and paid the tax.

6. In the course of the audit, the auditor assisted petitioner in obtaining a refund that was due on marketing expenses by completing the Application for Credit or Refund of Sales and Use Tax (Form AU-11) and sending it to Mr. Johnson for his signature.

7. The audit began on November 30, 2004 and was completed on September 23, 2005. The Division spent 172 hours conducting the audit.

8. On June 12, 2002, petitioner filed a form ST-810, New York State and Local Sales and Use Tax Return Quarterly for Part-Quarterly Filers, for the quarter ended May 2002. On this return, the total amount of reported credits against sales or use tax was \$653,972.78. However, the total amount of reported credits against sales and use tax shown on the form ST-810 for the prior quarter ended February 28, 2002 was \$1,053,079.79.

9. On October 21, 2009, petitioner filed a refund claim for \$399,107.01 for the period December 1, 2001 through February 28, 2002. On December 4, 2009, this refund claim was denied because:

The Sales and Use Tax Law requires that a refund application be filed within three years from the date the taxes are payable to the Tax Department . . . Your claim was filed on 10/21/09. Based on the three year statute of limitations, your claim can include periods beginning on 9/01/06. Tax paid on sales/purchases prior to that date cannot be refunded.

10. On June 12, 2006, petitioner filed its Form ST-810 for the quarter ended May 31, 2006. Petitioner reported that the amount of credits against sales or use tax was \$461,968.00. However, the amount of credits against sales or use tax shown on the ST-810 return for the prior quarter ended February 28, 2006 was \$535,653.12.

11. The quarter ended February 28, 2006 was not part of the audit period.

12. On October 23, 2009, petitioner filed a refund claim in the amount of \$73,685.12 for the period December 1, 2005 through February 28, 2006. On November 5, 2009, this claim for refund was denied in its entirety. The Division explained the basis for the denial as follows:

The Sales and Use Tax Law requires that a refund application be filed within three years from the date the taxes are payable to the Tax Department . . . Your claim was filed on 10/23/09. Based on the three year statute of limitations, your claim can include periods beginning on 9/01/07. Tax paid on sales/purchases prior to that date cannot be refunded.

13. During the periods in which BBW filed returns, made payments or claimed credits that are the subject of this proceeding, the Division's intake and processing procedure for sales tax returns did not include confirming that credits claimed by taxpayers as existing and available from earlier periods actually existed or corresponded to the amounts that were claimed. However, it did confirm that the payments reflected on the returns were supported by a check.

14. The Division performed a sales tax reconciliation for the period March 1, 2002 through November 30, 2004. In order to perform this reconciliation, petitioner provided a tax-collected log, that reported the total amount of the tax collected, per store, on a monthly basis. There was no beginning or ending balance. In order to reconcile the sales tax paid, the total for the month was transcribed from the tax collected logs and compared to the sales tax reported on the return. For the audit period, the tax collected log reconciled to the total of sales tax reported on BBW's sales tax returns for the audit period.

15. The auditor did not review or request to review petitioner's records for the quarter ended February 28, 2002 because it was not within her audit period. The auditor never discovered that petitioner had additional credits other than those that were applied on the quarterly return for the quarter ended February 28, 2002.

16. The audit of BBW was closed in October 2005, before the sales tax return for the quarter ended February 28, 2006 was due. Petitioner never provided any records relating to the quarter ended February 28, 2006 because the audit period closed well before this date. As a result, the auditor never learned that petitioner might have had additional credits beyond those that were applied to petitioner's quarterly return for the quarter ended May 31, 2006.

17. If the overpayment of sales tax paid for the quarter ended February 28, 2002 had been discovered during the audit, the amount of the refund would not have been netted against any liability found during the audit period. Rather, in order to obtain the funds, BBW would have had to file a refund claim.

18. It is the auditor's responsibility to determine whether a taxpayer is in compliance with the Tax Law. Consequently, an auditor will ensure that the correct amount of tax was remitted

or, if additional tax is due, to assess that amount. If a refund is due, the auditor would assist in regaining the amount to be recovered. In establishing that the taxpayer paid the correct amount of tax, evaluating whether the payments or credits were correctly reported on the return is as important as determining whether the correct amount of tax was computed.

19. Generally, an auditor will not request books and records for more than a three-year period. In the usual situation, an auditor will only request books and records outside the audit period if it is a case involving fraud or a return was not signed. If an auditor is starting an audit in the middle of a sales tax quarter, he or she is instructed to begin with the next quarter. Thus, an auditor will typically start with an 11-quarter sales tax period.

20. As part of their training, sales tax auditors are instructed that if they discover an overpayment during the course of an audit, to notify the tax manager, vendor or representative that there is a refund due and to assist in filling out the application for a refund of sales tax. An auditor does not have an incentive to conceal an overpayment. Rather, they would be reprimanded if they knew of an overpayment and it was not disclosed.

21. The Division is expected to verify that all claimed credits within the audit period are correct. However, it does not look past the audit period to verify dollar amounts carried forward. Accordingly, it does not request the records or review the information from prior periods.

22. On those occasions when petitioner overlooked the prepayments, there were internal controls in place. However, the internal controls failed to detect the discrepancies. In 2009, it was discovered that the person performing the sales tax reconciliation was doing a poor job. At the time that the errors in issue were made, petitioner's parent corporation was filing close to

12,000 tax returns a year with a staff of two full-time employees and one part-time employee. Petitioner files between 100 and 200 sales tax returns each year in the State of New York.

23. Petitioner has taken steps to ensure that the clerical error does not recur. In 2009, a new manager started in the financial reporting section and one of the tasks that the manager performed was the reconciliation of the sales tax account over a period of several years to verify that the balances reported were accurate. In the process, he discovered the clerical errors made by the associate filing the returns. BBW did not adequately perform sales tax reconciliations from 2002 through 2009.

24. An employee of BBW relied upon the Division's issuance of an assessment to conclude that the tax liabilities exceeded the amount of tax that BBW paid or had credited to it during the audit period. In this employee's experience, auditors are allowed access to audit information from prior periods and, if the amount of the credit could not be verified, the credit would be denied. Also, in this employee's experience, if the amount claimed as a credit were greater than the prepayments, an assessment would be issued and, alternatively, if the amount claimed were less than the amount of the prepayments, the taxpayer would be given a refund application.

SUMMARY OF THE PARTIES' POSITIONS

25. Petitioner maintains that, despite the discovery of the error after the expiration of the statute of limitations, the Commissioner has the authority to issue the requested refund. According to petitioner, Tax Law § 1142(6) should be construed as providing the same refund authority as that set forth in Tax Law § 697(d). Petitioner submits that such a construction is appropriate because under the sales tax law, the taxpayer is acting as a trustee on behalf of the

state. It is further submitted that the Division failed to perform the basic task of confirming the correct amount of the credit available for use by BBW during the periods at issue.

26. In the alternative, petitioner contends that the Division should be estopped from denying BBW's entitlement to the refund. According to petitioner, the Division failed to perform its most rudimentary tax collection functions by insuring that payments are properly credited, reconciling payments made with the amounts reported on the returns and ensuring that only the proper amount of tax is collected. It is submitted that the situation presented here is one of the rare instances where the Division should be estopped from asserting the statute of limitations to bar the correction of the error made as a trustee for New York. According to petitioner, elemental notions of fairness also support this position.

27. Lastly, petitioner maintains that the denial of the refund claims was arbitrary and capricious and an abuse of discretion. BBW submits that the failure to refund monies it collected as a trustee after it failed to perform due diligence in its audit results in a denial of due process.

28. In response to the foregoing, the Division adheres to its position that it properly denied BBW's claims for refunds because they are barred by the statute of limitations and disagrees with the contentions raised by petitioner.

CONCLUSIONS OF LAW

A. The present matter involves two claims for a refund - one for the quarter ended February 28, 2002 and one for the quarter ended May 31, 2006. Tax Law § 1139(c) provides that, where returns have been filed, as is the case here, a claim for a refund must be filed within the later of three years from the time the return was filed or two years from the time the tax was paid. In regard to the first claim for refund, as petitioner's sales tax return was filed on June 12,

2002 and its refund claim was filed on October 21, 2009, the refund claim clearly does not meet the requirement that it be filed within three years from the date the return was filed.

The return for the quarter ended February 28, 2002 was due by March 20, 2002 (Tax Law § 1136[b]). The latest date that the tax became payable was at the time the returns were due (Tax Law § 1137[a]). Petitioner's claim for a refund was filed on October 21, 2009. Accordingly, the refund claim was not filed within the alternative two-year period of Tax Law § 1139(c). It follows that under either period of limitation of the Tax Law cited above, petitioner's refund claim for the quarter ended February 28, 2002 was untimely.

A similar analysis applies to the claim for refund for the period March 1, 2006 through May 31, 2006. Petitioner's claim was filed on October 23, 2009. As petitioner's sales tax return was filed on June 12, 2006 and the refund claim was filed on October 23, 2009, it does not meet the requirement that the refund claim be filed within three years from the date the return was filed.

The return for the quarter ended May 31, 2006 was due by June 20, 2006. Since the refund claim was filed on October 23, 2009, it follows that petitioner similarly failed to comply with the requirement that the refund claim be filed within two years from the time the tax was paid.

B. Relying upon *Matter of Turner Constr. Co. v. State Tax Commn.* (57 AD2d 201 [1977]), petitioner argues that the Division of Taxation is authorized to issue the requested refund and that this authority should be exercised to grant the refund that was requested by petitioner. As pointed out by the Division, petitioner's reliance upon *Turner* is misplaced. *Turner* presented a situation wherein the Division granted a refund on the mistaken assumption that the taxpayer had paid additional sales taxes on materials used in performing a preexisting

lump sum contract. Thereafter, the Sales Tax Bureau issued a notice of determination that assessed tax on the ground that the refund claim was invalid. The taxpayer subsequently commenced a proceeding to annul the assessment. The Court held that the State Tax Commission “should not be precluded from correcting clerical errors to the detriment of the general taxpaying public.” (*Turner* at 205). In reaching this conclusion, the Court specifically found that there was no statutory barrier proscribing the recovery of erroneous refunds. It also noted that public policy favored the full and unhindered enforcement of the Tax Law.

C. It is evident, that the present situation is distinguishable from that presented in *Turner*. In *Turner*, the Court specifically noted that there was no statutory barrier prohibiting the recovery of erroneous refunds. In this case, Tax Law § 1139(c) specifically disallows the granting of refunds after a certain period of time has passed. Second, public policy does not favor the granting of refunds beyond the allowed period of time. In *Matter of Renaud d/b/a Beverage & Redemption Center* (Tax Appeals Tribunal, October 13, 2011), the Tribunal explained the policy considerations for enacting a statute of limitations as follows:

The statute of limitations here is clearly set forth in the Tax Law. Its purpose is to allow a reasonable time for taxpayers who have erroneously filed or paid taxes to realize their error and make an application for refund. The State is thus put on notice that there is a specific statutory 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.

D. Tax Law § 1142(6) authorizes the Commissioner of Taxation and Finance “[t]o assess, determine, revise and readjust the taxes imposed by . . . [Article 28 of the Tax Law].” In its brief, petitioner recognizes that Tax Law § 1142(6) does not have the special refund authority as that

provided in Tax Law § 697(d). However, petitioner submits that Tax Law §1142(6) should be construed as having the same authority. This argument is also rejected. In *Matter of Kimberly Hotel* (Tax Appeals Tribunal April 7, 2005) petitioner sought a refund of erroneously paid taxes and relied upon *Matter of Mobil Oil Corp. v. Commissioner of Fin.* (101 AD2d 723 [1984]) to support an interpretation of the special refund authority found in the New York City general corporation tax that is similar to the one provided in Tax Law § 697(d) and § 1096(d). The Tribunal concluded that there is no similar provision in the law governing sales and use taxes and therefore the *Mobil* case was irrelevant. The same considerations that led the Tribunal to conclude that the special refund authority could not be judicially imposed upon the sales tax provisions of the Administrative Code of the City of New York in *Kimberly Hotel* support the position that New York State sales tax law may not be construed to include the special refund authority found in Tax Law § 697(d).

E. According to petitioner, by failing to confirm the correctness of the credit available for use by BBW, the Division failed to comply with Tax Law § 3004-a(a). This section imposes a duty upon the Division to “disclose to a taxpayer all instances of overpayment of tax by such taxpayer discovered by the department during the course of an audit, assessment, collection or enforcement proceeding.”

The forgoing argument is a non sequitur. On its face, the requirement of Tax Law § 3004-a(a) applies when the Division *discovers* an overpayment. Since the Division did not discover an overpayment during the audit, the section relied on does not provide any relief to petitioner. Moreover, Tax Law § 3004-a(c) expressly prohibits the granting of a refund after the expiration of any period of limitation.

F. Petitioner contends that the overpayments became mere deposits that can be claimed at any time. This argument is also without merit because its acceptance would eviscerate the strong public policy considerations that support the application of a statute of limitations (*see Matter of Renaud d/b/a Beverage & Redemption Center*).

G. Petitioner submits that the Division is estopped from denying BBW's refund claim. The case law regarding the application of the doctrine of estoppel in tax matters is well established. In general, the doctrine of estoppel does not apply absent a finding of a "manifest injustice" (*Matter of Winners Garage v. Tax Appeals Tribunal*, 89 AD3d 1166 [2011], *lv denied* 18 NY3d 807 [2012]). The imposition of an estoppel requires the presence of three elements:

(1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts (citing *Matter of Rashbaum v. Tax Appeals Trib. of the State of N.Y.*, 229 AD2d 723, 725 [1996]). (*Matter of Winners Garage v. Tax Appeals Tribunal*, 89 AD3d 1166, 1169 [2011]).

H. Here, it is evident that none of the requirements for an estoppel are present. First, this is not a situation that presents a manifest injustice. Rather, this is simply a situation where a taxpayer failed to claim a refund within the time required by the statute of limitations. Unfortunately, this happens on occasion (*see e.g. Matter of Renaud d/b/a Beverage & Redemption Center; Matter of Nierenstein*, Tax Appeals Tribunal, April 21, 1988).

Moreover, petitioner has not satisfied the criteria for the application of an estoppel. Division did not engage in conduct that amounts to a false representation or concealment of material facts. It is not disputed that the Division did not examine those quarters that would have revealed that there were unclaimed credits. As a result, the Division was as unaware of the

unclaimed credits as petitioner. Obviously, the Division was not in a position to conceal or misrepresent a fact of which it was not aware.

Petitioner submits that BBW reasonably relied on the inference that an assessment would not have been issued unless there was an underpayment of sales tax. However, there is no basis for this inference. The Division's assessment did not have anything to do with the unclaimed credits at issue here and, in view of the clear statement of the audit period, there would be no reason to assume that the Division would have verified the credits prior to the audit period. In this regard, it should be obvious that an unspoken assumption by an employee of petitioner that New York would conduct its audit in the same manner as another state does not constitute a false representation by the Division. Here, it is evident that the unclaimed credits were the result of a mistake or dereliction of responsibility on the part of the individual or individuals entrusted with preparing the returns. An estoppel may not be imposed against the Division for the wrongful acts of third parties (*Matter of Salh*, Tax Appeals Tribunal, March 10, 2011, *confirmed*, 99 AD3d 1124 [3d Dept 2012]).

I. In this matter, the Division issued an appointment letter that set forth the period for review. It then confined its review to that period. Nothing more should be expected. If, as petitioner suggests, the Division were under the obligation to check on the credits claimed arising from periods prior to the audit period, it could be stuck in an endless loop reviewing returns that sequentially claimed credits from prior periods going back in time to the enactment of the sales tax law. It is obvious that the imposition of such an obligation would be unreasonable.

J. Lastly, petitioner argues that the failure to refund the excess remittances results in a violation of BBW's due process rights. This argument is also without merit. As explained

earlier, the statute of limitations allows a reasonable time for taxpayers who paid more than they should have to find their error and file a claim for refund. In turn, the State is aware that there is a three-year period wherein it may have to pay claims. Thereafter, the matters are settled and a balance is established between the needs of the State to protect its financial resources and the right of taxpayers to correct their errors. Hence, the requirements of due process are satisfied. Without this level of certainty, it would be difficult or impossible to maintain the financial operation of government (*Matter of the Kimberly Hotel*; *Matter of Nierenstein*).

K. The petition of Bath & Body Works, LLC, as successor-in-interest to Bath & Body Works, Inc., is denied and the denial of the claims for refund is sustained.

DATED: Albany, New York
April 25, 2013

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE