

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
EDMUND J. RENAUD D/B/A :
BEVERAGE & REDEMPTION CENTER : DETERMINATION
: DTA NO. 823595
for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for :
the Years 1994 through 1997. :
:

Petitioner, Edmund J. Renaud d/b/a Beverage & Redemption Center, 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 years 1994 through 1997.

On October 20, 2010, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (Lori P. Antolick, Esq., of counsel), filed a motion seeking summary determination in its favor pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b). Accompanying the motion was the affirmation of Ms. Antolick, dated October 20, 2010, and attached exhibits in support of the motion. Petitioner, appearing pro se, did not respond to the motion. Therefore, the 90-day period for issuance of this determination commenced on November 20, 2010, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. After due consideration of the affirmation and annexed exhibits, and all the pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner's request for a refund of sales and use taxes paid for the period in issue was timely.

FINDINGS OF FACT

1. Petitioner, Edmund J. Renaud d/b/a Beverage & Redemption Center, was audited by the Division of Taxation for the period June 1, 1994 through August 31, 1997,¹ which audit determined that petitioner owed additional sales and use taxes in sum of \$126,585.98. Subsequently, a Notice of Determination, notice number L-021328594, was issued to petitioner asserting the additional tax found due plus penalty and interest.

2. Ultimately, a stipulation of discontinuance with respect to notice number L-021328594 was executed on or about July 27, 2004. The stipulation recited that the agreed upon tax was the reduced amount of \$114,481.22 plus penalty and interest.

3. During the course of the audit, the matter was referred to the Division of Taxation's Revenue Crimes Bureau for investigation. The result of the investigation were criminal charges against petitioner. Petitioner pled guilty to grand larceny in the fourth degree and received a sentence of five years probation and was ordered by the Cattaraugus County Court to pay restitution to the Division in the sum of \$78,287.57. This amount represented the portion of the restitution allocated to Beverage & Redemption Center. Pursuant to the terms of the sentence, explained in the October 9, 2001 letter from Mr. Gerald Vella, petitioner's attorney, to petitioner, Mr. Renaud was required to pay one half of the restitution on October 10, 2001, the date he entered his plea in Cattaraugus County Court, and the remainder on or about October 31, 2001, the latter payment memorialized in a letter from Mr. Vella to the Attorney General bearing the same date.

¹In fact, petitioner's last sales and use tax return for Beverage & Redemption Center, for the quarter ended May 31, 1997, was filed in June 1999.

4. The Division received the final portion of the payment of \$78,287.57 in October 2001 and subsequently applied it to the balance due on notice number L-021328594.

5. On or about January 30, 2009, petitioner filed a claim for refund in the sum of \$78,287.57, which petitioner claimed covered the period 1994 to 1997, or the period covering the sales tax audit of Beverage & Redemption Center.

6. By letter dated May 6, 2009, the Division of Taxation denied the claim for refund in full. The Division stated:

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. Sales tax is deemed to be payable on the 20th day of the month following the quarter in which the sale/purchase was made.

Your claim was filed on 01/30/09. Based on the three year statute of limitations, your claim can only include periods beginning on 12/01/05. All taxes paid on sales/purchases made before that date cannot be recommended for approval.

7. On or about November 13, 2009, the Division of Taxation sent petitioner a Response to Taxpayer inquiry that informed him that it could not verify the payment of \$364,623.36 on notice number L-021328594 as petitioner had claimed. The Division of Taxation requested a photocopy of the canceled check as proof of payment.

8. Petitioner timely filed a request for a conciliation conference in the Bureau of Conciliation and Mediation Services, after which an order, dated January 22, 2010, was issued sustaining the denial of refund.

CONCLUSIONS OF LAW

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

B. In the instant matter, petitioner did not respond to the Division's motion or submit any evidence to contest the facts set forth in Attorney Antolick's affirmation and attached exhibits. Consequently those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *John William Costello Assoc. v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984], *appeal dismissed* 62 NY2d 942 [1984]) Since no question of fact requiring a hearing exists, summary determination may be granted in this matter.

C. Tax Law § 1139(a) provides that:

the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission . . . [ii] in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article. . . .

D. Tax Law § 1139(c) provides, in pertinent part, as follows:

Claim for credit or refund of an overpayment of sales tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within two years from the time the tax was paid.

E. The undisputed facts in the record demonstrate that petitioner's refund claim was not timely. The return for the quarter ended August 31, 1997, the last month audited, was due by September 20, 1997. (Tax Law § 1136[b].) And although there is some question concerning when the final return for the audit period was filed, it was no later than June of 1997, the date written on the sales and use tax return for the quarter ended May 31, 1997 filed on behalf of Beverage & Redemption Center and signed by Mr. Renaud.

Under either section of the Tax Law recited above, petitioner's January 30, 2009 refund claim was untimely. It was not filed within three years after the date when such amount was payable (September 20, 1997) or within three years from the time the return was filed (June

1999). Additionally, the refund claim was not made within two years from the time the tax was paid (October 31, 2001).

D. The Division of Taxation's motion for summary determination is granted and the petition of Edmund J. Renaud d/b/a Beverage & Redemption Center is hereby denied.

DATED: Troy, New York
February 10, 2011

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE