

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ABDO NAGI d/b/a GREEN APPLE DELI	:	DETERMINATION
		DTA NO. 823644
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
Period March 1, 2003 through November 30, 2005.	:	

Petitioner, Abdo Nagi, filed a petition for revision of a determination or for refund of sale and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2003 through November 30, 2005.

On December 13, 2010, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). Accompanying the motion was the affidavit of John E. Matthews, dated December 9, 2010, and annexed exhibits supporting the motion. Petitioner, appearing pro se, did not respond to the motion of the Division of Taxation within 30 days thereafter (Tax Law § 3000.5[b]). Accordingly, the 90-day period for issuance of this determination commenced on January 13, 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 affidavit, annexed exhibits, and all pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner's waiver of his right to a hearing in the Division of Tax Appeals, executed subsequent to his filing of a petition for such a hearing, properly requires the dismissal of such petition..

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Abdo Nagi d/b/a Green Apple Deli, a Notice of Determination bearing assessment ID number L-026757540, dated April 17, 2006. This Notice assessed sales and use taxes due for the period spanning March 1, 2003 through November 30, 2005 in the amount of \$227,512.00, plus penalty and interest.

2. On March 29, 2010, petitioner filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the foregoing Notice of Determination.

3. On April 16, 2010, BCMS issued to petitioner a Conciliation Order Dismissing Request (CMS No. 238317). The order stated that petitioner's March 29, 2010 protest against the Notice had not been filed within 90 days after the April 17, 2006 issuance date of the Notice, and was therefore dismissed as untimely.

4. On May 17, 2010, petitioner challenged this dismissal by filing a petition with the Division of Tax Appeals. The case was assigned DTA No. 823644, the petition was forwarded to the Division's Office of Counsel, and an answer to the petition was filed on August 4, 2010.

5. After the filing of the petition, the Division of Taxation rescinded the April 16, 2010 BCMS conciliation order and granted petitioner a BCMS conference on the merits. In turn, and as a result of this conference, petitioner and the Division reached an agreement in resolution of

the assessment at issue, whereby the assessed amount of tax was reduced to \$45,762.00, plus penalty and interest.

6. The foregoing agreement resolving the assessment was set forth in a Withdrawal of Protest (Form DTF 941), which lists the conciliation order number, the DTA case number, the assessment date and ID number, the period in issue, the agreed amounts due, any payments made, and the remaining balance then due.¹ This form is dated as signed by petitioner on August 11, 2010 and by the Division on August 17, 2010, and includes the following language:

I hereby withdraw the protest for a redetermination of a deficiency or revision of a determination, notice(s) of additional tax, notice and demand(s), and any credit/refund claim asserted therein, or any statutory notice identified above, and I consent to a discontinuance of the case initiated by the filing of such protest. *I waive any right to a conciliation conference and a hearing in the Division of Tax Appeals concerning the above notice.* For estate tax purposes, I waive my right to a special proceeding before the Surrogate Court. *This withdrawal shall finally resolve any credit/refund(s), deficiencies of [sic] determinations, notice(s) of additional tax, or notice and demand(s) indicated above with prejudice.* (Emphasis added)

7. Petitioner did not respond to the subject motion.

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 and, therefore, has conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*,

¹ A printout showing the history of the subject assessment (L-026757540), supplied by the Division as part of the documents accompanying this motion, reflects that petitioner has paid a significant portion of the subject assessment (as reduced per agreement.)

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]). In addition, petitioner has submitted no evidence to contest the facts alleged in the Matthews affidavit as filed with the subject motion and supported by the documents supplied therewith. Consequently, those facts may be deemed admitted and, accordingly, summary determination in favor of the Division may be granted in this matter.

C. The petition pending in this matter was filed in response to the April 16, 2010 BCMS conciliation order. Subsequent to the filing of this petition, the Division of Taxation and petitioner resolved the assessment at issue by agreement, as described, and memorialized the same by the execution of a Withdrawal of Protest. This Withdrawal of Protest clearly and unequivocally states that petitioner waives any right to a hearing in the Division of Tax Appeals concerning the subject Notice of Determination. This matter remains “open” before the Division of Tax Appeals solely because petitioner has not filed any document with the Division of Tax Appeals indicating withdrawal of the petition. Accordingly, given that the underlying assessment has been settled by agreement between the parties, and that petitioner has waived any right to further protest such assessment, it is appropriate that the petition challenging the same be dismissed.

D. The Division of Taxation’s motion for summary determination is granted, and the petition of Abdo Nagi d/b/a Green Apple Deli is dismissed with prejudice.

DATED: Troy, New York
March 24, 2011

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE