

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
VIJAY PATEL : ORDER
 : DTA NO. 825172
for Revision of Determinations or for Refund of :
Sales and Use Taxes Under Articles 28 and 29 of the :
Tax Law for the Period March 1, 2010 through :
November 30, 2010. :
:

Petitioner, Vijay Patel, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2010 through November 30, 2010.

On November 9, 2012, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the Division of Tax Appeals does not have jurisdiction to hear the matter. Petitioner, appearing pro se, filed his response to the notice on December 8, 2012. The Division of Taxation, by Amanda Hiller, Esq. (John E. Matthews, Esq., of counsel), submitted its response to the notice on January 17, 2013, which date commenced the 90-day period for issuance of this order (20 NYCRR 3000.5[d]; 3000.9[a][4]). After due consideration of the arguments submitted by the parties and the pleadings and proceedings had herein, Donna M. Gardiner, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner is entitled to a hearing in the Division of Tax Appeals after signing a Bureau of Conciliation and Mediation Services Consent.

FINDINGS OF FACT

1. On May 17, 2011, the Division of Taxation (Division) issued to petitioner, Vijay Patel, notices of determination L-035929385, L-035929386 and L-035929387, for additional sales and use taxes for the period March 1, 2010 through November 30, 2010. The notices were issued to petitioner as a responsible officer for M & V Food Corporation.

2. In response, petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). A conference was held and, on June 14, 2012, the conciliation conferee issued a letter to petitioner stating that the notices would be sustained. Included in this letter, the conciliation conferee enclosed two copies of a consent form. The letter states as follows:

After considering all the evidence submitted, I have determined that I must sustain the Notices of Determination issued by the Department of Taxation and Finance.

Enclosed are two (2) copies of a Consent form which reflects this decision. If you agree, please sign and return one copy of this form within fifteen (15) days in the envelope provided. A check in full payment made out to the COMMISSIONER OF TAXATION AND FINANCE, and received within the above time period, will stop the accrual of additional penalty and/or interest charges.

If you do not return the signed Consent forms within fifteen (15) days, a Conciliation Order will be issued as required by the Tax Law.

3. On June 27, 2012, petitioner signed the BCMS consent form relating to each of the three notices of determination set forth in Finding of Fact 1. The consent form provides as follows:

	L035929385	L035929386	L035929387
Tax	\$ 8,607.15	\$6,059.32	\$5,841.97
Penalty	\$ 2,409.97	\$1,817.73	\$1,752.39

Interest	\$ 2,126.95	\$1,775.46	\$1,989.79
TOTAL	\$13,144.07	\$9,652.51	\$9,584.15

I hereby agree to waive any right to a hearing in the Division of Tax Appeals concerning the above notice(s).

4. On August 13, 2012, petitioner filed a petition with the Division of Tax Appeals protesting the notices of determination and the BCMS consent.

5. On November 9, 2012, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition. The notice of intent stated, in pertinent part, that:

You are hereby notified of our intent to dismiss the petition in the above referenced matter.

All proceedings in the Division of Tax Appeals must be commenced by the timely filing of a petition in protest of a statutory notice (*see* 20 NYCRR 3000.3[b][8]). Further, the Division of Tax Appeals is without jurisdiction to consider the merits of a petition filed in excess of ninety (90) days following the issuance of a notice of determination issued under Articles 28 and 29 of the Tax law (*see* Tax Law § 1138[a][1]). Similarly, the Division of Tax Appeals is without jurisdiction to consider the merits of a petition filed in excess of ninety (90) days following the issuance of a conciliation order (*see* Tax Law § 170[3-a][e]). To establish the timeliness of the protest, a legible copy of the conciliation order or, if none was issued, then a legible copy of the notice of determination must be included with the petition (*see* 20 NYCRR 3000.3[b][8]).

6. In response to the issuance of the Notice of Intent to Dismiss Petition, petitioner submitted a letter on December 8, 2012, stating that, at the time of the conciliation conference, he was not afforded more time within which to submit the appropriate documents that he felt were crucial in his proceeding. Petitioner admits receiving and executing the consent form. However, petitioner states that he did not have an attorney represent him at BCMS and that he has a right to such representation. Petitioner claims that he was misled by the conferee as to the consequences of executing the consent.

7. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division submitted a letter stating that there is no dispute that petitioner signed the consent at BCMS. As a result, the Division argues that petitioner waived his right to a formal hearing.

CONCLUSIONS OF LAW

A. Tax Law § 2006(4) sets forth the functions, powers and duties of the Tax Appeals Tribunal including, in relevant part, as follows:

To provide a hearing as a matter of right, to any petitioner upon such petitioner's request, pursuant to such rules, regulations, forms and instructions as the tribunal may prescribe, *unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter* (emphasis added).

B. Tax Law § 170(3-a)(c) provides the following with respect to the powers and authority vested in the conciliation conferee:

A conciliation conferee, all of whom, unless otherwise provided by law, shall be in the classified civil service, shall conduct the conciliation conference in an informal manner and shall hear or receive testimony and evidence deemed necessary or desirable for a just and equitable result. The commissioner of taxation and finance shall have the power to delegate authority to a conferee to waive or modify penalty, interest and additions to tax to the same extent as such commissioner is permitted under this chapter.

The regulations promulgated thereunder specifically address the situation where, after the conferee has reviewed all the evidence, a proposed settlement is made and forwarded to the party requesting the conference for his approval or disapproval. The regulation at 20 NYCRR 4000.5(c)(3) provides, in part, as follows:

(I) After reviewing the testimony, evidence and comments, the conciliation conferee will serve on the requester a proposed resolution in the form of a consent. In developing this proposed resolution, the conciliation conferee may contact either party to clarify any issues or facts in dispute.

(ii) Where the proposal is acceptable to the requester, the requester shall have 15 days to execute the consent and agree to waive any right to petition for hearing in the Division of Tax Appeals concerning the statutory notice.

As set forth in the facts, the consent form included language consistent with the regulation that called for the requester to waive any rights that he may otherwise have to a hearing in the Division of Tax Appeals “concerning the above notice(s).” In this case, the statutory notices are notices of determination L-035929385, L-035929386 and L-035929387, dated May 17, 2011.

By signing the consent, petitioner voluntarily discontinued proceedings before BCMS prior to the issuance of an order and, by the consent’s own terms, waived any rights to a hearing before the Division of Tax Appeals concerning all aspects of the notices of determination dated May 17, 2011, and agreed to the amount of tax plus interest and penalty due as indicated in the BCMS consent (*see Matter of BAP Appliance Corp.*, Tax Appeals Tribunal, May 28, 1992). Accordingly, the Division of Tax Appeals lacks jurisdiction to hear this matter.

C. The petition of Vijay Patel is hereby dismissed.

DATED: Albany, New York
March 21, 2013

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE