

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
VIJAY PATEL : DECISION
 : 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 an exception to the order of the Administrative Law Judge issued on March 21, 2013. Petitioner appeared *pro se*. The Division of Taxation appeared by Amanda Hiller, Esq. (John E. Matthews, Esq., of counsel)

Petitioner filed a letter brief in lieu of a formal brief in support of his exception. The Division of Taxation did not file a brief in opposition. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

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

We find the facts as determined by the Administrative Law Judge, except for finding of fact "2," which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

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.

We modify finding of fact “2” of the Administrative Law Judge’s order to read as follows:

In response, petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). The original letter from BCMS acknowledging petitioner’s request for a conciliation conference is dated October 10, 2011. It appears that an initial BCMS conciliation conference in this matter was scheduled for and conducted on January 17, 2012, whereat neither petitioner nor any counsel appeared. An additional conference was held, and on June 14, 2012, the conciliation conferee issued a letter to petitioner stating that the Notices would be sustained. Enclosed with this letter, were 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.”¹

On June 27, 2012, petitioner signed the BCMS consent form relating to each of the three Notices of Determination at issue. The consent form provides the following table:

¹ We modify this fact to more accurately reflect the record.

	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

The relevant consent form also expressly provides the following language:

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

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

On November 9, 2012, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition. The Notice of Intent to Dismiss Petition 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]).”

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 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.

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.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that the Division of Tax Appeals has limited jurisdiction. The Administrative Law Judge also noted that a BCMS conciliation conferee has the power to proffer a taxpayer a consent form. The Administrative Law Judge found that BCMS had, in fact, proffered petitioner a consent form; that petitioner had executed the consent form; and that by the terms of the executed consent form, petitioner had waived the right to seek redress before the Division of Tax Appeals. Accordingly, the Administrative Law Judge concluded that the Division of Tax Appeals lacked jurisdiction to consider the petition in this matter.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the BCMS conciliation conferee denied him the right to an attorney. Petitioner alleges that the BCMS conferee refused to reschedule the BCMS conference, thereby prohibiting petitioner from retaining an attorney. In addition, petitioner asserts that certain parties at the Division “swayed” petitioner into executing the relevant consent form. Moreover, petitioner asserts that sometime after he executed the consent form, he “decided to seek the advice of a tax attorney,” and at that time, determined that his approach to this matter should have been to seek redress before the Division of Tax Appeals.

OPINION

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).

Tax Law § 170 (3-a) provides a taxpayer with an option to request a conciliation conference prior to, or possibly instead of, a hearing with the Division of Tax Appeals.

The regulations promulgated under Tax Law § 170 (3-a) specifically address the situation where, after the conferee has reviewed all of the evidence, a proposed resolution 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 noted above, the consent form included unambiguous language that is consistent with the regulation, which called for the signer to waive any right that he may otherwise have to a hearing with the Division of Tax Appeals concerning the relevant Notices of Determination. By signing the consent form, petitioner voluntarily discontinued proceedings before BCMS prior to the issuance of an order. By the clear terms of the consent form, petitioner 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 (*see Matter of BAP Appliance Corp.*, Tax Appeals Tribunal, May 28, 1992).

Petitioner asserts that he was denied his right to counsel at the BCMS conference because the conferee refused an adjournment of the conference date in order to obtain counsel. As relevant, the New York State Administrative Procedures Act provides that:

“In a proceeding before an agency, every party or person shall be accorded the right to appear in person or by or with counsel . . .” (State Administrative Procedures Act § 501, *see also* 20 NYCRR 4000.2 [b]).

Furthermore, we note that under the applicable regulations, BCMS does have the power to extend the date on which a conciliation conference must be held (*see* 20 NYCRR 4000.7 [c]). However, such is an optional consideration, not a mandatory duty on behalf of BCMS.

In the present case, there is no evidence that petitioner sought and was denied an adjournment of the BCMS conciliation conference date in order to seek legal counsel. Even if petitioner’s unsubstantiated assertions were accurate, a refusal to postpone a conciliation conference date does not necessarily amount to refusing a party the right to counsel (*see Matter of Mera v Tax Appeals Trib. of State of N.Y.*, 204 AD2d 818 [1994]). Furthermore, from representations contained within the petition itself, it appears that petitioner did not seek the assistance of legal counsel until after the relevant consent form was already executed and delivered to the Division.²

For the reasons stated above, the Division of Tax Appeals lacks jurisdiction to hear this matter.

² As noted in the findings of fact, it appears that an initial BCMS conference was scheduled for and conducted on January 17, 2012. A second BCMS conference for this matter was held on June 14, 2012 and the relevant consent form was signed by petitioner 13 days later, on June 27, 2012. These lapses of time further support the conclusion that petitioner may not have been genuinely seeking legal counsel until after signing the consent form.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Vijay Patel is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Vijay Patel is dismissed with prejudice.

DATED: Albany, New York
October 17, 2013

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner