STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PRIMA ASPHALT CONCRETE, INC.	:	DECISION DTA NO. 826280[1]
for Revision of a Determination and for Refund of Sales and Use Taxes under Articles 28 & 29 of the Tax Law for the Period September 1, 2006 through February 28, 2010.	:	

Petitioner, Prima Asphalt Concrete, Inc., filed an exception to the determination of the Administrative Law Judge issued on February 25, 2016. Petitioner appeared by Mark Stone, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Nicholas A. Behuniak, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard on August 18, 2016, in New York, New York, which date began the six-month period for issuance of this decision.

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

ISSUE

Whether petitioner may reduce the sales tax due on prior sales to account for a volume discount subsequently provided to customers on said sales.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, which appear below.

[1] As noted in finding of fact 13 herein, DTA No. 826279, previously associated with this matter, was resolved by agreement of the parties.

1. During the period September 1, 2006 through February 28, 2010 (audit period), petitioner Prima Asphalt Concrete, Inc., was a manufacturer of asphalt and asphalt-related products that sold its products to contractors directly. Ronald Fehr, the president of petitioner during the audit period, explained that the sale of asphalt comprised about 90 percent of the company's sales.

2. Customers' trucks came to petitioner's business location where they were loaded with asphalt pursuant to payment agreements reached between petitioner and the customers, usually oral and in accordance with posted prices. Once trucks were loaded, the asphalt was transferred to the customers for transportation to and use at destinations determined by the customers. Product was purchased and picked up when it was to be used, and customers were billed on the 15th and 30th of every month for product that had been purchased during that time period.

3. Petitioner posted prices for the asphalt but often offered discounts to customers as an incentive to gain and retain customers. Due to competition in the marketplace, and to prevent the customer from shopping for lower prices or switching to another asphalt supplier before its order was completely filled, petitioner offered volume discounts that were applied to a customer's purchases after it met the volume goal, usually when the entire order had been filled. Since large orders could be filled over the course of one or more years, monthly invoices for purchases would show sales prices and tax thereon that did not reflect a discount. When the volume discounts were applied to prior sales, the sales tax payable account was debited, or decreased, to reflect the tax due on the diminished sales price. The customer was issued a "credit memo" to indicate the discounted sales price and the reduced sales tax.

4. Typically, petitioner's agreements with its customers were verbal and no written contracts were placed in evidence. Mr. Fehr stated that the company's sizeable overhead costs required him to offer the volume discounts to increase the number of tons of asphalt he sold.

5. If a customer failed to reach the required volume of product to qualify for the discount, no discount would be applied.

6. In 2009, petitioner submitted a claim for refund based upon a bad debt. The Division undertook an audit of petitioner to determine if the claim was valid. Ultimately, a refund of $109,865.92 was granted, but the Division denied $25,020.20 of the claim.

7. The audit began on April 8, 2010 when the Division sent petitioner a request for books and records pertaining to its sales tax liability for the audit period. An additional request was made on May 26, 2011. The records produced were considered to be adequate and the Division decided to use a test period, September 1, 2009 through November 30, 2009, to review the sales records. The Division requested and received a test period audit method election from petitioner. The review completed by the Division discovered computational errors that resulted in an error rate of 0.0012371772, which, when applied to each quarter of the audit period, resulted in additional taxable sales of $14,512.00 and additional tax due of $1,251.66. At the hearing, the Division conceded the issue of additional tax on sales as determined on audit. Therefore, the tax asserted in the subject notice of determination is reduced by $1,251.66.

8. A test period audit method election was also used for petitioner's expense purchases for various periods within 2008 and 2009. The test yielded additional purchases of $18,252.38 and additional tax due of $1,574.27 for the audit period. Petitioner concedes the tax found due and it is no longer in issue.

9. Capital purchases were analyzed in detail for the audit period and resulted in no additional tax due.

10. The Division's audit included a review of petitioner's sales tax payable account. Here, the Division discovered that petitioner had made numerous adjustments to account for price reductions subsequent to the purchase and acceptance of asphalt by customers. The Division disallowed the reductions, or debits, made to the sales tax payable account attributable to discounts granted on prior sales. To expedite the audit of the sales tax payable account, the Division did not investigate or disallow debits to the account that were under $2,000.00.[2] The Division determined that petitioner had underreported $289,859.82 in sales tax for the audit period based on the adjustments made to the sales tax payable account after transactions had been consummated.

In the auditor's review of the sales tax payable account, the opening credit of $8,426.71 as of September 1, 2006 was not considered in her analysis and calculations. Thus, the Division disallowed petitioner's debit of $9,652.08, taken to neutralize the opening credit balance, which petitioner mistakenly believed the Division had considered. No explanation was given for the amount of petitioner's debit, which was in excess of the opening credit balance.

11. The Division issued to petitioner a statement of proposed audit change, which asserted additional sales and use tax for the audit period in the sum of $292,685.75 plus penalty and interest. The statement was returned by petitioner with the statement, "We disagree with the audit findings and with the Tax Department's position on the price adjustments."

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[2] During the audit, inexplicably, the auditor allowed a debit to the sales tax payable account in the sum of $35,925.70 posted in August 2008. The auditor had no recollection of why this was allowed.

12. The Division applied the allowable portion of the refund, $109,865.92, to the outstanding liability resulting from the audit.

13. As noted in finding of fact 6, petitioner filed a claim for refund, dated December 18, 2009. The Division issued a refund denial letter to petitioner, dated January 30, 2013, which indicated that $109,865.92 of the $134,886.12 requested had been granted, but denying the amount of $25,020.20. At the hearing, petitioner conceded the propriety of the Division's modifications and withdrew its opposition to the conclusions reached in the denial letter. As noted in footnote 1, that matter is resolved and closed (DTA No. 826279).

14. The Division issued to petitioner a notice of determination, dated February 22, 2013, based on the audit performed for the audit period, which asserted additional tax of $292,685.75 plus penalty and interest, and indicated credit for the allowable portion of the refund, $109,865.92. The additional tax was attributed to additional sales, $1,251.66, additional expense purchases, $1,574.27, and the disallowance of debits to the sales tax payable account, $289,859.82.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that, with respect to sales of tangible personal property, sales tax is imposed at the time of transfer of title or possession of such property. He noted further that sales tax is imposed on the receipts from such a sale; that is, the selling price. Upon review of the Division's regulations, the Administrative Law Judge found that volume discounts from the stated purchase price, when applied at the time of the sale, reduce the taxable receipt, but he found no authority in the Tax Law or regulations for the reduction of taxable receipts based on the kind of retroactive price adjustments made by petitioner. The Administrative Law Judge noted that petitioner's proposed interpretation of the law would leave

the moment of the incidence of tax on a sale in a suspended state which could extend indefinitely and might never materialize. Accordingly, the Administrative Law Judge concluded that petitioner improperly debited its sales tax payable account, and thus improperly failed to pay sales tax with respect to the volume discounts granted on prior sales.

The Administrative Law Judge also rejected two arguments attacking the audit methodology; one relating to the balance of the sales tax payable account at the start of the audit period and the other related to the auditor's decision to ignore sales tax payable account debits of $2,000.00 or less.

The Administrative Law Judge thus denied the petition and sustained the subject notice of determination, as modified consistent with findings of fact 7 and 8.

SUMMARY OF ARGUMENTS ON EXCEPTION

The sole issue raised on exception is whether petitioner properly debited its sales tax payable account.

Petitioner agrees that it correctly collected and paid over sales tax as charged at the time of the transactions, but contends that it is entitled to credit for the sales taxes attributable to the post-transaction volume discounts. Petitioner notes that the Division's regulations include volume discounts among examples of discounts that reduce taxable receipts. Petitioner asserts that its volume discounts should receive similar treatment. Petitioner further asserts that neither the Tax Law nor the regulations expressly require that volume discounts be given at the time of sale in order to exclude the discounted amount from the taxable receipt. Petitioner thus contends that it properly debited its sales tax payable account during the period at issue.

While conceding that the sales tax is a transaction tax and therefore payable at the time of the transaction, petitioner asserts that this is a general principle to which the instant matter is an exception.

In response to the concerns raised in the determination that, under petitioner's proposed interpretation, a final determination of sales tax on any given transaction could be suspended indefinitely, petitioner proposes that retroactive volume discounts, such as those at issue, should have a three-year period of limitations running from the date of the original sale. Petitioner notes that there is generally a three-year limitations period applicable to claims for credit or refund of sales tax under the Tax Law.

Petitioner also contends that, since the issue herein is whether the discounted amounts are to be excluded from taxable receipts, this matter involves an exclusion from tax and that, accordingly, the relevant law must be construed in its favor.

The Division asserts that price discounts that are concurrent with a sales transaction may reduce taxable receipts, but that discounts that occur subsequent to the sale do not reduce taxable receipts. The Division thus contends, accordingly, that petitioner properly collected and paid sales tax on the full price at the time of the original transactions. In support of its position, the Division notes that both the Tax Law and regulations prohibit any deduction to taxable receipts based on an early payment discount. The Division argues that an early payment discount is, in effect, a retroactive price reduction similar to the volume discounts at issue.

The Division also notes that the Tax Law provides specific refund provisions that permit sales tax refunds for events which occur subsequent to the sale. The Division notes further that a refund or credit for a retroactive volume discount is not among such refund provisions.

The Division thus contends that petitioner failed to meet its burden of proof to show that the debits to its sales tax payable account were proper.

OPINION

For the reasons that follow, we affirm the determination of the Administrative Law Judge.

We first reject petitioner's contention that the instant matter involves an exclusion from tax. Rather, the ultimate question here is whether petitioner properly collected and paid tax on the purchase price at the time of the subject transactions. Petitioner plainly has the burden of proof to show that the portion of the purchase price which was subsequently discounted and credited to the purchaser is not subject to tax (***see*** Tax Law § 1132 [c] [1]; 20 NYCRR 3000.15 [d] [5]).

Tax Law § 1105 (a) imposes sales tax upon the receipts from every retail sale of tangible personal property. Petitioner's sales of asphalt to its customers were subject to sales tax pursuant to this provision.

As relevant here, receipt means sale price (***see*** Tax Law § 1101 [b] [3]). As liability for the sales tax is incurred at the time of the sales transaction (***see*** 20 NYCRR 525.2 [a] [2]), petitioner properly collected and paid over tax based on the price at the time its customers made their purchases of asphalt.

The discounts at issue were contingent on a customer's subsequent purchase of more asphalt. If a customer failed to meet its volume goal, there would be no discount. Neither the statutory nor regulatory definitions of receipt contain any language authorizing deductions from the computation of a receipt for discounts under such circumstances. Accordingly, we find that the selling prices with respect to the sales at issue were fixed at the time of such sales and that sales tax is properly imposed on the full amount of those receipts (***see Matter of Future Motors,***

Inc v The State Tax Commn. of the State of New York, Sup Ct, Albany County, March 21, 1979, Casey, J. [no reduction of taxable receipt where customer paid full price at the time of sale and subsequently received a rebate when customer's purchase goal was met]).

As noted, petitioner contends that the Division's regulations provide that volume discounts are deductible in computing receipts, and concludes, therefore, that the discounts at issue should receive similar treatment. We disagree with petitioner's conclusion. The regulation in question states that "[d]iscounts which represent a reduction in price, such as a trade discount, volume discount or cash and carry discount are deductible in computing receipts" (20 NYCRR 526.5 [d] [2]). The examples that follow, however, indicate that such discounts must be given at the time of purchase to reduce the taxable receipt (***id.*** [examples 2 and 3]). In the present matter, the discounts were not given to customers at the time of purchase and thus the cited regulation does not support petitioner's position.

As the Division suggests, more analogous to the present circumstances is the express statutory prohibition against deducting early payment discounts in calculating receipts (***see*** Tax Law § 1101 [b] [3] ["receipt" determined "without any deduction for . . . early payment discounts"]). As the regulations make clear, such early payment discounts are contingent on an event, i.e., the early payment of the amount due, that occurs subsequent to the transaction (***see*** 20 NYCRR 526.5 [d] [1] [example 1]). The discounts at issue are also contingent on events occurring subsequent to the transaction, that is, additional purchases of asphalt. The statutory treatment of early payment discounts thus supports the conclusion that the retroactively granted discounts at issue are not deductible from receipts.

As we have determined that petitioner's taxable receipts may not be reduced by the subsequent discounts or rebates, we find that the tax at issue was not erroneously or illegally collected and hence such tax may not be credited or refunded pursuant to Tax Law § 1139 (a).

We observe that the Tax Law does provide for refunds of sales tax paid upon the occurrence of events subsequent to the sale (***see*** Tax Law §§ 1132 [e] [bad debts, canceled sales, defective merchandise] and 1119 [a] [refunds based on certain uses]). The Legislature has not, however, authorized a refund where, as here, a portion of the purchase price is rebated to a customer following subsequent purchases of the product.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Prima Asphalt Concrete, Inc. is denied

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Prima Asphalt Concrete, Inc. is denied; and

4. The notice of determination, dated February 5, 2013, as modified consistent with findings of fact 7 and 8, is sustained.

DATED: Albany, New York
February 9, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner