

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
CROWN SECURITY, LLC :
for Revision of a Determination or for Refund of Sales :
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period June 1, 2011 through August 31, 2011. :
: **DETERMINATION**
: **DTA NOS. 824873 AND 824957**

In the Matter of the Petition :
of :
FELIX EKE :
for Revision of Determinations or for Refund of Sales :
and Use Taxes under Articles 28 and 29 of the Tax :
Law for the Period September 1, 2009 through :
August 31, 2010. :
:

Petitioner Crown Security, LLC, 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 period June 1, 2011 through August 31, 2011.

Petitioner Felix Eke 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 September 1, 2009 through August 31, 2010.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, in New York, New York, on December 16, 2013, at 1:00 P.M., with all briefs to be submitted by March 21,

2014, which date commenced the six-month period for issuance of this determination. Petitioners appeared by Richard M. Gabor, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Michael Hall, of counsel).

ISSUES

I. Whether the Division of Taxation properly assessed sales tax on Crown Security, LLC's sales of security services.

II. Whether penalties asserted against petitioners should be abated.

III. Whether the Division of Tax Appeals has jurisdiction over the petition filed by Crown Security, LLC.

FINDINGS OF FACT

1. Petitioner Crown Security, LLC, provides security guard services at various locations in New York City. Petitioner Felix Eke was the president and a member of Crown Security and concedes his responsibility as a person required to collect and remit sales tax for the periods at issue. During the period at issue Crown Security provided guard services at construction sites for contractors working on projects for the New York City School Construction Authority.

2. In a letter dated October 21, 2009, Crown Security was advised by the New York City School Construction Authority that its services were subject to New York State sales tax. Also in 2009, Crown Security was advised during the course of an audit by the Division of Taxation (Division) that its services were subject to the imposition of New York State sales tax.

3. As a result of the advice received from the New York City School Construction Authority and the Division, Crown Security filed New York State and local sales and use tax returns for the quarters ended November 30, 2009, February 28, 2010, May 31, 2010 and August 31, 2010. The return for the quarter ended November 30, 2009 was filed late with a partial

payment of the amount of tax indicated as due. The returns for the quarters ended February 28, 2010 and May 31, 2010 were also filed late and without remittance of any of the tax indicated as due. The return for the quarter ended August 31, 2010 was timely filed but without remittance of any of the tax indicated as due.

4. Following the issuance of notices and demands to Crown Security, the Division issued to petitioner Felix Eke four notices of determination, dated May 2, 2011 for the period ended November 30, 2009 (assessment number L-035814573) and dated March 22, 2011 for the periods ended February 28, 2010 (assessment number L-035546540), May 31, 2010 (assessment number L-035546542) and August 31, 2010 (assessment number L-035546541). The notices are based upon Crown Security's failure to timely file returns and pay the sales tax due and were issued to Mr. Eke as a responsible person of Crown Security.

5. The contractor exempt purchase certificates introduced by petitioners in an effort to establish that they are not responsible for the sales tax shown to be due on the returns filed for the periods ended November 30, 2009, February 28, 2010, May 31, 2010 and August 31, 2010 all indicate they were provided by their customers for the purchase of tangible purchase property. Some were dated prior to the October 21, 2009 letter from the New York City School Construction Authority and the Division's audit. Others were not dated at all. In addition, several did not contain Crown Security's name as the vendor of the tangible personal property provided.

6. Based upon a review by an auditor in the Division's Technical Unit Field Audit Management of information provided by petitioners and the Division's records, the Division established that during the periods at issue there was no overlap of any sales and use tax audits of

Crown Security's purchasers that would entitle petitioners to a credit for taxes assessed against another entity.

7. On January 23, 2012, the Division of Taxation (Division) issued to petitioner Crown Security, LLC, a Notice of Determination (Estimated) for the period June 1, 2011 to August 31, 2011. The notice stated that, as Crown Security had not filed a sales and use tax return for the period indicated, the Division was estimating the amount of tax due.

8. Crown Security had filed, on January 17, 2012, a sales and use tax return for the period June 1, 2011 through August 31, 2011. The return indicated sales tax due in the amount of \$22,735.00. Crown Security, however, did not remit to the Division the amount of sales tax due as stated on the return.

9. On March 27, 2012, the Division issued to Crown Security a Notice and Demand for Payment of Tax Due in the amount of \$22,735.00, plus penalty and interest.

10. During the period May 1, 2009 through June 30, 2013, Crown Security was issued 17 notices of additional tax due. In addition, for the period December 1, 2008 through May 31, 2013, Crown Security failed to file sales and use tax returns for seven quarters.

CONCLUSIONS OF LAW

A. Tax Law § 1105(c)(8) imposes sales tax on the receipts from every sale, except for resale, of protective and detective services, including patrol and watchman services. There is no dispute in the instant matter that the guard services provided by Crown Security were protective and detective services within the meaning of Tax Law § 1105(c)(8) and that the services were subject to the imposition of sales tax (*Matter of Robert Bruce McLane Associates, Inc. v. Urbach*, 232 AD2d 826 [1996]). Petitioners assert, however, that they should not be liable for the collection and remittance of sales tax on their services because they relied on the sales tax

exemption certificates received from the purchasers (*see* Finding of Fact 5). Petitioners argue that the Division should assess any sales tax due against its customers, rather than petitioners.

B. Tax Law § 1132(a)(1) provides that, “[e]very person required to collect the tax shall collect the tax from the customer when collecting the price, amusement charge or rent to which it applies.” Additionally, Tax Law § 1132(c)(1) provides that:

For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five . . . are subject to tax until the contrary is established, and the burden of proving that any receipt . . . is not taxable hereunder shall be upon the person required to collect tax or the customer. . . . [U]nless (i) a vendor . . . shall have taken from the purchaser a resale or exemption certificate . . . to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax . . . , the sale shall be deemed a taxable sale at retail. . . . Where such a resale or exemption certificate . . . has been furnished to the vendor, the burden of proving that the receipt, amusement charge or rent is not taxable hereunder shall be solely upon the customer.

Section 532.4(b)(2) of the sales and use tax regulations provides as follows:

A vendor who in good faith accepts from a purchaser a properly completed exemption certificate . . . not later than 90 days after delivery of the property or the rendition of the service is relieved of liability for failure to collect the sales tax with respect to that transaction. The timely receipt of the certificate . . . will satisfy the vendor’s burden of proving the nontaxability of the transaction and relieve the vendor of responsibility for collecting tax from the customer.

(I) A certificate . . . is “accepted in good faith” when a vendor has no knowledge that the exemption certificate . . . issued by the purchaser is false or is fraudulently presented. If reasonable ordinary due care is exercised, knowledge will not be imputed to the seller required to collect the tax.

Petitioners have failed to present sufficient evidence to show that they received properly completed exemption certificates and that the certificates were relied upon in good faith.

Although petitioners point to the contractor exempt purchase certificates introduced into the record as evidence that they are not responsible for the sales tax shown due on the returns,

petitioners' proof is flawed. Some of the certificates do not identify Crown Security as the vendor, all indicate the purchase of tangible personal property rather than the purchase of security services and those that are dated bear a date prior to Crown Security being advised by both the New York City School Construction Authority and the Division that its security services were subject to the imposition of sales tax. Once Crown Security was advised of the taxability of its security services, it could no longer rely in "good faith" on the previously received exemption certificates. Petitioners failed to submit any credible evidence that their security services were exempt, or that their reliance on the exemption certificates was in good faith. Petitioners were aware in 2009, prior to the periods at issue, that their security services were subject to sales tax. As such, petitioners cannot now claim that the receipt of exemption certificates years earlier somehow relieves them of the responsibility to collect and pay over the sales tax due when they were fully aware at the time the security services were provided that such services were properly subject to the imposition of sales tax.

C. In establishing reasonable cause for the abatement of penalty, the taxpayer faces an onerous task (*Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). In *Philip Morris* it was explained that "[b]y first requiring the imposition of penalties (rather than merely allowing them at the Commissioner's discretion), the Legislature evidenced its intent that filing returns and paying the tax according to a particular timetable be treated as a largely unavoidable obligation [citations omitted]" (citing *Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992, *confirmed* 193 AD2d 978, 598 NYS2d 360 [1993]). Here, petitioners failed to timely file sales tax returns and pay the tax shown to be due on the returns. In addition, Crown Security has a lengthy history of failing to timely file sales tax returns and timely paying the tax due. Under these circumstances, the waiver of penalties is not justified.

D. The Division of Tax Appeals is an adjudicatory body of limited jurisdiction; its powers are limited to those conferred by its authorizing statute (*Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom Matter of New York State Dept. of Taxation & Fin. v. Tax Appeals Tribunal*, 151 Misc 2d 326, 573 NYS2d 140 [1991]).

Accordingly, absent legislative action, this forum cannot extend its authority to disputes that have not been specifically delegated to it (*Matter of Hooper*, Tax Appeals Tribunal, July 1, 2010).

E. The Division of Tax Appeals is authorized to “provide a hearing as a matter of right, to any petitioner upon such petitioner’s request . . . unless a right to such hearing is specifically provided for, modified or denied by another provision of this chapter” (Tax Law § 2006[4]).

F. The Division of Taxation is authorized to issue a notice and demand for payment of sales and use taxes reported due where a taxpayer fails to remit payment with its return and for penalties arising from failure to timely file or failure to timely remit payment for the amount reported due (*see* Tax Law § 173-a[3][a], [b][1]). Such a notice and demand may not be construed as a notice which gives a person a right to a hearing in the Division of Tax Appeals (*see* Tax Law § 173-a[3][c]).

G. Accordingly, Crown Security’s right to a hearing in the Division of Tax Appeals with respect to the notice and demand for payment of sales and use tax for the period June 1, 2011 through August 31, 2011 is specifically denied pursuant to Tax Law § 173-a(2) and (3)(c). The Division of Tax Appeals thus lacks subject matter jurisdiction to consider the merits of Crown Security’s protest of such notice and demand (*see* Tax Law § 2006[4]; *Matter of Chait*, Tax Appeals Tribunal, April 22, 2010).

H. To the extent petitioner Felix Eke seeks review of the various notices listed on the consolidated statements of tax liabilities, except the four addressed above, it is noted that Mr. Eke

has failed to provide a statutory notice or other document that confers jurisdiction or the right to a hearing in the Division of Tax Appeals (*see Matter of Pacori*, Tax Appeals Tribunal, November 20, 2008). In addition, the Division of Tax Appeals has no authority to review activities conducted by the Division to collect unpaid taxes after the assessments have become fixed and final (*Matter of Driscoll*, Tax Appeals Tribunal, April 11, 1991; *Matter of Pavlak*, Tax Appeals Tribunal, February 12, 1998). Finally, as previously noted, neither Article 22 nor Article 40 of the Tax Law provides taxpayers with the right to a hearing to contest a notice and demand, but rather the right to such a hearing, including a hearing to address the protocol pursuant to which the Division applies payments on outstanding assessments, is specifically denied by operation of law (*Matter of Chait*; *Matter of Brodmerkel*, Tax Appeals Tribunal, August 9, 2011).

I. The petition of Crown Security, LLC, is dismissed.

J. The petition of Felix Eke is denied, and the four notices of determination are sustained, together with such penalties and interest as may be lawfully due.

DATED: Albany, New York
May 1, 2014

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE