STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
KROLL BOND RATING AGENCY, INC.	:	DETERMINATION DTA NOS. 826900 AND 827411
for a Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 2010 through September 12, 2013.	:	

Petitioner, Kroll Bond Rating Agency, Inc., filed petitions for a refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 2010 through September 12, 2013.

A formal hearing was held before Donna M. Gardiner, Administrative Law Judge, on November 29, 2016, in New York, New York, with all briefs to be submitted by April 7, 2017, which date commenced the six-month period for issuance of this determination. Petitioner appeared by McDermott Will & Emery LLP (Peter L. Faber, Esq., and Alysse McLoughlin, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (M. Greg Jones, Esq., of counsel).

ISSUE

Whether petitioner has demonstrated that it is entitled to a refund of sales tax paid on its securities rating services.

FINDINGS OF FACT

1. Petitioner, Kroll Bond Rating Agency, Inc., is a securities rating agency that was founded in 2010 by Jules Kroll. Petitioner sought to create greater transparency for investors and to provide them with better information than did the other securities rating agencies.

2. On August 23, 2010, petitioner received its Nationally Recognized Statistical Rating Organization (NRSRO) license which permitted it to provide securities rating services in the United States.

3. When petitioner was entering the business, it was competing against large competitors, that, between them, controlled most of the securities rating industry. Petitioner's principal competitors were Moody's, S&P and Fitch. In 2011, Moody's and S&P each had approximately $2.5 billion of revenue and Fitch had approximately $900 million of revenue. Petitioner's revenue in 2011 was $2.5 million.

4. Petitioner's primary objective upon entering the business was to make investors aware of its rating services so that issuers would hire it to produce a rating. Petitioner's fee for securities rating services was between an eighth and a quarter of the fee that other agencies charged. During the period at issue, petitioner negotiated its fees for securities rating services with each customer. Petitioner did not utilize a formula to set its fees. Each negotiated fee was memorialized in an engagement agreement before petitioner began its work for the customer. Petitioner issued invoices for its services after its work was completed.

5. During the period at issue, petitioner was unsure whether the service that it provided was subject to New York sales tax. Although petitioner understood that the industry practice was not to collect sales tax, it was uncertain as to whether that practice was correct.

6. In 2011, petitioner consulted with its principal outside tax advisor, Daniel Zeman at BDO, regarding whether petitioner's securities rating services were taxable. Mr. Zeman testified that he and his state and local tax colleagues determined that the New York tax law was unclear regarding the taxability of securities rating services; thus, he advised petitioner to request an

advisory opinion from the Division. A petition for an advisory opinion was filed on or about March 8, 2012.

7. In October 2011, petitioner began including the statement "includes any applicable sales taxes" on its invoices for security rating services, surveillance fees and certain legal fees while waiting to receive an answer to its request for an advisory opinion from the Division. Mr. Zeman acknowledged in his testimony that the inclusion of this type of statement on an invoice indicates that sales tax would be calculated on the entire invoice amount. This statement regarding sales tax was not included on an invoice issued to a municipality or an entity that was tax exempt.

8. Petitioner did not remit sales tax on the total amount of the services charged on the invoices. Rather, petitioner allocated the invoice amount into taxable and non-taxable charges, if applicable, and applicable sales tax. In other words, the total amount of the invoice was a sum of taxable services, non-taxable services and sales tax.

9. The advisory opinion, TSB-A-13(27)S, was issued on September 9, 2013, over 18 months after it was requested by petitioner. The conclusion reached by the Division was that petitioner's credit rating service was not taxable under Tax Law § 1105(c)(1), but, rather, taxable under Tax Law § 1212-A(a)(3). As such, petitioner's credit rating services are subject to New York City tax, if the service is delivered in New York City.

10. On December 20, 2013, petitioner submitted a refund claim for the period December 1, 2010 through August 31, 2013, claiming a refund for a portion of the New York State sales tax that it paid on sales of securities rating services during this period. The claimed refund was in the amount of $1,355,525.00. By letter dated April 25, 2014, the Division denied this claim in full. The denial letter stated, in pertinent part, that:

> "A review of our records, along with the books and records you have provided, indicate that the taxable sales reported on your returns have been reduced by the tax due. This indicates that sales tax was collected from your customer and remitted to the department. No documentation was received to indicate that this tax was repaid to the customer."

11. Petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) to protest the refund denial letter. On January 23, 2015, a conciliation order, CMS No. 262580, was issued sustaining the denial of the refund.

12. Petitioner filed a timely petition in protest of the conciliation order.

13. On March 30, 2015, petitioner filed a second claim for refund with the Division for the period March 1, 2012 through September 12, 2013 for New York City sales taxes paid. By letter dated September 9, 2015, the Division denied the second claim for refund in full for the same reason as set forth in Finding of Fact 10.

14. On December 31, 2015, petitioner filed a petition in protest of the denial of its second refund claim.

15. On April 5, 2016, petitioner requested permission to amend its original petition to reflect the entire amount of New York State and City sales tax paid to the Division covered by both refund claims. Its request to amend was granted, and the refund claim was increased to the amount of $2,317,727.00.

CONCLUSIONS OF LAW

A. As a preliminary matter, the Division asserts that the petition in the matter of DTA No. 827411, filed in protest of the second refund denial letter, dated September 9, 2015, was untimely. Additionally, the Division argues that petitioner's request to amend its original petition, DTA No. 826900, should have been denied. The Division points out that the amended

petition merely morphed the second, late-filed petition into the original petition in order to mask that the second petition was untimely filed. In opposition, petitioner explains that it erred in filing two separate refund claims initially, one for New York State sales tax and the other for New York City sales tax. Petitioner alleges that the sales tax periods in issue are nearly identical and that both refund claims should be made into one application for refund for the tax period at issue herein.

B. Tax Law § 1139(b) provides a right to protest a refund denial letter, either by filing a request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals within 90 days (***see*** Tax Law §§ 170[3-a][a]; 2006[4]). Where the Division asserts that a taxpayer's protest of a statutory notice is untimely, the Division bears the burden of proving proper mailing of the notice (***see Matter of Katz***, Tax Appeals Tribunal, November 14, 1991). Here, the Division has produced no such proof and, thus, has not established the date of mailing of the September 9, 2015 refund denial letter. Therefore, the statutory time period for the filing of a protest is not triggered and the protest is deemed timely filed (***Matter of Katz***).

C. Turning to the merits of this case, the advisory opinion issued to petitioner, TSB-A-13(27)S, determined that the securities rating services provided during the period at issue herein were not subject to New York State sales tax. However, sales tax was remitted to the Division for the entire period at issue. Petitioner argues that it did not collect any sales tax from its customers because no other rating agency was assessing sales tax on its services. While it waited for a determination by the Division on the issue of taxability, petitioner argues that it paid sales tax on behalf of its customers. Thus, petitioner filed the instant claims for refund.

D. Tax Law § 1139(a) provides, in pertinent part, that:

> "the tax commission shall refund or credit any tax, penalty or interest erroneously . . . collected or paid if application therefor shall be filed with the tax commission . . . (ii) . . . within three years after the date when such amount was payable under this article . . . . No refund or credit shall be made to any person of tax which he collected from a customer until he shall first establish to the satisfaction of the tax commission, under such regulations as it may prescribe, that he has repaid such tax to the customer."

The regulation promulgated pursuant to Tax Law § 1139(a), 20 NYCRR 534.2, prescribed the form of the refund application and evidence satisfactory to the Division that the applicant had refunded the tax to its customer. However, in this case, petitioner argues that it paid the tax on behalf of its customers and, thus, its customers are not required to be refunded in order for it to prevail in this matter.

E. Petitioner bears the burden of proof to show that it is entitled to the refund requested (***see*** 20 NYCRR 3000.15[d][5]). Based upon the invoices, engagement letters and the taxable sales reported on its sales tax returns, it is determined that petitioner has not demonstrated that the sales tax was not collected from its customers.

Petitioner points to the fact that the rates charged on the invoices are the same as the rates outlined in the engagement letters. However, the sales tax remitted to the Division does not correlate to the tax due on the amount charged for its services. In other words, if petitioner was responsible for remitting the sales tax on behalf of its customers, the sales tax due and owing would be applied to the total amount set forth on the invoice. In this case, sales tax was not paid on the total amount of the invoice. Rather, petitioner subtracted the sales tax rate from the invoice amount. In essence, the invoice amounts included the tax (a statement to that effect was printed on the face of the invoice). The customer paid the entire amount set forth on the invoice, a portion of which represented the sales tax that was remitted to the Division. This method of

breaking down the sales tax from the total amount received by the customers clearly demonstrates that a portion of the amount paid by the customer represented the sales tax.

Petitioner notes that Tax Law § 1132 provides that a seller must separately state sales tax on its invoice. The Division's regulations specifically state that:

> "[t]he words *tax included* or words of similar import, on a sales slip or other document, do not constitute a separate statement of the tax, and the entire amount charged is deemed the sales price of the property sold or services rendered (emphasis supplied)" (20 NYCRR 532.1[b][3]).

Petitioner used the phrase *includes any applicable sales tax* on its invoices. A statement printed on an invoice that indicates that tax is included, results in the entire amount charged being the price subject to tax. Mr. Zeman, petitioner's outside tax advisor, acknowledged this in his testimony. If petitioner paid the sales tax for its customers, the tax rate would be calculated on the entire invoice amount. Petitioner's documentation does not reflect that the tax paid by petitioner was on the entire invoice amount, but rather, the tax was a portion of the amount remitted by the customer. Accordingly, petitioner's assertion that it did not collect the sales tax from its customers is untenable.

Petitioner relies on ***Matter of Noar Trucking Co. v. State Tax Commn.*** (139 AD2d 869 [3d Dept 1988]) for the proposition that the language "tax included" on an invoice does not mean that a seller collected sales tax. From the limited facts in ***Noar Trucking***, the Appellate Division held that the petitioner failed to sustain its burden of proof on this issue. However, the court affirmatively stated that "the entire amount charged is deemed to be the sales price" (***id.*** at 872). The record herein, which includes the engagement letters, the invoices and petitioner's sales tax returns, clearly shows that petitioner did not remit sales tax on the entire amount charged on the

invoice, but rather, used a portion of the amount charged on the invoice to remit sales tax. Therefore, ***Noar*** is distinguishable.

F. As set forth above, petitioner is only entitled to a refund if it demonstrated that such sales tax had been refunded to its customers. Since petitioner did not refund its customers, the claims for refund must be denied.

G. Petitioner argues that for the Division to keep the sales tax that it is not entitled to results in unjust enrichment. Primarily, petitioner argues that the Division exceeded the time frame within which to issue the advisory opinion to it. As a result, petitioner remitted sales tax for a much longer period than it would have if the advisory was issued within the proper issuance deadline. Petitioner submitted a calculation to demonstrate the total amount of sales tax paid to the date the advisory opinion was due (either within 90 or 120 days from the request).

Tax Law § 2000 provides the Division of Tax Appeals with quasi-judicial authority to resolve tax controversies between the Division and taxpayers. The Division of Tax Appeals does not have any jurisdiction to consider the issue of timely issuance of advisory opinions.

Next, petitioner relies on the ***Matter of Raemart Drugs v. Wetzler*** (157 AD2d 22 [3d Dept 1990]) in support of its claim of unjust enrichment. In ***Raemart***, the taxpayer made an overpayment of cigarette sales tax to the Division. The court noted that: "this petitioner merely seeks a refund of its money which it overpaid the Department of Taxation and Finance and which it did not receive from its customers" (***Raemart Drugs v. Wetzler***, 157 AD2d at 25-26). Since it was determined that petitioner's customers herein paid the sales tax, rather than petitioner, ***Raemart*** does not apply.

H. The petitions of Kroll Bond Rating Agency, Inc., are denied and the refund denial letters are sustained.

DATED: Albany, New York
October 5, 2017

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE