

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**8<sup>th</sup> AVENUE GOURMET & GROCERY INC.** : ORDER  
 : DTA NO. 825427  
for Revision of a Determination or for Refund of Sales :  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Periods June 1, 1991 through November 30, 1995 :  
and March 1, 2002 through May 31, 2003. :  
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Petitioner, 8<sup>th</sup> Avenue Gourmet & Grocery Inc., 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 periods June 1, 1991 through November 30, 1995 and March 1, 2002 through May 31, 2003.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated July 9, 2013, seeking an order dismissing the petition pursuant to section 3000.9(a)(ii) of the Tax Appeals Tribunal's Rules of Practice and Procedure, or in the alternative, for summary determination in favor of the Division of Taxation pursuant to section 3000.9(b) of the Tax Appeals Tribunal's Rules of Practice and Procedure, on the grounds that petitioner executed a consent to one assessment by which the company waived its right to further review before the Division of Tax Appeals and, as to five other assessments, on the grounds that petitioner has no right to a hearing before the Division of Tax Appeals to challenge penalties asserted in notices and demands. Petitioner filed no response to the motion.

Accordingly, the 90-day period for the issuance of this determination began on August 8, 2013.

After due consideration of the affidavit and documents presented by the Division of Taxation,

Catherine M. Bennett, Administrative Law Judge, renders the following order.

***ISSUES***

I. Whether the Division of Taxation's motion to dismiss should be granted for lack of subject matter jurisdiction on the basis that petitioner waived its right to challenge assessment L-014551387-2 before the Division of Tax Appeals by its execution of a consent to that assessment.

II. Whether the Division of Taxation's motion to dismiss should be granted for lack of subject matter jurisdiction on the basis that petitioner has no right to a hearing before the Division of Tax Appeals to challenge penalty assessments asserted in five notices and demands for payment.

III. Whether the Division of Taxation's motion for summary determination as to any of the notices in issue should be granted.

***FINDINGS OF FACT***

1. The petition as originally filed challenged the following 15 notices: L-018250842-9, L-018345239-7, L-020550108-1, L-018115306-3, L-023232084-5, L-025006450-5, L-019374979-8, L-019920740-7, L-020313194-9, L-023403237-5, L-023426122-3, L-023426123-2, L-014551387-2, L-023403236-6, and L-023426121-4. The Division of Taxation made a motion for dismissal or in the alternative summary determination concerning the last six notices listed (L-023403237-5, L-023426122-3, L-023426123-2, L-014551387-2, L-023403236-6, and L-023426121-4), and this order responds only to the motion concerning those notices. DTA No. 825372 has been created to address the remaining nine notices (L-018250842-9, L-018345239-7, L-020550108-1, L-018115306, L-023232084-5, L-025006450-5, L-019374979-8, L-019920740-7, L-020313194-9) in due course.

2. Assessment Notice L-014551387-2, a notice and demand for payment of tax due dated December 30, 1997, was issued to petitioner asserting sales and use taxes due for the period June 1, 1991 through November 30, 1995 in the amount of \$33,949.90 plus penalties and interest, in accordance with and subsequent to petitioner's signed statement of proposed audit adjustment.

3. The Division of Taxation's (Division) motion documents include a statement of proposed audit adjustment dated September 18, 1997, for the period June 1, 1991 through November 30, 1995, asserting tax due in the amount of \$33,949.90, plus penalty and interest. A signature appears in the space designated for owner, partner or corporate office, and in the space for title, the word "President" appears. The signature and title are dated November 17, 1997.

4. The following five notices and demands, Assessments L-023403237-5, L-023426122-3, L-023426123-2, L-023403236-6, and L-023426121-4, were issued to petitioner after its filing of timely sales tax returns with no tax due reported for the quarters ending May 31, 2002, August 31, 2002, November 30, 2002, February 28, 2003 and May 31, 2003. These five notices each bear a penalty in the amount of \$50.00.

5. Included with attachments to the petition was a Bureau of Fire Investigation, City of New York, report concerning a multiple alarm fire at the address of petitioner's business location in Brooklyn on November 11, 2001.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

6. The Division maintains that as to Assessment L-014551387-2, petitioner signed a consent to the tax as determined and therefore has no right to a hearing.

As to assessments L-023403237-5, L-023426122-3, L-023426123-2, L-023403236-6, and L-023426121-4, the Division asserts that where no tax is due on a timely filed return, a minimum payment of \$50.00 is still required. The Division further contends that these notices represent

penalties that were self-assessed, and there is no right to a hearing for any of these notices and demands.

7. The Division, in the alternative, argues that summary determination as a matter of law should be granted in favor of the Division as to all six notices, as there are no questions of fact.

8. Petitioner filed no response or statement of position to the Division's motions.

### ***CONCLUSIONS OF LAW***

A. The Division of Taxation has made a motion to dismiss, and alternatively, a motion for summary determination, as to the six notices in issue herein. A motion to dismiss the petition may be granted, as pertinent in this matter, if the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition (20 NYCRR 3000.9[a][ii]). A motion for summary determination may be granted,

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

Here, petitioner did not respond to the Division's motion, and it is therefore deemed to have conceded that no question of fact exists which would require a hearing to resolve (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667 [1975]; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984], *appeal dismissed* 62 NY2d 942 [1984]).

B. Focusing first on Assessment L-014551387-2, a signed consent on a statement of proposed audit adjustment prohibits the subsequent filing of a petition to challenge the same tax. Petitioner did not respond to the motion made by the Division with any evidence contrary to its signing the consent in November 1997. In *Matter of SICA Elec. & Maintenance Corp.* (Tax Appeals Tribunal, February 26, 1998), the Tribunal stated:

In addition, the above provisions also provide for a taxpayer to agree and consent to the amount of a tax liability (sections 1138[c] and former 1139[c]), thereby obviating the requirements of the issuance of a notice of determination and the 90-day protest waiting period thereafter, i.e., a taxpayer may consent to an assessment as was done in this matter. By agreeing to the amount of tax and consenting to an assessment, a taxpayer gives up its right to protest such assessment, except as provided by Tax Law former § 1139(c); to wit, the taxpayer may protest by payment of the amount assessed and by filing a claim for refund of any such amount so paid within two years of the date of payment thereof.

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We conclude that the signature on the consent to tax rendered the use tax fixed and final (*Matter of BAP Appliance Corp.*, Tax Appeals Tribunal, May 28, 1992; *Matter of Rosemellia*, Tax Appeals Tribunal, March 12, 1992 . . . .

Since petitioner specifically waived its right to a hearing in this matter by executing a consent to the assessment as detailed in Finding of Fact 3, the Division of Tax Appeals is without subject matter jurisdiction over this assessment. Petitioner's only remaining remedy is to pay the tax assessment as agreed and file for a refund of the tax as provided for in Tax Law § 1139(c) (*see Matter of Brewsky's Goodtimes Corp.*, Tax Appeals Tribunal, February 22, 2001).

Accordingly, the Division's motion to dismiss for lack of subject matter jurisdiction over Assessment L-014551387-2 is granted, and there is no further need to address this assessment in the context of a motion for summary determination.

C. The Division issued notices and demands to petitioner for timely-filed zero-tax-due sales tax returns covering periods set forth in Finding of Fact 4. The Division's motion to dismiss with respect to these five notices and demands is based upon its assertion that petitioner has no right to a hearing for any of these notices. Under the facts of this matter, the Division's argument is flawed, and petitioner appropriately exercised its right to petition the notices and demands. All the notices and demands were issued prior to December 1, 2004 when there was no statutory authority governing issuance of notices and demands, particularly their right to a

hearing (*see Matter of Meyers v. Tax Appeals Tribunal*, 201 AD2d 185, 615 NYS2d 90 [1994], *lv denied* 84 NY2d 810, 621 NYS2d 519 [1994]). Accordingly, the Division's motion to dismiss based on a lack of subject matter jurisdiction is denied.

D. The Division also made a motion for summary determination as to the five notices and demands set forth in Finding of Fact 4, as an alternative argument, on the basis that a determination can be made in favor of the Division as a matter of law, and that no material and triable issue of fact remains. The Division refers to the amounts due on each of the notices (\$50.00) as a "minimum payment" required by the Division when there was no sales tax due on a timely-filed return, inferring it to be the imposition of a minimum sales tax amount. However, all the notices and demands list the amounts due as penalties, not a tax due amount. The Division has not cited to any law, regulation or case law in support of its position, and accordingly, as a matter of law, has not established its entitlement to a motion for summary determination. In addition, there are material and triable issues of fact concerning the fire that petitioner experienced that may have affected its business records and formed the basis for reasonable cause for the imposition of penalties. Accordingly, the Division's motion for summary determination is denied, and the matter will be scheduled for a hearing on the merits of these five notices and demands.

E. The Division's motion to dismiss with respect to assessment L-014551387-2 is granted; the Division's motion to dismiss with respect to assessments L-023403237-5, L-023426122-3, L-023426123-2, L-023403236-6, and L-023426121-4 is denied; and the Division's motion for summary determination as to assessments L-023403237-5, L-023426122-3, L-023426123-2, L-023403236-6, and L-023426121-4 is denied, and a hearing will be scheduled

before the Division of Tax Appeals in due course on assessments L-023403237-5, L-023426122-3, L-023426123-2, L-023403236-6, and L-023426121-4.

DATED: Albany, New York  
October 24, 2013

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE