

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**NACMIAS & SONS AUTO SERVICE, LLC** : ORDER  
for Revision of a Determination or for Refund of Sales and : DTA NO. 830700  
Use Taxes under Articles 28 and 29 of the Tax Law for the :  
Period March 1, 2006 through February 4, 2021. :

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Petitioner, Nacmias & Sons Auto Service, 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 March 1, 2006 through February 4, 2021.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel), brought a motion, dated July 10, 2023, seeking dismissal or, in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Ballon Stoll, P.C. (Norman R. Berkowitz, Esq., of counsel), filed a response by August 9, 2023, which date commenced the 90-day period for the issuance of this order. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Nicholas A. Behuniak, Administrative Law Judge, renders the following order.

***ISSUE***

Whether the Division of Taxation's motion for dismissal or, in the alternative, summary determination should be granted.

***FINDINGS OF FACT***

1. Petitioner, Nacmias & Sons Auto Service, LLC, filed a petition on October 6, 2021, with the Division of Tax Appeals.

2. The petition challenges a sales tax refund claim determination notice bearing audit case ID number X-189671749 and dated September 1, 2021 (the refund denial notice) denying petitioner's refund request. The petition indicates, in part, that the reason for the protest is that the amount of the tax calculated is incorrect.

3. In support of its motion, the Division of Taxation (Division) submitted the affirmation of Melanie Spaulding, Esq., dated July 10, 2023, and the affidavits of Joseph DiGaudio, Assistant Director of the Division's Bureau of Conciliation and Mediation Services (BCMS), dated June 13, 2023, and Susan Ramundo, a manager in the Division's mail room, dated June 14, 2023. In its motion, the Division asserts that petitioner already protested the subject of the refund denial notice by filing a request for a conciliation conference with BCMS seeking review of notices of determination. The Division asserts BCMS issued a conciliation default order, dated February 11, 2011, bearing CMS No. 239189 (conciliation order), resolving the relevant matter against petitioner. The Division represents that petitioner did not protest the conciliation order. The affidavits of Joseph DiGaudio and Susan Ramundo, pertain to the mailing of the conciliation order. In addition, the Division asserts that the New York State Supreme Court of Kings County (*Nacmias & Sons Auto Serv., LLC v Coney Is. Sunoco Serv. Sta., Inc., et al.*, Index Nos. 33903/08 and 503916/14 [Kings County Supreme Court, 2017]), has resolved the issue of whether petitioner made a bulk purchase which is the sole issue in this case. Therefore, the Division states that it is entitled to summary determination.

4. Petitioner's response in opposition to the Division's motion included the affirmation of Norman R. Berkowitz, Esq., dated July 26, 2023, wherein he asserts, in part, that there are newly discovered facts surrounding this matter, that the court in *Nacmias & Sons Auto Serv.* decided in favor of petitioner, and that the conciliation order is not the matter at issue but rather the refund denial notice is.

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

A. Proceedings in the Division of Tax Appeals are commenced by the filing of a petition protesting any written notice of the Division that has advised the petitioner of a tax deficiency, a determination of tax due or a denial of a refund or credit application (Tax Law § 2008 [1]). To claim a refund or credit for any tax, a person must file an application for such refund or credit with the Division (Tax Law § 1139 [a]; 20 NYCRR 534.2 [a]). The Division will review, and either grant, adjust or deny the application for credit or refund and issue a determination to the taxpayer (20 NYCRR 534.2 [d] [1]). The determination is final and irrevocable unless the applicant, within 90 days after the date of mailing the notice of determination, applies to BCMS for a conciliation conference or to the Division of Tax Appeals for a hearing to review the determination (Tax Law § 1139 [b]; 20 NYCRR 534.2 [d] [3]).

In the case at hand, petitioner filed the petition within 90 days of the refund denial notice, therefore, the petition was timely filed.

B. The Division of Tax Appeals is a forum of limited jurisdiction (Tax Law § 2008). The Division seeks a dismissal of the petition alleging that the Division of Tax Appeals does not have jurisdiction over the matter based upon its assertion that the refund denial notice pertains to a matter previously protested by petitioner at BCMS and resolved by the conciliation order (*see Matter of Pugliese*, Tax Appeals Tribunal, July 12, 2018). However, based upon the motion

papers, it is not clear that the refund sought by petitioner in fact relates to the conciliation order. Since it is unclear whether the refund at issue pertains to the matter the Division alleges it does, dismissal of this matter is not appropriate.

C. The Division argues in the alternative that it is entitled to summary determination claiming that the State Supreme Court's holding in *Nacmias & Sons Auto Serv.* supports its assertion that petitioner made a bulk sale purchase. A motion for summary determination "shall 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]).

In this case, even if the Division's interpretation of *Nacmias & Sons Auto Serv.* is correct and that decision addressed the same issue as the one pertaining to the refund denial notice, in the petition, petitioner also asserts that the amount of tax calculated is incorrect. The Division does not address this material issue in its motion or supporting papers. Summary judgment is inappropriate in any case where there are material issues of fact in dispute (*see Friends of Thayer Lake, LLC v Brown*, 27 NY3d 1039, 1043 [2016]). There are material issues of fact in dispute relating to the refund denial notice. Accordingly, the Division's motion for summary determination is denied.

D. The motion of the Division of Taxation for dismissal or, in the alternative, summary determination is hereby denied, and this matter will be scheduled for a hearing in due course.

DATED: Albany, New York  
November 2, 2023

/s/ Nicholas A. Behuniak  
ADMINISTRATIVE LAW JUDGE