STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BREWSKY'S GOODTIMES CORPORATION	:	DECISION DTA NO. 817439
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 September 1, 1993 through February 28, 1998.	:	

Petitioner Brewsky's Goodtimes Corporation, 27 Woodshire Terrace, Towaco, New Jersey 07082-1457, filed an exception to the determination of the Administrative Law Judge issued on June 29, 2000. Petitioner appeared by Michael Swaaley, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Christina L. Seifert, Esq., of counsel).

Neither party filed a brief on exception. Petitioner's request for oral argument was denied.

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

ISSUE

Whether the Division of Tax Appeals has jurisdiction over a Notice and Demand issued subsequent to petitioner's execution of an agreement to the assessment of tax and interest by petitioner's president.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "2" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

As the result of an audit of the books and records of petitioner, Brewsky's Goodtimes Corporation, the Division of Taxation ("Division") issued to petitioner a Statement of Proposed Audit Change for Sales and Use Tax due for the period September 1, 1993 through February 28, 1998 of $56,858.37 plus interest.

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

> On February 1, 1999, petitioner's president and sole officer, Swiatoslaw Kuziw, executed an agreement to assessment of the proposed tax by signing his name under the following statement:
>
> > **If you agree** that a sales and/or use tax as summarized above is due and payable to the Commissioner of Taxation and Finance please sign and return one copy of this statement postmarked by Feb. 03, 1999. Interest is computed to: Feb. 03, 1999.
> >
> > I agree to the assessment of tax and penalties and accept any overassessment (decrease in tax and penalties), plus any interest provided by law as determined on this audit. I may consider these findings final unless I hear from the Department to the contrary within 60 days after receipt of this signed consent. I understand that: (1) If I later wish to contest the findings in this agreement, I must first pay the full amount shown due and file a timely application for a credit or refund. If the Department denies my application in whole or part, I may then timely contest the amount so denied in the Bureau

> of Conciliation and Mediation Services or Division of Tax Appeals, or both. (2) Since a field audit was conducted, the Department will not audit me again with respect to this tax for the periods shown on this statement, except in circumstances such as fraud, malfeasance or misrepresentation of a material fact.[1]

The Division issued to petitioner a Notice and Demand for Payment of Tax due on February 22, 1999, assessing tax in the amount of $56,858.37 plus interest of $19,087.24 for a total amount due of $75,945.61.

Petitioner filed a petition with the Division of Tax Appeals on November 19, 1999 challenging the sales tax audit method employed by the Division's auditors and the amount of tax determined by the auditors. The petition states that Mr. Kuziw, the only officer of the corporation, was never present during the audit; that petitioner was not represented by a qualified New York State attorney or certified public accountant during the audit; that the audit was conducted in New Jersey at the premises of Mr. Robert Weiss; and that the individuals representing petitioner on audit, either Mr. Weiss or John Babbit, were neither attorneys nor certified public accountants. The petition also challenges the manner in which the purchase markup test of petitioner's business was conducted.

Based upon the execution of the consent to assessment of tax by Mr. Kuziw, the Division filed the instant motion for summary determination arguing that the Division of Tax Appeals lacks jurisdiction to consider the petition.

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[1]We modified finding of fact "2" of the Administrative Law Judge's determination to emphasize that Mr. Kuziw was not only the president of petitioner, but its sole officer.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge granted the Division's motion for summary determination, finding that there was no material issue of fact and that the facts mandated a determination in the Division's favor. The Administrative Law Judge noted that the Tax Law mandates that the Tax Appeals Tribunal (hereinafter the "Tribunal") provide a hearing as a matter of right unless a hearing is specifically provided for, modified or denied by another provision (Tax Law § 2006[4]).

The Administrative Law Judge found that petitioner specifically waived its right to a hearing in this matter by executing a consent to the assessment of tax, which thereby fixed the tax liability and eliminated the hearing right provided for in Tax Law § 1138(a)(1). The Administrative Law Judge noted that petitioner's remaining remedy after executing the consent was to pay the tax assessment and file for a refund of the tax as provided for in Tax Law § 1139(c).

The Administrative Law Judge rejected the conclusory assertions made by petitioner's president in his affidavit in opposition to the motion, stating that the allegations were insufficient to raise triable issues of fact.

ARGUMENTS ON EXCEPTION

On exception, petitioner raises the identical arguments it raised before the Administrative Law Judge. Petitioner believes that it has raised a material and triable issue of fact in that its president, Mr. Kuziw, did not know the nature of the consent to tax and waiver of hearing he executed and never intended to waive his rights to contest the proposed assessment. Petitioner argues that the Division erred in relying on a representative for whom it had no power of attorney

on file. Since no power was submitted into evidence by the Division, petitioner believes there is a triable issue of fact. Further, petitioner argues that the Division violated the secrecy provisions of Tax Law § 1146 when it divulged information to individuals for whom it allegedly did not have valid powers of attorney executed by petitioner. In the alternative, petitioner contends that even if he did waive his right to a hearing, Tax Law § 2006(4) grants the Tribunal the authority to provide a hearing as a matter of right to any petitioner upon such petitioner's request.

Petitioner also raised audit issues concerning the statute of limitations as applied to certain periods in issue and certain adjustments that should have been made to lower the assessment, such as an allowance for pilferage, waste and the volume of beer actually delivered to petitioner as opposed to what was invoiced.

The Division, in opposition to the exception, relied on the determination of the Administrative Law Judge.

OPINION

We affirm the determination of the Administrative Law Judge. The Division has established that there is no material issue of fact and it is entitled to summary determination as a matter of law (20 NYCRR 3000.9[b][1]).

Petitioner correctly noted that this Tribunal is empowered with the authority to provide a hearing as a matter of right, upon request, unless a right to such a hearing is specifically provided for, modified or denied by another provision of the law (***see***, Tax Law § 2006[4]). However, it fails to acknowledge the provision of Tax Law § 1138(c) which provides that:

> A person liable for the collection or payment of tax . . . shall be entitled to have a tax due assessed prior to the ninety-day period

> [for the filing of a petition challenging such tax] by filing with the [Division] a signed statement in writing . . . consenting thereto.

Petitioner executed a consent to the assessment contained on the Statement of Proposed Audit Changes (the document described in Tax Law § 1138[c]), and thereby rendered the tax liability set forth on the Statement fixed and final and extinguished its hearing right provided for in Tax Law § 1138(a)(1).

In ***Matter of SICA Elec. & Maintenance Corp.*** (Tax Appeals Tribunal, February 26, 1998; ***see also***, ***Matter of House of Lloyd,*** Tax Appeals Tribunal, November 13, 1998), we stated, in part, that:

> 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) and established the rational basis for the assessment. Having signed the consent, the audit method and audit computation ceased being an issue. Further, the threshold issue of "rational basis" that might otherwise be present in an audit case under Tax Law § 1138(a) was no longer present. The Division was relieved of the burden of showing a rational basis because petitioner's signature on the consent established that there was a rational basis.

As noted in the Administrative Law Judge's determination, petitioner's only remedy after executing a consent is to pay the tax assessment and file for a refund of tax as provided for in Tax Law § 1139(c).

Petitioner's only evidence was the affidavit of its sole officer, Mr. Kuziw, and the facts alleged in said affidavit do not provide a basis for invalidating the consent to the assessment of tax he executed on behalf of petitioner. In motions for summary determination, the respondent must do more than make conclusory assertions. It must present evidentiary facts which raise legitimate triable issues of fact. Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (***Alvord & Swift v. Muller Constr. Co.***, 46 NY2d 276, 413 NYS2d 309). Petitioner has failed to meet its burden. Its contentions on exception are the same as those raised before the Administrative Law Judge and are not supported by evidence. Therefore, they are without evidentiary value. Although an affidavit may serve as a vehicle for the submission of acceptable exhibits or attachments which do provide the necessary evidentiary proof to raise an issue of fact, it was not done here (***see*, *Matter of Wisdom***, Tax Appeals Tribunal, April 9, 1998).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Brewsky's Goodtimes Corporation is denied;

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

3. The petition of Brewsky's Goodtimes Corporation is dismissed.

DATED: Troy, New York
February 22, 2001

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner