

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
	:	
of	:	
	:	
<b>EVA TACZANOWSKI</b>	:	<b>DECISION</b>
	:	<b>DTA NO. 821740</b>
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, 2001	:	
through August 31, 2004.	:	

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Petitioner, Eva Taczanowski, filed an exception to the determination of the Administrative Law Judge issued on May 21, 2009. Petitioner appeared by Lawrence R. Cole, CPA. The Division of Taxation appeared by Daniel Smirlock, Esq. (Anita K. Luckina, Esq., of counsel).

Petitioner filed a letter brief in support of her exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was withdrawn.

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

***ISSUE***

Whether petitioner has demonstrated that she is entitled to a refund of sales and use tax.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The Division of Taxation (“Division”) performed a sales tax field audit for the period September 1, 2001 through August 31, 2004 of the business operation of Amy Liquors, Inc., a retail liquor store located in Middle Island, New York. Gross and taxable sales were computed based upon third-party verification of purchases and multiplied by a markup percentage based upon store shelf prices and actual purchase prices as indicated on the purchase invoices. The audit resulted in additional taxable sales of \$826,688.15 and additional tax due of \$68,006.90. A Notice of Determination of additional sales tax due, plus penalty and interest, was issued to the corporation (notice number L-024842890). The original amount of tax assessed was \$63,698.20, which was subsequently reduced to tax due of \$53,676.70, plus penalty and interest, following a Bureau of Conciliation and Mediation Services (“BCMS”) conference.

On December 13, 2004, the Division created a Notice of Determination addressed to petitioner, Eva Taczanowski, at a post office box in Pompano Beach. The notice, which bore assessment identification number L-024846307, asserted additional sales and use taxes due for the period December 1, 2001 through August 31, 2004 in the amount of \$53,509.05, plus penalty and interest. Petitioner was assessed as an officer or responsible person of Amy Liquors, Inc. The parties dispute whether this notice was properly issued.

On the same date, the Division issued to Joseph Chaikel, as an officer or responsible person of Amy Liquors, Inc., a Notice of Determination assessing the same amount of tax, penalty and interest for the same period.

On February 14, 2005, the Division created two additional notices of determination addressed to petitioner, Eva Taczanowski, at the same post office box in Pompano Beach, Florida. The notices, which bore assessment identification numbers L-025031894 and L-025033055, asserted additional sales and use taxes due for the period September 1, 2001 through

November 30, 2001 and for the period September 1, 2001 through August 31, 2004 in the amounts of \$10,189.15 and \$4,308.68, respectively, plus penalty and interest. Again, petitioner was assessed as an officer or responsible person of Amy Liquors, Inc. The parties dispute whether these notices were properly issued.

On the same date, the Division issued to Joseph Chaikel, as an officer or responsible person of Amy Liquors, Inc., a Notice of Determination assessing sales tax due for the period September 1, 2001 through November 30, 2001 in the amount of \$4,308.68, plus penalty and interest.

Petitioner did not protest any of the notices of determination within 90 days of the dates listed thereon.

In addition to the assessments issued to Amy Liquors, Inc., Joseph Chaikel and petitioner, a Notice of Determination was issued to Podniesinski Family, Inc., for the unpaid sales tax liability of Amy Liquors, Inc., as a purchaser in a bulk sales transaction that failed to comply with the requirements of Tax Law § 1141(c). Podniesinski Family, Inc., had purchased the business operation from Joseph Chaikel.

For the period December 1, 2001 through August 31, 2002, the New York State and local quarterly sales and use tax returns, Form ST-100, of Amy Liquors, Inc., were signed by petitioner. The sales and use tax returns for the period September 1, 2002 through February 28, 2003 were signed by Joseph Chaikel, as president.

The tax year 2001 U.S. Income Tax Return for an S Corporation, Form 1120S, of Amy Liquors, Inc., indicates on the Shareholder's Share of Income, Credits, Deductions, etc., Schedule K-1, that petitioner's share of stock ownership was 100 percent. For the tax years 2002 and

2003, Schedule K-1 indicates that Joseph Chaikel owned 100 percent of the stock of Amy Liquors, Inc.

On February 19, 2003, the New York State Liquor Authority, Division of Alcoholic Beverage Control, approved a change in the ownership of Amy Liquors, Inc., in which Joseph Chaikel became president and 100 percent owner of the shares of the corporation.

On November 15, 2005, Amy Liquors, Inc., by its representative Roy S. Nilsson, CPA, executed a BCMS consent in which the corporation agreed that Notice of Determination L-024842890 be recomputed to sales tax due of \$53,676.71, plus penalty and interest. The total amount of sales tax due from petitioner, Joseph Chaikel and Podniesinski Family, Inc., was reduced accordingly.

On September 6, 2006, the Tax Compliance Division of the Department of Taxation and Finance docketed a warrant (ID # E-413710573-W002-3) in the County of Suffolk, New York, against Eva Taczanowski in the amount of \$48,743.47. On November 10, 2006, the Tax Compliance Division issued a tax compliance levy (Levy ID# E-413710573-L003-2) against a bank account of petitioner maintained at the Wachovia Bank in the amount of \$49,514.39. Tax compliance levy ID E-413710573-L003-2 was closed by the Tax Compliance Division on December 12, 2006 because petitioner did not have an account with the Wachovia Bank at the time the levy was served.

Ms. Mary Lee C. Kiernan is employed in the Department of Taxation and Finance's Protest & Exception Bureau ("PERB"), Individual Exception Resolution Unit. Ms. Kiernan has been trained to receive telephone calls placed to the Individual Exception Resolution Unit by taxpayers. It is Ms. Kiernan's practice upon receipt of a telephone call to verify the individual she is speaking to by obtaining the caller's name, address, date of birth and social security

number. During a conversation, she will enter relevant information into her computer as well as take handwritten notes as required.

On April 6, 2007, Ms. Kiernan received a telephone call from Joseph Chaikel regarding Amy Liquors, Inc. Mr. Chaikel indicated that he wanted to pay in full the notices of determination issued to Eva Taczanowski, as a responsible officer of Amy Liquors, Inc. Ms. Kiernan noted in the case contact information sheet that as of April 6, 2007, the payout figure for the assessments issued to petitioner was \$51,178.92. Mr. Chaikel stated during the conversation that he would call back to obtain the revised pay out figure as he would be taking out a loan to pay the sales tax obligations. He also stated that he did not want petitioner to have an income execution levied against her.

On April 9, 2007, Ms. Kiernan received a follow-up telephone call from Joseph Chaikel. During the conversation, Mr. Chaikel stated that he would be remitting payment in the amount of \$51,260.54 in certified funds to pay in full the assessments issued to petitioner. Ms. Kiernan indicated in this case contact information entry that the payment would pay in full the notices of determination issued to Mr. Chaikel, as well.

According to the Division's Case and Resource Tracking System ("CARTS"), three payments were received by the Department of Taxation and Finance to satisfy Notice of Determination L-024842890 issued to Amy Liquors, Inc. The payments were applied on January 30, 2006 in the amount of \$57,380.12, April 26, 2006 in the amount of \$1,356.80 and April 9, 2007 in the amount of \$51,260.54. The first two payments were made on behalf of Podniesinski Family, Inc., as indicated on the reference line of the checks presented to and cashed by the Department. The third payment was made by a treasurer's check issued by the Mercantile Peninsula Bank of Princess Anne, Maryland. It references the identification number (ID # E-

413710573-W002-3) of the warrant docketed by the Tax Compliance Division on September 6, 2006 in Suffolk County, New York, against petitioner.

The payment of \$51,206.54 was also applied to the notices of determination issued to petitioner as follows:

<b>ASSESSMENT ID #</b>	<b>AMOUNT APPLIED</b>
L-024846307	\$30,685.37
L-025031894	12,417.98
L-025033055	8,110.52

There was an overpayment in the amount of \$46.67.

On June 8, 2007, the Division received from petitioner an Application for Credit or Refund of Sales or Use Tax. The claim requested a refund of \$60,000.00 for the period 2001 through 2005. The refund claim stated that the notices of determination were never received by petitioner, that there was no basis for the officer responsibility assessments and that the sales tax assessed, if determined to be due, should be allocated between petitioner and Joseph Chaikel as the business changed hands during the audit period.

The Division issued to petitioner, on July 2, 2007, a letter denying the refund claim in full. The letter stated, in part, as follows:

According to Article 28 of the tax law, section 1139(c), “. . . No refund or credit shall be made of a tax, interest or penalty paid after a determination by the commissioner made pursuant to section eleven hundred thirty-eight unless it be found that such determination was erroneous, illegal or unconstitutional or otherwise improper, by the division of tax appeals pursuant to article 40 of this chapter or by the commissioner of his own motion, or in a proceeding for judicial review provided for in section two thousand sixteen of this chapter, in which event a refund or credit shall be made of the tax, interest or penalty found to have been overpaid.”

On June 22, 2007, the Petition Intake Unit of the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition on the basis that the petition was filed more than 90 days after the issuance of the notices of determination. A copy of the Notice of Intent to Dismiss Petition was sent to the Division's representative. In response, on July 25, 2007, the Division's attorney informed the Petition Intake Unit that the Division did not have any documentation to submit on the issue raised in the Notice of Intent to Dismiss. On August 22, 2007, the Petition Intake Unit informed petitioner that the Notice of Intent to Dismiss Petition had been rescinded and this matter would be heard on the merits.

In her petition, petitioner contests the appropriateness of the Division's issuance of the notices of determination, claiming that she never received the notices and, thus, was unable to timely file a protest to them.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In his determination, the Administrative Law Judge noted that since petitioner raised the proper issuance of the subject notices of determination in her refund application, petition and amended petition, the Division had the burden of proof on this issue.

The Administrative Law Judge rejected the Division's contention that since petitioner is seeking a refund or is raising a defense based on nonreceipt of the subject notices, petitioner has the burden to show nonreceipt of the notices. The Administrative Law Judge concluded that since the question presented is whether the statutory notices were properly issued, such evidence is not within the knowledge of the taxpayer and the burden of proving proper mailing of the statutory notices rests with the Division.

The Administrative Law Judge observed that in order to meet this burden, the Division was required to provide proof of a standard procedure used by the Division for the issuance of

statutory notices by one with knowledge of the relevant procedures, as well as proof that the standard procedure was followed in this particular instance. The Administrative Law Judge noted that the Division admitted in response to the Notice of Intent to Dismiss that it did not have any documentation to submit on this issue. The Administrative Law Judge rejected the Division's assertion that the proper remedy for any failure to prove mailing is a hearing on the merits of the assessments.

The Administrative Law Judge concluded that due to the Division's failure to prove the fact and date of mailing, the subject notices of determination were improperly issued and, therefore, could not serve as the basis for a valid assessment. Since the notices of determination were not valid assessments, the Administrative Law Judge held that petitioner's liability was not fixed and final and was not subject to collection. As a result, any amounts paid by petitioner on the purported assessments were erroneously collected and must be refunded.

Considering petitioner's claim for refund, the Administrative Law Judge noted that pursuant to Tax Law § 1139(a), actual payment of sales tax is a prerequisite to entitlement to a refund. Despite petitioner's claim that the Division seized a bank account that she maintained at Wachovia Bank pursuant to a tax compliance levy, the Administrative Law Judge found that the Division had established that the levy issued to Wachovia Bank was closed without payment as petitioner did not have an account with the bank at the time the levy was served.

In addition, the Administrative Law Judge concluded that the Division had established that it was Joseph Chaikel, and not petitioner, who made payment to the Division on April 9, 2007 in the amount of \$51,260.54 in order to satisfy the sales and use tax liability of Amy Liquors, Inc. The Administrative Law Judge concluded that Mr. Chaikel had reason to make payment because he had also been assessed as an officer or person responsible for the collection



and remittance of sales tax for Amy Liquors, Inc. Therefore, as petitioner had not made any payment of the taxes at issue, the Administrative Law Judge sustained the Division's denial of petitioner's claim for refund.

### ***ARGUMENTS ON EXCEPTION***

On exception, petitioner argues that the Administrative Law Judge erroneously concluded that petitioner did not make payment of the tax, penalty and interest in the amount of \$51,260.54. Petitioner asserts that she provided an affidavit as evidence that she borrowed funds to pay her tax liability. In her affidavit, she included a copy of the cancelled bank check, which indicated on its face that it was in satisfaction of the warrant issued against petitioner. Further, petitioner maintains that since the Administrative Law Judge has determined that petitioner was not liable for the tax debt, it does not matter how or why the assessment was paid. Finally, petitioner points out that the Division's witness testified that Mr. Chaikel indicated that he was paying petitioner's assessment.

In opposition, the Division argues that petitioner has failed to prove that she paid the tax liability at issue. The Division asserts that petitioner's affidavit is self-serving and contrary to the evidence presented that Mr. Chaikel, and not petitioner, paid the tax liability. The Division points out that except for petitioner's assertion, there is no evidence that petitioner borrowed money to pay her tax debt as she claims. The Division argues that petitioner's claim is contradicted by Mr. Chaikel's statements to the Division, contemporaneously with the April 9, 2007 payment, indicating that he would be borrowing money and remitting payment. Further supporting the fact that Mr. Chaikel made payment is the fact that he was also issued notices of determination for the same periods as petitioner. Therefore, the Division notes that his payment of petitioner's liability was also payment of his own liability.

The Division asserts that petitioner incorrectly maintains that the payment on April 9, 2007 was made to release the levy issued against petitioner's bank account with Wachovia Bank. The Division points out that the levy on petitioner's account was closed because petitioner did not have an account with that bank when the levy was served. As for the bank check that was used to pay the subject tax liability, the Division argues that there is no indication that the check was issued at petitioner's request or on petitioner's behalf. Instead, the Division maintains that the evidence supports the Administrative Law Judge's conclusion that Mr. Chaikel, not petitioner, paid the tax indebtedness.

### ***OPINION***

Neither petitioner nor the Division have taken exception to the portion of the Administrative Law Judge's determination that concluded that the notices of determination issued to petitioner were invalid. Petitioner excepts to only so much of the Administrative Law Judge's determination as concluded that petitioner was not eligible for a refund of sales and use taxes because petitioner did not prove that she had actually made payment of such taxes.

Tax Law § 1139(a) provides, in relevant part, that:

In the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission . . . or (ii) in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article . . . .

The Administrative Law Judge succinctly stated, and we agree, that "As is clear from the statute set forth above, actual payment of sales tax is a prerequisite to entitlement to a refund." Except for petitioner's affidavit that she remitted tax to the Division, there is no evidence in the

record that would allow us to conclude that the payment of \$51,260.54 made on April 9, 2007 was made by petitioner. The Division does not contest that this payment was made in order to satisfy the tax liability assessed to petitioner as a result of her status as an officer or responsible person of Amy Liquors, Inc. However, based on the evidence provided by the Division, we conclude, as did the Administrative Law Judge, that such payment was made by Joseph Chaikel. While petitioner's liability for the tax, penalty and interest was absolved by the Administrative Law Judge's determination, Mr. Chaikel was also assessed as a responsible person of Amy Liquors, Inc. Therefore, his payment on behalf of petitioner satisfied his liability, as well.

Petitioner, who bears the burden of proof in this matter, provided nothing but her own declaration to link her to this payment to the Division. Her claim that she borrowed money in April 2007 to release a tax levy filed against her account with Wachovia Bank is disingenuous, as the Division's evidence showed that such levy was considered "closed" as of December 12, 2006, due to the fact that petitioner did not have an account with Wachovia at the time that the levy was served.

As a result, we find that the Administrative Law Judge completely and adequately addressed the issues presented to him and correctly applied the relevant law to the facts of this case. Petitioner has offered no evidence below, and no argument on exception, that would provide a basis for us to modify the determination in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Eva Taczanowski is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Eva Taczanowski is denied; and

4. The Division of Taxation's denial of petitioner's claim for refund is sustained.

DATED: Troy, New York  
January 28, 2010

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
President

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