

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
RAINBOW WATERPROOFING CORPORATION	:	ORDER
AND ANTHONY BALLATO, OFFICER	:	DTA NOS. 812269
	:	AND 812270
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1985	:	
through May 31, 1991.	:	

Petitioners, Rainbow Waterproofing Corporation and Anthony Ballato, officer, 59-18 Parsons Boulevard, Flushing, New York 11365, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1985 through May 31, 1991.

On October 3, 1994, petitioners moved for an order pursuant to CPLR 2211 and section 3000.5 of the Rules of Practice and Procedure of the New York State Division of Tax Appeals for a change in the venue of this hearing from Troy, New York to Hempstead, New York. Accompanying the Notice of Motion was an affirmation of petitioner's representative, Louis F. Brush, and an affidavit of petitioner Anthony Ballato. The Division of Taxation filed an affirmation in opposition on October 7, 1994. Petitioners appeared by Louis F. Brush, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kathleen D. Church, Esq., of counsel). Based upon the motion papers, the affirmations of the attorneys, the affidavit of Anthony Ballato, and all pleadings and documents submitted, Thomas C. Sacca, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners are entitled to a change of venue to permit Anthony Ballato to present sworn testimony and produce documentary and other evidence at the continuation of this hearing.

FINDINGS OF FACT

This matter was commenced at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 16, 1994 at 1:15 P.M. Petitioners' representative, Louis F. Brush, Esq., appeared one hour late. At the conclusion of the Division of Taxation's ("Division") case, Mr. Brush stated that he wished to call Mr. Ballato to testify but that Mr. Ballato did not accompany Mr. Brush to Troy, New York. The reason given for Mr. Ballato not coming to Troy was his inability to reach Mr. Brush's office due to a strike of the employees of the Long Island Railroad.¹ Arrangements were made to try to reschedule the hearing in Troy, New York for a new date that would be convenient for all concerned.

On July 7, 1994, Mr. Brush stated, in a letter to Daniel J. Ranalli, Assistant Chief Administrative Law Judge, the dates that would be convenient for the rescheduled hearing for both himself and his client, Mr. Ballato. Included in the dates was October 19, 1994. On August 3, 1994, Mr. Ranalli advised Ms. Kathleen D. Church, the Division's representative, and Mr. Brush that the new hearing would be held on October 19, 1994.

The affidavit of Mr. Ballato provides two reasons for changing the venue of the hearing:

"a) Since I reside in Queens, N.Y., my business was in Queens, N.Y. and my attorney's office is located in Mineola, N.Y., it is unfair to hold the hearing in Troy, N.Y.

"b) Due to my poor financial condition in which I have no assets and earn just enough for support, I cannot afford to continue to prosecute this matter in Troy, New York."

Petitioners request that the hearing be held at the Department of Taxation and Finance's offices in Hempstead, New York.

CONCLUSIONS OF LAW

A. If a taxpayer is afforded notice of the imposition of a tax and an opportunity to challenge the tax at any stage before it is finally fixed, even before an administrative agency, he has not been denied due process (Turner v. Wade, 254 US 64, 65 L Ed 134). The right to a

¹Although a strike was threatened, none took place.

hearing imports the requirement that a taxpayer entitled to it shall have the right to support his allegations by argument, however brief, and, if necessary, proof, however informal (Londoner v. Denver, 210 US 373, 52 L Ed 1103). The requirement for due process is fully met when a forum exists in which an aggrieved person or entity after notice has the right to be heard (Snyder v. Massachusetts, 291 US 97, 78 L Ed 674; Twinning v. State of New Jersey, 211 US 78, 53 L Ed 97; Metallic Flowers v. New York, 4 AD2d 292, 164 NYS2d 227, mod on other grounds 5 NY2d 246, 183 NYS2d 801, remittitur denied 6 NY2d 997, 191 NYS2d 976). Therefore, it is concluded that petitioners are not being denied due process, as they are being afforded a hearing in which they have the opportunity to present both legal argument and evidence in support of their position (see, Matter of Ausnit, Tax Appeals Tribunal, August 5, 1993; Matter of Thompson, Tax Appeals Tribunal, January 28, 1993; Matter of John Mera Associates, Inc., Tax Appeals Tribunal, November 25, 1992, confirmed ___ AD2d ___, 611 NYS2d 716).

B. It is noted that there are options available that could have allowed this matter to be submitted for determination without the need for a hearing in Troy, i.e., a stipulation of facts (20 NYCRR 3000.7) or a submission of the case on documentary evidence (20 NYCRR 3000.8). Petitioners did not attempt to utilize these procedures. In addition, Mr. Ballato could have submitted an affidavit as to the relevant facts in lieu of his oral testimony (Matter of Orvis Co. v. Tax Appeals Tribunal, ___ AD2d ___, 612 NYS2d 503; 20 NYCRR 3000.10[d]).

C. Petitioners' motion for a change of venue is denied.

DATED: Troy, New York
October 14, 1994

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE