

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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|---|---|---------------------------------|
| In the Matter of the Petition | : | |
| of | : | |
| PB FOOD MARKET, INC. | : | |
| for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods December 1, 1985 through November 30, 1988 and March 1, 1993 through August 31, 1993 and for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Year 1985. | : | DETERMINATION DTA NO. 817150 |

Petitioner, PB Food Market, Inc., 110-14 Farmers Boulevard, Jamaica, New York 11431, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods December 1, 1985 through November 30, 1988 and March 1, 1993 through August 31, 1993 and for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the year 1985.

On May 1, 2000 and May 11, 2000, respectively, petitioner, appearing by J. L. Massas, Esq., and the Division of Taxation, by Barbara G. Billet, Esq. (Christina L. Seifert, Esq., of counsel), waived a hearing and agreed to submit this matter for a determination based on documents and briefs submitted by August 28, 2000, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether, by its execution of a consent, petitioner waived its right to file a petition with the Division of Tax Appeals with respect to assessment number L-004615284.

II. Whether petitioner filed a timely petition with the Division of Tax Appeals and, if so, whether penalties imposed against petitioner should be abated.

FINDINGS OF FACT

1. Petitioner, PB Food Market, Inc., filed a petition with the Division of Tax Appeals on May 27, 1999. The petition did not reference any assessment numbers (it mistakenly listed petitioner's taxpayer identification number as the relevant assessment number). Attached to the petition, however, was a Consolidated Statement of Tax Liabilities dated February 26, 1998, which listed the following assessments:

| <i>Tax Type</i> | <i>Assessment ID Number</i> | <i>Tax Period</i> |
|-----------------------|-----------------------------|-------------------|
| Sales | L-004615284 | 12/1/85-11/30/88 |
| Sales | L-008061116 | 3/1/93-5/31/93 |
| Sales | L-008401483 | 6/1/93-8/31/93 |
| Corporation Franchise | L-003157897 | 1985 |

2. The petition appears to protest the assessment of penalties only as it makes the following single allegation of error by the Division of Taxation: "The buyer is not to be charged with penalties for the errors of the seller's accountant." Additionally, the petition indicates that that the amount of tax determined was \$142,667.00. This corresponds roughly with the total of the current balance due amounts plus assessment payments as indicated by the consolidated statement of tax liabilities. The petition further indicates that the amount of tax contested is

\$85,503.00. This amount approximately corresponds with the total of the interest and penalty portions of the assessments as set forth in the consolidated statement of tax liabilities.

3. Assessment L-004615284 was previously designated Notice number S900319010Q. Petitioner was given notice of this assessment by issuance of a Notice of Determination and Demand for Payment of Sales and Uses Taxes Due dated March 19, 1990. Petitioner timely protested this notice and, following a conciliation conference, consented to the fixing of tax, penalty and interest with respect to this assessment. Petitioner's representative signed the Bureau of Conciliation and Mediation Services Consent form on May 23, 1991. The consent form explicitly states that petitioner agrees to waive its right to petition for hearing in the Division of Tax Appeals with respect to this assessment.

4. The Division of Taxation has reduced the amount due on assessment numbers L-003157897 and L-008401483 to zero and is no longer pursuing these assessments.

5. Assessment number L-008061116 asserts \$4,931.58 in tax due, plus penalty and interest for the period March 1, 1993 through May 31, 1993. Petitioner reported \$4,931.58 in tax due on its sales tax return for this period, but did not remit payment. This assessment was set forth in a Notice of Estimated Determination dated October 19, 1993.

CONCLUSIONS OF LAW

A. Petitioner consented to assessment number L-004615284 following a conciliation conference. The consent was used pursuant to 20 NYCRR 4000.5(c)(3) which provides:

(i) After reviewing the testimony, evidence and comments, the conciliation conferee will serve on the requester a proposed resolution in the form of a consent. In developing this proposed resolution, the conciliation conferee may contact either party to clarify any issues or facts in dispute.

(ii) *Where the proposal is acceptable to the requester, the requester shall have 15 days to execute the consent and agree to waive any right to petition for hearing in the Division of Tax Appeals concerning the statutory notice.*

(iii) Where the requester fails to agree with the proposed resolution and does not execute the consent within 15 days, the conciliation conference proceeding will be deemed concluded. The conciliation conferee shall render a conciliation order within 30 days after the conciliation conference proceeding is concluded (emphasis added).

The import of the foregoing section is that when the requester (i.e., the taxpayer) accepts the proposed resolution and executes a consent, there is a waiver of the right to petition for a hearing concerning the statutory notice. The language on the consent form is clear and unambiguous and is sufficient to put taxpayers on notice that they are irrevocably accepting the terms set forth thereon.

Accordingly, by its execution of the consent, petitioner waived its right to file a petition with the Division of Tax Appeals with respect to assessment number L-004615284.

B. Inasmuch as the Division has reduced the amount due on assessment numbers L-003157897 and L-008401483 to zero, petitioner's petition in protest of such assessments is moot.

C. With respect to assessment number L-008061116, where, as here, the timeliness of a petition is at issue the Division has the burden of demonstrating proper mailing of the statutory notice (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). Here, the Division did not submit any evidence of mailing. Petitioner's petition with respect to assessment number L008061116 is therefore deemed timely filed (*see, Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). Turning to the merits of this claim, as noted previously, the petition protests the imposition of penalty. Petitioner, however, did not submit any evidence of reasonable cause or the absence of willful neglect to support the abatement of penalty (*see, Tax*

Law § 1145[a][1][iii]). Additionally, by its complaint that “the buyer is not to be charged with penalties for the errors of the seller’s accountant,” the petition may refer to a bulk sale subject to tax under Tax Law § 1141. A bulk sale situation could impact petitioner’s liability for penalty (*see, Matter of Gaughan*, Tax Appeals Tribunal, May 14, 1992), but there is no evidence of any such sale in the record. To the contrary, the record indicates that assessment number L-008061116 resulted from petitioner’s failure to remit payment of tax with its filed sales tax return for the period March 1, 1993 through May 31, 1993 (*see*, Finding of Fact “5”).

D. The petition of PB Food Market, Inc. is denied and the assessments set forth in Finding of Fact “1”, as modified pursuant to Finding of Fact “4”, are sustained.

DATED: Troy, New York
October 19, 2000

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE