

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**BREWSKY'S GOODTIMES CORPORATION** : DETERMINATION  
for Revision of a Determination or for Refund of Sales : DTA NO. 817439  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period September 1, 1993 through February 28, :  
1998.

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Petitioner, Brewsky's Goodtimes Corporation, 27 Woodshire Terrace, Towaco, New Jersey 07082-1457, 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 September 1, 1993 through February 28, 1998.

On March 10, 2000, the Division of Taxation filed a motion for an order dismissing the petition and granting summary determination to the Division of Taxation on the ground that the Division of Tax Appeals lacks jurisdiction over the matter. Petitioner, appearing by Michael Swaaley, Esq., filed a response to the motion on April 3, 2000 which date began the 90-day period for the issuance of this determination. The Division of Taxation appeared by Barbara G. Billet, Esq. (Christina L. Seifert, Esq., of counsel). Based on the pleadings and motion papers, Jean Corigliano, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Tax Appeals has jurisdiction over a Notice and Demand issued as a consequence of the execution of an agreement to the assessment of tax and any penalties by petitioner's president and sole shareholder.

***FINDINGS OF FACT***

1. 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.

2. Petitioner's president, 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.

3. 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.

4. 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.

5. 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.

***SUMMARY OF PETITIONER'S POSITION***

6. In an affidavit in opposition to the Division's motion, Mr. Kuziw states that the Division violated the period of limitations for assessment of sales tax by assessing petitioner for a period in excess of four years (September 1, 1993 through February 28, 1998). He also alleges that neither of the principals of Weiss Associates was given a valid power of attorney and neither had the authority to represent petitioner on audit. He alleges that he did not knowingly sign the consent to tax and that "[t]he document was presented to me by Mr. Weiss as a tax form that I had to sign in a stack of other forms." He claims that the Division failed to follow the law and procedures in the conduct of the audit and that he was deprived of his constitutional and statutory right to represent himself at the audit.

**CONCLUSIONS OF LAW**

A. The Division's motion for summary determination is granted. To obtain summary determination, the moving party must submit evidence sufficient to "show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor" (20 NYCRR 3000.0[b][1]). A review of the evidence and affidavits submitted by the parties establishes that that the Division has made such a showing and is entitled to summary determination as a matter of law.

B. Tax Law § 2006(4) gives authority to the Tax Appeals Tribunal to "provide a hearing as a matter of right, to any petitioner upon such petitioner's request . . . unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter." The right to a hearing is specifically denied to petitioner under section 1138(c) of the Tax Law which provides as follows:

A person liable for 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.

The Statement of Proposed Audit Changes is a consent to assessment of tax as described in Tax Law § 1138(c). Moreover, the execution of the consent renders the tax liability fixed and final and eliminates the hearing right provided for in Tax Law § 1138(a)(1) (*see, Matter of House of Lloyd*, Tax Appeals Tribunal, November 13, 1998; *Matter of SICA Elec. & Maintenance Corp.*, Tax Appeals Tribunal, February 26, 1998). Consequently, the Division of Tax Appeals has no authority to provide a hearing to petitioner. 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).

C. The facts alleged in Mr. Kuziw's affidavit provide no grounds to invalidate the consent to the assessment of tax which he signed on behalf of petitioner. The respondent in a motion for summary determination cannot simply put forth conclusory assertions, but must present evidentiary facts sufficient to raise a triable issue of fact (*see, State Bank of Albany v. McAuliffe*, 97 AD2d 907, 467 NYS2d 944). The mere assertion that the Division violated the law in the conduct of its audit is not sufficient to raise triable issues of fact. The allegations relating to representation of petitioner on audit are totally lacking in factual detail and amount to no more than accusations of unspecified misconduct by the Division's auditors. Petitioner did not cite to any regulation or statute purportedly violated by the auditors. None of Mr. Kuziw's allegations show that the regulations of the Commissioner of Taxation and Finance governing powers of attorney (20 NYCRR 2390) were violated. Moreover it was Mr. Kuziw who bound petitioner by executing the consent to assessment, and he admits that he had the authority to do so. If he was duped by Mr. Weiss into signing the consent, as he alleges, the wrongdoing was Mr. Weiss's and not the Division's.

D. The motion of the Division of Taxation for summary determination is granted, and the petition of Brewsky's Goodtimes Corporation is dismissed with prejudice.

DATED: Troy, New York  
June 29, 2000

/s/ Jean Corigliano  
ADMINISTRATIVE LAW JUDGE