STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
B & D ENTERPRISES OF UTICA, INC.	:	DETERMINATION DTA NO. 817901
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 Ended January 1, 1997.	:	

Petitioner, B & D Enterprises of Utica, Inc., 900 Oswego Street, Utica, New York 13502, 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 ended January 1, 1997.

On November 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 there are no material issues of fact and the Division of Taxation is entitled to a determination in its favor as a matter of law. Petitioner did not respond to the motion. Petitioner is represented by Thomas R. Batters. The Division of Taxation appears by Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel). After due consideration of the documents and arguments submitted, Jean Corigliano, Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Taxation is entitled to summary determination in its favor because there are no material issues of fact and petitioner's challenge to the Notice of Determination lacks any merit.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued to petitioner, B & D Enterprises of Utica, Inc., a Notice of Determination of Sales and Use Taxes Due, assessment number L-014044776-8. The notice explained that sales tax of $40,000.00, plus penalty and interest, was being assessed based on a bulk sale.

2. Petitioner timely requested a conciliation conference to protest the notice, and a conference was held on May 17, 2000. By letter dated May 22, 2000, the Division's Bureau of Conciliation and Mediation Services ("BCMS") informed petitioner that the Division agreed to modify the Notice of Determination based on evidence presented at the conference which established that some of the items transferred in the bulk sale were exempt from sales tax. BCMS enclosed three Consent forms which reflected the modification and gave petitioner the following directions:

> If you agree, please sign and return two (2) copies of the Consent within fifteen (15) days in the return envelope provided. A Check in full payment made out to the COMMISSIONER OF TAXATION AND FINANCE, and received within the above time period, will stop the accrual of additional penalty and/or interest charges.

The Consent shows the following computation:

	L014044776
Tax	$ 14.240.00
Penalty	Cancelled
Interest	$ 4,597.67
TOTAL*	**$ 18,837.67**

The asterisk indicates a final note which states: "If payment is received after June 2, 2000, additional penalty and/or interest charges will accrue."

3. Petitioner did not execute the Consent. BCMS then issued a Conciliation Order, dated June 23, 2000, reducing the tax assessment to $14,240.00, canceling all penalties and imposing interest "Computed at applicable rate."

4. On July 3, 2000, petitioner filed a petition with the Division of Tax Appeals contesting the amount of interest imposed by the Conciliation Order, $4,597.67. Petitioner alleges as follows:

> On May 22, 2000, we received a letter from Mr. Farrelly, Conciliation Conferee, indicating that the interest had been calculated to be $ 4,597.67. This is about 33% of the tax itself; hardly a minimum amount. I advised Mr. Farrelly in a letter dated 5-31-00, that we would not agree to this figure.
>
> If the tax had been calculated correctly in 1997, we would have paid the amount due resulting in no interest penalty. Interest charges should not be calculated from 1-1-97. Interest should be calculated from the due date of the correct amount of tax ($14,240.00).

5. The Division filed the instant motion for summary determination on November 3, 2000. Petitioner did not respond to the Division's motion.

6. The Division contends that pursuant to Tax Law §§ 1142(9); 1145(a)(1) and sections 531(1)(b) and 531(6)(b) of the sales tax regulations, interest on unpaid sales taxes begins to accrue on the date that payment of the tax is due. In an affidavit, the Division's attorney asserts that petitioner's bulk sale purchase occurred on January 1, 1997. He also asserts that petitioner was not a registered vendor on that date and, therefore, was required to file a Purchaser Report of Sales and Use Tax and remit the tax due within 20 days of the purchase, in this case by January 21, 1997. The facts asserted by Mr. Mc Kinley are reflected in the Notice of Determination. Where the taxpayer's filing frequency is indicated, the notice states: "NOT REQ TO FILE." The

tax computation section shows a period ended date of January 1, 1997 and a file due date of January 21, 1997.

7. Interest calculations are made by the Division's computerized Case and Resource Tracking System(CARTS) based on information stored in the system. Edward Oberting, a Tax Technician II in the Sales Tax Audit Division, verified that the amount of interest calculated by BCMS is correct by entering the tax amount of $14,240.00 and a payment due date of January 21, 2000 into CARTS. In addition, he notes that the correct amount of interest due as of November 15, 2000 was $5,384.62.

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]). Summary determination is a "drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (***Moskowitz v. Garlock***, 23 AD 2d 943, 259 NYS 2d 1003; ***see***, ***Daliendo v. Johnson***, 147 AD2d 312, 543 NYS2d 987, 990). Because it is the "procedural equivalent of a trial" (***Crowley's Milk Co.v. Klein***, 24 AD2d 920, 264 NYS2d 680, 682), undermining the notion of a "day in court," summary judgement must be used sparingly (***Wanger v. Zeh***, 45 Misc 2d 93, 256 NYS2d 227, 229, ***affd*** 26 AD2d 729). It is not for the court "to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist" (***Daliendo v. Johnson***, ***supra***, 543 NYS2d at 990).

B. In this case, there are no material issues of fact. The Division's attorney asserts in his affidavit that a sale of tangible personal property subject to sales tax occurred on January 1, 1997. He does not state the basis for his knowledge of this fact; therefore, his statement is not entitled

to be given any weight and cannot, by itself, form the basis for a finding of fact (***see***, ***Zuckerman v. City of New York***, 49 NY2d 557, 427 NYS2d 595, 598; ***Jabs v. Jabs***, 221 AD2d 704, 633 NYS2d 616, 617; ***see also***, ***Matter of Roland***, Tax Appeals Tribunal, February 22, 1996). However, there is barely enough evidence in the record to support the allegation made in this attorney's affidavit. The Notice of Determination asserts, as the basis for the assessment, that a bulk sale took place on January 1, 1997 and that no return reporting that sale was filed. Petitioner did not contest these basic facts in his petition and did not respond to the Division's motion or in any other manner challenge the Division's assertions regarding the fact and date of the bulk sale. Accordingly, petitioner may be deemed to have conceded the correctness of those facts (***see***, ***Kuehne & Nagel v. Baiden***, 36 NY2d 539, 544, 369 NYS2d 667). Thus, it can be concluded that a sale subject to sales tax took place on January 1, 1997.

C. Tax Law § 1105(a) imposes a sales tax on every retail sale of tangible personal property. "The sales tax is a 'transactions tax', liability for the tax occurring at the time of the transaction" (20 NYCRR 525.2[a][2]). Where a person has failed to pay the tax imposed by Tax Law § 1105 to the person required to collect it, then the tax is payable directly to the Tax Commissioner, and it is the duty of the purchaser to file a return with the Tax Commissioner and to pay the tax within 20 days of the date the tax was required to be paid (Tax Law § 1133[b]; 20 NYCRR 531.6[a],[b]). Since the transaction giving rise to the tax liability occurred on January 1, 1997, petitioner was required to file a return and pay the tax due by January 21, 1997.

Where, as here, a return required to be filed by article 28 is not filed, the Tax Commissioner is authorized to issue a notice of determination estimating the amount of tax due based on any available information (Tax Law § 1138[a][1]). Any person failing to file a return or pay a tax within the time required, in this case by January 21, 1997, is subject to a penalty and

interest on the amount of tax not paid (Tax Law § 1145[a][1][i],[ii]). The interest is at a rate of 12% per year or the rate set pursuant to Tax Law § 1142(9), whichever is greater (Tax Law § 1145[a][1][ii]). In accordance with these provisions, the Division's notice properly imposed penalty and interest for failure to file a return or to pay any tax when due.

D. There is no merit to petitioner's contention that interest should be calculated from the date that BCMS modified the Notice of Determination rather than the date the tax was due. By presenting evidence at the conciliation conference, petitioner was able to reduce the tax assessment and, apparently, to show that failure to file a timely return and pay the tax when due was a result of reasonable cause. This brought about a cancellation of penalty which in turn reduced the rate of interest to the amount computed at the underpayment rate set pursuant to Tax Law § 1142. However, the tax amount was due on January 21, 1997 and not when petitioner finally provided information sufficient to enable the Division to determine the correct amount of tax due. Therefore, the interest is properly calculated from January 21, 1997.

Article 28 of the Tax Law sets forth a procedure for the timely filing of tax returns and remittance of tax (Tax Law §1137). Failure to remit tax when due gives the taxpayer the use of funds which do not belong to him and deprives the State of funds which belong to it. Interest is imposed on outstanding amounts of tax due to compensate the State for its inability to use the funds and to encourage timely remittance of tax due (***see***, ***Matter of Mauceri***, Tax Appeals Tribunal, May 13, 1993). In this case, interest accrued as a result of petitioner's failure to file a timely return and to pay the tax due required to be shown on that return. If the Division did not determine the exact amount of tax due until May 2000, petitioner has no one to blame but itself. It might, at any time, have filed a return and paid the tax due thereby stopping the accrual of interest.

D. The petition of B & D Enterprises of Utica, Inc. is denied; the Notice of Determination dated August 29, 1997 is sustained as modified by the Conciliation Order of June 23, 2000; and the Division's motion for summary determination is granted.

DATED: Troy, New York
December 21, 2000

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE