STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
VOICEMATE.COM, INC.	:	ORDER DTA NO. 819157
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, 1998 through August 31, 2001.	: :	

Petitioner, Voicemate.com, Inc., 29 West 34th Street, New York, New York 10001, 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, 1998 through August 31, 2001.

Petitioner, by its representative, Michael Buxbaum, CPA, brought a motion dated January 30, 2003 seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. The Division of Taxation, by its representative, Barbara G. Billet, Esq. (Cynthia E. McDonough, Esq., of counsel), filed an affirmation in opposition to petitioner's motion dated March 4, 2003, and also brought a cross-motion dated March 4, 2003 seeking dismissal of the petition herein pursuant to section 3000.9(a)(1)(ii) of the Rules. Petitioner did not respond to the Division of Taxation's cross-motion. Accordingly, the 90-day period for the issuance of this order commenced on April 3, 2003, the date petitioner's time to serve a response to the Division's cross-motion expired. Based upon the motion papers and documents submitted therewith, and all pleadings filed in connection with this matter, Timothy J. Alston, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. By application dated November 18, 2001, petitioner, Voicemate.com, Inc., filed an Application for Credit or Refund of Sales or Use Tax on Form AU-11. The Form AU-11 filed by petitioner was accurately completed with respect to petitioner's name and address, petitioner's representative's name and address, petitioner's identification number, the period covered by the claim, and the amount of the claim. The form was also properly signed by petitioner's representative. Attached to the claim was a schedule of computer hardware purchases, along with invoices of such purchases, itemizing and substantiating each purchase for which petitioner seeks a refund of sales tax. Also attached to the refund application was a brochure describing petitioner's business and the services it provides to customers. The brochure provides, in part:

> With Voicemate's turnkey service solutions, there is no hardware, software, or bandwidth to purchase, install, configure, maintain or support. Voicemate handles everything from creation, to delivery, to 24x7 technical support, requiring no up-front capital expenditures, implementation headaches or additional employees.

2. In explanation of the refund claim, the application stated:

> Voicemate.com is a computer software company that is applying for a refund for the overpayment of Sales and Use Tax for computer hardware (servers and computers) that is used predominantly (more than 50 % of the time) in designing and developing custom computer software for sale (Section 1115[a][35] and TSB-M-98 [5]S).
>
> Voicemate.com is a computer software company that sells custom computer software to specific industries. The purchase of the servers and computers are used to develop this software for customers so that they can manage information with voice (including wireless) or keystroke commands.

3. According to the case contact notes made by employees of the Division of Taxation ("Division") handling petitioner's refund claim, the Division initiated contact with petitioner's representative in February 2002 to discuss the pending claim. Over the course of several

conversations, petitioner's representative answered questions posed by the Division's employees regarding petitioner's claim. The Division employees specifically discussed with petitioner's representative whether petitioner sold software to its customers. In response to a Division request petitioner's representative provided the Division with an invoice of a sale to one of its customers. This invoice, submitted as part of the motion papers, bills petitioner's customer for "Mobile Hoots Hosting Fees." According to the case contact sheet, petitioner's representative advised the Division that petitioner leases the custom software application that its customers use and that petitioner charges its customers a monthly licensing fee for the use of the software. In response to a request for a contract with a customer, petitioner's representative advised that petitioner did not have a written agreement with its only client, but petitioner did submit a proposed contract with another customer. That proposed contract was submitted with the motion papers herein and indicates that petitioner would provide its customer with services that allow users to listen to live or pre-recorded audio content on their phone or access the content of their desktop. Petitioner would also provide the entire technical infrastructure necessary for the service. The proposed contract describes a fee structure consisting of set-up fees, maintenance fees, and hosting fees. Under the heading "Intellectual Property" the proposed contract states:

> No license is granted herein, either by implication, estoppel or otherwise to any VoiceMate product or service or any copyright, patent, trademark or other legally protectible right incorporated in such product or service. VoiceMate owns, shall own and possesses all right, title and interest in any and all VoiceMate products and services provided under this Agreement and all intellectual property rights related thereto, including without limitation, all patents, inventions, copyrights, copyrightable works, trademarks, trade secrets and any other proprietary rights.

4. Subsequent to petitioner's submission of the proposed contract petitioner's representative and the Division employee handling the claim had a further discussion of the claim. The Division employee handling the claim noted in the case contact notes that while

petitioner claims that it leases software to its customers, other documents submitted appear to indicate that software is not sold or leased. The notes also indicate that petitioner's representative continued to maintain that the software was leased.

5. The case contact notes indicate that a meeting regarding the refund claim was held among several Division employees on April 16, 2002. One of the participants at the meeting stated that it was unclear what petitioner was selling and that the information supplied by petitioner in support of the refund application does not support the claimed exemption. The notes of the meeting also indicate that the petitioner's sales may be subject to tax for telephony and information services and that the Division "definitely wanted to get a look at the business for possible tax implications." There appears to have been an agreement that more detail concerning the business was necessary and that the matter would be referred for a field audit.

6. By letter dated April 19, 2002, the Division advised petitioner of the status of its refund claim as follows:

> We have examined the information and documentation supplied in support of the exemption claimed under Section 1115(a)(35) of the Tax Law for computer system hardware used or consumed directly and predominantly in designing computer software for sale. The sales invoice provided in support of the exemption does not specify charges for a sale, lease or license to use computer software. In addition, Voicemate's internet web site description of its products or services indicates that there is no software to purchase, install, configure, maintain or support. Since sufficient documentation has not been provided to demonstrate predominant use of computer system hardware to produce computer software "for sale," the application for refund is not in processible form.
>
> Since the exemption claimed is dependant on the sale of computer software, your refund application has been forwarded for field audit verification of the nature of the items or services sold.

7. The Division issued an audit appointment letter on or about July 1, 2002 scheduling an audit of petitioner's sales and use tax records. This transmittal included a list of records required to be produced on audit. The auditor's tax field audit record indicates that petitioner's

representative spoke with the auditor in July 2002 questioning why an audit would be conducted. The representative also provided the auditor with an additional invoice. The field audit record indicates that in September 2002 petitioner's representative advised the auditor that he was filing a protest with respect to the refund claim. The field audit record further indicates that in a telephone conversation on November 6, 2002, petitioner's representative advised the auditor that if she wanted to work on the refund claim, "that is fine," but if she wanted to do the audit, she would have to "wait."

8. Petitioner filed a request for conciliation conference dated September 20, 2002 with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). A letter attached to the request asserted that the Division's failure to grant or deny the refund claim was a deemed denial and therefore requested a conciliation conference in protest of such deemed denial. By letter dated September 27, 2002, BCMS advised petitioner that since a determination denying the refund claim in whole or in part had not been issued, the request for conciliation conference was premature and could not be accepted by BCMS.

CONCLUSIONS OF LAW

A. Addressing first the Division's motion to dismiss, the Division asserts that because no determination or notice denying petitioner's refund claim has been issued, petitioner has no right under the Tax Law to file a petition with the Division of Tax Appeals or to request a conciliation conference with BCMS. Accordingly, the Division argues, the Division of Tax Appeals is without subject matter jurisdiction in this matter and thus must dismiss the instant petition.

B. As the Division correctly notes, the Division of Tax Appeals is an adjudicative body of limited and statutorily created jurisdiction (***see***, ***Matter of Scharff***, Tax Appeals Tribunal, October 4, 1990, ***revd on other grounds sub nom New York State Department of Taxation and***

Finance v. Tax Appeals Tribunal, 151 Misc 2d 326, 573 NYS2d 140). The Division also correctly notes that Tax Law § 2008 provides a right to commence a proceeding in the Division of Tax Appeals by filing a petition "protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency, a determination of tax due, a denial of a refund or a credit application . . . or any other notice which gives a person the right to a hearing in the division of tax appeals under this chapter or other law." In addition, Tax Law § 1139(b) provides a refund applicant with the right to petition the Division of Taxation's denial, in whole or in part, of such an application within 90 days after the mailing of notice of such denial.

C. Tax Law § 1139(b) provides, in relevant part, as follows:

> If an application for refund or credit is filed with the commissioner of taxation and finance as provided in subdivision (a) of this section, *the commissioner of taxation and finance shall grant or deny such application in whole or in part within six months of receipt of the application in a form which is able to be processed* and shall notify such applicant by mail accordingly. Such determination shall be final and irrevocable unless such applicant shall, within ninety days after the mailing of notice of such determination, petition the division of tax appeals for a hearing. (Emphasis added.)

Tax Law §1139(b) thus mandates that the Division either grant or deny a refund application, in whole or in part, within six months of receipt of the application in a form which is able to be processed.

D. Section 534.2(a)(2)(i) of the Division's regulations (20 NYCRR 534.2[a][2][i]) lists the following requirements for the form of a refund application:

> An application for a refund or credit must contain the following information:
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> (a) name of applicant;
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> (b) address of applicant;
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> (c) applicant's vendor identification number (if the applicant is registered);

(d) period covered by claim . . .;

(e) amount of refund or credit claimed;

(f) name and address of authorized representative (if the applicant has a representative);

(g) a full explanation of facts on which the claim is based, including substantiation of the basis for and the amount of the claim;

(h) a certification that no part of the tax paid for which the claim is made has been refunded or credited to the applicant by the person to whom it was paid, or, in the case of an application by a vendor, a certification and evidence satisfactory to the Department of Taxation and Finance that he has refunded the tax to his customer;

(i) date of application; and

(j) signature of the applicant and, if the applicant is an officer of a corporation or a partner in a partnership, the individual's title.

E. The Division takes the position that the six-month requirement to grant or deny the subject refund claim was not triggered because the claim was not in a processible form. The Division's position rests on its contention that petitioner did not produce sufficient documentation to show that the computer hardware in question was predominantly used to produce computer software *for sale*. The Division asserts that the lack of such documentation is inconsistent with the requirements of section 534.2 (a)(2)(i)(g) of the regulations and therefore the claim is not, in the language of Tax Law § 1139(b), "in a form which is able to be processed."[1]

F. The Division's contention is rejected. The refund claim at issue was clearly in a form "which is able to be processed" within the meaning of Tax Law § 1139(b) and the actions taken

[1] The Division apparently equates the requirements listed in the regulation with the processible form requirement in Tax Law § 1139(b). The regulation, however, does not purport to define processible form and makes no reference to processible form.

by the Division with respect to petitioner's application support this conclusion. First, other than the issue of whether petitioner proved that it produced computer software for sale, the record is clear that the subject refund application was in all respects proper and complete (***see***, Findings of Fact "1" and "2"; ***see also***, 20 NYCRR 534.2[a][2]). As to this "for sale" issue, petitioner provided the Division with a brochure describing its business, an invoice to a customer, and a proposed contract with a potential customer. In addition, petitioner's representative had several conversations with the Division regarding the nature of petitioner's business. According to the case contact notes, the Division reviewed this information and concluded that the evidence presented did not show that petitioner produced software for sale and therefore did not support the claimed refund. The Division thus reviewed the evidence presented and came to a conclusion. In so doing, the Division clearly "processed" petitioner's refund claim. The Division then advised petitioner of its position regarding the refund claim in the April 19, 2002 letter (***see***, Finding of Fact "6"). Although the letter concludes with the Division's assertion that the application was not in processible form, it also states that the evidence presented by petitioner did not support a finding that petitioner produced software for sale and therefore did not support the claimed refund. The Division thus effectively concluded that the refund claim should be denied. The April 18, 2002 letter was therefore a denial of petitioner's claim.

G. The Division's interpretation of the statutory phrase "in a form which is able to be processed" as used in Tax Law § 1139(b) is far too expansive. According to the Division, a refund applicant, such as petitioner, must substantiate all factual elements of a claim to the Division's satisfaction before an application is "processible" and the six-month requirement for action is triggered. Applications failing to meet this standard are deemed "not in processible form" and the Division is apparently relieved from any obligation to act upon such applications

in a timely manner. This interpretation renders meaningless the mandatory language of Tax Law § 1139(b) requiring a decision on a refund application within six months and also effectively deprives applicants of their administrative appeal rights under Tax Law §1139(b). Such a construction is to be avoided if any other reasonable interpretation is possible (***see***, ***Matter of Morton Bldgs. v. Chu***, 126 AD2d 828, 510 NYS2d 320, 321, ***affd*** 70 NY2d 725, 519 NYS2d 643).

In this case, as discussed above, following a review of information provided and discussions with petitioner's representative, the Division concluded that the evidence submitted did not support the claimed refund. Despite this conclusion, the Division takes the position that the application is "not in processible form." As a result, petitioner's refund claim has been placed in a bureaucratic limbo, having been effectively denied, but (according to the Division) petitioner having no administrative appeal rights. Significantly, by its interpretation of Tax Law § 1139(b), the Division has arrogated to itself the sole right to determine whether refund claim applicants, such as petitioner, have substantiated their claims and thus has arrogated to itself the authority to determine which applicants may exercise their appeal rights granted under Tax Law § 1139(b). Obviously, as in the instant matter, the Division and a refund claim applicant may disagree as to whether a particular fact or a particular claim has been substantiated. It seems logical that where, as here, the Division takes the position that the evidence presented does not support a claimed refund, then such a claim should be denied and the applicant be given an opportunity to pursue an administrative appeal.

H. Tax Law § 1139(b) was amended by chapter 441 of the Laws of 1998 by substituting the mandatory "shall" for the permissive "may" and by adding "within six months of receipt of the application in a form which is able to be processed." In a letter to the Governor dated June

30, 1998 expressing no objection to the approval of the bill, then-Commissioner of Taxation and Finance Michael H. Urbach explained this amendment, in relevant part, as follows:

> The bill would require the Department to grant or deny sales tax refund applications within six months of the receipt of a processible application . . . . The bill was amended by the sponsor to add the language 'in a form which is able to be processed' in response to our concern that the six month time frame could have required the Department to deny incomplete refund applications to the detriment of some taxpayers, rather than risk authorizing an improper payment. The 'processing' concept is derived from existing language in section 1139(f) of the Tax Law, for Lemon Law sales tax refunds, and in sections 688(e) and 1088(e) of the Tax Law, for personal income tax and corporate franchise tax purposes. Accordingly, this bill would be administered in a manner consistent with these existing provisions.

Tax Law § 688(e)(2) and § 1088(e)(2), referred to in the Urbach letter, define "processible form" for a tax return in the context of calculating interest on overpayments of tax and both such sections use identical language in defining "processible form" as follows:

> (2) For purposes of paragraph one of this subsection, a return is in processible form if -
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> (A) such return is filed on a permitted form, and
>
> (B) such return contains -
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> (i) the taxpayer's name, address, and identifying number and the required signatures, and
>
> (ii) sufficient required information (whether on the return or on required attachments) to permit the mathematical verification of tax liability shown on the return. (***See***, Tax Law § 688[e][2]; § 1088[e][2].)

The "processible form" requirements in Tax Law § 688(e)(2) and § 1088(e)(2) thus require taxpayers to provide the Division with certain basic information and are much more limited in nature than the Division's broad interpretation of the "processible form" requirement of Tax Law

§ 1139(b).[2] Clearly, the refund application at issue was in processible form as defined in Tax Law § 688(e)(2) and § 1088(e)(2). According to the Urbach letter, the "'processing' concept" was derived from these income tax and corporation franchise tax sections and was intended to be administered in the same manner. The Urbach letter is thus at odds with the Division's construction of Tax Law § 1139(b) and supportive of the conclusion that petitioner's refund claim was "in a form which is able to be processed."

I. The Division seeks to justify its position that the subject refund application was not in processible form by petitioner's representative's asserted refusal "to permit a field audit of its business in order for the Division to verify petitioner's assertions concerning its refund claim to establish its entitlement to the sales tax exemption under Tax Law § 1115(a)(35)." With regard to this assertion, first, as discussed above, the refund application was in processible form before the matter was referred for a field audit. Second, the Division's field audit record indicates that petitioner's representative did not object to the auditor's working on the refund claim, but did object to an audit which, as the Division's notes indicate, was concerned, at least in part, with examining "possible tax implications" arising from the possible sale of telephony and information services (***see***, Finding of Fact "5"). While it is indisputably the duty of the Division of Taxation to investigate such possible tax implications, petitioner's reluctance to cooperate in such an investigation has no relevance to the refund claim or to the Division's decision to issue the April 18, 2002 letter, and does not, therefore, support the Division's decision to deem the claim "not in processible form."

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[2] Tax Law § 1139(f), also referred to in former Commissioner Urbach's letter, provides that interest on Lemon Law sales tax refunds shall be payable from the date which is three months after the date the application for refund in processible form is received. This subsection does not define "processible form."

J. Having concluded that petitioner's refund claim was in processible form and that the April 18, 2002 letter was a denial of petitioner's application, it follows that the Division's motion to dismiss must be denied because, as noted previously, Tax Law § 1139(b) provides petitioner with the right to protest such a denial, either by filing a request for a conciliation conference with BCMS (***see***, Tax Law § 170[3-a][a]) or a petition with the Division of Tax Appeals (***see***, Tax Law § 2006[4]).

K. The Division asserts that, even if petitioner's request for conciliation conference was appropriate, such request was untimely made on September 20, 2002, nearly five months after the date of the Division's April 19, 2002 letter. Where the Division asserts that a taxpayer's protest of a statutory notice is untimely, the Division bears the burden of proving proper mailing of the notice (***see***, ***Matter of Katz***, Tax Appeals Tribunal, November 14, 1991). Here, the Division has produced no such proof and has thus not established the date of mailing of the April 19, 2002 letter. Nor do documents submitted establish the date of filing of the request for conciliation conference. Under such circumstances, the statutory time period for the filing of a protest is not triggered and the protest is deemed timely filed (***id.***).

L. Turning to petitioner's motion for summary determination, the Rules of Practice and Procedure of the Tax Appeals Tribunal provide that summary determination may be granted:

> if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact (20 NYCRR 3000.9[b][1]).

Section 3000.9(c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The

proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (***Winegrad v. New York Univ. Med. Ctr***, 64 NY2d 851, 487 NYS2d 316, 317, ***citing Zuckerman v. City of New York***, 49 NY2d 557, 427 NYS2d 595). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (***Glick & Dolleck v. Tri-Pac Export Corp.***, 22 NY2d 439, 293 NYS2d 93; ***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572, 536 NYS2d 177). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (***Gerard v. Inglese***, 11 AD2d 381, 206 NYS2d 879).

M. Petitioner's motion for summary determination must be denied because a material and triable issue of fact is presented in this matter. The motion papers show that the issue of whether the computer hardware which is the subject of the refund claim was directly and predominantly used to produce software for sale is in dispute. Petitioner's entitlement to the refund claim at issue turns upon resolution of this issue (***see***, Tax Law § 1115[a][35).

N. This matter shall proceed to a hearing on the merits as scheduled on May 15, 2003.

DATED: Troy, New York
April 28, 2003

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE