

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MINNIE TORNATO	:	DETERMINATION DTA NO. 819170
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Year 2001.	:	

Petitioner, Minnie Tornato, 4 Carlin Place, Great Neck, New York 11023, 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 year 2001.

On December 19, 2002, the Division of Taxation, by its representative, Barbara G. Billet, Esq. (Justine Clarke Caplan, Esq., of counsel) filed a motion for an order dismissing the petition and granting summary determination to the Division of Taxation pursuant to sections 3000.3(b), 3000.4(a), 3000.5 and 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal on the grounds that there exists no provision in the Tax Law which allows for the relief sought by petitioner and, in addition, that Minnie Tornato is not a proper petitioner. Petitioner, appearing *pro se*, did not file a response to the motion which was due by January 19, 2003, which date began the 90-day period for the issuance of this determination. Based upon the motion papers and the affidavits and documents submitted therewith and the pleadings in this matter, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether a lessee of a vehicle was entitled to a refund of a prorated portion of the sales tax paid on the total amount of lease payments due under an automobile lease agreement of 36 months as a result of the lessee's death one month after entering into the lease.

II. Whether Minnie Tornato, a person who was not a party to the lease agreement, was a proper petitioner in this matter.

FINDINGS OF FACT

1. Anselmo Tornato, husband of the petitioner, Minnie Tornato, leased a 2002 Ford Explorer as a resident of New York State. The lease term was for 36 months. Pursuant to the terms of the lease, Anselmo Tornato paid the full amount of sales tax due on the lease of the vehicle to New York State at the inception of the lease.

2. On December 7, 2001, the Division of Taxation ("Division") received a claim for refund of sales and use taxes in the amount of \$1,184.05 from Minnie Tornato. The basis of the claim for refund was that the lessee of the vehicle, Anselmo Tornato, had died approximately one month after entering into the lease agreement.

3. On February 2, 2002, the Division denied, in full, the claim for refund. The refund denial advised petitioner that there is no provision in the Tax Law to allow for a refund of sales tax paid on the lease of a vehicle where the lease is terminated prematurely, either by choice or due to the death of the lessee.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 1105(a), sales tax is imposed on "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

B. The terms “sale, selling or purchase” are defined by Tax Law § 1101(b) to mean any transaction in which there is a transfer of title or possession or both of tangible personal property for a consideration including the “exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever.”

C. Pursuant to Tax Law § 1111(i)(A), effective June 1, 1990, all payments under a motor vehicle lease for a term of one year or more are “deemed to have been paid or given and shall be subject to tax, and any such tax due shall be collected, as of the date of first payment under such lease.”

D. 20 NYCRR 527.15 provides, in pertinent part, as follows:

(a) Section 1111(i) of the Tax Law provides special rules for the payment of sales and use tax on certain leases of motor vehicles, vessels and noncommercial aircraft. Rather than the tax being due upon each periodic lease payment, the Tax Law provides that with respect to the leases described in this section the tax is due at the inception of the lease on the total amount of the lease payments for the entire term of the lease.

* * *

(e) *Limitations on refunds and credits.* No refund or credit shall be allowed based upon the fact that receipts are not actually paid as in the case of early termination of a lease, failure to exercise an option to renew a lease or bad debt . . . since, under section 1111(i), such receipts are deemed to have been paid.

E. The Division’s limitation on refund and credit in cases similar to the one at issue herein has previously been upheld by the Tax Appeals Tribunal. In *Matter of Moerdler* (Tax Appeals Tribunal, April 26, 2001, *confirmed* 298 AD2d 778, 750 NYS2d 329), no refund or credit was allowed to a taxpayer whose motor vehicle was stolen four months into a 36-month lease. In *Matter of Torquato* (Tax Appeals Tribunal, October 12, 2000), a refund was denied to a taxpayer who had made 11 lease payments pursuant to a 36-month lease and then relocated to California and registered the vehicle in that state. In *Matter of Miehle* (Tax Appeals Tribunal,

August 24, 2000), the Tribunal held that the Division had properly denied a refund to a taxpayer whose vehicle had been badly damaged in an accident which resulted in the termination of the lease one month into the lease period (the original lease was for 36 months). In *Matter of Miehle (supra)*, the Tribunal stated:

Tax Law § 1139 and the regulation at 20 NYCRR 534.8(a)(1) provide that a refund or credit is allowable for any tax, penalty or interest which was erroneously, illegally or unconstitutionally collected or paid. However, none of these circumstances was present in this matter, where the lessor collected and petitioner paid the proper amount of sales tax in the manner prescribed by the [sic] Tax Law § 1111(i). There is no claim or evidence that the tax was erroneously, illegally or unconstitutionally collected or paid, and there is no provision under Tax Law § 1139 for a refund of any portion of the sales tax properly paid at the inception of the lease.

F. 20 NYCRR 3000.9(b)(1) provides that a motion for 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.

G. In this matter, petitioner did not respond to the Division's motion for summary determination. Accordingly, she is deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Therefore, based upon the facts presented and upon the provisions of Tax Law § 1111(i) and 20 NYCRR 527.15(e), I must conclude that there is no material and triable issue of fact herein and, as such, the Division is entitled to a determination in its favor.

H. As a result of Conclusion of Law "G", Issue II is moot.

I.. The Division's motion for summary determination is granted, the Division's refund denial is sustained and the petition of Minnie Tornato is hereby denied.

DATED: Troy, New York
March 27, 2003

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE