STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ANDREW ROSENBERG	:	DETERMINATION DTA NO. 821118
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 2005.	:	

Petitioner, Andrew Rosenberg, 2 Kipps Court, Somers, New York 10589, 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 2005.

The Division of Taxation, appearing by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), brought a motion filed December 4, 2006, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and (b). The Division of Taxation submitted the affidavit of John E. Matthews, Esq., together with exhibits attached thereto in support of the motion. Petitioner, appearing *pro se,* did not respond to the motion of the Division of Taxation. Accordingly, the 90-day period for issuance of this determination commenced on January 3, 2007, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. After due consideration of the documents and arguments presented, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner is entitled to a hearing in the Division of Tax Appeals after signing a Bureau of Conciliation and Mediation Services Consent.

FINDINGS OF FACT

1. In response to petitioner's claim for refund of sales and use tax in the amount of $2,106.12, the Division of Taxation ("Division"), in a letter dated November 11, 2005, requested that petitioner provide additional information. The letter stated as follows:

> A capital improvement is an addition or alteration to real property that substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and is intended to become a permanent installation.
>
> The invoice submitted with your application for refund lists the components, i.e., 50" plasma HDTV, DVD changer, remote, speakers, A/V receiver, power source, power amplifier, subwoofer, cables, wiring and installation of a home theater. The components of the system do not qualify for a refund of New York State Sales and Use Tax. Please provide detailed documentation and/or invoice listing the actual charge for the wiring and the installation of the wiring for the home theater. Additional information may be requested as needed.

2. On November 29, 2005, the Division issued to petitioner a letter denying the refund claim, which stated, in part, as follows:

> Your claim for a refund of sales tax is being denied in full.
>
> . . . . We requested detailed documentation and/or invoices listing the actual charge for the wiring and the installation of the wiring for the home theater. The information we received did not provide the detailed documentation for the wiring and the installation of the wiring.
>
> This determination denying your claim in full will, according to section 1139(b) of the Sales and Use Tax Law, be final and irrevocable unless you apply for a hearing. If you decide to appeal this determination, complete the enclosed CMS-1, Request for Conciliation Conference, and mail it within 90 days of the date of this letter.

3. On December 7, 2005, petitioner filed a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services ("BCMS"). BCMS issued a Conciliation Default Order to petitioner on March 31, 2006 when he failed to appear at a scheduled conciliation conference. Upon petitioner's request, the default order was vacated and petitioner agreed to have the matter handled on a correspondence basis.

4. By letter dated May 5, 2006, the conciliation conferee advised petitioner, in part, as follows:

> In dispute is a refund claim in the amount of $2,106.12. At issue is whether the construction of a home theatre results in a capital improvement.
>
> I would agree that the construction of a room or walls to accommodate a home theatre would result in a capital improvement, and the charge by a contractor to do this work would be a capital improvement. However, the items of tangible personal property for the home theatre (plasma television, DVD changer, speakers, receiver, power amplifier, and cables) remain tangible personal property, and are subject to sales tax.
>
> Accordingly, I must sustain the refund denial issued by the Department of Taxation and Finance.
>
> Enclosed are three (3) copies of a Consent form which reflects this decision. If you agree, please sign and return two (2) copies of this form within fifteen (15) days in the envelope provided.

5. On May 9, 2006, petitioner signed the consent form and filed it with BCMS on May 11, 2006. The consent form indicated the amount of the claim as $2,106.12, and the date of the notice as November 29, 2005. The consent form provides as follows:

> The final disposition of the claim for credit or refund at issue, as described above, is acceptable to me as follows:
>
> **Your claim for a credit or refund is denied.**
>
> I hereby agree to waive any right to a hearing in the Division of Tax Appeals concerning the above notice(s).

6. Petitioner filed a petition with the Division of Tax Appeals on December 5, 2006, in which he requested that the Conciliation Default Order issued on March 31, 2006 be vacated.

CONCLUSIONS OF LAW

A. 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 (20 NYCRR 3000.9[b][1]).

B. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal 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, 853, 487 NYS2d 316, 317, ***citing Zuckerman v. City of New York***, 49 NY2d 557, 562, 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, 441, 293 NYS2d 93; ***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572, 573, 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).

"To defeat a motion for summary judgment the opponent must also produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,' and 'mere conclusions, expressions of hope or unsubstantiated allegations or

assertions are insufficient'" (***Whelan v. GTE Sylvania***, 182 AD2d 446, 449, 582 NYS2d 170, 173 ***citing Zuckerman v. City of New York***, ***supra***).

C. In the instant matter, petitioner did not respond to the Division's motion; he is therefore 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, 229, 472 NYS2d 325). Moreover, petitioner presented no evidence to contest the facts alleged in the Matthews affidavit; consequently, those facts may be deemed admitted (***see***, ***Kuehne & Nagel v. Baiden***, ***supra***, at 544, 369 NYS2d at 671; ***Whelan v. GTE Sylvania***, ***supra***).

D. Tax Law § 170(c) provides the following with respect to the powers and authority vested in the conciliation conferee:

> A conciliation conferee, all of whom, unless otherwise provided by law, shall be in the classified civil service, shall conduct the conciliation conference in an informal manner and shall hear or receive testimony and evidence deemed necessary or desirable for a just and equitable result. The commissioner of taxation and finance shall have the power to delegate authority to a conferee to waive or modify penalty, interest and additions to tax to the same extent as such commissioner is permitted under this chapter.

The regulations promulgated thereunder specifically address the situation where, after the conferee has reviewed all the evidence, a proposed settlement is made and forwarded to the party requesting the conference for his approval or disapproval. The regulation at 20 NYCRR 4000.5(c)(3) provides, in part, as follows:

> (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.

As set forth in the facts, the consent form included language consistent with the regulation which called for the requester to waive any rights he might otherwise have to a hearing in the Division of Tax Appeals "concerning the above notice." In this case, the statutory notice was the letter from the Division, dated November 29, 2005, denying petitioner's request for a refund.

By signing the consent, petitioner voluntarily discontinued proceedings before the Bureau of Conciliation and Mediation Services ("BCMS") prior to the issuance of an order and, by the consent's own terms, waived any rights to a hearing before the Division of Tax Appeals concerning all aspects of the refund denial dated November 29, 2005.

E. Pursuant to Tax Law § 171(18), the Division was authorized to enter into a written agreement with petitioner fixing the amount of the refund claim, if any. The consent in this matter was issued in accordance with BCMS procedures (***see***, 20 NYCRR 4000.5[c][3]). By his execution of the consent, petitioner knowingly and voluntarily[1] waived his right to a hearing in the Division of Tax Appeals on issues related to the notice of denial of refund, and agreed to have the refund denied in full (***see, Matter of BAP Appliance Corp.***, Tax Appeals Tribunal, May 28, 1992).

Clearly, the issue of whether petitioner's purchases of tangible personal property relating to the installation of a home theater was an issue which could have been raised by petitioner at a hearing before the Division of Tax Appeals. Petitioner chose instead to resolve his entire dispute

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[1] It is noted that there is neither evidence nor allegation that petitioner's execution of the consent was anything other than knowing and voluntary, nor has the question been raised as to the authenticity of the signature on the consent.

with the notice of refund denial, dated November 29, 2005, by executing the consent which effectively precluded him from raising any issues concerning the notice before the Division of Tax Appeals.

F. It is also noted that petitioner's petition only requests that the March 31, 2006 Conciliation Default Order be vacated. This order had been vacated by the conciliation conferee prior to the issuance of his May 5, 2006 letter to petitioner.

G. The Division of Taxation's motion for summary determination is granted and the petition of Andrew Rosenberg is dismissed with prejudice.

DATED: Troy, New York
March 29, 2007

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE