

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>CHAMPION ABSTRACT LLC</b>	:	<b>DETERMINATION</b>
for Revision of a Determination or for Refund of	:	<b>DTA NO. 822233</b>
Real Estate Transfer Tax under Article 31 of the	:	
Tax Law.	:	

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Petitioner, Champion Abstract LLC, filed a petition for revision of a determination or for refund of real estate transfer tax under Article 31 of the Tax Law.

On July 11, 2008, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (Michele W. Milavec, Esq., of counsel), filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5 and 3000.9(b). Accompanying the motion was the affirmation of Michele W. Milavec, dated July 11, 2008, and annexed exhibits supporting the motion. Petitioner's response to the motion was due by August 11, 2008, which date commenced the 90-day period for issuance of this determination. After due consideration of the affidavits and documents presented by the Division of Taxation, Arthur S. Bray, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether summary determination should be granted in favor of the Division of Taxation because there are no disputed facts and, as a matter of law, the facts mandate a determination in its favor.

***FINDINGS OF FACT***

1. On January 31, 2005, Bomi Enterprises, Inc., conveyed title to a certain parcel of real property to Briarwood Partners LLC for \$3,000,000.00. The New York City Department of Finance required that all deed transfers have a computer-generated ACRIS Transfer Tax Affidavit executed and attached to the deed when it was recorded. In this instance, the ACRIS forms indicated that the property was 100% residential and calculated the transfer tax on Form TP-584 at \$12,000.00 and a mansion tax of \$30,000.00. Checks were drafted by petitioner, Champion Abstract LLC, on the basis of the ACRIS cover page which indicated that New York State real estate transfer tax was due in the amount of \$42,000.00.

2. Petitioner remitted a check to the New York City Department of Finance, dated February 11, 2005, in the amount of \$120,873.00. The check was endorsed on February 25, 2005.

3. On November 13, 2007, the Division of Taxation (Division) received a Real Estate Transfer Tax Claim for Refund. According to the claim for refund, petitioner did not collect the mansion tax because New York State does not require that mansion tax be paid on vacant land. Nevertheless, the checks were drafted on the basis of the ACRIS cover page which indicated that New York State real estate transfer tax in the amount of \$42,000.00 was due. As a result, petitioner requested a refund in the amount of \$30,000.00 constituting the mansion tax allegedly paid in error.

4. In a letter dated November 14, 2007, the Division denied the claim for refund because it was not filed within two years of the date of payment of the real estate transfer tax.

5. Petitioner requested a conciliation conference which was held on March 18, 2008. In an order dated April 11, 2008 (CMS No. 221645), the request was denied and the denial of the refund was sustained.

6. On April 18, 2008, the Division of Tax Appeals received a petition, dated April 16, 2008, which challenged the denial of the refund. The petition alleges that the refund request was filed within the three-year period within which New York State could have conducted an audit. According to the petition, it was noted at the conciliation conference that petitioner would have been entitled to a full refund if its request was received within the two-year period. Petitioner also maintains that “[t]he refund requested is a substantial sum of money which was calculated incorrectly based upon our reliance of the ACRIS system implemented by the NYC Department of Finance and subsequently paid. It would be unjust enrichment for the state to keep said monies.”

7. The Division filed an answer dated June 18, 2008, which stated that the refund claim was time barred pursuant to Tax Law § 1412(a) because it was filed on November 8, 2007 which is more than two years after the real estate transfer tax was paid on February 25, 2005.

8. On July 11, 2008, the Division made a motion for summary determination. Petitioner did not respond to the motion.

### ***CONCLUSIONS OF LAW***

A. A motion for summary determination shall be granted:

if, upon all 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. Here, petitioner did not respond to the Division's motion and, therefore, has conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984], *lv dismissed* 62 NY2d 942 [1984]). Moreover, petitioner submitted no evidence to contest the facts alleged; consequently, those facts may be deemed admitted. Accordingly, summary determination may be granted in this matter.

C. Tax Law § 1412(a) provides, in relevant part, as follows:

A grantor or grantee claiming to have erroneously paid the tax imposed by this article or some other person designated by such grantor or grantee may file an application for refund within two years from the date of payment.

In this instance, the date of payment was February 25, 2005. The claim for refund was filed with the Division on November 8, 2007. On the basis of the foregoing dates, it is clear that the claim for refund was untimely.

D. Petitioner argues in its petition that it would constitute unjust enrichment for New York State to keep the monies. Under the circumstances presented, this position is clearly understandable. However, there is no legal basis for an equitable tolling of the statute of limitations (*see Matter of Levine*, Tax Appeals Tribunal, August 7, 2008).

E. The Division's motion for summary determination is granted, and the petition of Champion Abstract LLC is denied.

DATED: Troy, New York  
October 30, 2008

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE