

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MAMMA ROSA’S CUCINA CORPORATION : ORDER
for Revision of a Determination or for Refund of Sales and : DTA NO. 823759
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period March 1, 2006 through February 28, 2009. :

Petitioner, Mamma Rosa’s Cucina Corporation, 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 period March 1, 2006 through February 28, 2009.

On September 23, 2010, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). In letters dated September 28, 2010 and September 30, 2010, petitioner, appearing by Angelo J. Milone, CPA, submitted letters in opposition to dismissal. By letter dated September 27, 2010, the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), stated that it was in agreement with the Notice of Intent to Dismiss. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced on October 23, 2010. After due consideration of the documents submitted, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether the petition of Mamma Rosa's Cucina Corporation should be dismissed because no hearing rights were conferred by either the Notice and Demand for Payment of Tax Due or the Statement of Proposed Audit Change.

FINDINGS OF FACT

1. Following a field audit of petitioner's books and records and an observation conducted in October 2009, the Division of Taxation (Division) determined that petitioner owed additional sales and use tax for the period March 1, 2006 through February 28, 2009 (audit period) in the sum of \$34,006.07 plus interest. The Division presented the results of its audit to petitioner in a Statement of Proposed Audit Change (form AU-346), dated July 16, 2010.

2. Although a partial copy of the Statement of Proposed Audit Change was attached to the petition filed with the Division of Tax Appeals, the cover (and signature) page was not included.¹

3. The notice and demand for payment of sales and use tax due was issued to petitioner on or about August 13, 2010, consistent with the statement of proposed audit change, setting forth additional tax due of \$34,006.07 plus interest. In the computation section of the Notice and Demand, it stated:

Based on our audit of your records, we determined that you owe tax, interest and any applicable penalties, as you agreed to on Form AU-346, Statement of Proposed Audit Change for Sales and Use Tax.

4. In its petition, filed on July 23, 2010, prior to the issuance of the Notice and Demand, petitioner attacked the Division's audit methodology for both sales and use tax determined to be

¹ The Division's representative submitted to the Division of Tax Appeals an allegedly complete and executed copy of the statement on November 2, 2010 by facsimile transmission, beyond the 30 days permitted by the Notice of Intent to Dismiss, and, therefore, it was not accepted and has not been considered in reaching the conclusions herein.

due, but conceded that petitioner had agreed with the Division's determination, albeit under alleged duress. Petitioner stated:

In pressure to close case we agreed under duress due to the fact the team leader stated that we would not receive abatement of penalties and simple interest calculation if we did not agree to a taxable amount of 68%.

5. At the time the Statement of Proposed Audit Change was executed in July of 2010, the form AU-346 provided that, if the taxpayer was in agreement with the proposed changes, it should sign the form and return it to the Division. However, in so consenting, the taxpayer was notified by language on the form that it was waiving its right to have a notice of determination issued to it, and also waiving its right to a hearing to contest the validity and amount of tax, penalty and interest determined and consented to be due.²

6. When petitioner filed its petition with the partial copy of the Statement of Proposed Audit Change, the Division of Tax Appeals, by letter dated July 30, 2010, requested a copy of the Notice of Determination or Conciliation Order. Petitioner responded to the request by submitting the Notice and Demand. By letter dated August 19, 2010, the Division of Tax Appeals informed petitioner that a notice and demand did not confer a right to a hearing.

CONCLUSIONS OF LAW

A. Section 3000.9(a)(4) of the Rules of Practice and Procedure allows the supervising administrative law judge on his or her own motion, and on notice to the parties, to issue a determination dismissing a petition for lack of jurisdiction.

²Official notice is taken of the form AU-346 issued by the Division of Taxation in most sales tax audit cases and actually issued to petitioner herein as evidenced by the partial copy attached to the petition and mentioned in the Notice and Demand.

B. Petitioner filed a petition with the Division of Tax Appeals on July 23, 2010, attaching only a single page from the Statement of Proposed Audit Change issued to it on July 16, 2010, clearly indicating that this was the document it was protesting.

The law is well settled that a taxpayer's protest filed prior to receiving a Notice of Determination is not an adequate protest (*Matter of West Mountain v. Department of Tax & Finance*, 105 AD2d 989, 482 NYS2d 140 [1984], *affd* 64 NY2d 991, 489 NYS2d 62 [1985]). The court in *West Mountain* held that a timely filed letter protesting a statement of proposed audit adjustment could not supplant the statutory requirement that a petition for a hearing be filed within 90 days after issuance of the Notice of Determination. Under *West Mountain*, petitioner's petition protesting the findings set forth in the Statement of Proposed Audit Change could not function as a proper protest of the tax asserted on the statement.

Further, where a petition is filed before a notice of determination has been issued, the petition must be dismissed because "[r]eview by the Division of Tax Appeals would be premature and meaningless if the Division of Taxation's assessment was only a proposed one, subject to change under the internal procedures within the Division of Taxation [citation omitted]." (*Matter of Yegnukian*, Tax Appeals Tribunal, March 22, 1990.)

Here, a notice of determination would never have been issued because petitioner consented to the tax found due on audit, which was set forth on the Statement of Proposed Audit Change.

C. After submitting the single page of the Statement of Proposed Audit Change with its petition, petitioner was instructed by the Division of Tax Appeals, by letter dated July 30, 2010, to submit a notice of determination or conciliation order. Petitioner responded by submitting the Notice and Demand, issued to it on August 13, 2010. The Division of Tax Appeals informed

petitioner by letter dated August 19, 2010 that the Notice and Demand did not confer a right to a hearing.

Tax Law § 173-a (as added by L 2004, ch 60, eff August 20, 2004), applying to notices and demands issued on or after December 1, 2004, amended the Tax Law to specifically state that a taxpayer shall not be entitled to a hearing before the Division of Tax Appeals with respect to, inter alia, the issuance of a notice and demand for payment of tax due.

Therefore, even if petitioner were petitioning the Notice and Demand, which could not have been the case given the chronology of events here, there would be no jurisdiction to entertain its petition. (Tax Law § 173-a[3][b].)

D. Given the statement on the Notice and Demand that a consent had been signed and petitioner's concession that it had agreed to the Division's determination of tax in exchange for abatement of penalty and additional interest, it is also concluded that petitioner had waived its right to challenge the tax determined to be due and its right to a hearing. This language is plainly stated on the Statement of Proposed Audit Change, and it would appear to be more than a coincidence that petitioner failed to include that page with its petition. In any event, a signed consent on a Statement of Proposed Audit Change prohibits the subsequent filing of a petition to challenge the same tax.

In *Matter of SICA Elec. & Maintenance Corp.* (Tax Appeals Tribunal, February 26, 1998), the Tribunal stated:

In addition, the above provisions also provide for a taxpayer to agree and consent to the amount of a tax liability (sections 1138[c] and former 1139[c]), thereby obviating the requirements of the issuance of a notice of determination and the 90-day protest waiting period thereafter, i.e., a taxpayer may consent to an assessment as was done in this matter. By agreeing to the amount of tax and consenting to an assessment, a taxpayer gives up its right to protest such assessment, except as provided by Tax Law former § 1139(c); to wit, the taxpayer may protest by

payment of the amount assessed and by filing a claim for refund of any such amount so paid within two years of the date of payment thereof.

* * *

We conclude that the signature on the consent to tax rendered the use tax fixed and final (*Matter of BAP Appliance Corp.*, Tax Appeals Tribunal, May 28, 1992; *Matter of Rosemellia*, Tax Appeals Tribunal, March 12, 1992) and established the rational basis for the assessment. Having signed the consent, the audit method and audit computation ceased being an issue. Further, the threshold issue of "rational basis" that might otherwise be present in an audit case under Tax Law § 1138(a) was no longer present. The Division was relieved of the burden of showing a rational basis because petitioner's signature on the consent established that there was a rational basis.

E. Petitioner's allegation, made only in its petition, that it agreed to the tax stated in the Statement of Proposed Audit Change under duress is not supported by any facts in the record. In fact, petitioner's characterization of the events leading to its agreement to the tax appears to describe a settlement offer that waived penalty and additional interest in exchange for an agreement to the Division's tax determination after audit. Petitioner was not deprived of its right to challenge the audit results through the hearing process and never alleged that it lost that right.

F. The petition of Mamma Rosa's Cucina Corporation is hereby dismissed.

DATED: Troy, New York
January 13, 2011

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE