

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
VATICA DINER, INC. : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 824299
and Use Taxes under Articles 28 and 29 of the Tax Law :
Period March 1, 2005 through November 30, 2007. :

Petitioner, Vatica Diner, Inc., filed a petition for revision of a determination or for refund of sale and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2005 through November 30, 2007.

On November 7, 2012, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Lori P. Antolick, 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; 3000.9(a)(1) and (b). Accompanying the motion was the affidavit of Lori P. Antolick, dated November 6, 2012, and annexed exhibits supporting the motion. Petitioner, appearing by Tsempelis & Associates PLLC (Maria Tsempelis, Esq.), did not respond to the motion of the Division of Taxation within 30 days thereafter (20 NYCRR 3000.5[b]). Accordingly, the 90-day period for issuance of this determination commenced on December 7, 2012, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. After due consideration of the affidavit, annexed exhibits, and all pleadings and proceedings had herein, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation has established its entitlement to summary determination because petitioner, in signing a withdrawal of protest and consenting to the tax due, waived its right to a hearing in the Division of Tax Appeals.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Vatica Diner, Inc., a Notice of Determination bearing assessment ID number L-029935340-4, dated May 5, 2008, assessing sales and use taxes due for the period March 1, 2005 through November 30, 2007, in the amount of \$107,274.31, plus penalty and interest.

2. The Division thereafter issued a revised Statement of Proposed Audit Change for Sales and Use Tax dated June 26, 2008, which asserted \$80,282.32 in sales and use taxes due, plus interest, for the same period as previously assessed. The revised statement did not include a penalty.

3. On June 26, 2008, petitioner, by its president, Stavros Tsakos, signed the Statement of Proposed Audit Change for Sales and Use Tax, consenting to the revised tax amount.

4. Mr. Tsakos next executed a Withdrawal of Protest dated July 1, 2008, on behalf of petitioner as its responsible officer, accepting a final disposition of notice number L-029935340, based on the recomputation of the tax due to \$80,282.32 plus interest. The penalty included in the original notice was cancelled.

5. The Withdrawal of Protest provides that petitioner withdraws its protest for redetermination of a deficiency or revision of the subject notice of determination, consents to a discontinuance of the case initiated by the filing of such protest, and “waive[s] any right to a

conciliation conference and a hearing in the Division of Tax Appeals concerning the above notice.”

6. On July 1, 2008, petitioner paid the amount due, as revised, by check number 0600000468, a copy of which was made a part of the record.

7. Petitioner filed an application for credit or refund of sales and use tax for the period March 1, 2005 through November 30, 2007, dated March 26, 2009, seeking a refund in the amount of \$94,344.97. This application was date-stamped as received by the Division on April 2, 2009.

8. The Division sent a letter dated July 24, 2009 to petitioner denying the application for refund in full indicating, “This refund claim relates to a prior audit assessment, agreed and paid in full, for which no records or documents were provided for review.”

9. Petitioner subsequently filed a Request for Conciliation Conference dated September 8, 2009 with the Division in protest of the denial of the refund claim previously described. Although petitioner admitted signing the consent regarding the audit adjustments, the protest spoke to the merits of the audit methodology used to estimate the tax liability of petitioner’s business.

10. A conciliation conference was conducted on September 20, 2010.

11. A conciliation order (CMS No. 235012) dated January 7, 2011, was issued to petitioner denying the request to revise the refund denial and sustained the statutory notice.

12. On April 7, 2011, petitioner challenged this order by filing a petition with the Division of Tax Appeals.

13. Petitioner did not respond to the subject motion.

CONCLUSIONS OF LAW

A. A motion for summary determination shall 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. In the instant matter, 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]; *John William Costello Assoc. v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984], *appeal dismissed* 62 NY2d 942 [1984]). In addition, petitioner has submitted no evidence to contest the facts alleged in the affidavit by Lori P. Antolick, Esq., as filed with the subject motion and supported by the documents supplied therewith. Consequently, those facts may be deemed admitted and, accordingly, summary determination in favor of the Division may be granted in this matter.

C. The Division's argument that petitioner's claim for refund is barred by the Withdrawal of Protest form has merit. In *Matter of Westbury Smoke Stax, Ltd. v. New York State Tax Commn.* (142 AD2d 878, 531 NYS2d 65 [1988], *lv denied* 73 NY2d 706, 539 NYS2d 299 [1989]), the taxpayer and the Division reached an agreement as to the amount of the liability for tax and interest. Subsequently, the taxpayer withdrew his petition and discontinued his case. Petitioner paid the agreed upon amount of penalty and interest under protest and thereafter sought to reopen the matter on the grounds that the settlement agreement was predicated on payment of interest only from the date of settlement, not the date the tax was due. The Court affirmed the dismissal of the petition and held that the taxpayer's right to hearing was forfeited when he entered into the settlement agreement with the Division. Specifically, the Court stated that "the

withdrawal of the petition for redetermination of the initial assessment resulted in a determination by consent, subsequent to the opportunity for a hearing, and thus resulted in the forfeiture of the right to an additional hearing (*see* Tax Law § 1139[c]).” (*Id.*, 531 NYS2d at 66-67). Similarly, in this case, petitioner had the opportunity for a hearing to protest the notice of determination. Instead, after a revision of the tax due, petitioner agreed to the revision and executed a Withdrawal of Protest. By executing the Withdrawal of Protest form, which expressly waived his right to a hearing in the Division of Tax Appeals, the agreed amounts asserted became fixed and final (*Matter of Westbury Smoke Stax, Ltd.*). Since petitioner has waived any right to further protest such assessment, it is appropriate that the petition challenging the same be dismissed.

D. The Division of Taxation’s motion for summary determination is granted, and the petition of Vatica Diner, Inc. is dismissed.

DATED: Albany, New York
February 28, 2013

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE