STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
STAMFORD SUBARU, LLC	:	DECISION DTA NO. 826071
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period July 1, 2008 through June 30, 2011.	:	

Petitioner, Stamford Subaru, LLC, filed an exception to the determination of the Administrative Law Judge issued on December 10, 2015. Petitioner appeared by Sales Tax Defense LLC (Mark L. Stone, CPA and Jennifer L. Koo, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Oral argument was heard in New York, New York on June 16, 2016, which date began the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for refund for the period July 1, 2008 through June 30, 2011.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. Such facts are set forth below.

1. Stamford Subaru, LLC (petitioner), operated an automobile dealership in Stamford, Connecticut, and sold new and used automobiles and extended warranties. Petitioner's automobile dealership is located approximately three miles from the New York border. Due to its proximity to New York State, petitioner frequently sold automobiles to New York State residents.

2. During the period at issue, petitioner collected sales tax on the sales of automobiles and extended warranties from its New York customers, and remitted such tax to New York State.

3. Petitioner was subsequently audited by the Connecticut Department of Revenue for sales tax purposes. As a result of that audit, petitioner was advised by the Connecticut auditor that sales tax was due on the sale of all extended warranties sold in Connecticut. On April 16, 2012, petitioner issued a check to the Connecticut Commissioner of Revenue Services in the amount of $50,769.46, for sales and use tax for the period July 2008 through June 2011.

4. On or about October 18, 2012, petitioner filed a refund claim with the New York State Division of Taxation (Division), seeking a refund of sales tax in the amount of $37,446.98, for amounts it collected from its New York customers on the sale of extended warranties and remitted to New York State.

5. By letter dated December 21, 2012, the Division denied petitioner's refund request.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that Tax Law § 1139 (a) and the regulations promulgated thereunder require that, in order for a vendor, like petitioner, to be eligible for a refund of taxes collected erroneously from its customers, the vendor must show that such sales tax was repaid to such customers. Since petitioner did not repay the tax to its customers, the

Administrative Law Judge determined that it did not fulfill the requirements of Tax Law § 1139 (a) and thus was not entitled to the refund.

The Administrative Law Judge rejected petitioner's claim that it repaid its customers "in essence" because it paid sales tax to the State of Connecticut on its customers' behalf on the same transactions. The Administrative Law Judge found that the plain language of the statute requires that the vendor repay the tax collected before the vendor is entitled to a refund. Accordingly, in the present matter, the Administrative Law Judge reasoned, as petitioner has not reimbursed its customers for the sales tax collected on the extended warranties, it is not entitled to a refund.

The Administrative Law Judge also rejected petitioner's contention that, because most of the sales tax remitted by its customers and paid over to New York was actually owed to Connecticut, petitioner, and not its customers, paid the sales tax to New York, and therefore petitioner was not required to reimburse its customers. The Administrative Law Judge found this contention to be contrary to the record and also found that the record herein shows that the amount claimed as a refund was, in fact, collected by petitioner from its customers.

ARGUMENTS ON EXCEPTION

Petitioner argues that, by its payment of sales tax on the extended warranties to the State of Connecticut, it assumed the debts of its customers who were liable for the payment of such sales tax in the first instance. Petitioner contends that such an assumption of debt constitutes repayment for purposes of the repayment requirement set forth in Tax Law § 1139 (a).

Petitioner also contends that it was not acting as a fiduciary for New York State in collecting tax from its customers on the extended warranties. Petitioner contends that it acted as

a fiduciary for the State of Connecticut; that it did not, in fact, charge its customers New York State sales tax; and that it collected such tax on behalf of Connecticut, but erroneously remitted such tax to New York.

The Division asserts that the Administrative Law Judge properly determined that petitioner is not entitled to a refund because it has not refunded the tax collected to its New York customers. The Division also notes that it does not concede that petitioner erroneously collected sales tax on petitioner's sales of extended warranties to New York customers. Rather, the Division maintains that all of the sales tax that petitioner collected from its New York customers and remitted to the Division was properly due.

OPINION

We affirm the determination of the Administrative Law Judge.

Tax Law § 1139 (a) permits persons, like petitioner, who collect sales tax from customers, to apply for a refund of tax that has been erroneously collected and remitted. That provision, however, conditions such a refund as follows:

> "No refund or credit shall be made to any person of tax which he collected from a customer until he shall first establish to the satisfaction of the tax commission, under such regulations as it may prescribe, that he has repaid such tax to the customer."

The Division's regulations contain several provisions that address the repayment requirement in Tax Law § 1139 (a).

Specifically, the regulations related to the repayment of sales tax by a vendor to a customer in the context of a refund application provide that such a person "must repay such tax to the customer before the Department of Taxation and Finance may refund any amounts to him" and that such a vendor must maintain accurate records of the "dates of the . . . repayment to each

customer" and "proof of payment to each customer" (20 NYCRR 534.2 [c] [1] [v] and [vi]).

Regulations pertaining to the form of a refund claim application state that a vendor must provide "a certification and evidence satisfactory to the Department of Taxation and Finance that he has refunded the tax to his customer" (20 NYCRR 534.2 [a] [2] [i] [h]).

Division regulations at 20 NYCRR 534.8 (a) (2) and (3) further provide:

> "(2) Any person who has erroneously, illegally, or unconstitutionally collected a tax from a customer may repay such tax to the customer and in turn claim a refund or credit of such tax from the Department of Taxation and Finance, provided the tax has been paid to the Department of Taxation and Finance.
>
> (3) No refund or credit may be made to any person of tax which he collected from a customer until he shall first establish to the satisfaction of the Department of Taxation and Finance, as provided in section 534.2 of this Part [20 NYCRR 534.2], that he has in fact repaid such tax to the customer."

In accordance with the unambiguous language of the foregoing statute and regulations, we have held that the repayment requirement in Tax Law § 1139 (a) requires actual repayment or reimbursement to have occurred before a refund may be granted (***see Matter of New Cingular Wireless PCS***, Tax Appeals Tribunal, February 16, 2016). We reach the same conclusion in the present matter. Accordingly, since petitioner has not actually repaid the tax to its customers, it has not fulfilled the requirements of Tax Law § 1139 (a) and is not entitled to the claimed refund.

We thus reject petitioner's theory on exception that it fulfilled the repayment requirement by an assumption of its customers' debts.

We also reject petitioner's contention that it actually collected Connecticut sales tax from its New York customers on its extended warranty sales. This contention is unsupported by the record.

Finally, we note that we take no position as to whether petitioner erroneously collected and

remitted sales tax from its New York customers on its sales of extended warranties as this issue was not raised below and was not raised by petitioner on exception.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Stamford Subaru, LLC is denied;

2. The determination of the Administrative Law Judge is affirmed;

4. The petition of Stamford Subaru, LLC is denied; and

5. The denial of petitioner's refund request, dated December 21, 2012, is sustained.

DATED: Albany, New York
November 23, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner