

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions :

of :

RIVER BARREL, INC. :

DECISION
DTA NO. 827252
AND 827253

for Revision of Determinations or for Refund of Sales :
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period June 1, 2011 through August 31, 2013. :

Petitioner, River Barrel, Inc., filed an exception to the determination of the Administrative Law Judge issued on January 14, 2016. Petitioner appeared by Jay Oher, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Jennifer Hink-Brennan, Esq. and Frank Nuara, Esq., of counsel).

Petitioner did not file a brief in support of its exception. The Division of Taxation did not file a brief in opposition. Oral argument was not requested. The six-month period for issuance of this decision began on February 29, 2016, the date that the Tax Appeals Tribunal received the Division of Taxation's notification that it would not file a brief.

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

ISSUE

Whether the Division of Tax Appeals has subject matter jurisdiction to entertain the petition.

FINDINGS OF FACT

We find the following facts.

1. The Division of Taxation (Division) issued to petitioner, River Barrel Inc., two notices and demands for payment of tax due, each dated September 9, 2015 (assessment nos. L-043626355 and L-043626439), which assessed \$41,285.80 and \$47,797.35, respectively, in sales and use taxes and interest.

2. The computation section of each of the notices states that, based on the Division's audit of petitioner's records, it was determined that tax and interest were owed, and that petitioner agreed to such liability on forms AU-346 (statement of proposed audit change for sales and use tax).

3. On September 22, 2015, petitioner filed two petitions with the Division of Tax Appeals challenging each of the two notices and demands dated September 9, 2015. In its petitions, petitioner asserts that the notices and demands are materially defective and invalid because both such notices are based on materially defective and invalid forms AU-346. Petitioner further alleges that the Division knew or should have known of such defects. Accordingly, petitioner claims that the Division of Tax Appeals has jurisdiction in this matter in that the subject notices and demands are not based upon mathematical or clerical errors, and they do not represent taxpayer self-assessments.

4. On November 6, 2015, the Division of Tax Appeals issued a notice of intent to dismiss petition, which stated, in pertinent part:

“Pursuant to § 173-a(3)(c) of the Tax Law, the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition that is filed in protest of a Notice and Demand for Payment of Tax Due.

In this case, the petitioner filed a petition in protest of two Notices and Demands for Payment of Tax Due (Assessment Nos. L-043626355-4 and L-043626439-1). The Division of Tax Appeals lack [sic] jurisdiction to consider the merits of the petitions. Therefore, no hearing rights exist to protest Notices and Demands.”

5. The parties were given 30 days to respond to the notice of intent to dismiss petition.

Petitioner did not respond. The Division of Taxation responded that it was in agreement with the proposed dismissal.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge dismissed the petitions, with prejudice, for the reasons stated in the notice of intent to dismiss.

ARGUMENTS ON EXCEPTION

On exception, petitioner raises the same argument as it did below. That is, petitioner continues to argue that the forms AU-346, upon which the notices and demands were based, are materially defective and therefore invalid and that, accordingly, the notices and demands are also invalid. Thus, petitioner argues that Tax Law § 173-a does not preclude the Division of Tax Appeals from exercising jurisdiction over this matter.

The Division argues that the Administrative Law Judge correctly decided the relevant issues and that the order should be affirmed.

OPINION

We affirm the determination of the Administrative Law Judge.

The Division of Tax Appeals is authorized to “provide a hearing as a matter of right, to any petitioner upon such petitioner’s request . . . unless a right to such hearing is specifically provided for, modified or denied by another provision of this chapter” (Tax Law § 2006 [4]).

The Division of Taxation is authorized to issue a notice and demand for payment of sales

and use taxes due “in cases of mathematical or clerical errors or failure to pay the tax due shown on the return” (Tax Law § 173-a [3] [c]). The authorization to issue such a notice and demand “shall be construed as specifically denying and modifying the right to a hearing with respect to any such notice” and “[a]ny such notice shall not be construed as a notice which gives a person a right to a hearing [in the Division of Tax Appeals]” (*id.*).

The Division of Taxation is also authorized to issue a notice and demand for payment of sales and use taxes due for tax “which has been finally determined to be due or which has been finally and irrevocably fixed” (Tax Law § 173-a [3] [b] [1]). Such a final and irrevocable fixing of tax occurs when a person liable for collection or payment of tax files with the Division a signed statement in writing consenting to such liability (*see* Tax Law § 1138 [c]); 20 NYCRR 535.2 [c] [2]). A taxpayer’s signature on the consent portion of a statement of proposed audit change (form AU-346) is a consent pursuant to Tax Law § 1138 (c) that results in the final and irrevocable fixing of tax (*see Matter of SICA Elect. & Maintenance Corp.*, Tax Appeals Tribunal, February 26, 1998). By consenting to an assessment of tax in this manner, a taxpayer gives up its right to a prepayment hearing in the Division of Tax Appeals (*see Matter of Brewsky’s Goodtimes Corp.*, Tax Appeals Tribunal, February 22, 2001).¹

In this case, petitioner sought to obtain a prepayment hearing in the Division of Tax Appeals with regard to two notices and demands. Pursuant to the foregoing discussion, petitioner’s right to such a hearing is specifically denied by other provisions of the Tax Law. Accordingly, the Division of Tax Appeals is without jurisdiction to hear and determine this

¹ The taxpayer retains its right to protest by paying the liability and filing a refund claim pursuant to Tax Law § 1139 (*see Matter of Brewsky’s Goodtimes Corp.*).

matter (*see Matter of Chait*, Tax Appeals Tribunal, April 22, 2010; *see also Matter of PC Touch Services Inc.*, Tax Appeals Tribunal, August 23, 2012).

We note that, while petitioner may have been entitled to a hearing to address its contention that the notices and demands were invalid, it was incumbent upon petitioner to provide evidentiary support for such contention (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980][unsubstantiated allegations or assertions are insufficient to defeat a summary judgment motion]). Petitioner submitted nothing in response to the notice of intent to dismiss petition. Hence, its position is unsubstantiated and thus we do not address this argument.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of River Barrel, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of River Barrel, Inc. is dismissed with prejudice.

DATED: Albany, New York
August 18, 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