STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MARIO PUGLIESE	:	DECISION DTA NO. 827843
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 March 1, 2005 through August 31, 2009.	:	

Petitioner, Mario Pugliese, filed an exception to the determination of the Administrative Law Judge issued on July 20, 2017. Petitioner appeared by Duke, Holzman, Photiadis & Gresens LLP (Gary M. Kanaley, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Oral argument was heard in Albany, New York, on February 15, 2018, 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 petitioner is entitled to a hearing on the merits for the sales tax quarter ending August 31, 2009.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for findings of fact 3, 12 and 14, which we have modified to more fully reflect the record. The Administrative Law Judge's findings of fact and the modified findings of fact appear below.

1. The Division of Taxation (Division) issued a notice of determination, L-041450142, dated June 11, 2014, to petitioner, Mario Pugliese, as a responsible officer for The Ridge, Inc., assessing additional sales and use taxes in the amount of $58,800.11, plus penalties and interest for the period March 1, 2005 through August 31, 2009.

2. The notice of determination asserted fraud penalties against petitioner pursuant to Tax Law § 1145 (a) (2).

3. The Division brought a motion dated March 10, 2017, seeking dismissal of the petition and summary determination in its favor pursuant to Tax Law § 2006 (6) and 20 NYCRR 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. In support of its motion, the Division submitted, among other documents, the following: (i) the affidavit of Robert A. Maslyn, Esq., dated March 10, 2017; (ii) an affidavit, dated March 6, 2017, of Mary Ellen Nagengast, a Tax Audit Administrator I and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a "Certified Record for Presort Mail - Assessment Receivable" (CMR) postmarked June 11, 2014; and (iv) an affidavit, dated March 7, 2017, of Melissa Kate Koslow, a Head Mail & Supply Clerk in the Division's mail room.

4. The Division states that it has no record of petitioner ever filing a New York State personal income tax return, form IT-201, or any other application other than the refund that is the subject of this proceeding. The Division affirms that the address provided for petitioner during the audit of the corporation (i.e. The Ridge, Inc.), is the same address as is listed in the petition

herein, as well as the address listed for petitioner on the power of attorney form. Petitioner does not dispute that this address is the correct address.

5. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date is manually changed on the first and last page of the CMR. In addition, as described by Ms. Nagengast, generally all pages of the CMR are banded together when the documents are delivered into possession of the United States Postal Service (USPS) and remain so when returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

6. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and PO Address."

7. The June 11, 2014 CMR consists of 30 pages and lists 319 certified control numbers along with corresponding assessment numbers, names and addresses. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated June 11, 2014 to each page of the CMR and also wrote his or her initials on each page thereof. Page 27 of the CMR indicates that a notice of determination, assigned certified control number 7104 1002 9730 0245 1127 and assessment number L-041450142, was mailed to petitioner at the Lewiston, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

8. The affidavit of Melissa Kate Koslow, a supervisor in the mail room since April 2010 and currently a head mail and supply clerk, describes the mail room's general operations and procedures. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Ms. Koslow confirms that a mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheet and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The first and last pieces listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the information contained on the CMR. Each of the CMRs has been stamped "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas." A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR, indicating receipt by the post office. The USPS employee initialed each page of the CMR and affixed a postmark

to each page. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. A review of the June 11, 2014 CMR indicates that the USPS employee complied with this request by circling the number of pieces received.

9. According to the Koslow affidavit, the subject notice was mailed to petitioner on June 11, 2014, as claimed.

10. Petitioner failed to timely request a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) or to timely file a petition with the Division of Tax Appeals with respect to the notice.

11. On or about January of 2016, the amount of $212.82 was paid and applied to the outstanding liability of unpaid sales tax determined to be due. The amount of $212.82 represents the tax assessed against petitioner for the sales tax quarter ending August 31, 2009.

12. Petitioner subsequently filed a claim for refund in the amount of $212.82. By letter dated June 2, 2016, the Division advised petitioner that the "refund claim is being returned to you per Regulation Section 534.1 (b)(2) [20 NYCRR 534.1 (b) (2)]." The letter then quoted 20 NYCRR 534.1 (b) (2) (i), which states that a person who has had an opportunity for a hearing as provided under Tax Law § 1138, is not entitled to a refund of any portion of the amount determined due pursuant to that section.

13. Petitioner filed a request for a conciliation conference with BCMS contesting the refund denial. A conciliation order dismissing request, CMS No. 271302, dated August 12, 2016, dismissed the request for a conciliation conference for being untimely filed. The conciliation order dismissing request stated that the notice of determination was issued on June

11, 2014, but the request for conciliation conference was not filed until July 28, 2016, which was in excess of the 30 days required.

14. Petitioner timely filed his petition with the Division of Tax Appeals, on September 6, 2016. The petition references notice of determination number L-041450142, but specifically contests the denial of his refund claim of $212.82. The petition contends that the conciliation order dismissing request improperly stated that petitioner's request for conciliation conference was untimely; that such request was filed with respect to the refund denial; and that petitioner has the right to protest the refund claim denial. The petition also asserts that petitioner was out of the country when the notice of determination was issued and therefore was unable to file a timely protest of that notice.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Given the conciliation order dismissing request and the evidence and arguments of the Division in support of its motion, the Administrative Law Judge first addressed whether petitioner's request for conciliation conference was a timely filed protest of the June 11, 2014 notice of determination. The Administrative Law Judge noted that there is a 30-day statutory limitations period for filing a protest of a notice of determination that asserts a fraud penalty. The Administrative Law Judge further noted that where the timeliness of a protest is at issue, the Division bears the burden of establishing that it properly issued the notice by mailing the document to the taxpayer's last known address using certified mail. The Administrative Law Judge concluded that the Division met its burden here and established that the subject notice of determination was properly mailed to petitioner on June 11, 2014.

Next, in light of the specific protest set forth in the petition (***see*** finding of fact 14), the Administrative Law Judge addressed whether petitioner is entitled to a hearing on the denial of his claim for refund. The Administrative Law Judge determined that, pursuant to Tax Law § 1139 (c), petitioner was required to pay the full amount of the tax asserted in the notice of determination in order to claim a refund.

The Administrative Law Judge thus granted the motion for summary determination and denied the petition.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner contends that he is entitled to a hearing on the merits for the sales tax quarter ended August 31, 2009, with respect to which he has paid the amount of tax assessed, exclusive of penalty or interest. Petitioner seeks to distinguish ***Matter of SICA Elec. & Maintenance Corp.*** (Tax Appeals Tribunal, February 26, 1998) and ***Matter of Brewsky's Goodtimes Corp.*** (Tax Appeals Tribunal, February 22, 2001), upon which the Administrative Law Judge relied in concluding that petitioner was required to pay the full amount of the liability asserted in the June 11, 2014 notice of determination in order to claim a refund. Petitioner notes that the taxpayers in those cases consented to the tax assessed against them pursuant to Tax Law § 1138 (c), thereby rendering their liability fixed and final. Petitioner notes that he did not execute such a consent and asserts that, as a consequence, the assessment against him was neither fixed nor final and that he remains entitled to a hearing on the portion of the assessment he paid. Petitioner asserts that the Division's regulations, specifically 20 NYCRR 534.1 (b) (2) (ii), provide for such a hearing.

The Division contends that the assessment against petitioner was fixed and final because he failed to timely request a conciliation conference or a file a petition with the Division of Tax

Appeals. Hence, according to the Division, petitioner has no protest rights with respect to the assessment. The Division contends that the right to challenge a fixed and final assessment is limited to those instances where a taxpayer signs a consent pursuant to Tax Law § 1138 (c), which is not the case here. The Division notes that, as the assessment was fixed and final, petitioner was not allowed to file a refund claim and that the Division did not deny his claim, but rather rejected it as "not allowable."

Alternatively, the Division contends that, in order to file a claim for refund, a taxpayer must pay the full amount assessed, and not a portion of that amount, as petitioner here has done.

OPINION

We note first that the jurisdictional question of the timeliness of petitioner's protest is not at issue in this matter. Petitioner's request for conciliation conference and petition were filed in protest of the refund claim denial letter dated June 2, 2016 and not the June 11, 2014 notice of determination.[1] There is no question that such request and petition were timely filed within 90 days of the denial letter and the conciliation order, respectively (***see*** Tax Law §§ 1139 (b) and 170 [3-a] [a]).[2]

Tax Law § 1139 generally permits the refund of sales tax, penalty or interest that is erroneously, illegally or unconstitutionally collected or paid, subject to certain conditions. The Division asserts that petitioner has failed to meet two of these conditions.

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[1] Notwithstanding language in the June 2, 2016 letter indicating that petitioner's refund claim was being "returned" (***see*** finding of fact 12), the letter clearly communicates the Division's decision to deny the claim. The Tax Law does not provide the Division with the option of "returning" a filed refund application as a final resolution of a refund claim, but rather requires the Division to either grant or deny the claim, in whole or in part (Tax Law § 1139 [b]).

[2] As neither the request for conference nor the petition protested the June 11, 2014 notice of determination, the 30-day limitations period applicable to protests of statutory notices that assert fraud penalties and the attendant rules regarding expedited hearings are not relevant to the present matter (***see*** Tax Law §§ 2008 [2] [a]; 170 [3-a] [h]).

Specifically, and as noted, the Division contends that petitioner has no right to claim a refund of any part of the assessment because he failed to contest the June 11, 2014 notice of determination by timely requesting a conciliation conference or filing a petition. The Division asserts that the tax, interest and penalty assessed in the notice became "fixed and final" upon such failure, and that, accordingly, petitioner's refund claim must be denied.

The Division's position on this point appears to rely on a previous sales tax refund statutory scheme that provided that a taxpayer "shall not be entitled to a refund . . . of a tax, interest or penalty which had been determined to be due pursuant to [Tax Law § 1138] where all opportunities for administrative and judicial review . . . have been exhausted with respect to such determination" (Tax Law former § 1139 [c]). In other words, a taxpayer who received a notice of determination and failed to timely file an administrative protest had no recourse with respect to the liability. Consistent with this provision, Tax Law former § 1138 (a) (1) provided that the tax, interest and penalty asserted in a notice of determination became "finally and irrevocably fix[ed]" upon a taxpayer's failure to timely file an administrative protest.

These provisions were amended, however, in 1996, effective for taxable years beginning on or after January 1, 1997 (***see*** L 1996, c 267). Specifically, the 1996 enactment removed from Tax Law § 1139 (c) the language expressly prohibiting sales tax refunds following the issuance of a notice of determination and a failure to timely protest as quoted above. The 1996 amendment also changed the language in Tax Law § 1138 (a) (1), which had provided that a notice of determination "shall finally and irrevocably fix the tax" if not protested, to "the notice shall be an assessment [of the amount specified therein]" if not protested.

The changes made to the law in 1996 thus clearly reveal a legislative intent to remove the blanket prohibition on refunds following the issuance of a notice of determination and

subsequent failure by the taxpayer to pursue administrative review. Accordingly, we reject the Division's contention that petitioner's refund claim herein must be denied simply because it was filed after petitioner failed to protest the notice of determination.[3]

The Division also contends that a taxpayer's right to a refund following the issuance of a notice of determination under Tax Law § 1138 first requires payment of the full amount assessed, and not a portion of that amount, as petitioner here has done. We agree.

Tax Law § 1139 (c) provides the following with respect to the granting of a refund subsequent to the issuance of a notice of determination:

> "No refund or credit shall be made of a tax, interest or penalty paid after a determination by the commissioner made pursuant to section eleven hundred thirty-eight [i.e., a notice of determination] unless it be found that such determination was erroneous, illegal or unconstitutional or otherwise improper, by the division of tax appeals pursuant to article forty of this chapter or by the commissioner of his own motion, or in a proceeding for judicial review provided for in section two thousand sixteen of this chapter, in which event a refund or credit shall be made of the tax, interest or penalty found to have been overpaid."

This language distinguishes between refunds made following a determination under Tax Law § 1138 and other refunds. As noted previously, such other refunds shall be made if tax, penalty or interest has been erroneously, illegally or unconstitutionally collected or paid (Tax Law § 1139 [a]). In contrast, Tax Law § 1139 (c) requires a finding that the notice of determination was erroneous, illegal or unconstitutional before a refund of tax, penalty or interest can be made. Such language indicates that the entire determination must be reviewed for error and thus recognizes that a refund claim made following the issuance of a notice of determination

[3] We observe that section 534.1 (b) (2) (i) of the Division's regulations (20 NYCRR 534.1 [b] [2] [i]), which was referenced in the June 2, 2016 refund denial letter (***see*** finding of fact 12), appears to reflect the pre-1997 state of the Tax Law with respect to a refund claim made following the issuance of a notice of determination. Petitioner has not contested the validity of this regulation and thus we do not address it herein.

is, necessarily, a protest of that assessment. Under such circumstances, the entire amount of the assessment must be paid before a refund of any part of the assessment may be granted.

We find no statutory support for petitioner's contention that payment of tax due for one reporting period within an assessment is sufficient to entitle petitioner to an administrative hearing on the merits for that one period. Such a rule would permit taxpayers who have failed to make a timely prepayment protest of a notice of determination to take a piecemeal approach to overturning the assessment. In our view, petitioner's contention is contrary to the statute.

Consistent with our interpretation of Tax Law § 1139 (c), the legislative history of L 1996, c 267 indicates a clear understanding that, while the bill would permit refunds following the issuance of a notice of determination and subsequent failure by the taxpayer to pursue administrative review, full payment of the assessment would be required before a refund could be granted. The State Senate's Introducer's Memorandum in Support states that the legislation "[a]mends Section 1139 of the tax law to permit a taxpayer who has defaulted in making a petition to contest a Notice of Determination *and who had paid the outstanding liability assessed therein*, to request a refund" (New York State Senate Introducer's Memorandum in Support, Bill Jacket [at p 4], L 1996, c 267 [emphasis added]). Similarly, in a letter in support of the bill, the State Assembly sponsor wrote that "[a] hearing on the merits after 90 days *would require payment in full by the taxpayer* in advance of such a hearing" (Assemblymember Paul Harenberg, Letter in support to Governor George Pataki, June 26, 1996, Bill Jacket [at p 8], L 1996, c 267 [emphasis added]). In a similar letter, the State Senate sponsor wrote that "the bill makes the taxpayer's right to a hearing *conditioned upon the timely payment of the sales tax determined to be due by the Department*" (Senator Owen H. Johnson, Letter in support to Governor George Pataki, June 26, 1996, Bill Jacket [at p 3], L 1996, c 267 [emphasis added]).

Our statutory interpretation is also consistent with the treatment of a taxpayer who executes a written consent to a determination or proposed determination pursuant to Tax Law § 1138 (c). Such taxpayers must pay the full amount of an assessment in order to receive a refund in connection therewith (***see*** 20 NYCRR 534.2 [b] [1] [iii]; ***Matter of SICA Elec. & Maintenance Corp.***; ***Matter of Brewsky's Goodtimes Corp.***). Petitioner's position in the present matter is similar to a taxpayer who signs such a consent. Like the consenting taxpayer, petitioner seeks a refund following action taken by the Division to determine liability. Also like the consenting taxpayer, petitioner had an opportunity for a prepayment hearing to determine liability. From a policy perspective, such similar circumstances justify similar treatment and clearly do not justify, as petitioner proposes, the significant advantage of permitting a partial payment and partial refund for a taxpayer who fails to timely contest a notice of determination.

Finally, we reject petitioner's contention that 20 NYCRR 534.1 (b) (2) (ii) provides for a hearing on the merits under the present circumstances. As the language of that regulation essentially mirrors that of Tax Law § 1139 (c), we find that the regulation, like the statute, precludes a hearing on the merits under the present circumstances.

As noted, the Administrative Law Judge's determination granted a motion for summary determination brought by the Division. Such a motion is properly granted if there are no material and triable issues of fact presented and, therefore, a determination may be issued, as a matter of law, in favor of either party (20 NYCRR 3000.9 [b] [1]).

There are no material or triable issues of fact related to the amount paid by petitioner on the assessment. Accordingly, pursuant to the foregoing discussion, we conclude that the Division's motion for summary determination is properly granted, as a matter of law, because

petitioner has not paid the full amount of the assessment as required under Tax Law § 1139 (c) to obtain a refund.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Mario Pugliese is denied;

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

3. The petition of Mario Pugliese is denied; and

4. The refund claim denial letter, dated June 2, 2016, is sustained.

DATED: Albany, New York
July 12, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner