STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NEW CINGULAR WIRELESS PCS LLC	:	DETERMINATION DTA NO. 825318
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 November 1, 2005 through September 30, 2010.	:	

Petitioner, New Cingular Wireless PCS LLC, 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 the period November 1, 2005 through September 30, 2010.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel), brought a motion, dated July 8, 2013, seeking summary determination in the above-captioned matter pursuant to Tax Law § 2006(6) on the ground that petitioner is not entitled to a refund of monies erroneously, illegally or unconstitutionally paid since it never refunded the tax paid to it by its customers or established a substantive right to a refund. Petitioner appeared in opposition to the motion by its representative, Margaret C. Wilson, Esq., and brought a cross-motion for partial summary determination based on petitioner's belief that there is no material issue of fact as to the sales tax refund due and owing to petitioner. The parties completed their submissions by April 28, 2014, which date began the 90-day period for issuance of this determination.

After due consideration of the motion and cross-motion, the supporting affirmation of

Robert A. Maslyn, Esq., and the exhibits attached thereto, the affidavit of Margaret C. Wilson, Esq., and the exhibits attached thereto, the Division of Taxation's Memorandum of Law, petitioner's Memorandum of Law, the affidavits of Linda A. Fisher, Richard Graf and Julia Rubenstein, and all the pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation (Division) or petitioner has demonstrated that there is no material issue of fact such that, as a matter of law, a determination may be made in favor of either party.

FINDINGS OF FACT

1. New Cingular Wireless PCS LLC (ATTM) is a Delaware limited liability company having its principal place of business in Atlanta, Georgia. ATTM provides Internet access services enabling its customers to use wireless devices, such as smart phones and laptops, to access the Internet. The Internet access services that ATTM sells are separate and distinct from other telecommunications services it provides.

2. Between November 1, 2005 and September 7, 2010 (refund claim period), ATTM billed and collected from New York customers sales tax on charges for Internet access services, which both parties agree was erroneous. All such taxes collected were remitted by ATTM to the Division.

3. In 2009, 54 separate class action lawsuits were filed on behalf of ATTM's customers in 44 states alleging that ATTM had improperly charged them taxes on Internet access service. The Judicial panel on Multidistrict Lititgation consolidated those lawsuits in the United States

District Court for the Northern District of Illinois as ***In re: AT&T Mobility Wireless Date Services Tax Litigation*** (MDL No. 2147 [ND Ill]).

4. On June 2, 2011, the Honorable Amy J. St. Eve granted final judicial approval to the Global Settlement Agreement between ATTM and a national settlement class with state specific sub-classes, including a New York sub-class, consisting of current and former customers that paid tax on charges specific to Internet access service for the refund claim period.

5. For taxing jurisdictions like New York, the Global Settlement Agreement required ATTM to file a refund claim seeking the refund of sales tax on Internet access services for the benefit of the impacted customers. Importantly, the Federal District Court noted that the settlement did not purport to dictate to any state the substance of its laws with regard to refunds or refund procedure. (***In re AT&T Mobility Wireless Data Services Sales Tax Litigation***, 789 F Supp 935, 983 [ND Ill 2011].)

6. By the express terms of the Global Settlement Agreement, each settlement class member consented to ATTM's filing of the claim for refund of Internet taxes erroneously collected, payment of the refund by the taxing authority to petitioner or directly to the court's escrow account, and the distribution of the net settlement fund to the customers by the escrow agent under the supervision of the court.

7. Per the agreement, ATTM assigned all of its rights, title and interest in any refund it received to the settlement class of customers.

8. The Global Settlement Account ensures that ATTM pays over any amounts refunded by the Division to its customers, first by establishing different escrow subaccounts (e.g. a New York specific subaccount) for the purpose of receiving funds specific to each taxing jurisdiction that

issues a refund or future tax credit. For those jurisdictions that issue a cash refund to ATTM, the agreement requires ATTM to seek to have the taxing jurisdiction refund monies directly to the escrow subaccount specific to that taxing jurisdiction. If the taxing jurisdiction issues the refund directly to ATTM, ATTM must transfer all refund monies it receives to the escrow subaccount specific to that taxing jurisdiction within seven days of receipt.

9. Where the taxing jurisdiction issues a future tax credit, the agreement requires ATTM to pay the full amount of the credit into the escrow subaccount for the specific taxing jursidiction within 14 days of receiving the notification of future tax credit.

10. ATTM's customers agreed that the funding of jurisdiction specific escrow subaccounts constitutes a repayment of erroneously collected taxes to the customers by ATTM.

11. Once a jurisdiction specific escrow subaccount is funded, the federal court is asked to approve the distribution of the funds in the account to the appropriate customer subclass. Upon receiving the distribution order from the settlement administrator, the escrow agent will transfer monies to an acceptable payment account from which payments to class members shall be made. Any checks returned by the United States Postal Service as undeliverable and with no forwarding address will be transferred into an escheat account under the jurisdiction of the federal court. When requested on behalf of a particular state, the District Court has entered an order providing that such funds will be repaid to the state pursuant to its escheat laws. Through these processes, the agreement sought to ensure that 100 percent of any amount that ATTM receives through refund or future tax credit is returned to ATTM's customers for the taxing jurisdiction.

12. The agreement also provides that, when a taxing jurisdiction, like New York, requires ATTM to refund the erroneously collected tax to its customers prior to the taxing jurisdiction

granting and/or paying a refund to ATTM, ATTM must fund a pre-refund escrow fund for class members. The agreement states:

> In order to effectuate the provisions of this Settlement Agreement, each Settlement Class Member agrees that, for purposes of satisfying the requirement of any Taxing jurisdiction, that AT&T Mobility refund taxes to the affected customers prior to granting or paying a refund claim, the payment by AT&T of an amount representing Internet Taxes paid by that Settlement Class member into the Pre-Refund Escrow Fund will be considered the payment by AT&T of such taxes to such Settlement Class Member. (Global Class Action Settlement Agreement, section 8.7.)

13. ATTM never made payments to a pre-refund escrow fund established under Section 8.7 of the Global Class Action Settlement Agreement.

14. The settlement agreement further provides that if the pre-refund escrow fund has been funded, once ATTM receives a refund from New York, the refund will be placed in the New York escrow subaccount and the funds previously deposited in the pre-refund escrow fund by ATTM will be returned to ATTM.

15. Following the Division's issuance of its denial of petitioner's refund application on August 6, 2012, ATTM and the settlement class entered into a "clarifying" agreement, dated September 9, 2013, officially titled the Agreement Regarding Payment to New York Escrow Account Under Global Class Action Settlement Agreement. This agreement provided that any payments made by ATTM to either the New York escrow account or the pre-refund escrow account are considered payments made to the settlement class and that said funds so deposited are to be used to make refunds and should be considered refunds to the settlement class at the moment they are deposited in the accounts. The agreement also provided that if the State of New York agrees that a refund will be granted, that the amount of the refund is fixed; that the only prerequisite for payment of the refund to ATTM is the payment of the refund amount to the

settlement class; and that a payment of the refund amount by ATTM to either of the escrow accounts satisfies the Global Settlement Agreement and Tax Law § 1139(a) and 20 NYCRR 534.2. At that point, ATTM will pay an amount equal to the refund amount into the New York escrow account. Such payment by ATTM will be subject to the Division agreeing to issue ATTM a refund of money or future credit in the refund amount within one day of the payment made by ATTM. In the alternative, if the foregoing conditions cannot be met, then ATTM will deposit a sum of money into the pre-refund escrow fund pursuant to the terms in the Global Agreement. When New York issues a refund or credit in full or partial satisfaction of the Internet tax refund claim (approved amount), funds equaling the approved amount will be transferred from the pre-refund escrow fund to the New York escrow account. Any shortage will be made up by ATTM and any excess amount remaining in the pre-refund escrow fund will be distributed to ATTM.

16. Although petitioner has not made a payment into any escrow fund, the clarification agreement states that it is ready to do so if the Division will concede that such a deposit will satisfy the repayment requirement of Tax Law § 1139(a).

17. Linda A. Fisher is the current Director of Transaction Tax Operations for an affiliate of ATTM. Her responsibilities include, and have included, accounting for and remittances of transaction taxes for all business units and affiliates of AT&T Mobility LLC, including New Cingular Wireless PCS. She was responsible for compiling aggregate and customer-specific data used for preparing the refund claim filed herein.

18. In her affidavit, Ms. Fisher stated that the refund amount was derived from individual billing records, first determining whether its New York customers were charged for Internet

access by examining which service order codes and feature codes were used in various billing plans for stand-alone sales, then by parsing customer billing records to determine which customers had purchased services under those codes. PriceWaterhouseCoopers was engaged to review and test the data analysis. During the testing, other combinations of codes were identified, on which taxes had been charged, collected and remitted.

19. Once the customers who purchased Internet access had been identified, the full amount of sales tax billed was computed. ATTM determined the amount reflected on the refund claim for the refund period to be $103,137,913.66, after adjustments from the original claimed amount of $107,074,142.31.

20. On November 9, 2010, ATTM submitted a claim for refund by certified mail seeking a refund of sales tax or credit in the sum of $107,074,142.31 plus interest. The claim included a detailed statement in support, a DVD with data purportedly identifying each customer charged New York sales tax on charges specific to Internet access service, the total amount each customer was charged and a separate listing of the total monthly amounts of sales tax billed on Internet access for each month of the refund period. This claim was assigned claim number 2010-11-0472 by the Division.

In the statement of support, ATTM noted that the settlement class acknowledged that its members already received payment of refund amounts sought in the refund claim by virtue of ATTM's assignment of its refund rights to the settlement class and its obligations under the Global Settlement Agreement to transfer all refunds received to the settlement class. Further, the settlement class waived any requirement that ATTM pay them cash refunds prior to obtaining a refund from the taxing jurisdiction. ATTM made no other statement with its claim for refund

that it had repaid or refunded any of the subject sales tax to its New York customers.

21. On or about March 28, 2011, ATTM notified the Division of adjustments in the amount of the refund sought, claiming an additional amount of $2,188,524.33 and a reduction in the refund claim of $378.65 for New York customers who opted out of the Global Settlement Agreement. The net claim became $109,262,287.99 and was assigned a second claim number, 2011-05-0712.

22. By letter, dated June 15, 2012, petitioner reduced its claim to account for removal of tax associated with "certain charges" determined to be taxable and changes in billing codes, warranting a reduction in the refund claimed of $3,223,689.40. In addition, in the same letter, petitioner suggested a 1.5% reduction in the claim due to bad debts. The percentage was suggested based upon historical records of ATTM that indicate the rate of bad debts typically encountered in each jurisdiction by month.

23. Subsequent to the claims for refund and petitioner's modifications, the Division audited the claim and examined the documentation submitted therewith. The Division concluded that, in order to approve the refund, two reconciliations needed to be made. The first is whether the amounts due to each customer are correct, i.e., that documentation indicate the actual overpayment by each customer. The second is whether the refund sought is properly attributed to the correct locality, allowing the Division to recapture the tax from the proper locality.

24. The financial data submitted by petitioner in support of its refund claim was reviewed in detail and determined to be insufficient to conduct the above reconciliations or complete an audit adequate to determine if the refund amount was accurate. This review took place between November 2010 and August 2012.

25. On August 6, 2012, the Division denied the refund claims for the refund period November 1, 2005 through September 30, 2010, i.e., 2010-11-0472 and 2011-05-0712. The refund amount listed on the denial was $109,262,287.99, the highest of all the claims made by petitioner.

26. The Division's denial letter cited three reasons for the denial:

> (A) Section 1139(a) of the Sales and Use Tax Law makes it clear that in order for a vendor to be eligible for a refund of taxes collected erroneously from their customers, the vendor must show that such sales tax was repaid to the customer. The Division also stated that, based on the information and documentation submitted, ATTM was not eligible to make a claim for refund of taxes paid on behalf of its customers for failing to reimburse the customers.
>
> (B) The documentation submitted did not allow the Division to determine how the refund amounts were calculated.
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> (C) The refund claim appeared to include claims made on behalf of customers that have opted not to participate in the Global Settlement Agreement.

27. Following the denial of petitioner's refund application in August of 2012, petitioner and the Division continued to pursue a resolution of their differences to no avail.

CONCLUSIONS OF LAW

A. A motion for summary determination may 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. Section 3000.9(c) of the Rules of Practice and Procedure provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

eliminate any material issues of fact from the case" (***Winegrad v. New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 317 [1985], ***citing Zuckerman v. City of New York***, 49 NY2d 557, 562, 427 NYS2d 595, 598 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (***Glick & Dolleck v. Tri-Pac Export Corp.***, 22 NY2d 439, 441, 293 NYS2d 93, 94 [1968]; ***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572, 536 NYS2d 177 [1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (***Gerard v. Inglese***, 11 AD2d 381, 206 NYS2d 879 [1960]). "To defeat a motion for summary judgment, the opponent must . . . produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim'" (***Whelan v. GTE Sylvania***, 182 AD2d 446, 449, 582 NYS2d 170, 173 [1992] citing ***Zuckerman***). It is determined, based on the analysis below, that this matter is ripe for summary determination.

C. ATTM erroneously billed, collected and remitted NewYork sales tax on its sales of Internet access services during the audit period. As part of a Global Settlement Agreement with the aggrieved customers, the settlement class, ATTM agreed to reimburse those who paid tax on Internet access services. As the vendor of the services who charged, collected and remitted the tax, it was the proper party to request a refund of the monies or credit to which it could establish an entitlement.

D. Tax Law § 1139(a) provides that:

> [t]he tax commission shall refund or credit any tax, penalty or interest erroneously . . . collected or paid if application therefor shall be filed with the tax commission . . .

(ii) . . . within three years after the date when such amount was payable under this article . . . . 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 regulation as it may prescribe, that he has repaid such tax to the customer.

The regulation promulgated pursuant to Tax Law § 1139(a), 20 NYCRR 534.2, prescribed the form of the application, which included a certification by the applicant and evidence satisfactory to the Department of Taxation and Finance that the applicant had refunded the tax to its customer. (20 NYCRR 534.2[h]; 534.8[a].) It also required that the application contain a full explanation of the facts on which the claim was based, including substantiation of the basis for and the amount of the claim. (20 NYCRR 534.2[h].)

The facts presented on the motion and cross-motion for summary determination are clear and do not establish that ATTM ever repaid the sales tax it erroneously collected from its customers and, therefore, the denial of its refund claim was proper.

E. Petitioner contends that the Division's denial of its refund application was based on a misinterpretation of Tax Law § 1139(a) because the refund denial letter stated that petitioner was not eligible to make a *claim* for refund without first reimbursing the sales tax paid by those customers. There is no question that petitioner was entitled to make a claim for refund and the Division's inference of an eligibility requirement that was not contained in the statutory language created unnecessary confusion. However, the Division may have been relying on the regulation at 20 NYCRR 534.8(a)(2), which provides:

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.

To the extent that this regulation requires the payment of the tax before one is eligible to

make a *claim* for refund, it exceeds the scope and intent of Tax Law § 1139 (the statute under which it was promulgated) and is invalid. (***Matter of Slattery Assocs. v. Tully***, 79 AD2d 761, ***affd***, 54 NY2d 711[1981]; ***Matter of Jones v. Berman***, 37 NY2d 42 [1975] [stating the Division has no authority to create a rule out of harmony with the statute]; ***Matter of Greig***, Tax Appeals Tribunal, September 16, 1999.)

The first sentence of the same paragraph in the denial letter, in which it deemed petitioner ineligible to make a claim, clearly states the basis of the denial consistent with the statute: "Section 1139(a) of the Sales and Use Tax Law makes it clear that in order for a vendor to be eligible for a refund of taxes collected erroneously from their customers, the vendor must show that such sales tax was repaid to the customer." Since petitioner has not repaid the tax to its customers, it has not fulfilled the requirements of Tax Law § 1139(a) and is not entitled to the refund.

Although petitioner has raised a contrary statutory interpretation, it is not persuasive in light of the clarity and unambiguous nature of the statutory provisions, which can and should be read literally. Petitioner's argument that its reimbursement of the tax collected should not be required is based on its concern that it may refund the wrong amounts and incur expense. Petitioner wants an assurance from the Division of the accuracy of the amounts it proposes to refund to its customers. While this may be more advantageous for petitioner, it is far beyond the clear and simple language of the statute and there is no authority for granting such relief. The timing of the reimbursement of petitioner's customers and the Division's refund to petitioner is clearly set out in Tax Law § 1139(a) and none of petitioner's arguments can change the plain language therein.

Further, it is curious that petitioner at once claims that it has impeccable and accurate

records of all tax collected from its customers in the New York class, yet it will not rely on them to make any payment to its customers or into any of the court ordered escrow accounts, particularly the pre-refund escrow account, established by the Global Settlement Agreement.

Statutory rules of construction provide that "[t]he legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction" (McKinney's Cons Laws of NY, Book 1, Statutes § 94). Where the statute is clear, the courts must follow the plain meaning of its words, and "there is no occasion for examination into extrinsic evidence to discover legislative intent . . ." (McKinney's Cons Laws of NY, Book 1, Statutes § 120; ***see Matter of Raritan Dev. Corp. v. Silva***, 91 NY2d 98, 667 NYS2d 327 [1997]; ***Matter of Schein***, Tax Appeals Tribunal, November 6, 2003). Where, as here, words of a statute have a definite and precise meaning, it is not necessary to look elsewhere in search of conjecture so as to restrict or extend that meaning (***Matter of Erie County Agricultural Society v. Cluchey***, 40 NY2d 194, 386 NYS2d 366 [1976]). As the language of the statute is clear, it is appropriate to interpret its phrases in their ordinary, everyday sense (***Matter of Automatique v. Bouchard***, 97 AD2d 183, 470 NYS2d 791 [1983]).

Here, petitioner has never reimbursed the tax collected from customers to those customers and, therefore, the Division, by statute, shall not issue a refund to it.

F. Petitioner argues that the Division's reference to its ineligibility to even make a claim for a refund indicated that the Division did not consider its claim at all, i.e., audit the substantiating documentation provided or confirm that each of the required elements of the application were provided. (20 NYCRR 534.2[a][2].) However, the affidavits of Richard Graf, Tax Auditor III,

and Julia Rubinstein, Data Processing Fiscal Systems Auditor II, demonstrate that the Division considered petitioner's claim for refund with care and that an audit was performed in an effort to justify the refund amounts claimed by petitioner for each customer. Between November 2010 and August 2012, 21 months, the Division worked to reconcile the records provided, but ultimately concluded that the substantiation provided was not adequate.

However, as discussed above, this did not remove petitioner's obligation to reimburse its customers before any refund would be made. Quite possibly, had petitioner made the reimbursement to its customers, a refund would have been issued, if, and to the extent, petitioner was able to carry its burden of proving its entitlement to a specific amount.

G. As recited in the facts, petitioner entered into a Global Settlement Agreement, approved on June 2, 2011, with a national Settlement Class with state specific sub-classes, including a New York sub-class, consisting of current and former customers that paid tax on charges specific to Internet access service for the refund claim period, reported in ***In re AT&T Mobility Wireless Data Services Sales Tax Litigation***.

Petitioner argues that it has satisfied the requirement that it repay its customers because of the terms of the Global Settlement Agreement. As will be evident from the discussion below, this argument is determined to be without merit.

Most importantly, the Federal District Court stated that the settlement did not purport to dictate to any state the substance of its laws with regard to refunds or refund procedure. (***In re AT&T Mobility Wireless Data Services Sales Tax Litigation)***. Hence, the reimbursement provision in Tax Law § 1139(a) was unaffected and remained a requirement petitioner needed to meet.

The Global Settlement Agreement required ATTM to file for a refund of the sales tax erroneously collected on Internet access services for the benefit of impacted customers. The agreement provided that each member of the settlement class consented to ATTM's refund claim, the payment of the refund to petitioner or the court's escrow account and the distribution of the net proceeds to the customers by the escrow agent under the supervision of the court. ATTM assigned all its rights in the refund to the settlement class and established subaccounts for each jurisdiction. Specific to this case, a New York subaccount was established. Monies were to be refunded directly into the subaccounts by the taxing authorities or by ATTM if the taxing authority issued the refund to it. Per the agreement, members of the settlement class agreed that funding of the state specific subaccount constituted repayment of the erroneously collected tax by ATTM.

The parties to the agreement, recognizing that jurisdictions like New York required reimbursement of the erroneously collected taxes before a refund would be made, added a requirement that ATTM fund a pre-refund escrow fund for class members. Following the denial of the refund application in August 2012, the settlement class and ATTM entered into a "clarifying agreement" on September 9, 2013, which reiterated the provisions concerning the escrow accounts and added the provisions that once ATTM made a payment into either escrow account it would be considered a refund to the settlement class at the moment of deposit; that if New York agrees to issue a refund the amount would be fixed; that the only prerequisite for payment of the refund to ATTM is payment of the refund amount to the settlement class; that a payment of the refund amount by ATTM to either of the escrow accounts satisfies the Global Settlement Agreement, Tax Law § 1139(a) and the regulations thereunder. Once the monies are

deposited into the escrow accounts, the Division would issue a refund within one day. In the alternative, ATTM agreed with its settlement class to deposit "a sum" of money into the pre-refund escrow account, presumably without a definitive refund amount, and the Division would then issue a refund or credit in full or partial satisfaction of the refund claim, that amount would be transferred from the pre-refund escrow account to the New York escrow account and distributed. Any shortage would be paid by ATTM and any excess funds in the pre-refund escrow account would be distributed to ATTM.

Although the "clarification agreement" between ATTM and its settlement class raises interesting points for discussions with the Division, the fact remains that ATTM has yet to fund any escrow account with any monies. In fact, in the almost two years since the refund application was denied for failure to reimburse the sales tax erroneously collected, petitioner appears to be moving closer to a literal interpretation of the statutory language, given the provisions placed in the "clarifying agreement." At the very least, it is apparent that the parties to the Global Settlement Agreement acknowledged that repayment is required in New York before a refund would be made. This was reinforced by the terms of the "clarifying agreement."

H. Although not a binding precedent on this forum, it is noted that the Tax Court of New Jersey, in ***New Cingular Wireless PCS, LLC v. Director, Division of Taxation*** (28 NJ Tax 1 [2014]), interpreted a refund statute (NJSA 54:32B-20[a]) similar to New York's Tax Law § 1139(a) within the context of the same Global Settlement Agreement. The New Jersey Tax Court decided that the New Jersey's Division of Taxation had denied the refund claim without any consideration of whether the refund was warranted. In the New Jersey case, petitioner argued that the New Jersey Division of Taxation had precluded it from making a claim prior to

reimbursement of the erroneously collected tax. The New Jersey court agreed, holding that the New Jersey Division of Taxation had erred in not deciding the substantive validity of the refund claim and then found that the Director had acted unreasonably in rejecting the repayment procedures outlined in the Global Settlement Agreement by finding that the provisions did not satisfy the repayment provisions of the New Jersey statute.

The New Jersey decision is distinguishable from the instant action for several reasons. From the affidavits filed in this action, it was established that the Division did not take the position that ATTM did not have a right to make a claim for a refund because it had not reimbursed the tax collected erroneously. An audit of its claim indicated the substantiating documentation had been audited and was found to be inadequate. It was also determined that repayment of the tax erroneously collected had not occurred, consistent with the plain directive of Tax Law § 1139(a) and 20 NYCRR 534.2. Both reasons were stated in the refund denial letter.

The critical difference between the New Jersey case and the instant matter lies in the statutory language. The New Jersey statute, NJSA 54:32B-20(a), contains a qualifying word before the word "refund," such that it reads that repayment must be made before "actual" refund will be made. This infers that there is a timing difference placed in the New Jersey statute that does not appear in Tax Law § 1139(a). While this determination will not explore the additional language in the New Jersey statute, it does underscore the clarity of the New York statute and lends further support for the interpretation thereof herein.

Although the New Jersey court chastised the New Jersey Division of Taxation for unreasonably rejecting the repayment schemes outlined in the Global Settlement Agreement, and noted above, ATTM has never abided by the clear directives in the agreement with respect to the

funding of either the New York or pre-refund escrow funds, or the clear language of the settlement agreement that the agreement did "not purport to dictate to any state the substance of its laws" with respect to refund procedures. Instead, ATTM made a conscious decision to have the State of New York determine the amount of tax due to each of ATTM's customers (including a proper determination of localities) and fund the New York escrow account based on its determination. Petitioner essentially shifted the burden of demonstrating with accuracy the amount of tax it had collected from customers for Internet access service and never anticipated paying any monies into an escrow fund or repaying customers directly.

It is not reasonable for ATTM to expect New York, a non-party to the Global Settlement Agreement and the "clarifying" agreement, to bear the burden of assuming ATTM's responsibilities, which were clearly stated in Tax Law § 1139(a) and 20 NYCRR 534.2.

ATTM was aware of the New York Tax Law when it negotiated and entered into the Global Settlement Agreement and now faces the consequences of that decision. Petitioner's claim that the amount of the refund has been determined from precise computerized records belies its refusal to fund the escrow accounts and its demand that the Division certify the refund amount before it would do so. Further, the Division's auditors who reviewed the information submitted by ATTM in support of its refund application found several shortcomings that directly contradicted petitioner's claim of accuracy.

I. Petitioner's discussion of ***Matter of Saltzman v. NYS Tax Commn.*** (101 AD2d 910 [1984]) and ***Matter of Raemart Drugs, Inc. v. Wetzler*** (157 AD2d 22 [1990]) is of little value in the determination herein. Although the ***Saltzman*** case was liberally cited by the Division, its value lies in its reiteration of the requirements for entitlement to a refund, including repayment of

tax to the customer. Petitioner is correct in its assertion that the facts of ***Saltzman*** are inapposite. There, a small drug store had few records and its own accountant determined taxable sales by applying an arbitrary percentage to gross sales. The accountant admitted that he could not determine if tax paid to the state was more than that collected from customers. On that basis, the refund claim was denied. The ***Raemart*** case presented a different set of facts, but no less inapposite to the facts herein. Raemart kept excellent records except for its use of older registers that did not track cigarette sales, which accounted for 15% of gross receipts. The store mistakenly included cigarette sales in its gross sales even though it included tax in its unit price. It applied for a refund and the Appellate Decision granted the refund, noting the auditor's concession that the records were complete. Since the register was common to the industry, the court refused to accept the Division's argument that Raemart's failure to use a proper register was the reason for an inability to determine the tax due and the amount of the reimbursement.

Here, there has been no repayment of the tax to customers that was erroneously collected. The issue is repayment. In ***Saltzman***, the records were so poor neither the amount nor the customer could be identified. The issue was records. In ***Raemart***, the tax was paid twice and was being claimed by the vendor for the vendor. The issue was records. Here, the issue of whether the records produced by ATTM with its refund application were adequate is an ancillary issue which would only be reached had it demonstrated payment in accordance with Tax Law § 1139(a). Petitioner has made no repayment of the tax erroneously collected from its customers and has not abided by the terms of the Global Settlement Agreement, which it claims constitutes payment to its customers.

J. The Division of Taxation's motion for summary determination is granted and the denial

of petitioner's refund application, dated August 6, 2012, is sustained. Petitioner's cross-motion for summary determination is denied.

DATED: Albany, New York
July 17, 2014

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