STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
A-1 PREMIER SCAFFOLDING, LLC	:	DETERMINATION DTA NO. 825878
for Revision of a Determination or Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 2007 through November 30, 2010.	:	

Petitioner, A-1 Premier Scaffolding, 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 June 1, 2007 through November 30, 2010.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, in New York, New York, on March 3, 2015 at 10:30 A.M., with all briefs to be submitted by May 18, 2015, which date began the six-month period for the issuance of this determination. Petitioner appeared by Isaac Sternheim & Co. (Isaac Sternheim, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Michael Hall).

ISSUES

I. Whether petitioner's execution of a consent to taxes set forth on a statement of proposed audit change for sales and use taxes for the period June 1, 2007 through November 30, 2010 prohibited petitioner from filing an application for credit or refund, the denial of which entitled petitioner to challenge the audit at a hearing.

II. Whether petitioner's application for refund, filed before full payment of the tax, was valid.

FINDINGS OF FACT

1. The Division of Taxation (Division) began an audit of petitioner, an unregistered vendor, on April 30, 2010 with a letter requesting an extensive number of documents for the period March 1, 2007 through February 28, 2010 (audit period), including the following: sales tax returns; worksheets and canceled checks for taxes paid; federal and New York State corporation tax returns; a general ledger; sales invoices; exemption documentation; fixed asset purchase and sales records; expense purchase invoices; bank statements, canceled checks and deposit slips for all bank accounts; a cash receipts journal; a cash disbursement journal; and depreciation schedules. By letter dated June 10, 2011, the audit period was amended to June 1, 2007 through November 30, 2010.

2. In response to this request, the Division received some documentation but not contracts and only sporadic purchase and sales invoices for the audit period. In addition, the general ledger was never made available for either 2009 or 2010. A second request for records was made to petitioner on June 10, 2011, but no further documentation was produced.

3. The Division reviewed the incomplete sales records that indicated some rentals of scaffolding and the provision of masonry services. Bank information was used to determine gross sales for the audit period. For 2007 and 2008, bank deposits could be traced to the general ledger. For 2009 and 2010, the untraced bank deposits were used to determine gross sales.

4. Petitioner informed the auditor that it had both taxable and nontaxable sales, noting its provision of masonry services constituted capital improvements and also sales to exempt organizations. The Division utilized a test period methodology in lieu of complete records to determine a taxable percentage of sales for the quarters ended August 31, 2009 and August 31, 2010, for which the records were most complete. The test found a taxable percentage of

39.435%, which was applied to audited taxable sales for the audit period, resulting in additional taxable sales of $937,321.82 and additional sales tax due of $79,851.48. A review of capital and expense purchases revealed that petitioner paid the appropriate tax due thereon.

5. On or about May 17, 2012, based on its audit of petitioner's available records for the audit period, the Division issued to petitioner a statement of proposed audit change for sales and use tax, indicating that tax had been determined in accordance with Tax Law § 1138 in the sum of $79,851.48 plus interest of $21,116.10.

6. The statement of proposed audit change admonished petitioner that failure to agree or disagree with the findings within a month would result in a notice of determination being issued. It also advised petitioner that if it agreed that the sales tax stated thereon was due and payable to the Division, it should sign, date and return the statement to it. The executed consent had to be postmarked by June 18, 2012.

7. The consent contained on the statement of proposed audit change, signed by petitioner's representative on June 7, 2012 and returned to the Division on June 11, 2012, clearly stated in preprinted language above said representative's signature, in pertinent part, as follows:

> "I consent to the assessment of the tax and penalties, if any, and accept the determination of any amount to be credited or refunded as shown above, plus any interest provided by law. By signing this consent, I understand that: (1) I am waiving my right to have a Notice of Determination issued to me, and I am also waiving my right to have a hearing to contest the validity and amount of the tax, interest, and any applicable penalties determined and consented to. (2) If I later wish to contest the findings in this agreement, I must first pay the full amount shown due, and file an application, within the time provided by law, for a credit or refund. . . . I may consider these findings final unless I hear from the department to the contrary within 60 days after the department's receipt of this signed consent."

8. On or about June 26, 2012, following petitioner's submission of the consent to tax, the Division issued a Notice and Demand for Payment of Tax Due that referenced assessment

identification number L-038211729-3 and taxpayer identification number B-26-0464205-6. The notice stated that the tax due had been based on an audit of petitioner's records and the tax and interest were reflective of the amounts agreed to by petitioner in the statement of proposed audit change.

9. On or about July 29, 2012, $4,500.00 was paid to the Division towards assessment number L-038211729-3, associated with taxpayer identification number B-26-0464205-6, the same number referenced on the audit report, statement of proposed audit change and the notice and demand issued to petitioner herein.

10. On September 24, 2012, petitioner filed a form AU-11, application for credit or refund of sales or use tax, seeking a refund of $4,500.00 and a credit of $95,467.58 for the audit period. The application was signed by petitioner's representative on September 19, 2012. The explanation for the application was stated as follows:

> "Taxpayer was audited for the abovementioned period (Case #X059958566). The Audit Division did not realize (and neither did the representative) that scaffolding for the purpose of a capital improvement is not taxable. Taxpayer informed Mr. Richard Citron, the Team Leader during the audit, of the error. Mr. Citron agreed that a refund claim should be filed but that, since only $4,500.00 had been paid to date, the remaining amount assessed during the audit should be claimed as a credit.
>
> Note: All taxpayer's scaffolding jobs during the audit period were in conjunction with capital improvement jobs."

11. No documentation accompanied the application for credit or refund to support its explanation that all scaffolding jobs were performed in conjunction with capital improvements.

12. The Division returned the application for refund filed on September 24, 2012 because it lacked supporting documentation. Petitioner resubmitted the application on October 23, 2012 with a copy of the statement of proposed audit change attached as supporting documentation.

13. Following the submission of the second refund application, the Division sent a letter to petitioner's representative, dated December 11, 2012, requesting documentation to substantiate the refund and credit claimed. An information document request was included that asked for the following records to be submitted within 30 days: a general ledger; general journal and closing entries; sales invoices; signed sales contracts for the entire audit period; all exemption documents; bank statements; schedule of deposits relating to construction services and scaffolding rentals for the entire audit period; and copies of checks deposited.

14. When no documentation was supplied by petitioner within that time period, the Division issued a letter on January 14, 2013 stating that the refund application had been reviewed with the result that the entire amount claimed for both refund and credit, $99,967.58, was denied. In its audit report, the Division stated that the refund had been denied for the following reasons:

a. The credit of $95,467.58 was not allowable because this amount was not paid by the taxpayer.

b. Of the $4,500.00 paid to the Division, the allowable refund amount was limited to the tax paid of $3,927.51. The taxpayer did not supply any documentation to support this amount, therefore the $4,500.00 was denied in full.

15. In support of its argument that its receipts were exempt from sales and use tax, Petitioner submitted into evidence nine certificates of capital improvement, eight of which were dated for years after the audit period. Each named petitioner as the contractor and either described the project as scaffolding or construction services ancillary to other building projects, like pedestrian walkways and bridges.

Petitioner also submitted 29 pages of invoices from Certified Lumber/Boro Park Lumber & Home Center issued to petitioner for the purchase of construction supplies, tools and hardware

during the audit period. In addition, petitioner supplied three pages of invoices it issued to Industry City Associates for the rentals between April and June of 2009, which were associated with a job at 62 Imlay Street and included a charge for sales tax.

SUMMARY OF THE PARTIES' POSITIONS

16. The Division argues that petitioner's execution of the consent to tax, which included a waiver of hearing rights and an agreement to contest the accuracy of the tax assessed only (not the validity of the audit) by paying the full amount and applying for a refund, was final and binding. Therefore, petitioner's arguments with regard to the validity of the audit were barred by the consent, and since it has not made full payment of the tax assessed the refund claim was premature and petitioner was not entitled to a hearing.

17. Notwithstanding the signed consent, petitioner argues that the Division erred in finding its receipts for scaffolding on construction jobs taxable given the law applicable to such receipts. Petitioner also argues that it did not consent to tax that was actually owing, given the Division's errors on audit. Therefore, it contends that the Division of Tax Appeals has jurisdiction to hear this matter and grant its requested relief for a refund and credit.

CONCLUSIONS OF LAW

A. This matter presents the issue of whether petitioner is entitled to a credit and refund of sales and use taxes that were fixed and final upon petitioner's execution of a consent to tax (Tax Law § 1138[c]; ***Matter of BAP Appliance Corp.***, Tax Appeals Tribunal, May 28, 1992; ***Matter of Rosemellia***, Tax Appeals Tribunal, March 12, 1992). The operational effect of the consent removed the matter from the purview of Tax Law § 1138 and the attendant analysis. In fact, the Tax Appeals Tribunal has said, in no uncertain terms, that the audit methodology and the audit computation ceased being issues. (***Matter of SICA Electrical and Maintenance Corp.***, Tax

Appeals Tribunal, February 26, 1998.) Therefore, petitioner, if it made payment of the assessed tax as set forth on the consent, could apply for credit or refund but was limited in what it could argue at a hearing upon denial of its application. Generally, the only issue remaining would have been whether the tax assessed was erroneous, defined as whether the actual tax liability was less than that set forth in the consent (Tax Law § 1139[c]; 20 NYCRR 534.1[b]; ***SICA Electrical***).

B. In this matter, there was a field audit of petitioner's books and records for the audit period that discovered a substantial deficiency in its record keeping, which was acknowledged by petitioner and resulted in the utilization of an estimated audit methodology pursuant to Tax Law § 1138(a)(1), which employed a test period using petitioner's own records. In addition to finding additional taxable sales, the methodology employed accounted for and credited petitioner with a significant number of exempt sales. The results of the audit were contained on the statement of proposed audit change, asserting additional sales tax and interest.

Pursuant to Tax Law § 1138©), petitioner was entitled to have the tax due assessed prior to the issuance of a notice of determination by filing a signed written statement consenting to the tax. This requirement was fulfilled by the signed consent contained in the statement of proposed audit change (***SICA Electrical***). In it, petitioner, by its representative, agreed to the amount of tax due, as determined in accordance with Tax Law § 1138, and consented to an assessment of same, as well as giving up any right to a hearing to contest the validity or the amount of the tax determined, except as provided by Tax Law § 1139©). Tax Law § 1139©) provides that a claim for refund may be made within two years from the time *the tax* was paid - - not a portion of the tax. Petitioner was required to pay the full amount of the tax assessed on the consent, a point underscored by the Tax Appeals Tribunal when it stated that a "taxpayer may protest by payment of *the amount assessed* and by filing a claim for refund of any such amount so paid within two

years of the date of payment thereof" (emphasis added) (***SICA Electrical***; ***see also Matter of Brewsky's Goodtimes Corp.***, Tax Appeals Tribunal, February 22, 2001; Form AU-11).

The record demonstrates, and petitioner does not dispute, that it only paid $4,500.00 of the $79,851.48 that it consented to be assessed. Tax Law § 1139(c) clearly requires that an application for refund must be made within two years of payment of the tax, which, as the discussion above illustrates, must have been the full tax assessed. On this basis alone the Division's denial of the application for credit or refund is sustained.

The Division's decision to entertain the premature application was in error. Reopening the audit, albeit informally, to request further records to justify a refund of the partial payment made by petitioner is contrary to the purpose of the signed consent, i.e. to permit the taxpayer to have its tax deficiency become a fixed and final assessment. Petitioner had neither the right to a refund of the partial payment without full payment of the assessment nor an entitlement to revisit and challenge the underlying audit to which it agreed and was assessed.

Further, the Division's bifurcation and separate treatment of the amounts claimed for a credit and refund was in error. The Division denied the credit claimed of $95,467.58 because petitioner had not paid *this* amount of the assessment, but denied the claim of $3,927.51, which had been paid, for lack of documentation. The Division's actions indicate that it did not believe that full payment of the assessment was necessary before a refund claim could be made. As discussed above, full payment of the tax is a necessary condition precedent to making an application for credit or refund.

C. Despite the premature application, since a petition was filed protesting a written notice of the Division, which advised the taxpayer of a denial of a refund, there was a right to a hearing (Tax Law § 2008[1]) since such right had not been specifically modified or denied by another

provision of the Tax Law (Tax Law § 2006[4]). The language of Tax Law § 1139 does not specifically deny a right to a hearing when the tax has not been fully paid, permitting the Division of Tax Appeals to hear this matter based on its limited facts.

Notwithstanding the Division's comments in its audit report on the efficacy of petitioner's claims with respect to the underlying audit and the sufficiency of petitioner's additional documentation submitted after the claim had been made, it remains that petitioner has never paid the tax assessed by the consent and, therefore, did not pay the tax within the two-year period provided for in Tax Law § 1139©). Thus, the Division properly denied the application and said denial is hereby sustained.

D. Assuming arguendo that it had been determined that petitioner may challenge the full assessment without full payment and receive a refund for any tax paid and a credit for the balance, it is clear from the record that petitioner never submitted the required documentation to demonstrate a modification of the tax determined to be due.

Petitioner's chief argument, based on an advisory opinion published by the Division, TSB-A-12(18)S, is that the service of installing scaffolding, safety netting, hoisting equipment, and temporary pedestrian walkways that are temporary facilities at a construction site, necessary to the construction of a capital improvement to real property, is not subject to sales tax (20 NYCRR 541.8[a]).

However, petitioner never submitted evidence on audit or thereafter, although requested on several occasions, that would have demonstrated an entitlement to the treatment of its services consistent with the advisory opinion. The 9 capital improvement certificates, 8 of which were dated long after the audit period, 29 invoices for construction supplies, and 3 pages of invoices

for one job in 2009 related to rentals, without more, do not justify any modification to the underlying tax determined to be due for the audit period.

E. The petition of A-1 Premier Scaffolding, LLC is denied and the Division's denial of petitioner's application for refund, dated January 14, 2013, is sustained.

DATED: Albany, New York
November 12, 2015

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