

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ROLAND BIAMONTE : DETERMINATION
: DTA NO. 826021
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, 2008 through August 31, 2009, and :
for Redetermination of Deficiencies or for Refund of :
Personal Income Tax under Article 22 of the Tax Law :
for the Periods Ended December 31, 2007, March 31, :
2008, September 30, 2008, December 31, 2008, :
March 31, 2009 and June 30, 2009. :
:

Petitioner, Roland Biamonte, 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, 2008 through August 31, 2009 and for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the periods ended December 31, 2007, March 31, 2008, September 30, 2008, December 31, 2008, March 31, 2009 and June 30, 2009.

The Division of Taxation brought a motion for summary determination, filed September 4, 2014, which was granted by Order of the undersigned on February 26, 2015 with respect to eight of the ten notices under review. The motion was denied with respect to two other notices for which no mailing evidence was submitted. On April 16, 2015, petitioner submitted a Notice of Withdrawal of Petition and Discontinuance of Proceeding with respect to those two other notices.

Based upon the Order issued on the motion for summary determination, the Notice of Withdrawal of Petition and Discontinuance of Proceeding and all the pleadings and documents

submitted herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether the Order issued in this matter on February 26, 2015, in conjunction with the Notice of Withdrawal of Petition and Discontinuance of Proceeding filed on April 16, 2015, closes this matter in the Division of Tax Appeals such that this determination constitutes a final determination pursuant to Tax Law § 3030(c)(5)(C).

FINDINGS OF FACT

1. Petitioner, Roland Biamonte, filed a Request for Conciliation Conference (Request) with the Bureau of Conciliation and Mediation Services (BCMS) of the Division of Taxation (Division). The Request was filed in protest of four notices of determination for sales tax due, bearing assessment numbers L-031962030, dated May 18, 2009, L-031962031, dated May 18, 2009, L-032570488, dated October 5, 2009, and L-037307088, dated February 8, 2012. In addition, the request was filed in protest of six notices of deficiency for income tax due, bearing assessment numbers L-031962016, dated May 26, 2009, L-031962017, dated May 18, 2009, L-031962018, dated May 18, 2009, L-031962019, dated May 18, 2009, L-033443479, dated March 25, 2010 and L-033655702, dated April 29, 2010. The Request was date stamped as received by BCMS on November 29, 2013.

2. On December 13, 2013, BCMS issued a Conciliation Order Dismissing Request (Order) to petitioner. Referencing notice numbers L-031962030, L-031962031, L-032570488, and L-037307088, the Order determined that petitioner's protest was untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notices were issued on May 18, 2009, October 5, 2009 and February 8, 2012, but the request was not

mailed until November 26, 2013, or in excess of 90 days, the request is late filed.”

3. On December 13, 2013, BCMS issued a second Conciliation Order Dismissing Request (Order) to petitioner. Referencing notice numbers L-031962016, L-031962017, L-031962018, L-031962019, L-033443479 and L-033655702, the Order determined that petitioner’s protest was untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notices were issued on May 18, 2009, May 26, 2009, March 25, 2010 and April 29, 2010, but the request was not mailed until November 26, 2013, or in excess of 90 days, the request is late filed.”

4. Petitioner timely challenged this dismissal by filing a petition with the Division of Tax Appeals on March 13, 2014.

5. The Division of Taxation brought a motion for summary determination, filed September 4, 2014, which was granted by Order of the undersigned on February 26, 2015 with respect to eight of the ten notices under review. Those notice numbers were as follows: notices of determination numbers L-031962030, dated May 18, 2009, L-031962031, dated May 18, 2009, L-032570488, dated October 5, 2009, and L-037307088, dated February 8, 2012; and notices of deficiency numbers L-031962016, dated May 26, 2009, L-031962017, dated May 18, 2009, L-031962018, dated May 18, 2009, and L-031962019, dated May 18, 2009.

6. The motion was denied with respect to two other notices of deficiency for which no mailing evidence was submitted, L-033443479, dated March 25, 2010, and L-033655702, dated April 29, 2010. These matters were scheduled to be placed on the hearing calendar in due course.

7. On April 16, 2015, prior to the matters being placed on the hearing calendar, petitioner submitted a Notice of Withdrawal of Petition and Discontinuance of Proceeding with respect to the two other notices, L-033443479, dated March 25, 2010, and L-033655702, dated April 29, 2010.

CONCLUSIONS OF LAW

A. The Order granting the Division's motion for summary determination, dated February 26, 2015, is now final and petitioner may take an exception within the time permitted by statute (Tax Law § 2006[7]; 20 NYCRR 3000.17[a]). Any exception may be taken only with respect to notice numbers L-031962030, L-031962031, L-032570488, L-037307088, L-031962016, L-031962017, L-031962018, and L-031962019.

B. Petitioner's execution of the Notice of Withdrawal of Petition and Discontinuance of Proceeding with respect to notice numbers L-033443479 and L-033655702 was done with prejudice, rendering these notices fixed and final and discontinuing the matter before the Division of Tax Appeals (*see Matter of Westbury Smoke Stax, Ltd. v. New York State Tax Commn.*, 142 AD2d 878 [1988], *lv denied* 73 NY2d 706 [1989]).

C. It is determined that the Order, dated February 26, 2015, and the Withdrawal of Petition and Discontinuance of Proceeding, dated April 10, 2015, read together, constitute the final determination pursuant to Tax Law § 3030(c)(5)(C) with respect to all ten notices.

D. The petition of Roland Biamonte denied and the four notices of deficiency and the six notices of determination are sustained.

DATED: Albany, New York
June 4, 2015

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