STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
STAMFORD SUBARU, LLC	:	DETERMINATION DTA NO. 826071
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 July 1, 2008 through June 30, 2011.	: :	
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Petitioner, Stamford Subaru, 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 July 1, 2008 through June 30, 2011.

A hearing was held before Barbara J. Russo, Administrative Law Judge, at the offices of the Division of Tax Appeals in New York, New York, on February 25, 2015 at 10:30 A.M., with all briefs to be submitted by June 26, 2015, which date commenced the six-month period for issuance of this determination. Petitioner appeared by Sales Tax Defense LLC (Mark L. Stone, CPA, and Jennifer L. Koo, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq.).

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for refund for the period July 1, 2008 through June 30, 2011.

FINDINGS OF FACT

1. Stamford Subaru, LLC (petitioner), operated an automobile dealership in Stamford,

Connecticut, and sold new and used automobiles and extended warranties. Petitioner's automobile dealership is located approximately three miles from the New York border. Due to its proximity to New York State, petitioner frequently sold automobiles to New York State residents.

2. During the period at issue, petitioner collected sales tax on the sales of automobiles and extended warranties from its New York customers, and remitted such tax to New York State.

3. Petitioner was subsequently audited by the Connecticut Department of Revenue for sales tax purposes. As a result of that audit, petitioner was advised by the Connecticut auditor that sales tax was due on the sale of all extended warranties sold in Connecticut. On April 16, 2012, petitioner issued a check to the Connecticut Commissioner of Revenue Services in the amount of $50,769.46, for sales and use tax for the period July 2008 through June 2011.

4. On or about October 18, 2012, petitioner filed a refund claim with the New York State Division of Taxation (Division), seeking a refund of sales tax in the amount of $37,446.98, for amounts it collected from its New York customers on the sale of extended warranties and remitted to New York State.

5. By letter dated December 21, 2012, the Division denied petitioner's refund request.

SUMMARY OF THE PARTIES' POSITIONS

6. Petitioner argues that it erroneously remitted sales tax collected on extended warranties sold in Connecticut to New York State. Petitioner contends that as a result of an audit by the Connecticut Department of Revenue, it paid sales tax to the State of Connecticut on the same sales, at a rate of approximately six percent. Petitioner maintains that it "in essence" refunded the six percent sales tax to its customers and then recharged the customers six percent sales tax

that was then remitted to Connecticut.

7. The Division argues that petitioner is not entitled to the refund claimed because petitioner did not pay the tax in the first instance, but simply remitted sales tax collected from its customers. Further, the Division contends that petitioner is not entitled to a refund because it has not refunded the tax collected to its New York customers.

CONCLUSIONS OF LAW

A. 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, prescribes the form of the application, which includes a certification by the applicant and evidence satisfactory to the Department of Taxation and Finance that the applicant has refunded the tax to its customer (20 NYCRR 534.2[a][2][i][h]; 534.8[a]). The regulation at 20 NYCRR 534.8(a) provides:

> "(2) 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.
>
> (3) No refund or credit may be made to any person of tax which he collected from a customer until he shall first establish to the satisfaction of the Department of Taxation and Finance, as provided in section 534.2 of this Part, the he has in fact repaid such tax to the customer."

The Tax Law and regulations unambiguously require 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.

Petitioner first argues that it has satisfied the requirement that it repay its customers because it has "in essence" repaid the sales tax it collected from New York customers on extended warranties and then paid sales tax to the State of Connecticut on the same transactions. Petitioner's argument is not persuasive in light of the clarity and unambiguous nature of the statutory provisions, which can and should be read literally. 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]). The plain language of the statute requires that the vendor repay the tax collected before

the vendor is entitled to a refund. 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.

In its reply brief, petitioner argues that *it*, and not the customers, paid the sales tax directly to New York, and as such it does not have to refund monies to its customers. Petitioner asserts that approximately 75% of the sales tax it paid to New York came from its own pocket, because that portion of the sales tax was actually owed to Connecticut, which petitioner remitted to Connecticut at a later date. Petitioner's contention that funds it paid to New York as sales tax on the extended warranties were from its own pocket, and not trust funds collected from its customers, is contrary to the facts in the record. Indeed, petitioner testified that the entire amount of sales tax collected from its customers, including sales tax on both the purchase of vehicles and the purchase of extended warranties, was remitted to New York. After petitioner was audited by the Connecticut tax department, it paid Connecticut the tax assessed on the extended warranties, and sought a refund from New York for the same transactions. The record shows that the amount sought to be refunded was collected by petitioner from its customers in the first instance. As such, pursuant to Tax Law § 1139(a), petitioner must repay its customers before it is entitled to a refund (***see Matter of Saltzman v. New York State Tax Commission***, 101 AD2d 910 [3d Dept 1984]).

B. The petition of Stamford Subaru LLC is denied and the refund denial, dated December 21, 2012 is sustained.

DATED: Albany, New York
December 10, 2015

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE