

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of : DETERMINATION  
**CLINTON DELICATESSEN, INC.** : DTA NO. 827615  
for Review of a Denial, Suspension, Cancellation or :  
Revocation of a License, Permit or Registration under :  
Articles 28 and 29 of the Tax Law. :

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Petitioner, Clinton Delicatessen, Inc., filed a petition for review of a denial, suspension, cancellation or revocation of a license, permit or registration under Articles 28 and 29 of the Tax Law.

On March 8, 2017, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel), filed a motion seeking summary determination in its favor pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.5 and 3000.9(b). Accompanying the motion was the affirmation of Robert A. Maslyn, Esq., dated March 8, 2017, and annexed exhibits in support of the motion. Petitioner, appearing by Jack Stuart Beige, Esq., did not file a response in opposition to the motion of the Division of Taxation.

An expedited hearing on the petition and the motion was scheduled to be held before Dennis M. Galliher, Administrative Law Judge, in Albany, New York, on March 21, 2017 at 10:30 A.M. However, on March 17, 2017 and March 20, 2017, respectively, petitioner and the Division of Taxation waived a hearing and submitted this matter for determination based on documents previously submitted, plus any additional documents or briefs to be submitted by April 10, 2017. Pursuant to

§ 3000.18 (a) and (b) of the Tax Appeals Tribunal's Rules of Practice and Procedure, the due date for issuance of this determination was 20 days thereafter. After due consideration of the petition and answer filed in this matter, the motion papers, attached affirmation and annexed exhibits, and all pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation's proposed revocation of petitioner's certificate of authority to collect sales tax should be sustained.

***FINDINGS OF FACT***

1. Petitioner, Clinton Delicatessen, Inc., owns and operates a business located in the State of New York. It is undisputed that petitioner's receipts from sales were subject to sales tax, pursuant to Tax Law § 1105(a), and that petitioner was authorized to collect and remit sales and use taxes pursuant to a valid Sales Tax Certificate of Authority (Certificate of Authority).

2. The Division of Taxation (Division) conducted a sales tax field audit of petitioner's business for the sales tax quarterly periods spanning December 1, 2010 through November 30, 2013 (audit period). This audit resulted in a finding that petitioner owed additional sales tax for the audit period in the amount of \$221,906.09.

3. On April 13, 2015, the Division issued to petitioner a Notice of Determination, Assessment ID L-042700138-7, assessing additional sales tax due for the audit period in the amount of \$221,906.09, plus interest and penalties, including fraud penalties pursuant to Tax Law § 1145(a)(2).

4. As detailed hereinafter, petitioner did not respond to the foregoing Notice of Determination or challenge the same within 30 days after its issuance, by filing either a request for conciliation

conference (Conference Request) with the Division's Bureau of Conciliation and Mediation Services (BCMS), or a petition for a hearing before the Division of Tax Appeals (*see* Findings of Fact 11, 12 and 13).

5. By a Notice of Proposed Revocation of Sales Tax Certificate of Authority (Notice of Proposed Revocation), dated January 15, 2016, the Division notified petitioner of its intention to revoke petitioner's Certificate of Authority, pursuant to Tax Law § 1134(a)(4)(A) and 20 NYCRR 539.4, based upon outstanding unpaid tax liabilities owed to the Division. There is no issue raised in this proceeding as to the propriety of the issuance of the Notice of Proposed Revocation, including the date of its issuance, the address for petitioner, or the address for petitioner's representative, to each of whom the Notice of Proposed Revocation was issued.

6. Accompanying the Notice of Proposed Revocation was a consolidated statement of tax liabilities (Consolidated Statement), pertaining to petitioner and listing the above-referenced Notice of Determination for the period ended November 30, 2013 (Assessment ID L-042700138-7) as an unpaid bill subject to collection action in the following then-due amounts:<sup>1</sup>

Tax Amount	Interest Amount	Penalty Amount	Payments/Credits	Current Balance
\$221,906.09	\$143,050.68	\$466,002.80	\$51,910.48	\$779,049.09

7. The foregoing Notice of Proposed Revocation advised that failure to either: a) file a Request with BCMS, or a petition with the Division of Tax Appeals), or b) make payment of the outstanding liability, within 30 days of the date of the Notice of Proposed Revocation would result in the revocation of petitioner's Certificate of Authority.

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<sup>1</sup> The Consolidated Statement also included some 10 additional estimated assessments, listing estimated amounts due (tax, penalty and interest). The Division's Notice of Proposed Revocation at issue herein is based upon Assessment ID L-042700138-7 as a fixed and final assessment that remains unpaid, and the other 10 estimated assessments set forth on the Consolidated Statement have not been considered or addressed in this matter.

8. Petitioner filed a Conference Request regarding the Notice of Proposed Revocation. By a Conciliation Order (CMS No. 269424), dated April 8, 2016, petitioner's Conference Request was denied, and the Notice of Proposed Revocation was sustained.

9. Petitioner challenged the Conciliation Order sustaining the Notice of Proposed Revocation by filing a petition with the Division of Tax Appeals, dated May 6, 2016. The petition alleges, in substance, that, with regard to the Notice of Determination, the audit methodology was unreasonable, the audit determinations were in error, and the same should be modified or set aside, thereby leaving petitioner current and in compliance with regard to its sales tax obligations, such that the Division's proposal to revoke petitioner's Certificate of Authority should be denied.

10. In its July 6, 2016 answer to the petition, the Division stated that the Notice of Determination (Assessment ID L-042700138-7) had not been timely protested by petitioner that, as a consequence, the amount of tax, penalty and interest assessed thereby was determined to be final, due and owing, and that such amount has not been paid and remains due and owing. Accordingly, the Division stated that its Notice of Proposed Revocation was proper and should be sustained.

11. On July 8, 2016 (i.e., subsequent to the commencement of this proceeding), petitioner filed a petition specifically challenging the same Notice of Determination (Assessment ID L-042700138-7). That matter was assigned Division of Tax Appeals number (DTA No.) 827746.

12. On July 15, 2016, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition (Notice of Intent), upon the basis that the Notice of Determination was issued on April 13, 2015, but the petition was not filed thereafter until July 8, 2016 (some 452 days later), and was therefore subject to dismissal as untimely, hence leaving the Division of Tax Appeals without jurisdiction to address the merits of the petition.

13. After review of the evidence submitted in response to the Notice of Intent, a Determination, dated December 22, 2016, was issued sustaining the Notice of Intent and dismissing the petition (DTA No. 827746) as untimely. As a consequence, the amount of tax, penalty and interest assessed via Notice of Determination L-042700138-7 remains fixed and final. Petitioner did not file an exception to that Determination.

14. On March 8, 2017, the Division filed its motion seeking summary determination, upon the assertions that petitioner remains subject to a fixed, final and unpaid sales tax liability, no material and triable issues of fact have been raised or exist in this matter, and thus petitioner's Certificate of Authority is properly subject to revocation as proposed by the Division in its Notice of Proposed Revocation and sustained by the Conciliation Order dated April 8, 2016.

#### ***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. Tax Law § 1134(a)(4)(A), as in effect when the Notice of Proposed Revocation was issued, provided, in relevant part, as follows:

“Where a person who holds a certificate of authority (i) willfully fails to file a report or return required by this article, (ii) willfully files, causes to be filed, gives or causes to be given a report, return, certificate or affidavit required under this article which is false . . . (iv) willfully fails to prepay, collect, truthfully account for or pay over any tax imposed under this article or pursuant to the authority of article twenty-nine of this chapter . . . the commissioner may revoke or suspend such certificate of authority and all duplicates thereof.”<sup>2</sup> (*see* 20 NYCRR 539.4)

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<sup>2</sup> The term “person” is defined to include a corporation (Tax Law § 1101[a]).

C. The record in this matter clearly reveals that there are no material and triable issues of fact raised or at issue. As the result of a sales tax field audit, the Division concluded that petitioner willfully underreported and underpaid sales tax due and owing to the Division. The Division then properly issued its Notice of Determination (Assessment ID L-042700138-7) to petitioner, on April 13, 2015, setting forth that determination of tax, penalty and interest due. In turn, petitioner did not timely challenge that Notice of Determination by filing either a Conference Request with BCMS, or a petition for a hearing with the Division of Tax Appeals, within 30 days after its issuance, as required under Tax Law §§ 170(3-a)(a); 170(3-a)(h)(iii); 2006(4). Consequently, the amount of tax, penalty and interest due under that Notice of Determination became a final and fixed assessment, with respect to which no further appeal rights remain, and that assessment remains unpaid.

D. Accordingly, the Commissioner was authorized to revoke petitioner's Certificate of Authority, pursuant to Tax Law § 1134(a)(4)(A), and there is no dispute that the Commissioner properly notified petitioner of the proposed revocation of its Certificate of Authority via the Notice of Proposed Revocation dated January 15, 2016 (*see* Findings of Fact 5, 6 and 7; Tax Law § 1134[a][4][D]; 20 NYCRR 539.4[c][2], [d]). Petitioner, in turn, has raised no basis in its petition upon which relief may be granted. In this regard, the petition alleges only that the audit methodology and its result were flawed (*see* Finding of Fact 9), a defense to revocation that is unavailing since the assessment upon which revocation is premised is fixed, final and unpaid.

E. The Division's motion for summary determination is hereby granted, the petition of Clinton Delicatessen, Inc., is dismissed, and the Notice of Proposed Revocation of petitioner's Certificate of Authority, dated January 15, 2016, is sustained.

DATED: Albany, New York  
May 25, 2017

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE