

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**BOUNCE AROUND, INC.** : DETERMINATION  
 : DTA NO. 827884  
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 December 1, 2002 through August 31, 2006. :  
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Petitioner, Bounce Around, Inc., 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 December 1, 2002 through August 31, 2006.

A hearing was held before Barbara J. Russo, Administrative Law Judge, in Albany, New York, on September 20, 2018 at 10:30 A.M., with all briefs to be submitted by February 19, 2019, which date commenced the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Justine Clarke Caplan, Esq., of counsel).

***ISSUE***

Whether the Division of Taxation properly denied petitioner's claims for credit or refund for the period December 1, 2002 through August 31, 2006 on the basis that the claims were filed after the applicable statute of limitations for credit or refund had expired.

***FINDINGS OF FACT***

1. Petitioner, Bounce Around, Inc., was a retailer/renter of inflatable "bounces" with offices in Lake George, New York.

2. On October 7, 2005, the Division of Taxation (Division) commenced an audit of petitioner's books and records for the period December 1, 2002 through August 31, 2006 (the period at issue).

3. No sales tax returns for the period at issue were filed beyond September 20, 2006.

4. As a result of the audit, the Division issued to petitioner two statements of proposed audit change (statement), dated July 2, 2008, asserting the following additional amount due:

Period	Tax	Interest	Penalty
12/1/02 - 8/31/06	\$47,108.14	\$20,867.15	\$14,431.32
12/1/02 - 8/31/06	\$8,868.40	\$2,886.59	\$0.00

5. Petitioner's president and manager, Thomas Barber, signed each statement on June 27, 2008, consenting to the assessment for the period at issue. The language contained in the statement wherein petitioner signed stated,

"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. If the Tax Department denies my application in whole or in part, I may then contest the amount denied, within the time provided by law, in the Bureau of Conciliation and Mediation Services, or in the Division of Tax Appeals, or in both. (3) If the Tax Department conducted a limited scope audit, it may later, within the time provided by law, determine that I owe additional tax. 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."

6. On July 21, 2008, the Division issued two notices and demands for payment of tax due (notices) for the period December 1, 2002 through August, 31, 2006, asserting the following amount due:

Notice Number	Tax	Interest	Penalty
L-030467849	\$48,109.90	\$21,685.06	\$14,431.32
L-030468333	\$8,868.40	\$2,932.40	\$0.00

7. By two checks dated June 27, 2008, petitioner remitted payment for the period December 1, 2002 through August 31, 2006 in the amounts of \$2,000.00 and \$13,000.00, respectively. By a check dated August 25, 2008, petitioner remitted an additional payment for the period December 1, 2002 through August 31, 2006 in the amount of \$80,548.05.

8. Petitioner filed an application for credit or refund of sales or use tax, dated November 16, 2015, for the period December 1, 2002 through August 31, 2006, seeking a refund of penalty and interest in the amount of \$36,184.03.

9. On April 20, 2016, the Division issued a denial of refund application, denying petitioner's refund claim for the period December 1, 2002 through August 31, 2006 in full on the basis that petitioner's refund claim was beyond the statute of limitations.

#### ***SUMMARY OF PETITIONER'S POSITION***

10. Petitioner does not dispute that its payments for the assessments at issue were made on June 27, 2008 and August 25, 2008 and that the refund sought was not claimed until November 16, 2015. Petitioner asserts that reasonable cause exists for the abatement of penalty and interest, contending that his then representative did not effectively represent him during the audit and pressured him to sign the consents in the statements.

**CONCLUSIONS OF LAW**

A. As relevant to this proceeding, Tax Law § 1139 © provides as follows:

“Claim for credit or refund of an overpayment of sales tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within two years from the time the tax was paid. If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return. If the claim is not filed within the three year period, but is filed within the two year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim.”

B. There is no dispute that petitioner’s refund claim was not filed within three years from the time its sales tax returns were filed or two years from the time taxes were paid for the periods at issue. As noted, no sales tax returns were filed for the period at issue subsequent to September 20, 2006 (*see* finding of fact 3). Following the audit and the issuance of the statements of proposed audit change for the periods at issue, petitioner paid the taxes due by checks dated June 27, 2008 and August 25, 2008 (*see* finding of fact 7). The claim for refund was not filed until November 16, 2015, well beyond the statutory time limit for filing such claim. As petitioner’s claim was late-filed, the merits of its argument for abatement of penalties and interest cannot be addressed.

C. As stated by the Tax Appeals Tribunal, “no matter how sympathetic the circumstances, the statute of limitations ‘must be strictly adhered to’” (*Matter of Guffin*, Tax Appeals Tribunal, September 18, 2014, citing *Kavanagh v Noble*, 332 US 535, 539 [1947]) and is “not open to discretionary change by the courts no matter how compelling the circumstances” (*Matter of Guffin*, citing *Cohen v Pearl River Union Free School Dist.*, 70 AD2d 94, 99 [2d Dept 1979])

*revd on other grounds* 51 NY2d 256 [1980]). While it may appear harsh that Tax Law § 1139 (c) places a statute of limitations on taxpayers to claim a refund, it is noted that the Division, once a return has been filed, generally has a like three-year period to issue a notice of determination to a taxpayer asserting that additional taxes are due. Both the Tax Appeals Tribunal, in *Matter of Jones* (January 9, 1997), and the Appellate Division, in *Matter of Brault v Tax Appeals Tribunal* (265 AD2d 700 [3d Dept 1999]), have upheld the validity of applying the statute of limitations for refund in these cases. By establishing time frames for the issuance of notices and the filing of claims for refund, the Tax Law provides both the State of New York and its taxpayers with the financial stability and security that comes from knowing that a specific tax year is closed. In *Matter of Nierenstein* (Tax Appeals Tribunal, April 21, 1988), the Tribunal opined that:

“There is no authority for the Division of Taxation to approve the claim in a manner inconsistent with the Tax Law. Statutes of limitations are matters of law, enacted by the State Legislature for the purpose of guiding all persons who are, or may become parties to a legal proceeding, with respect to the timely filing of the various documents necessary to the particular program or proceeding involved.

. . . [The statute of limitation’s] purpose is to allow a reasonable time for taxpayers who have erroneously filed or paid taxes to realize their error and make application for refund. The State is thus put on notice that there is this three year period during which it may be liable for such claims. At the end of the period, the matter is settled. Anything less than this degree of certainty would make the financial operation of government difficult, if not impossible. In short, the statute of limitations at issue here is a balance between the needs of the State with regard to the protection of its financial resources and the rights of taxpayers to correct their errors.”

The rationale set forth in *Nierenstein* is equally applicable to the case at hand.

Accordingly, the Division is correct in its assertion that petitioner’s claims for refund must be denied as not timely filed.

D. The petition of Bounce Around, Inc., is denied and the Division's refund denial dated April 20, 2016 is sustained.

DATED: Albany, New York  
August 15, 2019

/s/ Barbara J. Russo  
ADMINISTRATIVE LAW JUDGE