

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
NACMIAS & SONS AUTO SERVICE, LLC : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 830700
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period March 1, 2006 through February 28, 2009. :

Petitioner, Nacmias & Sons Auto Service, 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 March 1, 2006 through February 28, 2009.

On January 9, 2024 and January 8, 2024, respectively, petitioner, by its representative, Ballon Stoll, P.C. (Norman R. Berkowitz, Esq., of counsel), and the Division of Taxation, by Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs to be submitted by May 21, 2024, which date commenced the six-month period for the issuance of this determination. After due consideration of the documents and arguments submitted, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner has met its burden of proving entitlement to a refund.

FINDINGS OF FACT

1. On May 8, 2008, petitioner, Nacmias & Sons Auto Service, LLC, entered into a purchase agreement with Coney Island Sunoco Service Station, Inc. (Coney Island) for the

purchase of certain assets.¹ Petitioner did not provide the Division of Taxation (Division) notice of its purchase of the Coney Island assets.

2. The Division determined that petitioner was liable as a bulk sale purchaser for taxes determined to be due from Coney Island. The Division issued to petitioner a notice of determination, dated April 22, 2010, bearing audit identification number X-986271907, assessing sales tax due in the amount of \$152,852.00 (notice of determination). The notice of determination included a statement that indicated that the following assessments (collectively, the “assessments”) were the components of the liability set forth in the notice:

Assessment ID Number:	Tax Periods Ending:	Tax Assessed:
L-033560373	5/31/2006 - 11/30/2008	\$41,199.34
L-033560374	5/31/2006 - 11/30/2008	\$67,811.94
L-033560375	8/31/2009	\$14,614.49
L-033560376	5/31/2009	\$14,614.49
L-033560377	2/28/2009	\$14,614.49
	Sub-Total	\$152,854.75
	Less Payments/Credits	\$2.97
	Total	\$152,851.78

3. In its brief, the Division conceded that assessments L-033560375, L-033560376 and L-033560377 have all been cancelled, and that assessment L-033560374 has been reduced to \$35,034.74. In its brief, the Division does not provide any details regarding its adjustments to the individual assessments. After the Division’s adjustments, the remaining tax amount at issue is \$76,234.08 (\$35,034.74 + \$41,199.34).

4. In its brief, petitioner asserts: “The [Division] erroneously applied tax payments made by [petitioner] for its own liabilities against the alleged bulk sales [tax] liability of Coney Island

¹ Petitioner challenges whether Coney Island ever had title to certain assets allegedly transferred in the purchase agreement. However, this assertion has no bearing on the outcome of this determination.

leaving [petitioner] with increased sales tax liabilities.” Petitioner failed to provide any citation in support of this claim or otherwise assert how much of the bulk sales tax liability petitioner already paid or what the alleged payment date(s) were. Nothing in the record indicates petitioner ever requested or demanded this information from the Division.

5. On or around January 27, 2021, petitioner filed form AU-11, application for credit or refund of sales or use tax (refund request), seeking a refund of the \$152,852.00 in bulk sales tax liability assessed against petitioner in the notice of determination.²

6. The Division issued a refund claim determination notice, bearing audit case ID number X-189671749, dated September 1, 2021 (the refund denial notice), denying petitioner’s refund request. The refund denial notice stated, in relevant part, that:

“The refund claim is being denied.

Per Section 1139(c) of the Sales and Use Tax Law requires that a refund be filed by the taxpayer within three years from the time that the return was filed or two years from the time that the tax was paid, whichever is later. If no return was filed, the refund must be filed within two years from the time the tax was paid.

In the case of an issuance of a Notice of Determination under Tax Law 1138 where the taxpayer[’]s formal protest rights have expired, the Notice of Determination must be paid in full before a refund claim can be reviewed.

In addition, based on available information, the assessments related to the refund claim are the result of [a] bulk sale transaction that [you] entered into with Coney Island Sunoco Service, Inc.”

7. On October 6, 2021, petitioner filed a petition with the Division of Tax Appeals, protesting the refund denial notice.

² The undersigned administrative law judge issued an order, dated November 2, 2023, denying the Division’s motion for dismissal, or in the alternative, summary determination in this matter because, in part, the Division failed to establish that the refund request pertained to the notice of determination or any associated Bureau of Conciliation and Mediation Services’ [BCMS] order.

CONCLUSIONS OF LAW

A. A presumption of correctness attaches to a properly issued statutory notice issued by the Division and the taxpayer bears the burden to prove that the assessment is incorrect (*see Matter of Hotel Depot, Inc.*, Tax Appeals Tribunal, January 24, 2020, citing *Matter of Darman Bldg. Supply Corp. v Mattox*, 106 AD3d 1150, 1151 [3d Dept 2013]; *Matter of Blodnick v New York State Tax Commn.*, 124 AD2d 437, 438 [3d Dept 1986]).

B. A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (Tax Law § 1138 [a] [1]).

C. A taxpayer who fails to timely protest a notice of determination may still be entitled to subsequently protest the denial of a refund of the associated liability after payment thereof (*see Matter of Pugliese*, Tax Appeals Tribunal, July 12, 2018). Although petitioner failed to timely protest the notice of determination or any associated BCMS order, petitioner timely filed a petition on October 6, 2021, challenging the Division's September 1, 2021 refund denial notice.

D. As relevant to this proceeding, Tax Law § 1139 (c) 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 . . . No refund or credit shall be made of a tax, interest or penalty paid after a determination by the commissioner made pursuant to section eleven hundred thirty-eight [i.e., a notice of determination] unless it be found that such determination was erroneous, illegal or unconstitutional or otherwise improper, by

the division of tax appeals pursuant to article forty of this chapter or by the commissioner of his own motion, or in a proceeding for judicial review provided for in section two thousand sixteen of this chapter, in which event a refund or credit shall be made of the tax, interest or penalty found to have been overpaid.”

Petitioner failed to establish when or how much of the liability at issue was paid.

Petitioner was afforded the opportunity to present such evidence via either a hearing or by the submission of evidence. Petitioner chose the latter method to present relevant evidence but failed to provide any on the issue of the amount(s) and date(s) of any alleged payments. As such, petitioner failed to meet its burden of proof to show it was entitled to a refund.

E. The petition of Nacmias & Sons Auto Service, LLC, is denied and the refund claim determination notice, dated September 1, 2021, is sustained.

DATED: Albany, New York
November 21, 2024

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE