

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
FRANK A. MARCHELLO (DECEASED) : ORDER
for Revision of a Determination or for Refund of Sales : DTA NO. 821443
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period December 1, 1995 through August 31, 2002. :

Petitioner, Frank A. Marchello (Deceased), 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, 1995 through August 31, 2002.¹

Petitioner, by its representative, Hodgson Russ, LLP (Jack Trachtenberg, Esq., of counsel) brought a motion, dated August 20, 2008, to reopen the record and admit additional evidence, and for summary determination pursuant to 20 NYCRR 3000.5 and 3000.9(b) and CPLR 4404(b). Accompanying the motion was the affirmation of Jack Trachtenberg, Esq., dated August 20, 2008, and attached exhibits supporting the motion. On October 9, 2008, the Division of Taxation, appearing by Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel), filed the affirmation of Osborne K. Jack, Esq., dated October 9, 2008, and annexed exhibits, in opposition to petitioner's motion for summary determination. Petitioner filed a reply to the Division's response on November 10, 2008, which date began the 90-day period for issuance of this order.

¹ Frank A. Marchello passed away on January 29, 2002 in New Jersey. William Fleming was appointed executor of his estate by the Honorable Susan J. Hoffman, Surrogate of the County of Hunterdon and Deputy Clerk of the Superior Court of New Jersey, Chancery Division, Probate Part, Hunterdon County, on July 12, 2002. Mr. Fleming filed the petition in this matter.

Based upon the motion papers, and all pleadings and proceedings associated with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. On February 10, 2005, the Division of Taxation (Division) issued to Frank A. Marchello a Notice of Determination which assessed \$4,369,607.69 in sales and use taxes due, plus penalty and interest, for the period December 1, 1995 through August 31, 2002. The notice indicated that Mr. Marchello was being held liable as an officer or responsible person of Club V.I.P. of N.Y. Inc. (Club V.I.P.).
2. Petitioner, Frank A. Marchello (Deceased), by William Fleming, executor, filed a petition, dated December 4, 2006, challenging the Notice of Determination. The Division filed its Answer on February 21, 2007.
3. A hearing in this matter was held on January 8 through 10, 2008. The issues addressed at the hearing may be generally summarized as follows: the audit of Club V.I.P. and the taxability of its receipts; the Division's determination that Frank Marchello was a person responsible for collecting and paying over the sales taxes due from Club V.I.P.; and the propriety of issuing the Notice of Determination to Frank Marchello, rather than to his estate. At the hearing, in addition to the testimony of witnesses, petitioner introduced 22 exhibits into evidence. The Division presented the testimony of Alton Plunkett, an auditor in the Division's Metropolitan District Office, and introduced 17 exhibits into evidence. At the conclusion of the hearing, the record was closed.
4. Petitioner's brief was timely filed on March 27, 2008. The Division filed its brief on July 8, 2008. In accordance with a revised briefing schedule, petitioner's reply brief was due on

August 27, 2008. The filing of petitioner's reply brief is currently on hold pending the resolution of the instant motion.

5. By notice of motion, dated August 20, 2008, petitioner moved for an order reopening the record and admitting additional evidence, and granting summary determination in its favor. Petitioner's motion was supported by copies of four hearing exhibits, i.e., the petition, the answer, the Notice of Determination at issue and the auditor's field audit report for Club V.I.P.; a copy of petitioner's post-hearing brief; a copy of the Division's post-hearing brief; a copy of an Audit Verification Letter issued on July 3, 2008 by the Division's Metropolitan District Office's sales tax section to Hillsborough Corporation (Hillsborough) for the period December 1, 1995 through August 31, 2002 (Audit Verification Letter); a copy of a No Change Letter issued on July 3, 2008 by the Division's Metropolitan District Office, sales tax section, to Hillsborough for the period December 1, 1995 through August 31, 2002 (No Change Letter); and the affirmation of Jack Trachtenberg, Esq., petitioner's representative. The Division submitted the affirmation of Osborne Jack, Esq., the Division's representative, with attached exhibits, in opposition to petitioner's motion for summary determination. Petitioner submitted a reply to the Division's response.

6. The Division's brief raises six points for consideration. Point 1 of its brief argues that "Dezer Entertainment Concepts, Inc. (Hillsborough Corporation)² was a vendor responsible for the collection of New York State taxes and Frank Marchello as president of Dezer Entertainment Concepts was a responsible person." In his affirmation, Mr. Trachtenberg asserts that the Division did not raise this theory of liability on audit or at hearing. Because the Notice of

² Dezer Entertainment Concepts, Inc.'s name was changed to Hillsborough Corporation on December 6, 2002, by the Certificate of Amendment of the Certificate of Incorporation of Dezer Entertainment Concepts, Inc., under section 805 of the Business Corporation Law.

Determination at issue in this proceeding and Club V.I.P.'s audit documents relied upon an entirely different legal theory, Mr. Trachtenberg contends that petitioner has been surprised, thwarted from introducing relevant favorable evidence, and precluded from having an opportunity to fully and adequately address the new legal theory raised by the Division in its brief. Accordingly, Mr. Trachtenberg claims that petitioner cannot fully and adequately respond to this new legal theory absent the reopening of the record for the admission of additional evidence. Specifically, petitioner seeks the admission of the Audit Verification Letter and the No Change Letter into the record. Based upon his personal involvement in the case, Mr. Trachtenberg states that the audit of Hillsborough for the period in issue (December 1, 1995 through August 31, 2002) began in September 2004 and ended in or about December 2004. He further states that the Audit Verification Letter and No Change Letter are "merely a documentary reflection of audit conclusions that were reached long ago." Mr. Trachtenberg maintains "the only reason petitioner did not pursue these audit findings at hearing is because the Division had not made them an issue in its case against petitioner." He claims that the Division will be unfairly advantaged if these two letters are not accepted into the record.

7. In his affirmation, Mr. Trachtenberg asserts that once the Audit Verification Letter and No Change Letter are accepted into evidence, petitioner's motion for summary determination should be granted.

8. The Division did not file a response to petitioner's motion to reopen the record and admit additional documents. However, it did file a response in opposition to petitioner's motion for summary determination. The Division's affirmation asserts that material and triable issues of fact exist which preclude the Division of Tax Appeals from granting petitioner's motion for summary determination. In support of this assertion, three exhibits were attached to the

Division's affirmation. The first exhibit consisted of the Audit Verification Letter and the No Change Letter, the subject documents of petitioner's motion to reopen the record and admit additional evidence. The remaining two exhibits included three documents, not introduced into evidence at the hearing, and the affidavit of Alton Plunkett, sworn to on October 1, 2008.

9. In the reply to the Division's response, petitioner points out that the Division has not objected to petitioner's motion to reopen the record. Therefore, petitioner contends that its motion to reopen the record and admit additional evidence should be granted. In the reply, petitioner also points out that the Division attached new evidence, not introduced at the hearing, to its papers in opposition to petitioner's motion for summary judgment. Petitioner argues that this new evidence cannot be relied upon to create issues of fact because the Division failed to make a motion to reopen the record for submission of such documents. Since there are no material and triable issues of fact, petitioner avers summary determination should be granted in its favor.

10. The Division did not file a motion to reopen the record and admit additional evidence.

CONCLUSIONS OF LAW

A. The granting of a motion to reopen the record and admit additional evidence is dependent upon the sound exercise of discretion (*Matter of Byram*, Tax Appeals Tribunal, August 11, 1994). When the motion has been made following a hearing, the exercise of this discretion has been limited (*id.*; *Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991).

B. In the instant matter, at the conclusion of a three-day hearing the record was closed. Thereafter, in accordance with a revised briefing schedule, briefs were filed by petitioner and the Division. As noted above, the instant motion to reopen the record was made prior to the date set for the submission of petitioner's reply brief. Petitioner contends that the record should be

reopened for the admission of additional evidence necessary for it to fully and adequately respond to the new legal issue raised in point 1 of the Division's brief. Specifically, petitioner seeks the admission of two letters issued to Hillsborough Corporation, by the Division's Metropolitan District Office's sales tax section, for the period December 1, 1995 through August 31, 2002, i.e., an Audit Verification Letter and a No Change Letter. The Division did not respond to petitioner's motion to reopen the record.

In this proceeding, petitioner bears the burden of proof to demonstrate that the basis for the assessment is unreasonable or that the amount of tax assessed is incorrect (*Matter of Mera v. Tax Appeals Tribunal*, 204 AD2d 818, 611 NYS2d 716, 719 [1994]; *Matter of Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, 538 [1986], *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027 [1987]). Petitioner is entitled to a fair hearing in which all elements of due process are satisfied (Tax Law § 2000). At a minimum, due process requires reasonable notice of the Division's reasons for assessing tax because it is impossible for a taxpayer to respond effectively if he is uninformed or misled (*Matter of Diamond Terminal Corporation v. Dept. of Taxation and Finance*, 158 AD2d 38, 557 NYS2d 962 [1990], *lv denied* 76 NY2d 711, 563 NYS2d 767 [1990]). The Tax Appeals Tribunal has, on occasion, permitted a party to raise a new legal issue after the record is closed (*Matter of Chuckrow*, Tax Appeals Tribunal, July 1, 1993). However, the Tax Appeals Tribunal has not allowed new factual issues to be raised after the hearing which would disadvantage the party who had the burden of establishing the disputed fact (*id.*).

C. As noted above, in point 1 of its brief, the Division argues that Hillsborough was the vendor responsible for the remission of sales taxes owed by Club V.I.P., and that petitioner was a responsible person of Hillsborough. It is clear from my review of the record in this matter that

point 1 of the Division's brief raises a new alternative ground for its determination that Frank Marchello was a person responsible for collecting and paying over sales taxes of Club V.I.P. Fairness requires that petitioner have the opportunity to fully and adequately respond to the Division's newly raised theory via argument in petitioner's reply brief and the submission of documents supporting petitioner's position on that issue (*Matter of Chuckrow*). In that regard, petitioner requests that the record be reopened for the admission of two specific documents issued to Hillsborough by the Division for the period at issue, which petitioner claims support its position on the newly raised issue. Accordingly, petitioner's motion to reopen the record and admit additional documents is granted. The two letters issued to Hillsborough for the period at issue, the Audit Verification Letter and the No Change Letter, are admitted into evidence as Petitioner's exhibits 24 and 25, respectively.

D. In addition to a motion to reopen the record, petitioner also made a motion for summary judgment pursuant to 20 NYCRR 3000.9(b). Petitioner argues that summary determination should be granted in its favor because no triable issue of fact or law exists. The Division submitted an affirmation in opposition to petitioner's motion for summary determination. Any person may move for summary determination pursuant to 20 NYCRR 3000.9(b)(1) after issue has been joined. In reviewing a motion for summary determination, an administrative law judge is constrained by the following guidelines:

The motion shall 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. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion (20 NYCRR 3000.9[b][1]; *see also* Tax Law § 2006[6]).

Furthermore, a motion for summary determination made before the Division of Tax Appeals is “subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR.” (20 NYCRR 3000.9[c]; *see also Matter of Service Merchandise Co.*, Tax Appeals Tribunal, January 14, 1999.) CPLR 3212(a) provides that:

Any party may move for summary judgment in any action, after issue has been joined; provided however that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

E. In the instant matter, the petition was filed on December 4, 2006, the Answer was filed on February 21, 2007, a hearing was held on January 8 through 10, 2008, and briefs were filed by both petitioner and the Division on March 27, 2008 and July 8, 2008, respectively. Petitioner’s motion for summary determination was filed on August 20, 2008, prior to the date set for the submission of petitioner’s reply brief. A motion for summary determination is not appropriate at this stage of the proceeding and, therefore, petitioner’s motion is denied (20 NYCRR 3000.9[c]; CPLR 3212[a]). A new date will be set for the submission of petitioner’s reply brief, and a determination will be issued in due course.

F. In Conclusion of Law C, petitioner’s motion to reopen the record was granted, and two letters were admitted into the record as petitioner’s exhibits. Since the Division did not make a motion to reopen the record, the record closed after the two letters were admitted into evidence. Accordingly, the three documents and the affidavit of Alton Plunkett attached to the Division’s affirmation in opposition to petitioner’s motion for summary determination will not be considered in arriving at a determination in this matter (*Matter of Saddlemire*, Tax Appeals Tribunal, June 14, 2001).

G. Petitioner's motion to reopen the record is granted. The two letters are admitted into evidence as petitioner's exhibits, and the record is now closed. Petitioner's motion for summary determination is denied. A determination will be issued in due course.

DATED: Troy, New York
January 29, 2009

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE