

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petitions	:	
of	:	ORDER
<b>PNEUCO, INC. F/K/A</b>	:	DTA NOS. 823495,
<b>CASH REALTY OF NY, INC.,</b>	:	823496, 823497
<b>AND</b>	:	823498, 823499
<b>R. CASH CUNNINGHAM</b>	:	823743 AND 823744
	:	
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period March 1, 2003 through May 31, 2006.	:	

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Petitioners, Pneuco, Inc. f/k/a Cash Realty of NY, Inc., and R. Cash Cunningham, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2003 through May 31, 2006.

Petitioners, by their representative, Duke, Holzman, Photiadis & Gresens, LLP (Gary M. Kanaley, Esq., of counsel) brought a motion filed May 24, 2012, seeking summary determination in the above-referenced matters pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b). The Division of Taxation appeared in opposition to the motion by its representative, Mark F. Volk, Esq. (Michael B. Infantino, Esq., of counsel). The parties completed their submissions by June 20, 2012, which date began the 90-day period for issuance of this order.

After due consideration of the motion, the supporting affidavits of Terrence M. Connors, Esq., the Memorandum of Law and supporting exhibits attached to the Motion, the Division of Taxation's Answering Affirmation of Michael B. Infantino, Esq., the affidavit of Nate' Juntunen,

and supporting exhibits attached thereto, and all the pleadings and proceedings had herein, Donna M. Gardiner, Administrative Law Judge, renders the following order.

***ISSUE***

Whether petitioners have established their entitlement to summary determination and that there is no material and triable issue of fact such that, as a matter of law, a determination can be made in its favor.

***FINDINGS OF FACT***

1. Petitioners, Pneuco, Inc. f/k/a Cash Realty of NY, Inc., and R. Cash Cunningham, were the subject of an investigation by the Criminal Investigations Division of the Division of Taxation (Division).

2. The auditor conducted an audit and analysis of records regarding auctions held by Pneuco, Inc. f/k/a Cash Realty of NY, Inc. The actual period for which sufficient records were available encompassed the period of March 1, 2003 through May 31, 2007. The auditor examined the sales records, including, but not limited to, auction jackets, invoices and summary sheets, as well as the bank records of Raymond “Cash” Cunningham and the sales tax returns of Pneuco, Inc. f/k/a Cash Realty of NY, Inc.

3. According to Division records, Cash Realty of NY, Inc. was a local auction company succeeded by Pneuco, Inc. Pneuco, Inc. is a C-corporation owned 100% by Raymond “Cash” Cunningham. All of the sales tax returns pertinent to the subject audit period were in the name of these two corporations and signed by Raymond “Cash” Cunningham.

4. Based on its audit, the Division determined that petitioners collected, but failed to remit, \$169,292.62 in sales tax for sales transactions that occurred from March 1, 2003 through May 31, 2007. The case was then referred to the Erie County District Attorney’s Office.

5. Notices of determination were issued to Pneuco, Inc., bearing assessment numbers L-029478795, L-031120185 and L-031601156 for the periods March 1, 2003 through May 31, 2006 and to R. Cash Cunningham bearing assessment numbers L-030063856, L-030063857, L-029482857, L-031136875 and L-031626695 for the periods December 1, 1999 through November 30, 2002 and March 1, 2003 through May 31, 2006.

6. Petitioners retained the services of Terrence M. Connors, Esq., to represent them during the criminal tax investigation. On May 27, 2011, petitioners pled guilty to offering a false instrument for filing in the first degree. As part of the plea agreement, payment was made to the Division for restitution in the amount of \$164,390.20.

7. Petitioners claim that their plea agreement was in full satisfaction of both the criminal and civil liabilities against them. The Division of Taxation claims that the plea agreement was in full restitution of the criminal liability only.

### ***CONCLUSIONS OF LAW***

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]; *see also* Tax Law § 2006[6]).

In reviewing a motion for summary determination, an administrative law judge is initially guided by the following regulation:

The motion shall be granted if, upon all 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 (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 Mdse.*, Tax Appeals Tribunal, January 14, 1999). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439 [1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572 [1989]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381 [1960]).

B. From all the evidence submitted on this Motion, there is no doubt that a material and triable issue of fact exists. Petitioners have not presented sufficient evidence to demonstrate that the plea agreement prohibited any civil assessments in this matter.

C. Petitioners’ motion for summary determination is denied, and a hearing on the issues will be scheduled in due course.

DATED: Albany, New York  
September 6, 2012

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE