

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
TITLES OF NEW YORK, INC. : DETERMINATION
for Revision of a Determination or for Refund of : DTA NO. 823799
Mortgage Recording Tax under Article 11 of the :
Tax Law for the Year 2006. :

Petitioner, Titles of New York, Inc., filed a petition for revision of a determination or for refund of mortgage recording tax under Article 11 of the Tax Law for the year 2006.

The Division of Taxation, by its representative Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion filed December 17, 2010, including the affidavit of John E. Matthews, Esq., dated December 15, 2010, with supporting documents, seeking summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000(9)(a)(1)(i) and 3000.9(b). Petitioner, appearing by its president, Esen Edip, had until January 17, 2010 to respond in opposition to the motion but did not do so, and thus such date began the 90-day period for issuance of this determination.

After due consideration of the motion, affidavit and supporting documents, and all pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation has established its 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. On May 12, 2006 petitioner, Titles of New York, Inc., paid \$13,134.98 in mortgage recording tax.

2. On June 14, 2010, petitioner filed a claim seeking a refund of \$11,807.88 of the foregoing mortgage recording tax it had paid, upon the assertion that the amount of tax paid had been erroneously calculated.

3. On June 22, 2010, the Division of Taxation (Division) issued a letter denying petitioner's claim for refund on the basis that the same was barred as not filed within the requisite period of limitation set by Tax Law § 263.

4. On August 18, 2010, petitioner filed a petition challenging the Division's denial.

5. The Division, in turn, filed the subject motion seeking summary determination on the premise that regardless of the substantive basis upon which petitioner claims a refund, the claim itself was not filed within two years from the date of payment of the tax, and thus the relief sought by petitioner is barred by operation of law.

5. Petitioner did not respond to the Division's motion for summary determination.

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 the 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. 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]).

B. The standard with regard to a motion for summary determination has been set forth numerous times. 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.) Summary determination is a "drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (*Moskowitz v. Garlock*, 23 AD2d 943 [1965]; *see Daliendo v. Johnson*, 147 AD2d 312 [1989]). Because it is the "procedural equivalent of a trial" (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572 [1989]), undermining the notion of a "day in court," summary determination must be used sparingly (*Wanger v. Zeh*, 45 Misc 2d 93 [1965], *affd* 26 AD2d 729 [1966]). If any material facts are in dispute, if the existence of a triable issue of fact is "arguable," or if contrary inferences may be reasonably drawn from the undisputed facts, the motion must be denied (*Gerard v. Inglese*, 11 AD2d 381 [1960]).

C. Tax Law § 263(1)(a) provides that no refund of tax paid under Tax Law Article 11 (tax on mortgages) shall be allowed unless an application for refund is made within two years from the time the erroneous payment of tax was received. Here, it is undisputed that the tax was paid on May 12, 2006, but petitioner's claim for refund was not filed until June 14, 2010. Since

petitioner's claim was filed more than two years after the tax was paid, such claim must be denied as untimely as a matter of law. Accordingly, with no dispute as to the facts and no basis in law upon which to grant petitioner's claim, summary determination will be granted in the Division's favor.

D. The Division's motion for summary determination is hereby granted, the petition of Titles of New York, Inc., is denied, and the Division's denial of petitioner's claim for refund is sustained.

DATED: Troy, New York
April 14, 2011

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE