

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
UNLIMITED ABSTRACT, LLC	:	DETERMINATION
		DTA NO. 824163
for Revision of a Determination or for Refund of	:	
Mortgage Recording Tax under Article 11 of the	:	
Tax Law for the Year 2007.	:	

Petitioner, Unlimited Abstract, LLC, 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 2007.

The Division of Taxation, by its representative Mark F. Volk, Esq. (Michelle M. Helm, Esq., of counsel), brought a motion filed July 25, 2012, including the affidavit of Michelle M. Helm, Esq., dated July 24, 2012, with supporting documents, seeking summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5 and 3000.9(b). Petitioner, appearing by its president, Joel M. Granik, had until August 24, 2012 to respond in opposition to the motion, 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, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation has established its entitlement to summary determination because 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 25, 2007, petitioner, Unlimited Abstract , LLC, paid \$6,477.65 in mortgage recording tax.

2. On December 20, 2010, petitioner filed a Mortgage Recording Tax Claim for Refund form, seeking a refund of \$5,808.40 of the foregoing mortgage recording tax it had paid, upon the assertion that the amount of tax paid had been erroneously calculated. Petitioner's claim was received by the Division of Taxation (Division) on January 3, 2011.

3. The Division issued a letter, dated January 5, 2011, 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, i.e., by May 25, 2009.

4. Petitioner filed a petition dated February 8, 2011, received by the Division of Tax Appeals on February 10, 2011, 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.

6. In response to the Division's motion, petitioner submitted an internal report bearing a notation that a former employee had been working on the issue of the erroneously paid mortgage tax. The report bore a "run" date of May 13, 2009.

A second internal document indicated that an employee had written a letter to "NYC." The report did not bear a date, and there was no indication of the date of the correspondence to the Division. A copy of the correspondence was not provided.

7. Petitioner's next contact was made by correspondence dated August 31, 2009, to the New York City Department of Finance, Refunds and Adjustments Unit, as a follow up to the inquiry made by petitioner's former employee who had been working on the overpaid mortgage tax issue. This unit responded to petitioner on September 8, 2009, indicating that a refund could only be processed if there were credits on petitioner's account, and that none were showing at that time. There was no mention of the statute of limitations concerning recovery of the funds in the correspondence from the New York City Department of Finance.

SUMMARY OF THE PARTIES' POSITIONS

8. Petitioner asserts it made diligent attempts to recover the erroneously paid amount and the company would suffer greatly from this loss of revenue if the refund is denied.

9. The Division maintains that regardless of the basis on which petitioner claimed the refund, the refund claim was not timely filed within two years from the date of the mortgage tax payment.

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, 944 [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, 573 [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 25, 2007,¹ but petitioner’s claim for refund was not filed until December 20, 2010. Although petitioner claims a former employee was communicating with the New York City Department of Finance prior to the expiration of two years from the date of payment, there is no indication that the Division was on notice that a refund claim was being made. At the very least there had to be some proof of constructive notice to the Division, and this was simply lacking in

¹ Although the Division, in its affidavit, referred to the date of payment as March 25, 2007, this does not rise to the level of a material issue of fact such that it would affect the outcome of the determination.

this case. 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. The Tax Appeals Tribunal has summarized the purpose of such time-bar, as follows:

Its 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 . . . 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 (*Matter of Nierenstein*, April 21, 1988).

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 Unlimited Abstract, LLC, is denied, and the Division's denial of petitioner's claim for refund is sustained.

DATED: Albany, New York
November 15, 2012

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE