

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**MICHAEL GREENFIELD** : DETERMINATION  
 : DTA NO. 827851  
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 May 15, 2014 through July 6, 2015. :

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Petitioner, Michael Greenfield, filed a petition for revision of a determination or for refund of New York State sales and use taxes under articles 28 and 29 of the Tax Law for the period May 15, 2014 through July 6, 2015.

On April 16, 2018, the Division of Taxation filed a motion for an order granting summary determination on the ground that there are no material issues of fact and that the facts mandate a determination in favor of the Division of Taxation. The motion was initially served upon petitioner at an incorrect address. On June 5, 2018, the Division of Taxation again served the motion on petitioner at a corrected address. On June 14, 2018, petitioner filed a response. The 90-day period for issuing this determination commenced on July 5, 2018. The Division of Taxation appeared by Amanda Hiller, Esq. (Jessica DiFiore, Esq., of counsel). Petitioner appeared by Richard E. Rubin, Esq. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner is entitled to a refund of sales tax which was paid with respect to the lease of a motor vehicle where the lease was subsequently assumed by a third party.

***FINDINGS OF FACT***

1. On May 15, 2014, petitioner, Michael H. Greenfield, a resident of New York State, entered into an agreement for the lease of an automobile with BMW Financial Services. At the time he entered into the lease agreement, petitioner paid sales tax in the amount of \$1,604.60.
2. On July 6, 2015, the lease was assumed and transferred to a third party.
3. On or about July 31, 2015, petitioner filed a claim for refund in the amount of \$980.58.

The application for a refund stated that:

“I entered into a 36 month closed end lease with BMW Financial Services on May 15, 2014. I paid the entire tax amount (\$1604.60) upfront. The lease was assumed on 7/6/15. I want the balance of the tax money prorated and refunded to me.”

4. The Division of Taxation (Division) issued a refund claim determination notice (notice), dated December 18, 2015, denying petitioner’s refund claim. The notice states:

“When an individual leases a motor vehicle for a period of one year or more, the amount due under the agreement and for the entire period covered by the lease will immediately be subject to sales tax. This lease is considered a sale, and as such, it would be taxable in a like manner as any other tangible personal property. That is, tax is due when title or possession transfers from the seller to the purchaser for a consideration. There is no provision in the sales tax law that allows for a refund of the sales tax paid by [sic] the lessee even though the agreement may be terminated prematurely.

When the original lease is subsequently assumed by an assignee, this is a separate taxable transaction. As stated above, title or possession of tangible personal property has been transferred for a consideration. In this instance, the

consideration is the assumption of the lease payments and tax is due on the remaining payments on this lease as indicated above.”

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

A. A motion for summary determination “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” (20 NYCRR 3000.9 [b] [1]). Section 3000.9 (c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). 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, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably 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, 382 [2d Dept 1960]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992] citing *Zuckerman*).

Petitioner does not dispute the facts, but argues that he is entitled to a refund for the portion of the sales tax paid when the lease was assumed by a third-party. Petitioner argues that the Division's motion should be denied and summary determination should be granted in petitioner's favor.

B. Pursuant to Tax Law § 1105 (a), sales tax is imposed on the sale of tangible personal property in New York State. Tax Law § 1101 (b) (5) defines the terms "sale, selling or purchase" as meaning any transaction in which there is a transfer of title or possession or both of tangible personal property for a consideration, including the "exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever."

Tax Law § 1111 (i) provides in relevant part:

"(A) Notwithstanding any contrary provisions of this article or other law, with respect to any lease for a term of one year or more of (1) a motor vehicle . . . all receipts due or consideration given or contracted to be given for such property under and for the entire period of such lease . . . shall be deemed to have been paid or given and shall be subject to tax, and any such tax due shall be collected, as of the date of first payment under such lease . . . or as of the date of registration of such property with the commissioner of motor vehicles, whichever is earlier."

C. In this case, petitioner argues that he is entitled to a refund for a portion of the tax paid on the lease because the lease was assigned to another individual during a portion of the lease term. Petitioner's claim is rejected. Specifically, the Division's regulation at 20 NYCRR 527.15 (e) provides that a refund or credit will not be allowed because the receipts were not actually paid such as when there is an early termination of a lease. The basis for this provision is that Tax Law § 1111 (i) states that all lease payments are deemed to have been paid and are subject to tax as of the time of the first payment under the lease (*see Matter of Miehle*, Tax Appeals Tribunal, August 24, 2000; *see also Matter of Moerdler v Tax Appeals Trib.*, 298 AD2d 778 [3d Dept

2002]). The subsequent assignment of the lease to another individual was a discrete transaction (*see* Tax Law § 1101 [b] [5]). In *Miehle* the Tax Appeals Tribunal concluded that a refund was not authorized by the premature termination of a lease and specifically noted that the premature termination of a lease is not a situation where a contract of sale has been “canceled” (*Matter of Miehle*).

Petitioner argues that the Division’s interpretation creates the potential for double taxation because the same motor vehicle was re-leased under a lease assumption by another individual who paid tax for the period of the lease assumption. In *Matter of Moerdler*, the Tribunal rejected the same argument, stating that:

“Motor vehicles are frequently resold and re-leased during their useful lives and sales tax is collected on each transaction. This is consistent with the principle that the sales tax is a transaction tax; the liability for the tax occurs at the time of the transaction. ‘The time or method of payment is generally immaterial, since the tax becomes due at the time of the transfer of title to or possession of . . . the property’ (20 NYCRR 525.2[a][2])”.

D. The motion of the Division of Taxation for summary determination is granted and the petition of Michael Greenfield is denied.

DATED: Albany, New York  
September 27, 2018

/s/ Barbara J. Russo  
ADMINISTRATIVE LAW JUDGE