

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
BLUE ROCK CONTRACTING, INC. : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 828677
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the period March 24, 2015 through December 12, 2016. :

Petitioner, Blue Rock Contracting, Inc., 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 March 24, 2015 through December 12, 2016.

On January 23, 2019, petitioner, by its representative, Herschel Friedman, CPA, brought a motion dated January 21, 2019 seeking summary determination in the above-referenced matter pursuant to section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Together with the notice of motion, petitioner filed the affidavit of Herschel Friedman, CPA, and attached exhibits. At the request of the Division of Taxation, by Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel) an extension of time was granted to respond to petitioner's motion. The 90-day period for issuance of this determination commenced on March 7, 2019. Based upon the motion papers, the affidavit and documents submitted therewith, the Division of Taxation's response in opposition, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner has proven that it paid sales tax on carting services in conjunction with a capital improvement project and, therefore, is entitled to a refund of such sales tax and summary determination in its favor.

FINDINGS OF FACT

1. On December 20, 2016, the Division of Taxation (Division) received an application for credit or refund of sales and use tax (form AU-11), dated December 16, 2016, in the amount of \$95,422.89 (refund claim). The refund claim pertained to sales tax that petitioner, Blue Rock Contracting, Inc., paid for carting services (trash and debris removal) in conjunction with capital improvement projects located in New York City, and covered the period March 24, 2015 through December 12, 2016.

2. Laura Mugrace, a Tax Technician I in the Division's Audit Division-Sales Tax-Desk Audit-AG3 Unit, was assigned to review petitioner's refund claim. In the course of the desk audit review of that refund claim, oral and written requests were made to petitioner's representative for additional information including, among other items, copies of vendor invoices, and proof of payments to the two vendors, Guma Corporation (Guma) and IG Container Service, LLC (IG Container Service).

3. Review of the February 13, 2018 entry in the Division's "e-MPIRE APAC Refund Claim Inquiry Note Summary" for petitioner's refund claim indicates that based upon her review of all information provided with the claim for "refund of sales tax paid on the purchase of garbage removal in connection with capital improvements," the auditor was approving a partial refund of sales tax in the amount of \$87,060.82, and denying the remainder of the refund claim, i.e., \$8,362.07. The auditor's February 13, 2018 note entry states, in part, that:

“\$8,173.71 is being denied because on a portion of the invoices submitted from IG Container Service sales tax was not separately stated on the invoice. \$188.36 is being denied because on a portion of the invoices submitted from Guma a permit fee was charged and not taxed.”

4. With respect to the IG Container Service invoices reviewed during the desk audit, the auditor determined that sales tax was not separately stated on 40 of those invoices that bore various dates from April 18, 2016 through June 6, 2016.

5. On February 28, 2018, the Division issued to petitioner a refund claim determination notice that approved a refund of sales tax in the amount of \$87,060.82, and denied \$8,362.07, the balance of the refund claim. The explanation section of the refund claim determination notice provided, in relevant part, the following detailed explanation:

“Your claim for refund is being partially denied because there was an error on the refund requested for the invoices submitted from Guma Corp. On a portion of the invoices provided with your claim there was a permit fee that was not taxable. Therefore, I am disallowing the refund requested on this fee as no sales tax was charged.

In addition, if the customer is given any sales slip, invoice, receipt or other statement/ or memorandum of the price, amusement charge or rent paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him. Therefore, I am disallowing the refund on all invoices submitted from IG Container Service where sales tax was not separately stated on the invoice.”

6. On April 25, 2018, petitioner timely filed a petition challenging the partial denial of its refund claim in the amount of \$8,173.71 related to sales tax paid on certain IG Container Service invoices. The Division filed its answer on June 27, 2018. Thereafter, petitioner filed its motion for summary determination.

7. In support of its motion for summary determination, petitioner submitted: (i) the affidavit of Herschel Friedman, CPA, dated January 21, 2019; (ii) a copy of petitioner’s application for credit or refund of sales or use tax (form AU-11); (iii) a copy of the refund claim

determination notice, dated February 28, 2018; (iv) a copy of the petition; (v) a copy of the Division's answer; (vi) a copy of a printout from the Division's e-MPIRE APAC Refund Claim Inquiry Note Summary related to petitioner's refund claim; (vii) two pages entitled "IG Container Service LLC Customer Balance All Transactions" for "Blue Rock Demo Carter," listing all invoices and payments dated from April 18, 2016 through August 22, 2016; (viii) copies of IG Container Service invoices issued to petitioner; and (ix) copies of proof of payments to IG Container Service.

8. The billing date, invoice number, customer name and billing address, and payment terms appear in separately labeled boxes at the top of each of the IG Container Service invoices in question. In the middle section of each of those invoices, under the printed columnar headings "Qty"; "Item"; "Description"; "Serviced"; "Rate"; and "Amount," appears one or more separate lines of billing information.¹ Information contained on each line includes the number, size, location and service date of the containers provided, the rate charged for each such container, and the total amount billed. In the "Amount" column on each of those invoices, the capital letter "T" appears to the right of the amount billed on each line, indicating that the total amount billed on that line is subject to sales tax. In the bottom right of each of those invoices, there is a row of three boxes labeled "Sales Tax (8.875%)," "Total paid" and "Balance Due," respectively. Review of those invoices indicates that the sales tax box contains a dollar amount equal to 108.875%, the sum of the effective sales tax rate plus 100% of the total taxable base amount listed above on those invoices. On each of those invoices, the balance due amount is the same

¹ Some of the invoices contain multiple line entries for 15 yard containers, 20 yard containers or a combination thereof serviced on the same date.

amount as appears in the sales tax box because an amount of \$0.00 appears in the “Total paid” box.

9. The record includes proof of payments of amounts due on all IG Container Service invoices, including those invoices in question.

10. In opposition to petitioner’s motion for summary determination, the Division submitted: (i) the affirmation of Melanie Spaulding, an attorney employed in the Office of Counsel of the Division, dated February 27, 2019; (ii) a copy of the petition filed in this matter; (iii) a copy of the Division’s answer; and (iv) an unsigned stipulation for discontinuance in this matter.

11. In her affirmation, Ms. Spaulding asserts that in early February 2019, she discussed the refund claim with Ms. Mugrace, the auditor who had reviewed such refund claim. Although the Division continues to maintain that the invoices are legally insufficient because they fail to separately state the tax, Ms. Spaulding claims that the decision was made to grant petitioner’s refund in the amount of \$8,173.71, the amount at issue in the petition. Ms. Spaulding further claims that on February 13, 2019, she spoke to Mr. Friedman, petitioner’s representative, to let him know that the Division decided to grant the refund. She also avers that she forwarded a stipulation for discontinuance to Mr. Friedman on February 14, 2019, and requested that it be signed and returned to her by February 20, 2019 at noon. Ms. Spaulding affirms that to date, petitioner has failed to sign and return the stipulation for discontinuance.²

² The record includes an unsigned stipulation for discontinuance in this matter, on which the refund is recomputed to be tax of \$8,173.71, plus statutory interest. The box stating that “[p]etitioner(s) waives any rights to proceed to recover costs and fees in the Division of Tax Appeals pursuant to Tax Law § 3030” was checked on this stipulation for discontinuance. Because it was not agreed upon, it is in the nature of a settlement offer and cannot be considered in reaching this determination.

12. Ms. Spaulding, in her affirmation, also avers that on February 25, 2019, she “spoke to Ms. Mugrace and the amount of \$8,173.71 is now in the process of being refunded to Petitioner, notwithstanding Petitioner’s failure to sign and return the Stipulation.”

CONCLUSIONS OF LAW

A. A motion for summary determination “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” (20 NYCRR 3000.9 [b] [1]).

B. Section 3000.9 (c) of the Tax Appeals Tribunal’s Rules of Practice and Procedure 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*).

C. As noted, the Division denied a sales tax refund in the amount of \$8,173.71 because some of the IG Container Service invoices submitted in support of petitioner's refund claim failed to separately state the amount of sales tax charged as required by Tax Law § 1132 (a) (1). The petition filed in this matter challenges the Division's denial of its refund claim and seeks a refund of sales tax in the amount of \$8,173.71. Petitioner contends that review of the IG Container Service invoices in question clearly shows that sales tax was charged on amounts billed for carting services provided in connection with a capital improvement project, and that the total amount listed as due on such invoices included a charge for sales tax. Petitioner maintains that the evidence presented in support of its motion clearly shows that sales tax was charged on the IG Container Service invoices in question and was paid erroneously by it on the same. Therefore, petitioner asserts that there is no material issue of fact and that summary determination should be granted in its favor.

The Division contends that petitioner's motion for summary determination should be denied. It maintains that the invoices provided by the petitioner do not comply with Tax Law § 1132 (a) (1) because they fail to separately state the amount of sales tax charged. As such, the Division argues that petitioner has failed to establish that the sales tax was charged and paid.

D. After careful review of the IG Container Service invoices in question, I find that those invoices clearly show that sales tax was charged on the amounts billed to petitioner for carting services provided in connection with a capital improvement project located in New York City. Specifically, in the middle section of each of those invoices, one or more lines of billing information appears. Information contained on each line includes the number, size, location and service date of the containers provided, the rate charged for each such container, and the total amount billed. The capital letter "T" appears to the right of the total amount billed on each line

of the invoices in question, indicating that the total amount billed on that line is subject to sales tax. Although a sales tax rate of 8.875% is specifically listed in the sales tax box on each of the invoices in question, the specific amount of sales tax being charged on the total taxable base amount is not separately stated in that box. Rather, the dollar amount listed in the sales tax box equals 108.875%, the sum of the effective sales tax rate plus 100% of the total taxable base amount listed above on those invoices. As petitioner correctly points out, IG Container Service, as vendor, issued the invoices in question, and any shortcomings in the same rest with IG Container Service, not petitioner as the customer. Given all of the information provided on each of the invoices in question, the amount of sales tax charged on the same can easily be ascertained by subtracting the sum of the total amounts (i.e., the total taxable base amount), from the dollar amount listed in the sales tax box. Although there is no dispute that petitioner paid the amounts due on all of the IG Container Service invoices, including the invoices in question, petitioner did submit proof of such payments with its motion papers. Petitioner should not be denied a refund of sales tax erroneously paid on carting services merely because IG Container Service failed to separately state the amount of sales tax charged on some of the invoices that it issued to petitioner for carting services provided in connection with a capital improvement project.³

In sum, petitioner has proven that the amount listed as due on each of the IG Container Service invoices in question includes sales tax charged at a rate of 8.875%, and that it paid such tax erroneously (*see* Tax Law § 1139 [a]; 20 NYCRR 534.2).

E. As there is no material issue of fact, summary determination is granted in favor of petitioner. The Division is directed to refund \$8,173.71, the total amount of sales tax charged

³ The Division granted a refund of sales tax charged on other IG Container Service invoices presented by petitioner during the desk audit review of its refund claim (*see* finding of fact 3).

and paid on the IG Container Service invoices in question, plus statutory interest. It is noted that Ms. Spaulding, in her affirmation, asserts that as of February 25, 2019, the Division is in the process of refunding the amount of \$8,173.71 to petitioner (*see* findings of facts 11 and 12).

F. Petitioner's motion for summary determination is hereby granted. The petition of Blue Rock Contracting, Inc., is granted, and the Division of Taxation is directed to issue a refund in the amount of \$8,173.71, plus statutory interest.

DATED: Albany, New York
May 30, 2019

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE