

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

JOHAN GRATE BEY

for Revision of Determinations or for Refund of New York
State Sales and Use Taxes Under Articles 28 and 29 of the Tax
Law for the Periods January 24, 2017 and February 20, 2017.

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:
: DETERMINATION
: DTA NO. 828698
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Petitioner, Johan Grate Bey, filed a petition for revision of determinations or for refund of New York State sales and use taxes under articles 28 and 29 of the Tax Law for the periods January 24, 2017 and February 20, 2017.

On January 29, 2021, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel), brought a motion 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. The Division of Taxation submitted the affirmation of Adam Roberts, dated January 29, 2021, along with the affidavit of Daniel Arnold, sworn to January 28, 2021, with annexed exhibits, in support of its motion. On February 20, 2021, petitioner, appearing pro se, submitted documents and a brief in response to the motion for summary determination. The 90-day period for issuance of this determination commenced on March 1, 2021. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Kevin R. Law, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether summary determination should be granted in favor of the Division of Taxation because there are no facts in dispute and, as a matter of law, the facts mandate a determination in favor of the Division.

II. Whether a frivolous petition penalty should be imposed under the authority of Tax Law § 2018 and 20 NYCRR 3000.21.

FINDINGS OF FACT

1. On May 7, 2018, petitioner, Johan Grate Bey, filed a petition with the Division of Tax Appeals contesting two notices of determination, notices number L-046514683 and L-046514682. Attached to the petition was a conciliation order dated April 20, 2018 sustaining the notices. In Section VIII of the petition, petitioner alleges as follows:

“I am willing and ready to fulfill my contractual obligation to pay condition upon me able to verify/validate the original contract with my signature on it, as well as verify the accounting in regards to the penalties and interest add on is calculated [sic].

Before I waive or dismiss my right to a hearing in the division of tax appeals, I would like to make sure no errors have been made. If your office is unable to provide the requests [sic] documentation than it would be my intention to invoke my right for an appeal.”

2. On July 11, 2018, the Division of Taxation (Division) filed its answer to the petition. In its answer, the Division denied the allegations of fact and error alleged by petitioner, and the Division made the following allegations summarized as follows:

i) on or about January 24, 2017, petitioner purchased a Ford F-350 pickup truck (truck) from a dealership in Texarkana, Texas, for a purchase price of \$26,200.69;

ii) upon registering the truck with the New York State Department of Motor Vehicles (DMV), petitioner claimed to be a Moorish-American exempt from tax;

iii) DMV contacted the Division for assistance; at that point the Division agreed to bill petitioner for the tax due upon registration;

iv) the Division issued notice of determination L-046514682 on May 31, 2017 asserting the amount of tax due for registration of the truck (\$2,096.02) plus penalties and interest;

v) on or about February 20, 2017 petitioner, purchased a Jay Flight trailer (trailer) from RV ONE Superstore, Inc., in Albany, New York, for a purchase price of \$37,895.00, and refused to pay sales tax on the purchase claiming to be exempt as a Moorish-American;

vi) on May 31, 2017 the Division issued notice of determination L-046514683 representing the tax due on the purchase of the trailer (\$3,024.40) plus penalties and interest; and

vii) during the periods in issue, petitioner was a resident of New York.

3. Included in the Division's motion papers is the affidavit of Daniel Arnold, Tax Technician II, in the Division's Casual Sale Unit. Mr. Arnold has worked for the Division since December 1, 2008 and has been a Tax Technician II since June 21, 2012.

4. Mr. Arnold's responsibilities include reviewing filed DTF-803 forms (Claim for Sales and Use Tax Exemption - Title/Registration Motor Vehicle, Trailer, All-Terrain Vehicle [ATV], Vessel [Boat] or Snowmobile).

5. Mr. Arnold avers that he was involved with the audit of petitioner and that he assisted in preparing summaries of the audit which were attached to his affidavit. Mr. Arnold avers that said summaries are a true and accurate record of the events in this matter.

6. The first summary states that on March 6, 2017, petitioner registered a 2012 Ford F-350 crew cab four wheel drive pickup truck (the truck) at the New York State Department of Motor Vehicles (DMV) office in Rensselaer County, New York; petitioner purchased the truck from an auto dealer in Texas for a purchase price of \$26,200.29 on January 24, 2017. On the DTF-803, petitioner claimed an exemption from use tax for "Moorish American AA222141." A supervisor at the DMV office called the Division seeking clarification for the claimed exemption.

Mr. Arnold advised the DMV supervisor that no such exemption existed, and this was communicated to petitioner while at the DMV office while Mr. Arnold was still on the telephone with the DMV supervisor. At that point, petitioner became belligerent, claiming he was entitled to such exemption. To diffuse the situation, Mr. Arnold instructed the DMV supervisor to process the truck registration and mail the paperwork to his attention so the Division would audit the matter. On the DTF-803, petitioner lists a Troy, New York, address.

7. On March 8, 2017, two days after petitioner registered the truck, another supervisor at DMV was processing paperwork from local dealerships and recognized petitioner's name and the unusual exemption claimed as she had been in the DMV office when petitioner was registering his truck. Specifically, on February 20, 2017, petitioner purchased a 2017 Jay Flight Travel Trailer (travel trailer) from RV One Superstore in Albany, New York, for a purchase price of \$37,895.00 and claimed to be exempt from taxation based on his self-identified status as a "Moorish-American." The DMV supervisor sent this paperwork to Mr. Arnold for audit along with the registration paperwork for the truck.

8. According to the summaries Mr. Arnold assisted in preparing, a statement of proposed audit changes was sent to petitioner on March 29, 2017 proposing use tax in the amount of \$2,096.02, plus penalties and interest, on the registration of the truck. On that same date, a separate statement of proposed audit changes was sent to petitioner proposing sales tax in the amount of \$3,024.40, plus penalties and interest, on the purchase of the travel trailer. Copies of the March 29, 2019 statements of proposed audit changes are not included with the Division's motion papers.

9. Subsequently, on May 31, 2017, a notice of determination (notice number L-046514682) was issued to petitioner asserting use tax due of \$2,096.02, plus penalties and

interest, on the truck. A copy of notice of determination L-046514682 is included in the record as Exhibit D annexed to the affirmation of the Division's representative. Also, on May 31, 2017, the Division issued a notice of determination (notice L-046514683) asserting sales tax of \$3,024.40, plus penalties and interest, on the purchase of the trailer. A copy of notice of determination L-046514683 is included in the record as Exhibit F annexed to the affirmation of the Division's representative.

10. Petitioner's February 20, 2021 unsworn response raises no issues with the facts as set forth in the affidavit of Mr. Arnold and attached exhibits. Instead, his response can best be described as misused legal terms that do not address the underlying facts surrounding the issuance of the notices of determination at issue herein.

11. Petitioner previously filed a motion for summary determination and a motion to compel the Division to respond to a bill of particulars. In addition, through those motions, petitioner alleged that the Division had violated the fair debt collection practices act and demanded damages in the amount of \$5,000.00. By order dated July 30, 2020, the undersigned administrative law judge denied petitioner's motion seeking an order compelling the Division to file a response to his demands for bills of particulars and denied petitioner's motion for summary determination. In addition, petitioner's claim that he was exempt from taxation based upon his status as a Moorish-American was denied and judgment was granted to the Division on that issue. The findings of fact and conclusions of law from the July 30, 2020 order are incorporated herein by reference.

12. In addition, petitioner had also filed a separate motion challenging the subject matter jurisdiction of the Division of Tax Appeals, as well as arguing that the Division of Tax Appeals lacks personal jurisdiction over him. By order dated December 23, 2020, that motion was also

denied. The findings of fact and conclusions of law from the December 23, 2020 order are incorporated herein by reference.

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” and the moving party is entitled to a favorable determination as a matter of law (20 NYCRR 3000.9 [b] [1]). 20 NYCRR 3000.9 (c) 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*).

B. Sales tax is imposed on retail sales of taxable tangible personal property and specified taxable services (Tax Law § 1105). Use tax is imposed on the use of taxable items and specified taxable services in New York when the sales tax has not been paid (Tax Law § 1110).

C. The Division has established that there are no triable issues of fact. The Division submitted the affidavit of Daniel Arnold that establishes that petitioner, while a resident of New York State: (i) purchased a truck in Texas without paying sales tax thereon and brought it to New York whereupon he registered it with DMV; and (ii) purchased a travel trailer from a dealership in Albany, New York, and did not pay tax on the purchase. Clearly these acts make him liable for compensating use tax under Tax Law § 1110 with respect to the truck, and liable for sales tax on the purchase of the travel trailer. In both instances, he claimed that the transactions were exempt from taxation based on his status as a “Moorish-American.” Petitioner’s response to the instant motion consists of misused and inapplicable legal terms similar to what he affirmatively raised in the prior motions that he filed and were rejected by the undersigned administrative law judge. As was stated in the July 30, 2020 order, petitioner’s status as a “Moorish-American” does not exempt him from sales or use taxes. Based upon the foregoing, tax was properly asserted on these transactions.

D. Tax Law § 1145 (a) (1) (i) imposes a penalty for the failure to timely file a return or pay any tax imposed by articles 28 and 29 of the Tax Law. Penalties may be abated if such failure or delay was due to reasonable cause and not due to willful neglect (Tax Law § 1145 [a] [1] [iii]). Although not raised by either party, petitioner’s reliance on a nonexistent exemption based upon his self-identified status as a “Moorish-American” does not constitute reasonable cause.

E. Tax Law § 2018 authorizes the Tax Appeals Tribunal to impose a penalty “if any petitioner commences or maintains a proceeding in the [D]ivision of [T]ax [A]ppeals primarily for delay, or if the petitioner’s position in such proceeding is frivolous.” A penalty may be imposed on the Tribunal’s own motion or on motion of the Division (*see* 20 NYCRR 3000.21). The maximum penalty allowable under this provision is \$500.00 (*see* Tax Law § 2018). It has been held that where a position has been soundly rejected by the federal courts and absolutely no basis for the assertion can be found, the frivolous position penalty is appropriate (*see Matter of Thomas*, Tax Appeals Tribunal, April 19, 2001). In this case, petitioner’s arguments regarding his right to an exemption have been universally rejected by the courts (*see e.g. Bey v City of New York Dept. of Corrections*, 1997 WL 576090, at *2 [S.D.N.Y. Sept 17, 1997], *aff’d* 164 F3d 617 [2d Cir,1998], *cert denied* 528 US 860 [1999]; *Bey v State*, 847 F3d 559 [7th Cir, 2017]; *Gaines El v Commissioner*, T.C. Memo. 1975-54). Therefore, it is determined that petitioner’s position is frivolous, and the penalty provided for in Tax Law § 2018 is imposed on the motion of the Administrative Law Judge in the sum of \$500.00.

F. Based upon the foregoing, the Division of Taxation’s motion is granted, the notices of determination are sustained, the petition of Johan Grate Bey is denied, and the maximum penalty of \$500.00 for the filing of a frivolous petition is imposed.

DATED: Albany, New York
May 27, 2021

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE