STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **LYNN CALVANO** 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 September 1, 2019 through May 31, 2022.	: : : : : :	DETERMINATION DTA NO. 851521

Petitioner, Lynn Calvano, 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 September 1, 2019 through May 31, 2022.

On April 27, 2026, petitioner, by its representative, Armanio Advisory LLC (Jennifer Koo, Esq., of counsel), brought a motion seeking summary determination in her favor in the above-referenced matter pursuant to Tax Law § 2006 and sections 3000.5 and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. The Division of Taxation, appearing by Amanda Hiller, Esq. (Elizabeth A. Lyons, Esq., of counsel), requested and was granted an extension of time to respond to petitioner's motion, and timely did so by June 11, 2026, which date commenced the 90-day period for the issuance of this determination.

Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Kevin R. Law, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation can assert responsible person liability by issuance of a notice and demand for payment of tax due rather than a notice of determination.

FINDINGS OF FACT

1. Petitioner, Lynn Calvano, was the owner and responsible person of Landmark Unlimited Inc. (Landmark) during all relevant periods in issue.

2. The Division of Taxation (Division) audited Landmark for the period September 1, 2019 through May 31, 2022. As a result of the audit, the Division issued a notice of determination to Landmark for the period September 1, 2019 through May 31, 2022.

3. On November 6, 2024, the Division issued a notice and demand for payment of tax due, assessment number L-060971347 (notice and demand), to petitioner assessing sales and use taxes due of $522,844.95, plus penalties and interest, for the period September 1, 2019 through May 31, 2022. The notice and demand states that the Division's records indicate that petitioner was liable as an officer/responsible person for the collection and payment of sales and use taxes of Landmark. The notice and demand references an included payment document and provides, in relevant part, as follows:

> "YOU MUST complete the enclosed Payment Document whether you AGREE or DISAGREE with this NOTICE AND DEMAND for Payment of Tax Due.
>
> > IF YOU AGREE with the amount due, complete the Payment Application Section.
> >
> > IF YOU DISAGREE because the amount due was already paid, complete the Disagreement With Findings Section and attach a photocopy of the front and back of your canceled check or money order (not the money order receipt).
>
> Refer to the Instructions on the Payment Document for returning that form.
>
> If we do not receive full payment of the total amount due or your disagreement by 11/27/24:
>
> We will take legal action to compel payment of the balance due."

4. Included with the notice and demand is form DTF-996, notice of taxpayer rights, which provides a general summary of how a taxpayer may disagree

with actions taken by the Division. The section on formal protests states, in relevant part, as follows:

"In some cases, you may timely file a **protest** to have your dispute decided impartially. Your notice will indicate whether you have protest rights, which normally means you may request a conciliation conference or a Division of Tax Appeals hearing."

5. The notice and demand issued to petitioner does not indicate that it had protest rights.

6. On January 28, 2025, petitioner filed a petition with the Division of Tax Appeals challenging the notice and demand. The petition alleges that petitioner never received a notice of determination, only the subject notice and demand, and alleges that the Division never issued a notice of determination to her. In addition, the petition generally takes issue with how the Division determined the amount of tax due asserted against Landmark and, therefore, against petitioner. The petition does not challenge petitioner's status as a responsible person of Landmark.

7. The Division's answer to the petition denies the allegation that it never issued a notice of determination to petitioner but does not affirmatively plead that such a notice was issued to her as a responsible person of Landmark. Instead, the answer refers to the notice and demand described in finding of fact 3 as the notice issued to petitioner determining her to be liable for Landmark's sales and use taxes.

8. Petitioner filed the subject motion seeking cancellation of the notice and demand. Included with petitioner's motion papers was an affidavit of petitioner wherein she avers that she never received a notice of determination, only the notice and demand.[1]

9. In response, the Division asserts that the motion should be denied and the petition dismissed because the Division of Tax Appeals lacks subject matter jurisdiction to rule on the

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[1] Also included with the motion papers was the purported affirmation of petitioner's representative, Jennifer Koo, Esq. The language contained in the purported affirmation submitted by Ms. Koo does not comply with the requirements of Civil Practice Law and Rules (CPLR) 2106 and State Administrative Procedure Act (SAPA) § 302 and has been accorded no evidentiary value.

underlying merits because a statutory notice, as that term is defined by 20 NYCRR 3000.1 (k), was not protested, contending that the notice and demand is not such a notice. In the alternative, the Division contends that petitioner has not been prejudiced by the issuance of a notice and demand rather than a notice of determination because she is exercising her protest rights and no harm has occurred.

CONCLUSIONS OF LAW

A. A motion for summary determination is properly 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 that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party" (20 NYCRR 3000.9 [b] [1]).

B. Section 3000.9 (c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (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 v Tri-Pac Export Corp.***, 22 NY2d 439, 441 [1968]; ***Museums at Stony Brook v Village of Patchogue Fire Dept.***, 146 AD2d 572, 573 [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 (***see 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 v City of New York***, 49 NY2d at 562). After reviewing petitioner's motion papers, it is clear that summary determination in her favor is warranted.

C. In this case, there are no material facts in dispute. Petitioner was the responsible person of Landmark who was issued a responsible person assessment for the sales tax the Division claims is due based on its audit of Landmark. The Division, however, issued a notice and demand to petitioner rather than a notice of determination.

D. The Tax Law provides that the Division may issue a notice of determination of sales and compensating use taxes to a person or persons liable for the collection or payment of tax at his or her last known address using certified or registered mail (***see*** Tax Law §§ 1138 [a] [1]; 1147 [a] [1]). Such notice shall be an assessment of the amount due, plus interest and penalties, unless the person files a petition for hearing with the Division of Tax Appeals within 90 days from the date of the mailing of the notice (***see*** Tax Law § 1138 [a] [1]). A person also has the option of commencing an administrative challenge to such notice by filing a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) "if the time to petition for such a hearing has not elapsed" (Tax Law § 170 [3-a] [a]).

E. Conversely, the Division is authorized to issue a notice and demand for payment of sales and use taxes due "in cases of mathematical or clerical errors or failure to pay the tax due shown on the return" (Tax Law § 173-a [3] [c]). The Division is also authorized to issue a notice and demand for payment of sales and use taxes "which ha[ve] been finally determined to be due or which ha[ve] been finally and irrevocably fixed" (Tax Law § 173-a [3] [b] [1]; ***see*** 20 NYCRR 535.2 [c] [2]). The authorization to issue such a notice and demand "shall be construed as specifically denying and modifying the right to a hearing with respect to any such notice and demand" and "[a]ny such notice and demand shall not be construed as a notice which gives a person the right to a hearing [in the Division of Tax Appeals]" Tax Law § 173-a [3] [c].

F. Here, the sales tax at issue was not the result of a mathematical or clerical error or a failure to pay the tax due shown on the return, nor has the tax been finally determined to be due or been finally and irrevocably fixed. The tax asserted herein resulted from an audit of a business of which the Division has asserted that petitioner is the responsible person. The issuance of a notice and demand in this case is not authorized and, therefore, it must be cancelled (***see Matter of Beckerman v New York State Dept. of Taxation & Fin.***, 232 AD3d 961, 964 [3d Dept 2024]).

G. Although the Division contends petitioner is not prejudiced by the Division's failure to issue a notice of determination to her because she has exercised her protest rights, the requirement that a notice of determination be issued in the first instance is not optional (***see id.*** at 964-965.). If the Division's procedural failures were countenanced, such practice could effectively deny other taxpayers, who did not have experienced tax professionals as representatives, their right to due process because they erroneously believed they had no formal prepayment protest rights. In fact, the Division's assertion that the petition should be dismissed because a statutory notice having protest rights was not protested confirms this very point.[2] The Division's reliance on ***Matter of Pepsico, Inc. v Bouchard***, 102 AD2d 1000 [3d Dept 1984]) and

[2] The Division's assertion that the petition should be dismissed because a notice and demand does not come with protest rights is simply absurd. The Division of Tax Appeals has jurisdiction to rule on whether the Division issued a proper notice in the first instance. The Division's argument, if accepted, would effectively leave petitioner without a remedy.

Matter of Tops, Inc. (Tax Appeals Tribunal, November 22, 1989), is misplaced as both those matters involved an error appearing on the face of the respective *notice of determination* as to the sales tax periods at issue. Here, a notice of determination was never issued.

H. Petitioner's motion for summary determination is granted, the petition of Lynn Calvano is granted and the notice and demand for payment of tax due, dated November 6, 2024, is cancelled.

DATED: Albany, New York
September 3, 2026

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE