

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :
of :
EMERALD INTERNATIONAL HOLDINGS, LTD. : ORDER
for Revision of Determinations or for Refund of Sales and : DTA NOS. 827663
Use Taxes under Articles 28 and 29 of the Tax Law for : AND 827664
the Period December 1, 2011 through February 28, 2014. :

Petitioner, Emerald International Holdings, Ltd., filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 2011 through February 28, 2014.

Petitioner, by its President, Otu A. Obot, brought motions on October 11, 2016 seeking summary determination in favor of petitioner pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motions were the affirmations of Otu A. Obot. The Division of Taxation, by its representative, Amanda Hiller, Esq. (Anita Luckina, Esq., of counsel), did not file responses. Based upon the motion papers, and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Kevin R. Law, Administrative Law Judge, renders the following order.

ISSUES

I. Whether the Division of Taxation's answers consisting of a general denial of the allegations in the petitions constitute deemed admissions of the matters alleged.

II. Whether petitioner has established that there are no questions of fact and it is therefore entitled to judgment in its favor as a matter of law.

FINDINGS OF FACT

1. On or about June 1, 2016, petitioner, Emerald International Holdings, Ltd., filed separate petitions following the issuance of conciliation orders issued by the Division of Taxation's (Division) Bureau of Conciliation and Mediation Services on March 18, 2016.

2. The first petition (DTA#827663) references notice/assessment number L-042543058. Section (6) of the standard petition form used by petitioner states the following, "(54) Fifty four documented errors attached. See attached." Consistent therewith is a 10-page attachment with 54 allegations of fact and error.

3. The second petition (DTA#827664) references notice/assessment number L-042960579. Section (6) of the standard petition form used by petitioner states that "(62) Sixty two documented errors attached. See attached." Consistent therewith is a 12-page attachment with 62 allegations of fact and error.

4. On August 17, 2016, the Division of Taxation (Division) filed separate responsive pleadings to each petition. Each three-page document contained a caption specific to the respective petition and was referred to as the Division's answer to the petition.

5. Paragraph 1 of each of the Division's answers reads:

DENIES the allegations of error and assertions of fact in paragraph six (6) of the petition and the attachments thereto except as set forth herein."

6. Each of the Division's answers also contain 18 affirmative statements regarding the substance of a sales tax audit of petitioner and each of the paragraphs in the respective answer is separately numbered.

7. Petitioner filed replies to the Division's answers on August 23, 2016.

CONCLUSIONS OF LAW

A. The subject of petitioner's motions for summary determination in these matters is the allegation that the Division did not serve answers that comply with 20 NYCRR 3000.4(b)(2)(i). 20 NYCRR 3000.4(b)(1) requires that the Division serve an answer on a petitioner or its representative within 75 days of acknowledgment of receipt of a properly filed petition. The answer must advise the petitioner and the Division of Tax Appeals of the defense and, among other things, contain "a specific admission or denial of each statement contained in the petition" (20 NYCRR 3000.4[b][2][i]). "Material allegations of fact set forth in the petition which are not expressly admitted or denied in the answer shall be deemed to be admitted" (20 NYCRR 3000.4[b][3]). According to petitioner, the use of a general denial does not comply with the regulation as the Division was required to use separately numbered paragraphs corresponding to the paragraphs in the petition. Petitioner posits that since the Division did not comply with this regulation the allegations set forth in the petition are deemed admitted and summary determination is warranted.

B. A motion for summary determination may 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 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]). Section 3000.9 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 Civil Practice Law and Rules § 3212. It is well settled that 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 demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). In this case, petitioner's motions for summary determination fail.

C. At the outset it should be noted that petitioner has not made a prima facie showing of entitlement to summary determination. To the extent that facts are set forth in Otu Obot's affirmations, these affirmations have no evidentiary value as only attorneys, physicians, osteopaths or dentists, authorized by law to practice in New York, who are not parties to the proceeding, or individuals physically located outside the United States are authorized to submit affirmations (*see* CPLR 2106). It does not appear that Mr. Obot meets satisfies any of these requirements. More importantly, petitioner is simply incorrect in its assertion that the Division's answers do not comply with 20 NYCRR 3000.4. Critically, the answers deny all the allegations set forth in the attachment to each petition. The general denials provided by the Division are acceptable under the circumstances. The regulations do not require the Division to admit or deny each allegation of the petition in separate distinct paragraphs corresponding to the separate and distinct paragraphs contained in the petition. In fact, in civil practice in the New York courts, a general denial is acceptable. "The Official Forms do countenance, however, the inclusion of several such factual allegations in a single paragraph" (Practice Commentary CPLR 3018, C3018:6, C3014:1 [General Denial] *citing* Official Forms 12 [¶ 1], 13 [¶ 1], and 16 [¶ 2]; Practice Commentary CPLR 3014, C3014:1 [Separate Numbering of Statements]). Accordingly, the Division's answers do not admit any of the allegations contained in the petitions nor are the allegations deemed to have been admitted. In this case, it is abundantly clear that there are issues

of fact requiring a hearing in these matters. Accordingly, summary determination is not appropriate based upon these circumstances.

D. Petitioner's motions for summary determination are denied, and these matters shall proceed in due course.

DATED: Albany, New York
January 26, 2017

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE