

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
1128 36TH LLC	:	ORDER
	:	DTA NO. 828519
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 July 1, 2014 through December 31, 2016.	:	

Petitioner, 1128 36th LLC, 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 July 1, 2014 through December 31, 2016.

On January 23, 2019, petitioner, by its representative, Herschel Friedman, CPA, brought a motion dated January 22, 2019 seeking summary determination in the above-captioned 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 its representative, Amanda Hiller, Esq. (Howard Beyer, Esq., of counsel), an extension of time was granted to respond to petitioner's motion. The 90-day period for issuance of this order commenced on April 19, 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 order.

ISSUE

Whether petitioner has established that there are no material and triable issues of fact such that, as a matter of law, summary determination can be made in its favor.

FINDINGS OF FACT

1. On December 18, 2017, the Division of Taxation, Audit Division-Sales Tax-Desk Audit-AG3 unit, issued to petitioner, 1128 36th LLC, a refund claim determination notice that denied a claim for refund of sales tax in the amount of \$4,558.81 for the period July 1, 2014 through December 31, 2016 (refund denial notice). The explanation section of the refund denial notice provided the following detailed explanation:

“Your claim for a refund of sales tax is being denied in full.

The Sales Tax Law requires a contractor to pay tax on the purchase of materials they use in the performance of a capital improvement to real property. A capital improvement is an addition or alteration to real property that adds value to the property, is permanently affixed to the real property so that the removal would cause material damage to the property or article itself and is intended to become a permanent installation. The invoices from ISSM Protective Services Inc. received with your AU-11 indicate that the services do not add value to the property.”

2. Petitioner timely filed its petition with the Division of Tax Appeals on December 22, 2017 in protest of the refund denial notice. In its petition, petitioner asserted that the security services it purchased were a prerequisite to a capital improvement.

3. On February 28, 2018, the Division filed its answer to the petition. Thereafter, petitioner filed its motion for summary determination.

4. Petitioner’s motion was solely accompanied by the affidavit of Herschel Friedman, CPA, the representative who compiled and submitted the sales tax claim for refund on petitioner’s behalf. Mr. Friedman, in his affidavit, made statements and assertions regarding the unidentified project in which petitioner was allegedly engaged, petitioner’s alleged purchase of

security services and the necessity for the same, and the amount of sales tax petitioner allegedly paid for such services. Although Mr. Friedman asserted that he was “fully familiar with the facts and circumstances of this case,” his affidavit did not state how he had first-hand knowledge of the facts asserted. Moreover, the documentation attached to Mr. Friedman’s affidavit did not resolve the material issues of fact regarding the amount of sales tax petitioner allegedly paid, and its claim that the security services it purchased were a prerequisite to a capital improvement. The submitted documentation failed to include unredacted documents establishing the identity of the payer and the amount of sales tax paid by the same, project documents, and the contract between petitioner and the security services company it allegedly engaged in conjunction with such project.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

“Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party’s favor. The motion 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 and that the administrative law judge can, therefor, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact” (20 NYCRR 3000.9[b][1]; *see also* Tax Law § 2006[6]).

B. The standard with regard to a motion for summary determination is well-settled. A motion for summary determination made before the Division of Tax Appeals is “subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR” (20 NYCRR 3000.9 [c]; *see also Matter of Service Merchandise, Co.*, Tax Appeals

Tribunal, January 14, 1999). Summary determination is a “drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]; *see Daliendo v Johnson*, 147 AD2d 312 [2d Dept 1989]). Because it is the “procedural equivalent of a trial” (*Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]), undermining the notion of a “day in court,” summary determination must be used sparingly (*Wanger v Zeh*, 45 Misc2d 93 [1965], *affd* 26 AD2d 729 [3d Dept 1966]). If any material facts are in dispute, if the existence of a triable issue of fact is “arguable,” or if contrary inferences may be reasonably drawn from the undisputed facts, the motion must be denied (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Gerard v Inglese*, 11 AD2d 381 [2d Dept 1960]).

C. In support of its motion for summary determination, petitioner submitted the affidavit of Herschel Friedman, CPA, and some attached exhibits. In his affidavit, Mr. Friedman made statements and assertions regarding petitioner’s business, its alleged purchase of security services, its allegedly payments for such services, and the amount of sales tax it allegedly paid. Mr. Friedman is the representative who complied and filed the sales tax claim for refund on petitioner’s behalf. It is unclear, based upon his affidavit, as to whether or not he has personal knowledge of petitioner’s business activities. In addition, the documentation submitted with Mr. Friedman’s affidavit does not resolve the material issues of fact regarding the amount of sales tax petitioner allegedly paid, and its claim that the security services it purchased were a prerequisite to a capital improvement. As material and triable issues of fact exist in this matter, petitioner’s motion for summary determination must be denied.

D. The motion for summary determination filed by 1128 36th LLC is denied, and a hearing will be scheduled in due course.

DATED: Albany, New York
July 11, 2019

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE