

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
THE WARRANTY GROUP, INC. : ORDER
DTA NO. 828545
for Redetermination of a Deficiency or for Refund of :
Corporation Franchise Tax under Article 9-A of the :
Tax Law for the Periods ended December 31, 2009 :
through December 31, 2013. :
:

Petitioner, The Warranty Group, Inc., filed a petition for redetermination of a deficiency or for refund under article 9-A of the Tax Law for the periods ending December 31, 2009 through December 31, 2013.

Petitioner, by its representative, Ryan, LLC (Mark L. Nachbar, Esq.), brought a motion filed December 18, 2018, seeking summary determination in the above-referenced matter pursuant to Tax Law § 2006 (6) and sections 3000.5 and 3000.9 (b) (1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. On March 4, 2019, the Division of Taxation, by its representative, Amanda Hiller, Esq. (James Passineau, Esq., of counsel), filed a response in opposition to the motion, which date began the 90-day period for issuance of this order. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Donna M. Gardiner, 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. Petitioner, The Warranty Group, Inc. (TWG), is a Delaware corporation headquartered in Chicago, Illinois. During the periods in issue, petitioner provided services related to extended service, or warranty solutions to, among others, original equipment manufacturers and consumer products distributors and retailers nationwide.

2. Petitioner issued extended warranties through a series of special purpose obligor subsidiaries that provide customers with a broad range of product development, underwriting, actuarial, administrative management and legal, regulatory and compliance services.

3. The Division of Taxation (Division) performed an audit of petitioner's amended business corporation combined franchise tax returns, forms CT-3-A, for the periods December 31, 2009 through December 31, 2013. These amended returns sought refunds based upon its reduction of its business allocation percentages used in its original returns.

4. The Division disagreed with TWG's classification of its receipts as from services that were wholly performed within Illinois. The Division determined that petitioner's receipts were earned from the sale of extended warranty contracts. The Division concluded that for a receipt to qualify as a receipt from services, such service is required to be performed by a person. Furthermore, the Division states that a receipt from the sale, license, grant or provision of an intangible asset does not qualify as a receipt from services. Therefore, since the sales of the extended warranty contracts were the sales of intangible assets, such receipts are properly characterized as other business receipts under the law.

5. During its audit, the Division concluded that it needed additional documentation in order to fully complete its audit. The Division found certain inconsistencies with the methods used by petitioner for sourcing its receipts and it concluded that petitioner set forth some

contradictory statements in its written submissions on audit. After no further documentation was forthcoming to information requests made by the Division, it issued to petitioner a notice of deficiency, assessment number L-047243409-5, dated October 11, 2017, for additional tax, penalties and interest.

6. Petitioner filed its petition with the Division of Tax Appeals on December 28, 2017 in protest of the notice of deficiency. On March 14, 2018, the Division filed its answer to the petition. Thereafter, petitioner filed its motion for summary determination.

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” (20 NYCRR 3000.9 [b] [1]; *see also* Tax Law § 2006 [6]).

In reviewing a motion for summary determination, an administrative law judge is initially guided by the following regulation:

“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, therefore, 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 has been set forth numerous times. 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 Mdse. 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, 944 [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 Village 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 Misc 2d 93, 94 [1965], *affd* 26 AD2d 729 [3d Dept 1966]). If material facts are in dispute, or if contrary inferences may be reasonably drawn 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 [2d Dept 1960]).

“To defeat a motion for summary judgment, the opponent must also produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], citing *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

C. In support of its motion for summary determination, petitioner introduces the affidavit of Dale Marx, who is employed by petitioner as its director of state tax. Mr. Marx provides various statements and conclusions based upon his knowledge that he learned from inquiries of personnel of various departments. There was no documentation provided with this affidavit to support any of his assertions. More importantly, much of the information included in his affidavit is not based upon his personal knowledge of petitioner’s business operations.

In its response to the motion, the Division has presented audit workpapers to support its basis for issuing the notice herein. These documents are sufficient to demonstrate that there are material questions of fact that necessitate a hearing.

D. The motion for summary determination filed by The Warranty Group, Inc., is denied, and a hearing will be scheduled in due course.

DATED: Albany, New York
May 30, 2019

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE