STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
236 MESEROLE, LLC	:	ORDER DTA NO. 828569
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 January 1, 2016 through December 31, 2016.	:	

Petitioner, 236 Meserole, 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 January 1, 2016 through December 31, 2016.

On May 10, 2019, petitioner, by its representative H. Friedman and Associates, CPA (Herschel Friedman, CPA), 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 Tribunal. On June 6, 2019, the Division of Taxation, by Amanda Hiller, Esq. (Howard Beyer, Esq., of counsel) submitted an affirmation, together with an affidavit and accompanying documents in opposition to the motion for summary determination. The 90-day period for issuance of this order commenced on June 10, 2019. 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 order.

ISSUE

Whether summary determination may be granted in petitioner's favor.

FINDINGS OF FACT

1. On or about February 16, 2017, petitioner, 236 Meserole, LLC, filed a claim for refund of sales tax in the amount of $642.04 for the period January 1, 2016 through December 31, 2016 (refund claim). The refund claim was submitted on behalf of petitioner by its representative Herschel Friedman, CPA. The cover letter submitted with the refund claim states that petitioner is a real estate development and holding company which is building a new building that incurred expenses for locks and mice proofing on which sales tax was charged. The cover letter states that since the project is the construction of a new building, these costs were capital improvements exempt from sales tax. Attached to the refund claim are two invoices, one for four combination locks from Locks and More for $2,090.40 ($1,920.00 plus $170.40 of sales tax), and the other from Perfect Pest Control for $2,613.00 ($2,400.00 plus $213.00 of sales tax) for mice proofing at 236 Meserole Street, Brooklyn, New York. Both invoices are billed to Brooklyn GC, 199 Lee Ave #693, Brooklyn, New York. A cancelled check reflecting a payment of $3,538.44 to Locks and More from petitioner issued on September 13, 2016 is also attached to the refund claim. Finally, attached to the refund claim is a spreadsheet listing charges from Perfect Pest Control and Locks and More, totaling $7,877.11.

2. On December 18, 2017, the Division of Taxation (Division) issued a refund claim determination notice (refund denial) denying petitioner's refund claim for the period March 10, 2016 through October 26, 2016.[1] The refund denial states, in relevant part, that "[t]he scope of

[1] The record does not indicate why the refund denial specifies the period as March 10, 2016 through October 26, 2016, rather than the period set forth on the refund claim.

the work performed did not qualify as a capital improvement, and is considered a repair and maintenance."

3. Included with petitioner's motion for summary determination is the affidavit of Herschel Friedman. Mr. Friedman avers that the Division improperly denied petitioner's claim for refund of sales tax paid during a construction project that constituted a capital improvement. Mr. Friedman avers that certain of petitioner's vendors charged it sales tax for which petitioner seeks a refund. Attached to Mr. Friedman's affidavit is a copy of the refund claim originally filed with the Division as well as a copy of a certificate of occupancy (COA) for 236 Meserole Street, Brooklyn, New York. The COA indicates that 236 Meserole was altered and not new construction. No other documentation concerning the scope of the work done at 236 Meserole Street, Brooklyn, New York, was included in petitioner's moving papers.

4. In opposition, the Division contends that petitioner never submitted any documentation to support its assertion that its project constituted a capital improvement. The Division also takes issue with the adequacy of the documentation that was submitted to support the amount of the refund claimed.

CONCLUSIONS OF LAW

A. 20 NYCRR 3000.9 (b) (1) states the following:

> "[a]fter issue has been joined . . . . any party may move for summary determination. 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 the 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 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."

B. 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***).

C. Tax Law § 1105 (a) imposes a sales tax on the "receipts from every retail sale of tangible personal property, except as otherwise provided [in Article 28]." A "retail sale" is a

> "sale of tangible personal property to any person for any purpose" and includes "a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, . . . regardless of whether the tangible personal property is to be resold as such before it is so used or consumed . . ." (Tax Law § 1101 [b] [4] [i]).

It is presumed that all receipts for sales of tangible personal property are subject to tax until the contrary is established, and the burden of proving that any receipt is not taxable will be upon the person required to collect the tax or the customer (Tax Law § 1132 [c] [1]; ***Matter of Rizzo v Tax Appeals Trib.***, 210 AD2d 748 [3d Dept 1994]). Tangible personal property sold by a contractor to someone for whom the contractor is adding to or improving real property by a capital improvement is not subject to tax, provided that the property becomes an integral component part of the structure or real property (Tax Law § 1115 [a] [17]). Section 1101 (b) (9) of the Tax Law defines the term "capital improvement" as "an addition or alternation of real property which: (i) substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and (ii) becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and (iii) is intended to become a permanent installation."

D. Based upon the record, it is determined that petitioner has failed to make a prima facie showing that summary determination in its favor is warranted as there are clearly unresolved questions of fact. The determination of whether an installation of tangible personal property or a service to real property constitutes a capital improvement "must be decided on a case-by-case basis" (***Matter of Gem Stores, Inc.***, Tax Appeals Tribunal, October 14, 1988). As noted by the Division, petitioner bears the burden to show that each element of the statutory test has been met in order to establish entitlement to capital improvement treatment (***see Matter of A. Colarusso and Son, Inc.***, Tax Appeals Tribunal, June 23, 2011). Specific facts are very important in determining whether a claimed capital improvement meets each element of the statutory test (***see Matter of MacLeod***, Tax Appeals Tribunal, July 3, 2008, ***confirmed sub nom MacLeod v***

Megna, 75 AD3d 928 [3d Dept 2010]). In this case, petitioner's representative's conclusory statements that the purchases constitute a capital improvement are insufficient to meet its burden (***see Matter of NW Sign Indus., Inc.***, Tax Appeals Tribunal, May 12, 2016). There is nothing in the record in admissible form establishing that the building in question was new construction or that locks and mice proofing otherwise meet the definition of capital improvement contained in Tax Law § 1101 (b) (9). It is also noted that there are questions of fact as to the amount of sales tax that would be subject to a refund should it be determined that such charges constituted capital improvements. Finally, the two invoices in the record for locks and mice proofing were billed to Brooklyn GC rather than to petitioner, raising questions as to who the customer for these goods and services was.

E. Based upon the foregoing, petitioner's motion for summary determination is denied; this matter will be scheduled for a hearing in due course.

DATED: Albany, New York
September 5, 2019

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE