STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **CDECRE ARTWORK EAT LLC** 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 June 1, 2015 through November 30, 2016.	ORDER DTA NO. 828952

Petitioner, CDECRE Artwork EAT 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 June 1, 2015 through November 30, 2016.

On March 21, 2022, petitioner, appearing by Hodgson Russ, LLP (Timothy P. Noonan, Esq., of counsel), brought a motion with the Tax Appeals Tribunal seeking an order directing certain facts and evidence be deemed admitted pursuant to 20 NYCRR 3000.11 (f). The Division of Taxation, by its representative, Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel), filed a response on April 22, 2022. Petitioner filed a reply on May 4, 2022. By order dated June 2, 2022, the Tax Appeals Tribunal directed the supervising administrative law judge, or at the supervising administrative law judge's discretion, the administrative law judge, to address petitioner's motion. By letter dated June 7, 2022, Supervising Administrative Law Judge Herbert M. Friedman, Jr., assigned the motion to the undersigned administrative law judge. Based upon the motion papers, the affirmations 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 a motion requesting that certain facts and documents be deemed admitted pursuant to 20 NYCRR 3000.11 (f) should be granted.

FINDINGS OF FACT

1. The Division of Taxation (Division) conducted a sales and use tax audit of petitioner, CDECRE Artwork EAT LLC, for the period June l, 2015 through November 30, 2016 (the audit period).

2. During the audit, the Division issued a statement of proposed audit changes to petitioner, dated July 11, 2018, which asserted additional sales tax due by petitioner with respect to three transactions (the transactions).

3. According to a field audit report prepared by the Division, the primary issue in the audit is the application of trade-in credits allowed under 20 NYCRR 526.5 (f) that were utilized by petitioner in calculating the sales tax on the transactions and the resulting sales tax due by petitioner for the audit period. The field audit report states the Division's position that the trade-in credits were not allowed because "this arrangement is not a traditional 'trade-in' covered under the law."

4. At the conclusion of the audit, the Division issued a notice of determination to petitioner, assessment number L-048691566, dated August 13, 2018 (the notice), which asserted $3,622,597.50 in additional sales tax due plus interest for the audit period.

5. On November l , 2018, petitioner filed a petition with the Division of Tax Appeals protesting the notice.

6. In its petition, petitioner asserts that it served as a qualified intermediary (QI) during the audit period with respect to several IRC § 1031 exchanges for clients involving artwork and

that, in doing so, it followed the rules governing "trade-ins" for vendors under 20 NYCRR 526.5 (f) when calculating the total receipts subject to sales tax.

7. The petition further states that the sales tax asserted due in the notice is premised on the Division's disallowance of the trade-in credits with respect to the transactions for which petitioner served as a QI. In this regard, the petition alleges that the Division is taking the position that the "trade-in" credit applicable to vendors under 20 NYCRR 526.5 (f) does not apply to IRC § 1031 transactions.

8. The crux of this matter is whether the trade-in credit under 20 NYCRR 526.5 (f) can be claimed with respect to a transaction that qualifies as a like-kind exchange under IRC § 1031.

9. In the petition, petitioner alleged that the Division's position is inconsistent with its treatment of section 1031 exchanges in other published rulings and, as such, the notice is arbitrary and capricious and lacks a rational basis.

10. On March 21, 2022, petitioner filed the instant motion seeking an order directing that certain facts and exhibits be deemed admitted. Accompanying the motion was the affirmation of petitioner's representative, Timothy P. Noonan, Esq., with accompanying exhibits. In his affirmation, Mr. Noonan affirms that on February 18, 2022, he spoke with the Division's representative, Osborne Jack, Esq., to facilitate an agreement on stipulating to facts in this matter. Mr. Noonan advised Mr. Jack that he would be forwarding a proposed stipulation of facts to him and the two agreed to speak on March 8, 2022 concerning the same. Later that day, Mr. Noonan sent Mr. Jack a proposed stipulation of facts with annexed exhibits.

11. The proposed stipulation of facts is made up of two columns, one labeled "FACTS" and the other "PROOF." Under the heading "FACTS, " there are 61 separately numbered paragraphs of proposed stipulations. Corresponding to each of the 61 proposed stipulations of

fact under the column entitled "PROOF" is a citation to the annexed exhibits that petitioner claims provide support for the facts to which petitioner requests that the Division stipulate.

12. Mr. Noonan avers that he and Mr. Jack spoke on March 8, 2022, at which time Mr. Jack indicated the Division was questioning the authenticity of certain documents included in the exhibits to the proposed stipulation and would provide clarification upon consulting with the Division's auditors. In addition, Mr. Noonan states that Mr. Jack informed him that he had not yet completed his review of the proposed stipulation and that upon completion would indicate which proposed facts he was willing to stipulate to.

13. Review of the proposed stipulation indicates that in proposed stipulations of fact 5 through 20, 22, 24 through 48, and 50 through 52, petitioner is requesting the Division stipulate to: (i) the authenticity of certain documents which petitioner refers to as "transactional documents," and (ii) petitioner's description of the transactions resulting from those documents. In addition, in various proposed stipulations, petitioner refers to itself as having sold or purchased the specific artwork. The remainder of the proposed stipulations of fact involve brief summaries of the legal position taken by the Division during the audit and/or the position currently taken.

14. In response, the Division submitted the affirmation of Mr. Jack. He acknowledges the March 8, 2022, telephone conversation and affirms that he stated the Division could not stipulate that the documents attached to the proposed stipulation were "true and accurate copies of the transactional documents" because the Division had no knowledge that they were true and accurate copies. Mr. Jack stated that since the proposed stipulation of facts were largely based on those documents, the Division was unable to stipulate to most of the proposed facts. Mr. Jack also states that he informed Mr. Noonan about a discrepancy in the agreements (transactional

documents), and petitioner would need to provide witnesses to authenticate them and clarify any discrepancies.

15. Mr. Jack also avers that he stated that the Division did not agree with Mr. Noonan's characterization of the transactions at issue and explained that for all of the transactions, petitioner was a QI and, as such, petitioner conducted all transactions as an agent for one or more entities and therefore could not stipulate that petitioner purchased or sold anything except in its capacity as an agent acting on behalf of another entity. Mr. Jack also states that the the Division could not stipulate to any language in the proposed stipulations of fact that described the purchasers and sellers of the artwork at issue as petitioner's customers because they were petitioner's principals and not their customers.

16. Mr. Jack affirms that he told Mr. Noonan that he would return the proposed stipulation of facts indicating the items to which the Division could reasonably stipulate. Mr. Jack did return a copy of the proposed stipulation marked up with the proposed stipulations of fact that the parties agreed to, namely proposed stipulations of fact 1, 3, 4, 53, 54, 55, 59 and 61. The Division did not agree to the remaining proposed stipulations of fact. According to the affirmation of Mr. Jack, it was his understanding that he explained the reasons why the Division could not stipulate to the disputed items in the proposed stipulation of facts during the March 8, 2022 telephone call. In his affirmation, Mr. Jack gives specific reasons why it would not stipulate to each of the facts that the Division disagrees with.

17. In response, Mr. Noonan states that it was not his understanding that the March 8, 2022 telephone call constituted the formal response to the proposed stipulation of facts. Petitioner further states that, based upon the Division's response to the instant motion, it now knows the basis for the Division's refusal to stipulate to the disagreed facts, but asserts that

petitioner should not have to seek the intervention of the Division of Tax Appeals to get a written response and requests that all of the proposed stipulations of fact be deemed admitted.

CONCLUSIONS OF LAW

A. Section 3011 of the Tax Appeals Tribunal's Rules of Practice and Procedure (20 NYCRR 3011) sets forth the procedures for stipulations of fact to be used during proceedings before the Division of Tax Appeals. Under the rule, parties appearing before the Division of Tax Appeals are generally required to stipulate to exhibits and facts "which fairly should not be in dispute" (20 NYCRR 3011 [a] [1] [i]).

B. Petitioner has filed the instant motion in accordance with 20 NYCRR 3011 (f), which provides as follows:

> (1) Motion to compel stipulation. If, at the date of issuance of a hearing notice in a controversy, a party has refused or failed to confer with his or her adversary with respect to entering into a stipulation in accordance with this section, or has refused or failed to make a stipulation of any matter within the terms of this section, the party proposing to stipulate may, within 90 days of service of the proposed stipulation, make a motion to the tribunal, on notice to the other party or representative, if any, for an order directing that the matters covered in the motion should be deemed admitted for the purposes of the hearing. The motion shall be filed with the supervising administrative law judge and shall:
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> > (i) show with particularity and by separately numbered paragraphs each matter which is claimed for stipulation;
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> > (ii) set forth the specific stipulation which the moving party proposes with respect to each such matter, together with a copy of each document or other paper as to which the moving party desires a stipulation;
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> > (iii) set forth the sources, reasons, and bases for claiming, with respect to each such matter, why it should be stipulated to;
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> > (iv) show that the other party has been informed of and has had reasonable access to the sources or bases for the stipulation, and the reasons for stipulation; and
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> > (v) show proof of service of a copy of the motion papers on the other party or the party's representative, if any.

> (2) Procedure. Within 20 days of the service of the notice of the motion, that party shall file a response with the supervising administrative law judge, with proof of service of a copy thereof on the other party or representative, if any, showing why the matter set forth in the motion papers should not be deemed admitted for purposes of the pending controversy. The response shall list each matter involved on which there is no dispute, referring specifically to the numbered paragraphs in the motion to which the admissions relate. Where a matter is disputed only in part, the response shall show the part admitted and the part disputed. Where the responding party is willing to stipulate in whole or in part with respect to any matter in the motion by varying or qualifying a matter in the proposed stipulation, the response shall set forth the variance or qualification and the admission which the responding party is willing to make. Where the response claims that there is a dispute as to any matter in part or in whole, or where the response presents a variance or qualification with respect to any matter in the motion, the response shall show the sources, reasons and bases on which the responding party relies for that purpose. The supervising administrative law judge, where it is found appropriate, may schedule the motion for a hearing before an administrative law judge at such time as the supervising administrative law judge shall determine.
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> (3) Failure to respond. If no response is filed within the period specified with respect to any matter or portion thereof, or if the response is evasive or not fairly directed to the proposed stipulation or portion thereof, that matter or portion thereof will be deemed stipulated for purposes of the pending controversy, and an order will be entered accordingly.
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> (4) Matters considered. Opposing claims of evidence will not be weighed unless such evidence is patently incredible. Nor will a genuinely controverted or doubtful issue of fact be determined in advance of the hearing. The supervising administrative law judge will determine whether a genuine dispute exists, or whether in the interests of justice a matter ought not be deemed stipulated.

C. Petitioner contends that the Division refused or failed to respond to petitioner's request to stipulate to facts. In this case, after careful review of petitioner's motion papers, the Division's response thereto and petitioner's reply, petitioner's motion is denied. First, as a preliminary matter, petitioner's claim that the Division has refused or failed to confer with its representative with respect to entering into a stipulation in accordance with this section is rejected. Petitioner's own motion papers refute this claim as it is clear that the Division's representative conferred with petitioner's representative on the proposed stipulations of fact and

agreed to stipulate to some, but not all, of the proposed stipulations of fact. By written response, the Division agreed to stipulate to proposed stipulations of fact 1, 3, 4, 53, 54, 55, 59 and 61. As to the remaining facts, the Division orally explained to petitioner's representative why it could not stipulate to them during the March 8, 2022 telephone call with petitioner's representative. The regulation does not require a written response, nor will the administrative law judge impose such requirement on the Division. The regulation only requires that "[t]he office of counsel shall review the proposed stipulation drawn by the petitioner and shall indicate its agreement or disagreement with every proposed fact to be stipulated. Where the office of counsel disagrees, its position as to the fact in question should be stated" (20 NYCRR 3000.11 [f] [1] [ii]). That was done in this case. Moreover, had the Division refused or failed to confer with petitioner's representative, the Division set forth its basis for each disagreed fact in writing in its response to the instant motion. That is all that is required.

D. Since the Division has agreed to stipulate to findings of fact 1, 3, 4, 53, 54, 55, 59 and 61, these facts are deemed stipulated to. With respect to proposed stipulations of fact 5 through 20, 22, 24 through 48, and 50 through 52, these proposed facts are based upon photocopies of documents that the Division is not willing to stipulate are true and accurate copies. Although petitioner contends that there should be no question that these documents are true and accurate copies of the transactional documents, the Division is well within its rights to refuse to stipulate to same as it has no basis to know these documents are true and accurate copies. Since there is no indication that the Division has had the opportunity to examine the original documents, there is a genuine issue with respect to these proposed facts that emanate from these documents. Here, these documents can be authenticated through witness testimony by those with firsthand knowledge of these documents at the hearing in this matter. As to the remaining proposed

stipulations of fact, the Division's representative, Mr. Jack, explained his basis for not agreeing to stipulate to these proposed facts. Review of the these remaining disagreed proposed stipulations of fact indicates that the Division has a reasonable basis for its disagreement as the proposed stipulations of fact are drafted in a very nuanced manner. Since a stipulated fact is "a conclusive admission by the parties to the stipulation," (20 NYCRR 3000.11 [e]), the Division is well within its right to disagree with such proposed stipulated facts. For instance, throughout the stipulation, petitioner refers to itself at various points as either purchasing or selling the artwork in issue. Because the Division's theory is that petitioner acted as an agent for the actual purchasers and sellers, the Division has refused to stipulate to any such language that characterizes itself as having purchased or sold artwork. Here, it cannot be said that the proposed stipulations of fact and exhibits are matters "which fairly should not be in dispute."

E. Based upon the foregoing, petitioner's motion seeking an order directing certain facts and evidence be deemed admitted is denied, and this matter will be scheduled for a hearing in due course.

DATED: Albany, New York
September 1, 2022

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE