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.

Petitioner, by its representative, Hodgson Russ, LLP (Timothy P. Noonan, Esq., of counsel), brought a motion dated October 28, 2019, 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 December 19, 2019, the Division of Taxation, by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel) submitted an affirmation in opposition to the motion for summary determination. The 90-day period for issuance of this order commenced on December 23, 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 should be granted in petitioner's favor.

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). According to the audit file, petitioner provides intermediary and exchange accommodation titleholder services to investors seeking to defer gain.

2. Petitioner is headquartered in Chicago, Illinois, and has no locations in New York.

3. Over the course of the audit period, petitioner reported gross sales revenue of $139,000,000.00 and collected over $8,000,000.00 in New York State sales tax.

4. The primary issue involved during the audit concerns the application of "trade-in credits" utilized by petitioner in calculating the sales tax on its transactions during the audit period.[1]

5. Specifically, the Division disallowed the application of trade-in credits on invoices issued by petitioner in three separate transactions. One involved a transaction between petitioner and an entity called Narrows Holdings LLC (Narrows Holdings). On the bill of sale to Narrows Holdings for that entity's purchase of a Cezanne watercolor, petitioner reduced the sale price subject to sales tax by computing a trade-in credit for artwork that Narrows Holdings transferred to petitioner in connection with the exchange. The second transaction was between petitioner and AP Narrows LP (AP Narrows) involving a different Cezanne watercolor. On the bill of sale to AP Narrows for that entity's purchase of the watercolor, petitioner reduced the sale price subject to sales tax by computing a trade-in credit for artwork AP Narrows transferred to petitioner in connection with the exchange. The third transaction was between petitioner and DSOCA Holdings, LLC (DSOCA) for a Picasso painting. On the invoice issued to DSOCA for

[1] 20 NYCRR § 526.5 (f) provides that "[a]ny allowance or credit for any tangible personal property accepted in part payment by a vendor on the purchase of tangible personal property or services and intended for resale by such vendor shall be excluded when arriving at the receipt subject to tax. Only the net sale price of tangible personal property or the charge for services would be subject to tax."

that entity's purchase of the Picasso painting, petitioner reduced the sales price subject to sales tax by computing a trade-in credit for artwork transferred by DSOCA to petitioner in connection with the exchange.

6. The Division took the position that petitioner is not allowed to utilize trade-in credits when calculating the tax due on its transactions because "this arrangement is not a traditional 'trade-in' covered under the law."

7. On August 13, 2018, the Division issued notice of determination number L-048691566 (the notice) asserting sales and use tax in the amount of $3,622,597.52 for the periods ended May 31, 2016 and November 30, 2016, plus interest.

8. On November l, 2018, petitioner filed a petition with the Division of Tax Appeals protesting the notice. In its petition, petitioner alleged, among other things, that it was a sales tax "vendor" as defined by Tax Law §1101, and that it made sales of tangible personal property subject to tax within New York State during the period in issue.

9. On January 16, 2019, the Division filed its answer to the petition. In its answer, the Division admitted that "pursuant to 20 NYCRR 526.5 (f), when computing the receipt subject to sales tax, sales tax vendors are allowed a credit for any tangible personal property accepted in part payment on the purchase of tangible personal property as long as the vendor intends to resell the trade-in property." The Division's answer stated that it lacked knowledge or information sufficient to form a belief as to: (i) whether petitioner was a "vendor;" and (ii) whether petitioner made sales of tangible personal property subject to sales tax within New York.

10. On April 3, 2019, petitioner filed a request with the Division for admissions (the Notice to Admit) pursuant to 20 NYCRR 3000.6 (b) (1) (iii). The Notice to Admit requested the

following two admissions on the basis that they involved matters to which there could be no substantial dispute and were within the Division's knowledge:

> "1. Throughout the period June 1, 2015 through November 30, 2016 (the 'Audit Period') CDECRE Artwork EAT LLC ('Petitioner') made sales of tangible personal property within New York State.
>
> 2. During the Audit Period, Petitioner was a sales tax vendor as defined by Tax Law."

11. On April 18, 2019, the Division filed an affidavit in reply to the Notice to Admit (the Affidavit). In the Affidavit, the Division claimed that it was not required to admit or deny that petitioner made sales of tangible personal property subject to tax because such matters would be in substantial dispute at the hearing. The Division also objected to the term "sale" to the extent it implies a legal conclusion that petitioner transferred title or possession of tangible personal property subject to sales and use tax for consideration.

12. The Division claimed that it was not required to admit or deny that petitioner was a "vendor" because such matters would be in substantial dispute at the hearing, and objected to the term "vendor" to the extent it implies a legal conclusion that petitioner transferred title or possession of tangible personal property subject to sales and use tax for consideration.

13. In the Affidavit, the Division's representative averred that the Division "treated Petitioner as an agent of DSOCA pursuant to Tax Law 1101 § (b) (8) (ii), holding Petitioner jointly responsible with DSOCA for the collection and payment over of sales tax but denies that petitioner was a sales tax vendor as defined in Tax Law 1101 (b) (8)."

14. Pursuant to 20 NYCRR 3000.15 (d) (6), petitioner submitted 10 proposed findings of fact. With the exceptions of proposed findings of fact 1 and 10, each of the proposed findings of fact are supported by the record, and have been consolidated, condensed, combined, renumbered and substantially incorporated herein (***see*** State Administrative Procedure Act § 307 [1]).

Proposed finding of fact 1 has been rejected as it is conclusory and not supported by the record. Proposed finding of fact 10 has been rejected as it is redundant, conclusory, and not supported by the record.

CONCLUSIONS OF LAW

A. A motion for summary determination "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 the moving party is entitled to a favorable determination as a matter of law (20 NYCRR 3000.9 [b] [1]).

B. Section 3000.9 (c) 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 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 Village 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. In its motion, petitioner claims that summary determination should be granted in its favor because the Division's pleadings confirm that the Division had no basis in law for the assertion of tax against petitioner. According to petitioner, "[i]f the Division lacks knowledge sufficient to form a belief as to whether Petitioner transferred title or possession to tangible property for consideration (and objects to the transactions at issue as 'sales'), or whether Petitioner is a 'vendor' as defined by statute, then the Division has no basis as a matter of law to assert additional sales tax due from Petitioner." Petitioner also asserts that the Division's theory of liability on the basis that petitioner was an agent of DSOCA pursuant to Tax Law § 1101 (b) (8) (ii) is incorrect as a matter of law because DSOCA would have had to have been a "vendor" rather than a purchaser for this provision to apply. Petitioner also points out that, as evidenced by the bill of sale, petitioner was a purchaser of artwork rather than a vendor of artwork. In opposition, the Division submitted the affirmation of its representative alleging that there are material issues of fact that are in dispute, thus necessitating a hearing, such that petitioner's motion must be denied. For the reasons that follow, petitioner's motion is denied.

D. Sales tax is imposed on the retail sale or use of tangible personal property, except purchases for resale, and the sale of certain enumerated services (***see*** Tax Law §1105 [a], [b] and [c]). The tax is imposed on the customer, but the duty to collect is imposed upon "person[s] required to collect tax when collecting the price" (Tax Law §1132 [a] [1]). Among the persons required to collect tax is a "vendor" as defined in Tax Law §1101(b) (8) (***see*** Tax Law §1131 [1]). This provision is expansive and, thus, highly factual in nature; as a result, it is not appropriate to make a summary determination as to whether petitioner comes within its ambit on

the limited record herein. In its motion, petitioner seeks to elevate the Division's response to its allegation that it was a vendor to the level of an admission by the Division that petitioner was not in fact a vendor. While petitioner's allegation in the petition that it was a vendor during the period in issue is akin to an informal admission that it was a vendor (***see*** Prince, Richardson On Evidence § 8–219), the Division's response to this allegation is not an admission by the Division that petitioner was not a vendor. Clearly, whether petitioner was a "vendor" is in dispute and cannot be determined based upon the limited record herein.

E. In addition, regardless of whether petitioner was a "vendor" as that term is defined, Tax Law § 1101(b) (8) (ii) (A) specifically provides that "when in the opinion of the commissioner it is necessary for the efficient administration of this article to treat any salesman, representative, peddler or canvasser as the agent of the vendor, distributor, supervisor or employer … for whom he solicits business, the commissioner may, in his discretion, treat such agent as the vendor jointly responsible with his principal, distributor, supervisor or employer for the collection and payment over of the tax." Petitioner also seeks to dispose of this theory of liability by arguing that, as a matter of law, the purported agent must be solicitating business on behalf of a vendor. Petitioner's argument fails as it has been held that a broker that facilitated the sale of boats by displaying the boats or pictures of the boats, arranging the sales, providing financing, and collecting the purchase price was responsible for the collection and remittance of the tax (***see Matter of Jericho Boats of Smithtown, Inc. v State Tax Comm'n*** (144 AD2d 163 [3d Dept 1988]). There is no indication in ***Matter of Jericho Boats of Smithtown*** that the boat owners/sellers therein were themselves vendors. In addition, it is also observed that DSOCA also transferred artwork to petitioner as part of the exchanges at issue. Stated simply, summary determination is not appropriate based upon the limited record herein.

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

DATED: Albany, New York
March 16, 2020

/s/ Kevin R. Law_____
ADMINISTRATIVE LAW JUDGE