STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
73 STARR, LLC	:	ORDER DTA NO. 829143
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 13, 2017 through May 23, 2018.	:	

Petitioner, 73 Starr, 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 13, 2017 through May 23, 2018.

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 10, 2019, the Division of Taxation, by Amanda Hiller, Esq. (Michael Hall) submitted an affidavit, together with 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 June 20, 2018, petitioner, 73 Starr, LLC, filed a claim for refund of sales tax in the amount of $1,165.73 for the period January 13, 2017 through May 23, 2018 (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 developer that builds residential apartment buildings that incurred expenses in conjunction with adding to or improving real property. Attached to the refund claim is a spreadsheet listing charges from A to Z Signs & Awnings, Inc., Signup Signs and Awnings and D & M Garage Doors totaling $14,300.72.

2. The Division of Taxation (Division) audited petitioner's refund claim and requested copies of invoices corresponding to the charges listed on the spreadsheet that accompanied the refund claim. In response, petitioner provided a series of invoices for (i) the repair of a garage door; (ii) the purchase and installation of a new garage door; (iii) the removal of an awning; (iv) installation of elevator and exit signs; (v) exterior address sign; and (vi) signs identifying the apartment numbers in the subject building.

3. On November 20, 2018, the Division issued a refund claim determination notice (refund denial) partially denying petitioner's refund claim. Of the $1,165.73, a refund of $553.70 was allowed. The portion allowed was for tax paid on the purchase and installation of a new garage door and for the purchase and installation of elevator and exit signs; the Division denied the remainder of the claim as it is the Division's contention that said charges do not qualify as capital improvements.

4. 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 in addition to copies of the invoices upon which the refund is claimed. Mr. Friedman's avers that: (i) the removal of an old awning to upgrade the facade of a building constitutes a capital improvement; and (ii) the permanent installation of interior and exterior signs to a building adds value to the building and therefore constitutes a capital improvement. Petitioner failed to provide specific details of the work done and expenditures made by anyone with first hand knowledge of the same.

5. In opposition, the Division contends that petitioner has failed to establish that the charges in question qualified as capital improvements.

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 [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).

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