STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

SUMMER PAVILION CORP.

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, 2013 through February 29, 2016.

ORDER
DTA NO. 829371

Petitioner, Summer Pavilion Corp., filed a petition for a 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, 2013 through February 29, 2016. The Division of Taxation, by its representative, Amanda Hiller, Esq. (Elizabeth Lyons, Esq., of counsel), filed an answer dated August 7, 2019. On October 10, 2019, petitioner, appearing by Duke, Holzman, Photiadis & Gresens LLP (Gary M. Kanaley, Esq., of counsel) filed a motion for summary determination pursuant to 20 NYCRR 3000.9. The Division of Taxation filed its response in opposition to petitioner's motion on November 8, 2019. The 90-day period for the issuance of this order commenced on November 12, 2019. Based upon the motion papers and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Nicholas A. Behuniak, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner's motion for summary determination should be granted.

FINDINGS OF FACT

1. Petitioner, Summer Pavilion Corp., commenced this proceeding by filing a petition with the Division of Tax Appeals on May 3, 2019. The petition was filed in protest of notice of determination L-048097997, which asserted tax in the amount of $1,047,070.92, plus interest and penalties. The notice was for the period of June 1, 2013 through February 29, 2016.

2. The petition provided seven separate paragraphs which, in part, alleged the following: (i) petitioner executed a "Test Period Audit Method Election" form (test period election form) at the inception of the audit; (ii) in order to use the test period election form, there is a presumption that petitioner's records are complete and available for the entire audit period; (iii) the test period used in conjunction with the test period election form is a period in which "all applicable records within the selected test period are examined and the results, after appropriate adjustments, are projected over the remainder of the audit period"; (iv) the test period agreed to was the period of May 2015; (v) petitioner supplied complete records for the test period; (vi) the Division of Taxation's (Division's) auditor failed to properly review the records provided; (vii) the Division's audit procedures were "completely erroneous and inapplicable to the matter under audit"; and, (viii) a proper review of the records petitioner supplied will show petitioner's "sales and sales [sic] tax were properly reported and accurate for the entire period."

3. The Division's answer provided 15 separate paragraphs. In the answer, the Division admitted petitioner's assertion that the parties executed a test period election form at the inception of the audit. The Division also asserted that, contrary to petitioner's representations, the test period election form states: "*[g]enerally,* all applicable records within the selected test period are examined and the results, after appropriate adjustments, are projected over the remainder of the audit period" (emphasis added). Otherwise, the answer denied petitioner's

assertions and explained that the Division found petitioner's books and records were inadequate and, that based on available information, the Division determined petitioner owed additional sales and use taxes for the period at issue.

4. Petitioner filed the instant motion for summary determination. Included with the motion, petitioner provided the affirmation of Gary M. Kanaley, petitioner's attorney, and the affidavit of David M. McElwain, a certified public accountant and former employee of the Division.

5. In his affirmation, Mr. Kanaley represented that for his assertions his "source of knowledge [was] a review of the petitioner's documentation before the Bureau of Conciliation and Mediation Services (BCMS) and discussions with petitioner's representatives." The affirmation provided a "history of the underlying sales tax" in which Mr. Kanaley represented when petitioner received audit correspondence, when petitioner agreed to certain requests of the Division, and that based on his work, he determined that petitioner's "records were sufficient to independently determine the taxable status of each sale and the amount of tax due and charged thereon." Mr. Kanaley also provided his conclusions that the Division "has not made a showing that [petitioner's] records were 'so insufficient' that it was 'virtually impossible' for [the Division] to verify its taxable sales," and "[a]s such, the [Division's] determination, which is based on external indices, is clearly erroneous and improper as a matter of law." In the affirmation, Mr. Kanaley averred that "[t]he parties agreed to a test period of the month of May, 2015"; however, Mr. Kanaley asserts that "contrary to the parties' agreement to use May, 2015 as a test period, [the Division] only examined [petitioner's] records for a one-week period between May 1, 2015 and May 7, 2015." Mr. Kanaley also asserts that the factual history he provided in his affirmation is "undisputed, and the only disputed issues are pure questions of

law." Mr. Kanaley did not provide any of petitioner's books and records that might support his work and conclusions with his affirmation.

6. In his affidavit, David M. McElwain, CPA, represents that he was an employee of the Division for 39 years and now serves as "of counsel" with the state and local tax department of Tronconi Segarra & Associates, LLP. In his affidavit, Mr. McElwain represents that he reviewed petitioner's point of sale tapes and other records for the test period of May 2015. Mr. McElwain represents that he reviewed the executed test period election form and that he "understand[s] that [petitioner] and [the Division] agreed to an audit test period of the entire month of May, 2015." Mr. McElwain asserts that the Division did not conduct a proper test period audit in compliance with the agreement between the parties because the Division did not review all of petitioner's May 2015 records. Mr. McElwain asserts that petitioner's "records for the month of May, 2015 are sufficient to independently determine the taxable status of each sale," and the Division "was not justified in deviating from auditing the agreed test period." Mr. McElwain did not provide any of petitioner's books and records that might support his analysis or conclusions with his affidavit.

7. In its response, the Division provided the affirmation of Elizabeth Lyons, Esq., an attorney with the Division. In her affirmation, Ms. Lyons points out that several of the assertions made in petitioner's motion are matters in controversy with which the Division disagrees. In particular, the Division asserts that contrary to petitioner's assertions, material factual issues are in dispute, including the total sales reported, the adequacy of petitioner's records provided to the Division, and whether and when petitioner sold alcohol. The Division also challenges petitioner's assertion that the Division failed to comply with the terms of the test period election form. With regard to this issue, the Division provided a copy of the executed test period election

form, pointing out that the form did not specify what dates the test period would encompass and asserted that the actual test period agreed upon is a disputed fact. The Division also challenges petitioner's conclusion that the Division's audit findings are erroneous.

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. 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] [emphasis added]; ***see also*** Tax Law § 2006 [6]).

B. Section 3000.9 (c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to Civil Practice Law and Rules (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 by motion (***Gerard v Inglese***, 11 AD2d 381, 382 [2d Dept 1960]).

C. Failure to make a prima facie showing by the proponent of the motion requires a denial of the motion, regardless of the sufficiency of the opposing papers (***see Winegrad***). Accordingly, it is first incumbent upon petitioner to make a prima facie case in support of its motion for summary determination. In this case, the support for petitioner's motion is the affirmation of petitioner's attorney and the affidavit of an accountant hired by it. Both parties represent that they have reviewed petitioner's books and records independently and also provide the conclusions of their analyses. Neither the attorney nor the accountant supplied copies of the books and records they allegedly reviewed, nor do they represent what their analyses consisted of in detail. The books and records reviewed and a detailed discussion of what exactly was extrapolated from each relevant document leading to the conclusions they reached should have been provided. Rather, petitioner's attorney and accountant provide conclusory statements regarding the work they performed and their opinions of the Division's audit findings. Petitioner has therefore failed to meet its burden of establishing a prima facie case in support of its motion for summary determination.

D. Even if petitioner had met its burden of establishing a prima facie case supporting its motion for summary determination, the Division's response to the motion sufficiently established that material questions of fact exist that necessitate a hearing. "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***). In particular, petitioner asserts that the test period for the audit agreed upon was the month of May 2015. However, the

Division represents that this assertion is in controversy and provides a copy of the actual executed test period election form for the audit. The executed test period election form does not specify a particular period of time as the test period. Accordingly, the Division has appropriately established that material issues of fact exist including the length of the test period.

E. Petitioner's motion for summary determination is denied, and a hearing will be scheduled in due course.

DATED: Albany, New York
February 06, 2020

/s/ Nicholas A. Behuniak________
ADMINISTRATIVE LAW JUDGE