

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
	:	
of	:	
	:	
ANTHONY PIACQUADIO	:	ORDER
	:	DTA NO. 829589
	:	
for Revision of Determinations or for Refund of New York	:	
State Sales and Use Taxes Under Articles 28 and 29 of the Tax	:	
Law for the period December 1, 2013 through November 30,	:	
2016.	:	

Petitioner, Anthony Piacquadio, filed a petition for revision of determinations or for refund of New York State sales and use taxes under articles 28 and 29 of the Tax Law for the periods December 1, 2013 through November 30, 2016.

Petitioner, appearing by LRC, Group, Inc. (Lawrence Cole, CPA), brought a motion seeking an order dismissing the Division of Taxation’s motion dated January 28, 2020 and/or alternatively granting petitioner monetary compensation (damages) for the Division of Taxation’s affidavit dated January 27, 2020, canceling notices of determination issued to petitioner, and nullifying the conciliation order of the Bureau of Conciliation and Mediation Services dated July 19, 2019. On July 2, 2020, the Division of Taxation, by Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel) filed a response to petitioner’s motion. The 90-day period for issuance of this order commenced on July 13, 2020. Based upon the motion papers and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following order.

ISSUES

I. Whether petitioner's motion to dismiss the Division of Taxation's motion dated January 28, 2020 should be granted.

II. Whether petitioner is entitled to damages.

III. Whether petitioner's motion to cancel the notices of determination issued to petitioner and nullify the conciliation order dated July 19, 2019 should be granted.

FINDINGS OF FACT

1. On September 26, 2019, Anthony Piacquadio (petitioner) filed a petition with the Division of Tax Appeals contesting two notices of determination, notice numbers L-048760959 and L-048708314 (notices). The petition was signed by Lawrence Cole, CPA, as petitioner's representative. Attached to the petition was a power of attorney form, POA-1, dated September 20, 2018, naming Mr. Cole as petitioner's representative for the years, periods, or transactions of "2014 – 2016" and listing notice numbers L-048708314, L-047838953, and L-048700612.¹ Attached to the petition was a conciliation order dated July 19, 2019, sustaining notice numbers L-048760959 and L-048708314.

2. On December 4, 2019, the Division of Taxation (Division) filed its answer to the petition.

3. The Division filed a motion dated January 28, 2020, for an order dismissing the petition or, in the alternative, granting summary determination in favor of the Division pursuant to sections 3000.5, 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals

¹ Upon request of the Division of Tax Appeals, petitioner filed a corrected power of attorney form, dated August 24, 2020, naming Mr. Cole as petitioner's representative for sales and use taxes for the years/periods 2013 through 2016, and listing notice numbers L-048760959 and L-048708314.

Tribunal, on the basis that petitioner's protest was not timely filed. Attached to the Division's motion was, among other items, an affidavit of Melanie Spaulding, Esq., dated January 27, 2020.

4. Petitioner requested, and was granted, an extension of time to respond to the Division's motion. On May 13, 2020, petitioner filed the instant motion seeking an order dismissing the Division's motion dated January 28, 2020 and/or alternatively granting petitioner damages for the Division's alleged frivolous affidavit dated January 27, 2020, canceling notices of determination numbers number L-048760959 and L-048708314 issued to petitioner, and nullifying the conciliation order of the Bureau of Conciliation and Mediation Services (BCMS) dated July 19, 2019. Attached to petitioner's notice of motion is an undated document purporting to be an "affidavit" of Lawrence R. Cole.² No exhibits were attached in support of the motion.

5. By letter dated June 10, 2020, the Division withdrew its motion dated January 28, 2020 and supporting documentation and requested an extension of time to respond to petitioner's motion.

6. The Division was granted an extension of time to respond to petitioner's motion and responded on July 2, 2020.

CONCLUSIONS OF LAW

A. First, addressing petitioner's motion to dismiss the Division's motion for summary determination dated January 28, 2020, the Division withdrew its motion on June 10, 2020 (*see* finding of fact 5). As such, this issue is moot and petitioner's argument that a number of questions of fact exist such that the Division's motion should be denied need not be addressed.

² While the document is titled "affidavit," it is undated and not notarized.

B. Turing next to petitioner's request for damages on the basis that the Division's affidavit, dated January 27, 2020, was frivolous, it is first noted that the Tax Appeals Tribunal Rules of Practice and Procedure clearly state that motions for costs or disbursements as provided for in the Civil Rules of Practice and Procedure will not be entertained (*see* 20 NYCRR 3000.5 [a]). The only provision which allows for costs in Division of Tax Appeals proceedings is Tax Law § 3030 (a), which provides that:

“In any administrative or court proceeding which is brought by or against the commissioner in connection with the determination, collection, or refund of any tax, the prevailing party may be awarded a judgment or settlement for:

(1) reasonable administrative costs incurred in connection with such administrative proceeding within the department, and

(2) reasonable litigation costs incurred in connection with such court proceeding.”

A prevailing party is defined by the statute, in part, as follows:

“[A]ny party in any proceeding to which [Tax Law § 3030 (a)] applies (other than the commissioner or any creditor of the taxpayer involved):

(i) who (I) has substantially prevailed with respect to the amount in controversy, or (II) has substantially prevailed with respect to the most significant issue or set of issues presented, and

(ii) who (I) within thirty days of final judgment in the action, submits to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from an attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed . . . and (II) is an individual whose net worth did not exceed two million dollars at the time the civil action was filed . . .

(B) Exception if the commissioner establishes that the commissioner's position was substantially justified.

(i) General rule. A party shall not be treated as the prevailing party in a proceeding to which subdivision (a) of this section applies if the commissioner establishes that the position of the commissioner in the proceeding was substantially justified.

(ii) Burden of proof. The commissioner shall have the burden of proof of establishing that the commissioner's position in a proceeding referred to in subdivision (a) of this section was substantially justified, in which event, a party shall not be treated as a prevailing party.

(iii) Presumption. For purposes of clause (i) of this subparagraph, the position of the commissioner shall be presumed not to be substantially justified if the department, inter alia, did not follow its applicable published guidance in the administrative proceeding. Such presumption may be rebutted.

(C) Determination as to prevailing party. Any determination under this paragraph as to whether a party is a prevailing party shall be made by agreement of the parties or (i) in the case where the final determination with respect to tax is made at the administrative level, by the division of tax appeals, or (ii) in the case where such final determination is made by a court, the court” (Tax Law § 3030 [c] [5]).

As there has been no final determination in this matter as to what party is prevailing on the amount in controversy or most significant issues, petitioner’s request for “damages” must be denied.

C. Petitioner’s motion to cancel the notices of determination issued to petitioner and nullify the conciliation order dated July 19, 2019 must likewise be denied. Petitioner’s requests to cancel the notices and nullify the conciliation order are essentially a motion for summary determination in favor of petitioner. Such a 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” (20 NYCRR 3000.9 [b] [1]). Section 3000.9 (c) of the Rules 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]).

D. In his motion, petitioner claims that the notices should be canceled because “the Department of Taxation and Finance, to the best of our knowledge, did not send timely copies of the officer assessments to petitioner’s representative” and argues that the conciliation order should be nullified because “paragraphs 3 through 11 [of Mr. Cole’s purported affidavit] clearly raise triable facts.” First, petitioner’s motion is technically defective because it is not supported by a properly notarized affidavit or a copy of the pleadings (*see* 20 NYCRR 3000.9 [b] [1]; *see also* Tax Law § 2006 [6]). Second, petitioner submitted no evidence in admissible form to support his motion. While petitioner contends that the notices should be canceled on the basis that they were not sent to petitioner’s representative, the motion did not include a power of attorney form showing that petitioner had a duly authorized representative at the time the notices were issued. The only power of attorney forms in the record are one dated September 20, 2018, which was filed with the petition in this matter, naming Mr. Cole as petitioner’s representative for the years, periods, or transactions of “2014 – 2016” and listing notice numbers L-048708314, L-047838953, and L-048700612, and the subsequently filed one, dated August 24, 2020, listing sales and use taxes for the period 2013 through 2016 and the notices at issue. The date of these power of attorneys fall after the date the notices were issued, and petitioner has presented no proof of an authorized representative at the time the notices were issued.

E. Assuming, arguendo, that petitioner was represented by a valid power of attorney at the time the notices were issued, and the Division had notice of such representative but failed to

serve a copy of the notices to that representative, such would still not be a basis for cancellation of the notices. Rather, the 90-day period for filing a petition or request for a conciliation conference would be tolled if the taxpayer's representative was not served with the notice (*see Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988). Such a period of tolling is not indicated in this case, however, as petitioner has not shown that he had designated his purported representative at the time of the issuance of the statutory notices at issue.

F. As for petitioner's argument that the conciliation order should be nullified, petitioner contends that he has raised triable issues of fact. As noted above, petitioner's motion to nullify the conciliation order is akin to a motion for summary determination. Such motion must 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.*; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*). Rather than show that no issues of fact exist and petitioner is entitled to judgment as a matter of law, petitioner has argued the existence of material issues of fact. Accordingly, petitioner's motion to nullify the conciliation order must be denied.

G. Based upon the foregoing, petitioner's motion seeking dismissal of the Division's motion dated January 28, 2020 is deemed moot, and petitioner's motion for damages, cancellation of the notices and to nullify the conciliation order is denied. A hearing in this matter will be scheduled in due course.

DATED: Albany, New York
October 08, 2020

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE