

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition  
of  
**123 LINDEN LLC**

ORDER  
DTA NO. 830249

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, 2017 through December 13, 2020.

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Petitioner, 123 Linden 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, 2017 through December 13, 2020.

On May 6, 2021, petitioner, by its representative, H. Friedman and Associates, CPA (Herschel Friedman, CPA), brought a motion seeking summary determination in the above-captioned matter pursuant to section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. On June 4, 2021, the Division of Taxation, by Amanda Hiller, Esq. (Brandon Batch, Esq., of counsel) submitted an affidavit, together with accompanying documents, in opposition to the motion for summary determination.<sup>1</sup> The 90-day period for issuance of this order commenced on June 7, 2021. Based upon the motion papers, the affidavits and documents

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<sup>1</sup> On June 10, 2021, petitioner’s representative attempted to file a reply to the Division of Taxation’s response; however, because petitioner’s representative failed to obtain the appropriate permission in order to file a reply to the Division of Taxation’s response, petitioner’s reply was rejected and returned to its representative (*see* 20 NYCRR 3000.5 [b]). On August 2, 2021, petitioner attempted to submit additional documentation to the undersigned administrative law judge, which additional documentation was returned to petitioner’s representative (*id.*).

submitted therewith, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following order.

***ISSUE***

Whether petitioner has established that there are no material and triable issues of fact such that, as a matter of law, summary determination can be made in its favor.

***FINDINGS OF FACT***

1. On January 25, 2021, the Division of Taxation (Division), issued to petitioner, 123 Linden LLC, a refund claim determination notice that denied a claim for refund of sales or use tax in the amount of \$558,000.00 for the period June 1, 2017 through December 13, 2020 (refund denial notice). The explanation section of the refund denial notice provided the following detailed explanation:

“Your claim for credit or refund of sales or use tax is being denied in full.

The New York State Sales and Use Tax law imposes a tax on the cost of the building materials used in the performance of a capital improvement. The purchaser of the materials, whether it.s [sic] the contractor or the homeowner, must pay the sales tax on those materials at the time of the purchase. If the contractor supplies, and installs the material used in a capital improvement, the contractor must pay the tax on all materials that are used. The contractor then includes the sale tax he paid in the cost of the materials that he charges to his customer. The contractor may or may not choose to show this cost on the invoice to his customer.

Your claim for a refund is being denied because you were not charged sales tax on the purchase of a capital improvement i.e. materials, supplies and labor. As required by law, any sales tax charged must be separately stated on the invoice. If you are charged tax on a capital improvement, the invoice would show tax charged on the total of materials, supplies and labor. The sales tax shown on the statement you included with your claim was merely the recoupment by the contractor of his cost of materials. Accordingly, your claim is denied in full.

In addition, the Sales and Use Tax Law requires that a refund application be filed within three years from the date the taxes are payable to the Tax Department. Sales Tax is deemed to be payable on the 20th day of the month following the quarter in which the sale/purchase was made.

Your claim was filed on 12/21/2020. Based on the three year statute of limitations, your claim can only include periods beginning on 09/01/2017. All taxes paid on sales/purchases made before that date cannot be recommended for approval.”

2. Petitioner timely filed its petition with the Division of Tax Appeals on February 2, 2021 in protest of the refund denial notice. In its petition, petitioner asserted that sales tax was paid for services that were in the nature of and in conjunction with a capital improvement that are exempt from tax.

3. On April 14, 2021, the Division filed its answer to the petition. Thereafter, petitioner filed its motion for summary determination.

4. Petitioner’s motion was solely accompanied by the affidavit of Herschel Friedman, CPA, the representative who “drafted and submitted” the sales tax claim for refund on petitioner’s behalf. Mr. Friedman, in his affidavit, asserted that the Division improperly denied petitioner’s claim for refund of sales tax that petitioner, a real estate developer, allegedly paid on its capital improvement construction contract with Yuanda USA Corporation (Yuanda). He further asserted that “none of the amounts invoiced or paid precede September 1, 2017, and all the relevant transactions fall within the applicable statute of limitations.” Although Mr. Friedman asserted that he was “familiar with the business activities of petitioner” and was “informed of the facts and circumstances of this case,” his affidavit did not state how he had first-hand knowledge of any facts asserted in the same. Documentation attached to Mr. Friedman’s affidavit included the contract by and between petitioner and Yuanda; an application and certificate for payment (AIA documents G702 and G703) application no. 0000-015, dated May 8, 2019, for the period to April 19, 2019; a lien waiver and release and payment receipt for

the period ending May 10, 2019, executed on May 10, 2019; and a check payable to Yuanda dated May 30, 2019.

5. In opposition, the Division contends that petitioner failed to prove if and/or when it allegedly paid the sales tax for which it seeks a refund.

### ***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 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.”

B. 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, 573 [2d Dept 1989]). It is not for the court to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist (*Daliendo v Johnson*, 147 AD2d 312, 317 [ 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]).

C. In support of its motion for summary determination, petitioner submitted the affidavit of Herschel Friedman, CPA, and some attached exhibits. In his affidavit, Mr. Friedman made vague statements and assertions regarding petitioner's business, its alleged transaction with Yuanda, the contract by and between it and Yuanda that allegedly memorializes the transaction, alleged invoice payments related to such contract, and the amount of sales tax it allegedly paid. In addition, the documentation submitted with Mr. Friedman's affidavit does not resolve the material issues of fact regarding the underlying transaction between petitioner and Yuanda, the contract memorializing the same, the dates and amounts of alleged payments made in accordance with the contract, and the dates and amounts of such payments that petitioner alleges were made in payment of the sales tax for which a refund is claimed. As material and triable issues of fact exist in this matter, petitioner's motion for summary determination must be denied.

D. The motion for summary determination filed by 123 Linden LLC is denied and a hearing will be scheduled in due course.

DATED: Albany, New York  
September 2, 2021

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE