

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LDBM LLC	:	ORDER
	:	DTA NO. 851486
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 November 15, 2021 through May	:	
16, 2022.	:	

Petitioner, LDBM 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 November 15, 2021 through May 16, 2022.

Petitioner, by its representative, Dechert LLP (Michael Lehmann, Esq., of counsel), brought a motion on June 13, 2025 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. The Division of Taxation, by its representative, Amanda Hiller, Esq. (Eric R. Gee, Esq., of counsel), requested and was granted an extension of time to respond to petitioner's motion, and timely responded by August 1, 2025. Petitioner requested and was granted permission to file a reply, and timely did so by September 19, 2025, which date commenced the 90-day period for the issuance of this order.

Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Jennifer L. Baldwin, Administrative Law Judge, renders the following order.

ISSUE

Whether issues of fact mandating a hearing are present such that petitioner's motion for summary determination should be denied.

FINDINGS OF FACT

1. On or about February 14, 2023, petitioner, LDBM LLC, filed form AU-11, application for credit or refund of sales or use tax, with the Division of Taxation (Division) claiming a refund of sales tax in the amount of \$19,691,211.00 for the period November 15, 2021 through May 16, 2022 (the refund claim). In an attachment to the refund claim, petitioner explained, in part, as follows:

“There was no retail sale of tangible personal property. The taxpayer was the owner of the property subject to this refund claim prior to and subsequent to the auction transaction. The auction house collected and remitted Sales Tax purportedly to fulfill its collection obligation.”

2. Petitioner provided various documents in support of its refund claim. Among these documents were three invoices from Sotheby's, Inc., 1334 York Avenue, New York, New York, to petitioner. The first invoice, dated February 4, 2022, is an “**Invoice for The Macklowe Collection** Sale N10819 - 15 November 2021” and provides, in part, as follows:

LOT 11 - Jackson Pollock, Number 17, 1951	
Lot location	York Avenue
Hammer price	\$53,000,000.00
Buyer's premium	\$7,631,000.00
Overhead premium	\$530,000.00
Sales tax	\$5,428,038.75
Lot total	\$66,589,038.75

LOT 16 - Jeff Koons, Aqualung, 1985	
Lot location	York Avenue
Hammer price	\$13,000,000.00
Buyer's premium	\$2,071,000.00
Overhead premium	\$130,000.00
Sales tax	\$1,349,088.75
Lot total	\$16,550,088.75

LOT 28 - Michael Heizer, Track Painting, 1967	
Lot location	York Avenue
Hammer price	\$900,000.00
Buyer's premium	\$200,000.00
Overhead premium	\$9,000.00
Sales tax	\$98,423.75
Lot total	\$1,207,423.75

This invoice lists an invoice total of \$84,346,551.25, a wire payment of \$61,161,000.00, a total due of \$23,185,551.25 and a payment due date of February 13, 2022.

The second invoice is also dated February 4, 2022 and is also an “**Invoice for The Macklowe Collection** Sale N10819 - 15 November 2021” and provides, in part, as follows:

LOT 3 - Willem de Kooning, Untitled XXXIII, 1977	
Lot location	York Avenue
Hammer price	\$21,000,000.00
Buyer's premium	\$3,183,000.00
Overhead premium	\$210,000.00
Sales tax	\$2,164,878.75
Lot total	\$26,557,878.75

LOT 6 - Agnes Martin, Untitled #44, 1974	
Lot location	York Avenue
Hammer price	\$15,200,000.00
Buyer's premium	\$2,376,800.00
Overhead premium	\$152,000.00
Sales tax	\$1,573,431.00
Lot total	\$19,302,231.00

LOT 24 - Brice Marden, Point, 1969	
Lot location	York Avenue
Hammer price	\$5,000,000.00
Buyer's premium	\$959,000.00
Overhead premium	\$50,000.00
Sales tax	\$533,298.75
Lot total	\$6,542,298.75

LOT 32 - Rudolf Stingel, Untitled, 2013	
Lot location	York Avenue
Hammer price	\$2,300,000.00
Buyer's premium	\$480,000.00
Overhead premium	\$23,000.00
Sales tax	\$248,766.25
Lot total	\$3,051,766.25

This invoice lists an invoice total of \$55,454,174.75 and a payment due date of February 13, 2022.

The third invoice, dated May 18, 2022, is an “**Invoice for The Macklowe Collection** Sale N10382 - 16 May 2022” and provides, in part, as follows:

LOT 5 - Gerhard Richter, Seestück, 1975	
Lot location	York Avenue
Hammer price	\$26,000,000.00
Buyer's premium	\$3,938,500.00
Overhead premium	\$260,000.00
Sales tax	\$2,680,116.88
Lot total	\$32,878,616.88

LOT 7 - Cy Twombly, Synopsis of a Battle, 1968	
Lot location	York Avenue
Hammer price	\$13,000,000.00
Buyer's premium	\$2,131,500.00
Overhead premium	\$130,000.00
Sales tax	\$1,354,458.12
Lot total	\$16,615,958.12

LOT 8 - Mark Rothko, Untitled, 1960	
Lot location	York Avenue
Hammer price	\$41,500,000.00
Buyer's premium	\$6,093,000.00
Overhead premium	\$415,000.00
Sales tax	\$4,260,710.00
Lot total	\$52,268,710.00

This invoice lists an invoice total of \$101,763,285.00 and a payment due date of August 14, 2022.

According to all three invoices, sales tax was computed at 8.875% of the hammer price, buyer's premium and overhead premium.

3. Petitioner also included an amended order appointing a receiver to sell schedule II and III art at public auction (amended order), in *Macklowe v Macklowe* (Sup Ct, NY County, Nov. 1, 2019, Drager, J., index No. 350044/16). The amended order provided, in part, as follows:

“WHEREAS on December 21, 2018, this Court rendered its Amended Trial Decision and Order [], which determined, among other things, that the Parties’ art collection was marital property and that certain works from the collection should be sold by a receiver with the proceeds split between the Parties;

* * *

ORDERED, that the Receiver shall have sole and exclusive authority to sell the Art by public auction(s) through a major auction house or houses with global reach and a history of selling art collections of similar type and renown as the Art. . . . Nothing herein shall preclude either Party from bidding to buy any of the Art at any scheduled public auction . . .

* * *

ORDERED, that the Receiver, to the extent possible, shall allow the Art to remain in its present locations until needed for sale. However, if, in his professional judgment, it is necessary to move any of the Art to advance his obligation to sell the [A]rt, he may take possession of the Art . . . with the costs of the securing, transporting, storage and showing of the Art shared equally by the Parties as expenses of the Receiver. . . .”

Petitioner also included an assignment, dated May 30, 2014, between Linda Macklowe and petitioner, in which Ms. Macklowe transferred “all of [her] right, title and interest in and to the artworks” included in a schedule attached to the assignment. Ms. Macklowe signed on behalf of petitioner as “[m]ember.” The attached schedule includes the artwork listed on the Sotheby’s invoices (*see* finding of fact 2) with certain exceptions. The schedule lists a Jeff Koons piece titled “Vest with Aqualung” and a Gerhard Richter piece titled “Seascape.” Also, “Track Painting” by Michael Heizer does not appear on the schedule.

Petitioner also included an undated federal form SS-4, application for employer identification number, for petitioner, which lists Ms. Macklowe as the “responsible party” and

indicates that petitioner is a disregarded entity and a federal form W-9, request for taxpayer identification number and certification, for petitioner, dated July 16, 2014.

4. The Division conducted an audit of the refund claim, including reviewing the documents petitioner provided with, or as a supplement to, the refund claim to determine the validity of the refund claim. After such review, the Division determined that petitioner's purchases of artwork were taxable purchases of tangible personal property. Based on a sales tax bulletin issued by the Division that stated that artistic items such as sketches, paintings and photographs are tangible personal property, the Division found that the artwork sold at auction and purchased by petitioner was the sale of tangible personal property. In August 2023, the Division concluded that the refund claim should be denied because taxable sales occurred.

5. On September 6, 2023, the Division issued a refund claim determination notice (notice) to petitioner in which the Division denied petitioner's refund claim in full. The notice provided the following explanation:

“Upon review we have determined that the sale at auction constituted a taxable transaction and sales tax was properly collected by the auction house.

This denial is made in accordance with the provisions of section 1132(c) of the New York State Sales and Use Tax Law. It provides that all receipts from the sales of property or services of any type mentioned in section 1105 are subject to the tax until the contrary is established, and that the burden of proof that any receipt is not taxable shall be upon the person required to collect the tax or upon the customer.”

6. Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice, which was conducted on July 24, 2024. By conciliation order, CMS number 000358613, dated November 8, 2024, BCMS sustained the notice.

7. On January 10, 2025, petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order.

8. In support of its motion for summary determination, petitioner submitted the purported affidavit¹ of Ms. Macklowe, dated June 11, 2025, and attached exhibits. In her purported affidavit, Ms. Macklowe declares, under penalties of perjury, that she is the sole owner of petitioner, a Delaware limited liability company. Ms. Macklowe does not allege any other facts except to declare that the exhibits are “true and correct” copies of the attached documents. One such exhibit is a copy of the unreported decision and order in *Macklowe v Macklowe* (61 Misc 3d 1226(A) [Sup Ct, NY County 2018]), Ms. Macklowe’s divorce action, wherein the court determined the equitable distribution of her and her former husband’s property. In relevant part, the court stated as follows:

“The parties collected art almost from the beginning of their marriage. They now possess an internationally renowned collection of modern and contemporary art. Although the collection is held in the Wife’s name through a limited liability corporation, the art is marital property. The Wife was, and still is, passionate about art. She devoted significant time to curating the collection and maintaining relations with artists and gallery owners, but the art was purchased with funds earned by the Husband during the marriage. The Husband also enjoyed collecting art. He too developed relationships with artists and gallery owners, including assisting people in the art world with real estate transactions.

Neither party provided detailed information with respect to who held ownership of the art until 2007. It appears that at some point in time the art was placed in trusts in each party’s name. In 2007, the art was titled in the Wife’s name. In 2013, ownership of the art was transferred to [petitioner] of which the Wife is the sole member.

The collection consists of 165 pieces. . . .

* * *

¹ Ms. Macklowe’s signature on the purported affidavit was not notarized and the purported affidavit does not otherwise comply with Civil Practice Law and Rules (CPLR) 2106 and State Administrative Procedure Act (SAPA) § 302 (4) as an affirmation of truth of statement.

In this 55-year marriage during which each party made direct and indirect contributions and accumulated great wealth, the parties agree that the marital property should be distributed 50% to each party. . . .

* * *

In distributing 50% of the assets to each party, given the anticipated value of the art collection, it is impossible to distribute the art entirely to one party, nor would it be equitable given each party's participation in creating their 'crowning achievement' collection. . . . At the same time, the court appreciates the Wife's desire to maintain as much of the collection as possible for her enjoyment.

Upon consideration of these factors the court awards to the Wife all the art listed in Schedule I. . . . The art listed in Schedules II and III will be sold and the net proceeds distributed 50% to each party. . . .

* * *

ORDERED, that the art set forth in Schedule II and Schedule III of this Decision shall be sold. Each party shall receive 50% of the net proceeds from the sale of this art. The court shall appoint a receiver to sell the art. . . ."

Other exhibits attached to Ms. Macklowe's purported affidavit include a letter agreement, dated August 13, 2021 (letter agreement), related to a guarantee and consignment agreement of the same date (consignment agreement), and the consignment agreement. The letter agreement is between Sotheby's and the receiver to sell the Schedule II and Schedule III artwork "owned by" petitioner and Ms. Macklowe's former husband and is signed by Ms. Macklowe as sole owner, member and manager of petitioner. The letter agreement provides that petitioner had informed Sotheby's that petitioner and Ms. Macklowe's former husband owned the artwork to be sold as "50/50 tenants-in-common" and that petitioner represented and warranted that petitioner "own[s] a 50% undivided tenant-in-common interest" in such artwork. The consignment agreement also defines the owners of the artwork as petitioner and Ms. Macklowe's former husband.

Petitioner also included a statement of material facts, signed by petitioner's representative and dated June 13, 2025, and a memorandum of law in support of its motion for summary determination.

9. In opposition to petitioner's motion, the Division submitted the affirmation of Eric R. Gee, Esq., dated August 1, 2025, and the affidavit of Jeffrey Jennings, a Tax Technician 4 in the Sales Tax Refund Unit of the Division's Transaction Desk Audit Bureau, sworn to on August 1, 2025, with attached exhibits. Mr. Gee avers that petitioner has not provided competent proof to support the motion for summary determination and that material issues of fact exist that preclude the granting of summary determination. Therefore, according to Mr. Gee, petitioner's motion for summary determination should be denied.

Mr. Jennings, in his affidavit, states that he "closely supervised" the primary tax technician on this matter and, as such, is "fully familiar with the facts and circumstances of the refund claim." Mr. Jennings thereafter recounts the review of petitioner's refund claim as set forth in findings of fact 4 and 5.

10. In reply to the Division's response to its motion, petitioner argues that:

"the supposedly disputed factual issues [the Division] alleges are either settled by the current record or are immaterial to the legal issue to be decided. None of the factual issues raised are sufficient to preclude summary determination as a matter of law, and some are simply misstatements of what is and is not already in the record."

Petitioner does not address the Division's argument with respect to the competency of proof submitted with its motion for summary determination.

CONCLUSIONS OF LAW

A. Petitioner brings a motion for summary determination under section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). "After issue has been

joined . . . any party may move for summary determination” (20 NYCRR 3000.9 [b] [1]). The Rules provide 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 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” (*id.*).

Petitioner’s motion is not in proper form. While Ms. Macklowe seemingly has knowledge of the facts, her purported affidavit is unsworn and does not recite any facts let alone “all the material facts.” Further, her purported affidavit does not attempt to explain the documents attached thereto or the facts contained therein and, therefore, such documents are accorded little weight. As such, petitioner’s motion must be denied.

Notwithstanding the deficiencies in its motion papers, petitioner’s motion for summary determination would nonetheless be denied as there exist material issues of fact precluding judgment as a matter of law.

B. 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” (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 v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572, 573 [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 (*see Gerard v Inglese*, 11 AD2d 381, 382 [2d Dept 1960]).

C. Tax Law § 1105 (a) imposes sales tax on “[t]he receipts from every retail sale of tangible personal property, except as otherwise provided.” All receipts from sales of property described in Tax Law § 1105 (a) are presumptively subject to sales tax until the contrary is established (*see* Tax Law § 1132 [c] [1]). A “[r]etail sale” is “[a] sale of tangible personal property to any person for any purpose” with certain exceptions not relevant here (Tax Law § 1101 [b] [4] [i]). “Sale, selling or purchase” is defined as “[a]ny transfer of title or possession or both . . . in any manner or by any means whatsoever for a consideration, or any agreement therefor . . .” (Tax Law § 1101 [b] [5]).

Artwork, including a painting, is tangible personal property (*see* Tax Law § 1101 [b] [6]; *Matter of Objet LLC*, Tax Appeals Tribunal, February 28, 2022). It remains whether a “transfer of title or possession or both” took place for consideration such that taxable sales occurred herein. Petitioner’s support for its motion does nothing to answer this question and, in fact, creates issues of fact. For example, the May 30, 2014 assignment of artwork from Ms. Macklowe to petitioner (*see* finding of fact 3) would seem to indicate that petitioner owned the artwork to be sold. However, both the letter agreement and the consignment agreement indicate that the artwork was owned by petitioner and Ms. Macklowe’s former husband, specifically as “50/50 tenants-in-common” (*see* finding of fact 8). It is unknown if ownership changed prior to the sale to petitioner and Ms. Macklowe’s purported affidavit does not address this or, as noted,

assert any facts necessary to make a determination here. Moreover, it is unclear if petitioner possessed the artwork after the court order declaring the artwork marital property as it appears that petitioner no longer had any control over it (*see* findings of fact 3 and 8). There are also questions about the ownership of certain pieces of artwork that were not included in the assignment to petitioner or included under a different name without explanation (*see* finding of fact 3). In sum, petitioner has not made a prima facie showing of entitlement to summary determination in its favor as there remain questions of fact warranting a full hearing.

D. The motion of LDBM LLC for summary determination is denied, and a hearing will be scheduled in due course.

DATED: Albany, New York
December 18, 2025

/s/ Jennifer L. Baldwin
ADMINISTRATIVE LAW JUDGE