

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
	:	
of	:	
	:	
SAUL DEUTSCH	:	ORDER
	:	DTA NO. 851527
	:	
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 Ended December 31, 2022.	:	

Petitioner, Saul Deutsch, 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 ended December 31, 2022.

On April 7, 2025, petitioner, appearing by 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 (Rules). The Division of Taxation, by its representative, Amanda Hiller, Esq. (Elizabeth Lyons, Esq., of counsel) submitted an affirmation, dated June 6, 2025, and accompanying documents in opposition to the motion¹ and filed a cross motion for summary determination, dated June 6, 2025, in its favor pursuant to Tax Law § 2006 (6) and sections 3000.5 and 3000.9 (b) of the Rules. On July 7, 2025, petitioner filed a reply memorandum of law in further support of his motion for summary determination and in opposition to the Division's cross motion for summary determination, along with a supporting affirmation of

¹ The Division of Taxation (Division) requested and was granted until June 6, 2025 to respond to petitioner's motion.

Herschel Friedman, CPA, and accompanying documents.² The Division requested and was granted time to file a reply to petitioner's motion reply papers, and did so by August 22, 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, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUES

I. Whether petitioner has established that no material and triable issue of fact exists such that summary determination may be granted in his favor.

II. Whether the Division of Taxation has established that no material and triable issue of fact exists such that summary determination may be granted in its favor.

FINDINGS OF FACT

1. On December 18, 2023, petitioner, Saul Deutsch, and his spouse filed a form IT-201, New York State resident income tax return, for tax year 2022 (return). On that return, petitioner listed a 58th Street address in Brooklyn, New York. On line 59 of the return, petitioner reported "0.00" sales and use tax due.

2. On January 22, 2024, the Division's TDAB – Casual Sales Unit sent a form AU-346-D, statement of proposed audit change (SOPAC), to petitioner. The SOPAC asserted additional tax due in the amount of \$9,322.74, plus penalty of \$1,864.47 and interest of \$1,255.09.

3. Petitioner did not respond to the SOPAC. Therefore, on April 9, 2024, the Division issued a notice of determination, assessment ID L-059631844, to petitioner (notice) asserting tax

² Petitioner requested and was granted until August 15, 2025 to respond to the Division's cross motion and to file a reply.

due in the amount of \$9,322.74, plus penalty and interest, for a total amount due of \$12,696.38, for the period ended December 31, 2022.

The computation section of the notice stated, in part, that:

“Section 1101 (b) (7) of the Tax Law, in part, defines ‘use’ as, ‘[t]he exercise of any right or power over tangible personal property by the purchaser thereof and includes but is not limited to, the receiving, storage or any keeping or retention for any length of time. . .’.

Accordingly, we have determined that you owe compensating use tax, interest, and any applicable penalties, under sections 1110, 1138 and 1145 of the Tax Law.”

4. On July 5, 2024, petitioner filed a request for a conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (BCMS). Subsequently, on December 23, 2024, petitioner requested discontinuance of the proceedings at BCMS.

5. On January 30, 2025, petitioner filed a petition with the Division of Tax Appeals challenging the notice.

6. On April 2, 2025, the Division served its answer. The cover letter accompanying the Division’s answer stated, in part, that “[i]n the next few months, the Division of Tax Appeals will be contacting the parties to schedule a pre-hearing conference.”

7. On April 7, 2025, petitioner filed a motion for summary determination (motion) seeking cancellation of the notice. In support of his motion, petitioner submitted the following papers: (i) the affidavit of his representative, Herschel Friedman, CPA, sworn to on April 7, 2025; (ii) the petition filed in this matter; (iii) the Division’s answer and accompanying cover letter, each dated April 2, 2025; and (iv) materials that petitioner received from the Division in response to his freedom of information law (FOIL) request (FOIL materials) consisting of: (a) a copy of the notice; (b) a copy of the Division’s form AU-220.5, audit log for petitioner; (c) a copy of petitioner’s return; (d) a copy of a SOPAC issued to Saul Deutch, dated January 22,

2024,³ (SOPAC #2); (e) a copy of the SOPAC issued to petitioner (SOPAC #1); (f) a copy of the Division's Empire Case Management CARTS Assessment Receivable AR for petitioner; (g) a copy of a printout, dated "7/30/24, 11:17 AM," taken from the Division's "Empire Casual Sale Customs Imports > > Update" (casual sale imports) reporting customs import details for consignee Saul Deutch (Deutch casual sale imports) related to merchandise valued at \$2,748.00 (Deutch casual sale imports #1); (h) a copy of a printout, dated "7/30/24, 11:18 AM," listing Deutch casual sale imports related to merchandise valued at \$5,027.00 (Deutch casual sale imports #2); and (i) a copy of a printout, dated "7/30/24, 11:18 AM," listing Deutch casual sale imports related to merchandise valued at \$97,270.00 (Deutch casual sale imports #3).

8. In his affidavit, Mr. Friedman asserts that the grounds for petitioner's motion are that the Division "failed to request books and records from the Petitioner before issuing the assessment."

9. In opposition to petitioner's motion, the Division submitted the affirmation of its representative, Elizabeth Lyons, Esq., dated June 6, 2025. In her affirmation, Ms. Lyons avers that the Division submitted its answer to petitioner on April 2, 2025, and that on April 7, 2025, petitioner filed his motion. Ms. Lyons further avers that because petitioner did not file a reply to the Division's answer, the matter would be joined, or deemed at issue, 20 days after the service of the Division's answer, i.e., April 22, 2025. Therefore, Ms. Lyons claims that the Division of Tax Appeals lacks jurisdiction to consider petitioner's motion as the motion "was prematurely filed and the matter was not yet joined or at issue."

10. In support of its cross motion, the Division submitted the affirmation of Ms. Lyons, dated June 6, 2025, and the following supporting papers: (i) petitioner's return; (ii) the affidavit

³ Hereafter, the SOPAC issued to Saul Deutch will be referred to as SOPAC #2 and the SOPAC issued to petitioner will be referred to as SOPAC #1.

of Thomas Rifenberg, a Tax Technician 3 in the Division's Transaction Desk Audit Bureau, sworn to on June 4, 2025; (iii) a copy of the Deutch casual sale imports #1; (iv) a copy of the Deutch casual sale imports #2; (v) a copy of the Deutch casual sale imports #3; (vi) the certification of a Deputy Tax Commissioner in the Division's Office of Budget and Management Analysis, Disclosure and Government Exchange unit, dated May 12, 2025; (vii) a copy of SOPAC #1; (viii) a copy of SOPAC #2; and (ix) a copy of the notice.

11. In her affirmation, Ms. Lyons alleges that pursuant to "a 1995 Memorandum of Understanding" between the United States Customs and Border Protection⁴ and the Division (Customs memorandum), "[c]ustoms periodically shares information related on imports of tangible personal property into the State with the Division." Ms. Lyons further alleges that "the Division received information from Customs that on March 15, 2022, the Petitioner imported tangible personal property into New York from Canada that was subject to sales and use tax."

12. As noted above, the Division submitted the affidavit of Mr. Rifenberg who has held his current position as a Tax Technician 3 for the six past months, and immediately prior to that position he was a Tax Technician 2 for five years. Currently, Mr. Rifenberg's responsibilities "include developing audit methodologies, establishing audit case selection criteria, reviewing data and uploading it into the Division's internal case management system (e-MPIRE) for commercial customs cases, overseeing a team of supervisors and their respective staff, representing the Division at BCMS conferences and Division of Tax Appeals hearings, training staff and performing general supervisory functions." While Mr. Rifenberg was a Tax Technician 2, he also performed supervisory functions, including the assignment and review of commercial

⁴ The United States Customs Service was part of the United States Department of the Treasury until 2003 when it was moved to the Department of Homeland Security and renamed the United States Customs and Border Protection (Customs).

customs cases. In the performance of his duties, Mr. Rifenberg reviewed information in the Division's systems pertaining to the audit of petitioner, including information from Customs and petitioner's return.

13. In his affidavit, Mr. Rifenberg alleges that the "Division received information from Customs that indicated that the Petitioner imported tangible personal property into New York State on March 15, 2022 from Canada."

14. The Division did not submit the Customs memorandum or the underlying Customs documentation, such as Customs declarations, entry summaries, invoices or shipping documents, provided to it by Customs.

15. After being granted an extension of time to respond to the Division's cross motion and leave to file a reply to the Division's opposition papers, petitioner filed the affirmation of Mr. Friedman, dated July 7, 2025, (Friedman affirmation) in opposition to the Division's cross motion and in further support of petitioner's own motion, along with attached exhibits.

16. In his affirmation, Mr. Friedman avers that on April 7, 2025, prior to submitting petitioner's motion, he placed a telephone call to the Division of Tax Appeals "to inquire whether such could be filed at that time or whether it would be considered premature." Mr. Friedman further avers he received instruction that a motion could be submitted since the Division had filed its answer. Mr. Friedman cannot recall the name of the employee who relayed this information to him. Mr. Friedman asserts that he "received by mail the Division's opposition papers" and its cross motion on June 10, 2025. He further asserts that the Division's documents arrived in an oversized manila envelope which had "a private postage meter strip affixed by the sender," along with a certified mail label that he used to conduct a tracking inquiry. Mr. Friedman further avers that the "tracking history reflected that the first [United

States Postal Service] entry for this parcel occurred on June 7, 2025 at 8:48 p.m.,” a date after the June 6, 2025 extension deadline.

17. In response to the allegation raised by petitioner’s motion reply papers that the Division late filed its responding opposition papers, the Division submitted the affirmation of Ms. Lyons, dated August 20, 2025, and attached exhibits that included: (i) a copy of the letter, dated April 25, 2025, from Supervising Administrative Law Judge Donna M. Gardiner, granting the Division’s request for an extension of time within which to respond to petitioner’s motion until June 6, 2025; (ii) a one-page United States Postal Service (USPS) “PS Form 3877 (Facsimile)” (certified mail log), postmarked June 6, 2025; (iii) a color picture of the manilla envelope addressed to the Hon. Donna M. Gardiner, Supervising Administrative Law Judge (Gardiner manilla envelope); (iv) a color picture of the manilla envelope addressed to Herschel Friedman, CPA, Herschel Friedman and Associates, CPA (Friedman manilla envelope); and (v) a copy of the Division of Tax Appeals letter, dated January 31, 2025, that acknowledged receipt of the petition in proper form and a copy of the petition, date stamped received by the Division of Appeals on January 30, 2025. Ms. Lyons makes this affirmation based upon her “personal knowledge of the facts of this case and a review of the relevant files and records maintained by the Division in its ordinary course of business.” Ms. Lyons asserts that on June 6, 2025, the Division via USPS certified mail, timely filed its opposition to petitioner’s motion and filed its cross motion with supporting papers to the supervising administrative law judge and petitioner’s representative.

18. In her affirmation, Ms. Lyons avers that it is the Division’s regular procedure in the ordinary course of business that replies to motions and motions for summary determination are sent by the USPS via certified mail. The documents to be mailed are placed in envelopes

addressed to the Division of Tax Appeals – if an administrative law judge has been assigned the documents will be mailed to that administrative law judge, otherwise they are mailed to the attention of the supervising administrative law judge – and petitioner (by representative if petitioner is represented). When mail is sent by certified mail, a certified mail sticker, containing a unique article number, is affixed to the top of the envelope. The Division’s mail room will weigh each envelope and affix each piece of mail with prepaid postage and include any fees, if applicable. A certified mail log, corresponding to each article number on the sticker, is created and filled out with the “Name and Address of Sender,” the type of mail service selected, the addressee for each piece of mail to be sent, and the amount of postage and fee.

After the certified mail log is completed and the envelopes are affixed with certified mail stickers and prepaid postage, a Division employee will deliver the envelopes to the USPS for mailing via certified mail. At the post office, an USPS employee affixes a postmark to the certified mail log indicating the date and location of mailing. The USPS employee writes the total number of pieces received in the box labeled “Total Number of Pieces Received at Post Office” and the employee initials or signs the certified mail log indicating receipt by the USPS in the box labeled “Postmaster, Per (Name of receiving employee).” It is the ordinary course of business for the Division employee delivering the mail to the USPS to ask the postal employee to complete these steps.

19. Ms. Lyons avers that on June 6, 2025, she prepared two identical packages of documents in response to petitioner’s motion and each set of documents were packaged in a manilla envelope. According to Ms. Lyons, each manila envelope contained the following: (i) a cover letter dated June 6, 2025; (ii) an affirmation in opposition to petitioner’s motion with exhibits by Ms. Lyons, dated June 6, 2015; (iii) a notice of cross motion dated June 6, 2025; (iv)

an affirmation in support of the Division's cross motion with exhibits by Ms. Lyons dated June 6, 2025; and (v) a memorandum of law in support of the Division's cross motion dated June 6, 2025. Ms. Lyons further avers that on June 6, 2025, at approximately 2:00 pm., she entered the USPS post office located at Colonie Center, Albany, New York 12205 (Colonie Center post office) and personally mailed the two manilla envelopes, one to "Hon. Donna M. Gardiner, Supervising Administrative Law Judge" and the other to "Herschel Friedman, CPA, Herschel Friedman & Associates, CPA." Upon receipt of the two envelopes by the USPS employee, Ms. Lyons averred that she personally witnessed the employee stamp the certified mail log with the date of June 6, 2025 and the USPS "Colonie Center location – Albany, NY 12205" post office location, handwrite the number 2 in the box for "Total Number of Pieces Received at Post Office" and initial the box labeled "Postmaster, Per (Name of receiving employee)."

20. A review of the certified mail log indicates that there are three columns located along the top of the certified mail log, the first column shows the "Name and Address of Sender" as "Elizabeth Lyons NYS Department of Taxation & Finance Office of Counsel Building 9, Room 100 Harriman State Campus Albany, New York 12227-0001," the second column shows the box marked "Certified" checked under "Check type of mail or service," and the third column bears the stamped postmark of the Colonie Center Albany NY 12205 post office and the date of "JUN 06 2025" next to "Affix Stamp Here (*If issued as a certificate of mailing, or for additional copies of this bill*) Postmark and Date of Receipt." The certified mail log includes 8 numbered lines where information related to each item mailed can be entered. Line 1 of the certified mail log shows article number 9589 0710 5270 2946 9987 45 and identifies the "Addressee" as "Hon. Donna M. Gardiner Supervising Administrative Law Judge New York State Division of Tax Appeals Agency Building 1 Empire State Plaza Albany, NY 12223" and "Postage" of \$10.95

and a “Fee” of \$4.85. Line 2 of the certified mail log shows article number 9589 0710 5270 2946 9987 52 and identifies the addressee as “Herschel Friedman, CPA Herschel Friedman and Associates, CPA 5501 New Utrecht Ave. 6th Floor Brooklyn, NY 11219” and postage of \$11.70 and a fee of \$4.85. A diagonal line was drawn through lines 3 through 8 indicating that there was no information for those lines. At the bottom of the certified mail log there are three boxes: the “Total Number of Pieces Listed by Sender” box has the typewritten entry “2 pcs. - PG 06/06/2025,” the “Total Number of Pieces Received at Post Office” box has the handwritten number “2,” and the “Postmaster, Per (Name of receiving employee)” box has the initials or signature of the postal employee.

21. In her affirmation, Ms. Lyons also avers that immediately prior to entering the Colonie Center post office, she took pictures of the two manilla envelopes. A review of the Gardiner manilla envelope indicates that it is addressed to the Hon. Donna M. Gardiner, Supervising Administrative Law Judge, and that a certified mail sticker bearing article number 9589 0710 5270 2946 9987 45 and prepaid metered postage, dated June 6, 2025, in the amount of \$15.80 are affixed at the top of the manilla envelope. The article number and the addressee’s name, and address appearing on the Gardiner manilla envelope are the same as that listed on line 1 of the certified mail log. The prepaid postage in the amount of \$15.80 corresponds to the certified mail log listed as postage of \$10.95 plus a fee of \$4.85. A review of the Friedman manilla envelope indicates that it is addressed to Herschel Friedman, CPA, Herschel Friedman and Associates, and that a certified mail sticker bearing article number 9589 0710 5270 2946 9987 52 and prepaid metered postage, dated June 6, 2025, in the amount of \$16.55 are affixed to the top of the manilla envelope. The article number and the addressee’s name and address appearing on the Friedman manilla envelope are the same as that listed on line 2 of the certified

mail log. The prepaid postage in the amount of \$16.55 corresponds to the certified mail log listed as postage of \$11.70 plus a fee of \$4.85.

CONCLUSIONS OF LAW

A. In this matter, petitioner filed a motion for summary determination pursuant to section 3000.9 (b) of the Rules. The Division requested and received an extension of time until June 6, 2025 to respond to petitioner's motion. The Division submitted responding opposition papers, along with its cross motion for summary determination, dated June 6, 2025. Petitioner was granted permission to file a reply. In his motion reply papers, petitioner made an allegation regarding the timeliness of the Division's responding papers. Therefore, it is necessary to address the timeliness of the Division's responding opposition papers prior to addressing petitioner's motion for summary determination.

B. Section 3000.22 (c) (2) of the Rules provides that:

“[i]f an envelope or wrapper containing a document is sent by United States certified mail and the sender's receipt is postmarked by the postal employee to whom such envelope is presented, the date of the postmark on such receipt is treated as the postmark date of the document and the date of filing.”

Here, the Lyons affirmation sets forth the Division's procedures for its filing of replies and motions for summary determination by USPS certified mail and how those procedures were followed in the mailing of the Division's reply to petitioner's motion (*see* findings of fact 18 and 19). Specifically, Ms. Lyons affirmed that she personally presented two manilla envelopes, bearing certified mail article numbers and prepaid postage, and the certified mail log to the USPS employee at the Colonie Center post office on June 6, 2025, and witnessed the USPS employee affix a postmark to the certified mail log on the same date (*see* finding of fact 19). The certified mail log contains two entries, line 1 related to the Gardiner manilla envelope and line 2 related to the Friedman manilla envelope bearing certified mail article number 9589 0710 5270 2946 9987

52 (*see* finding of fact 20). The certified mail log also bears the USPS postmark, dated June 6, 2025, of the Colonie Center, Albany, New York, post office (*see id.*). The certified mail log bearing the USPS postmark, dated June 6, 2025, of the Colonie Center post office constitutes the receipt for the Division's mailing of the Friedman manilla envelope that contained its reply to petitioner's motion by certified mail on June 6, 2025 (*see* 20 NYCRR 3000.22 [c] [2]). The postmark date of June 6, 2025 on the certified mail log is treated as the postmark date of the Division's reply to petitioner's motion and the date of filing of the same (*see id.*; *see also Matter of Hey's Entrs., Inc.*, Tax Appeals Tribunal, January 30, 2003). Accordingly, the Division timely filed its reply to petitioner's motion for summary determination.

C. Section 3000.9 (b) of the Rules provides that, after issue is joined, any party may bring a motion for summary determination. Issue is joined when a petitioner files a reply to the Division's answer within 20 days after service of such answer on petitioner or petitioner's representative, or after the expiration of 20 days (*see* 20 NYCRR 3000.4 [c]). In this matter, the Division served its answer on petitioner's representative on April 2, 2025 (*see* finding of fact 6). Because petitioner did not file a reply to the Division's answer, issue would be joined 20 days after the service of the Division's answer on petitioner's representative, i.e., April 22, 2025. Here, petitioner filed his motion for summary determination on April 7, 2025 (*see* finding of fact 7), a mere 5 days after the Division's answer was served. In as much as issue was not joined in this matter at the time petitioner filed his motion for summary determination (*see* 20 NYCRR 3000.4 [c]), it was prematurely filed and must be denied (*see* Tax Law § 2006 [6]; *see also* 20 NYCRR 3000.9 [b] [1]).

D. The Division filed a cross motion for summary determination. 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]).

E. 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 Civil Practice Law and Rules § 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 (*Gerard v Inglese*, 11 AD2d 381, 382 [2d Dept 1960]).

F. Tax Law § 1110 (a) imposes use tax on tangible personal property purchased outside of New York State by a New York State resident that is used in the State and when such purchase would be subject to sales tax if purchased in the State (*see also* 20 NYCRR 525.2 [b] [1]). Tax Law § 1101 (b) (7) defines “[u]se,” in part, as “[t]he exercise of any right or power over tangible personal property . . . by the purchaser thereof, and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time . . .”

G. Here, the Division issued the notice to petitioner asserting use tax due on petitioner’s purported importation of tangible personal property into New York State. In support of its

motion for summary determination, the Division submitted the affidavit of Mr. Rifenberg and printouts from the Division's internal records that contain details of information it allegedly received from Customs regarding imports associated with petitioner. The Division did not submit the Customs memorandum or the underlying Customs documentation, such as Customs declarations, entry summaries, invoices or shipping documents, provided to it by Customs. Given the issues raised by the absence of any Customs source documentation, the Division's cross motion for summary determination must be denied.

H. Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853). If such a showing is made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial (*see Zuckerman v City of New York*, 49 NY2d at 562). Here, the Division failed to submit sufficient evidence to demonstrate the absence of any material issues of fact (*see* conclusion of law G), and denial of the Division's cross motion for summary determination is warranted.

I. The motion of Saul Deutsch for summary determination and the cross motion of the Division of Taxation for summary determination are each hereby denied, and a hearing in this matter will be scheduled in due course.

DATED: Albany, New York
November 20, 2025

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE