

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>STRAIGHT PATH SERVICE STATION, INC.</b>	:	<b>ORDER</b>
	:	DTA NO. 821621
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 December 1, 1999 through November 30,	:	
2004.	:	

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Petitioner, Straight Path Service Center, Inc., 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 December 1, 1999 through November 30, 2004.

Petitioner, by its representative, David L. Silverman, Esq., brought a motion filed September 13, 2007, seeking summary determination in the above-referenced matter pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b). The Division of Taxation appeared in opposition to the motion by its representative, Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel). The parties completed their submissions by October 24, 2007, which date began the 90-day period for issuance of this determination.

After due consideration of the motion, the supporting affidavits of David L. Silverman, Esq., Steven Schneiderman, CPA, Amy Burte, and John Musacchia, the Memorandum of Law, and the 15 exhibits attached to the Motion, the Division of Taxation's Brief in Opposition, the affirmation of Osborne K. Jack, Esq., and the three exhibits attached thereto, and the affidavit of

Robert DeFilippis and all the pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

***ISSUE***

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

***FINDINGS OF FACT***

1. Petitioner, Straight Path Service Station, Inc., was the subject of a sales tax audit by the Division of Taxation (Division) for the period December 1, 1999 through August 31, 2002, later extended to November 30, 2004.

2. Books and records pertaining to the corporation's sales tax liability were requested from petitioner on several occasions beginning on or about October 4, 2002.

3. After reviewing the records made available by petitioner, the Division determined that they were insufficient to perform a detailed audit, and therefore it chose an indirect methodology, utilizing available information, to establish petitioner's actual sales of petroleum products and the tax due thereon. It also analyzed petitioner's prepaid gasoline credits and fixed asset purchases.

4. Based on its audit, the Division determined total additional tax due of \$172,411.96 for the audit period and issued a Notice of Deficiency to petitioner on March 20, 2006, which also asserted penalties and interest.

5. At the conciliation conference, held on July 20, 2006, petitioner claimed it always had complete books and records and that the Division failed to use them in its audit.

6. Due to this allegation, the Division agreed to review the records again and met with petitioner's representatives on September 7, 2006.

7. The Division once again concluded that the records were not adequate to perform a detailed audit and refused to adjust its audit findings. These results were reported to the conferee and a Conciliation Order was issued on December 29, 2006 sustaining the Notice of Determination.

8. The Division, through the affidavits of Mr. Jack and Mr. DeFilippis, indicated that the Division maintains its position that petitioner's records were inadequate and that the Notice of Determination should be sustained.

9. Petitioner argues that all records were provided and that Mr. DeFilippis erred in not performing a full audit, which resulted in an inaccurate assessment of petitioner's sales tax liability.

10. Petitioner's position was buttressed by the affidavit of its accountant, Mr. Schneiderman, who argued that petitioner's records were complete and that he was able to demonstrate his client's compliance with the Tax Law but that the Division refused to consider his arguments on several occasions.

11. Petitioner also contends that there was never a request for books and records made for the extended audit period and that no consent was given for a test period audit to be performed.

12. Petitioner also argued that the Division did not understand the relationship between OK Petroleum and itself. The two companies shared the same principal owner, John Musacchia. It was conceded that invoices were not always provided by OK Petroleum for sales to petitioner, but that a record of the sale was always made in the general ledger.

### **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. (20 NYCRR 3000.9[b][1]; *see also* Tax Law § 2006[6].)

In reviewing a motion for summary determination, an administrative law judge is initially guided by the following regulation:

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]; *see also* Tax Law § 2006[6].)

Furthermore, a motion for summary determination made before the Division of Tax Appeals is “subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR.” (20 NYCRR 3000.9[c]; *see also Matter of Service Merchandise, Co.*, Tax Appeals Tribunal, January 14, 1999.) Summary determination is a “drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Moskowitz v. Garlock*, 23 AD2d 943, 259 NYS2d 1003, 1004 [1965]; *see Daliendo v. Johnson*, 147 AD2d 312, 543 NYS2d 987, 990 [1989]). Because it is the “procedural equivalent of a trial” (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179 [1989]), undermining the notion of a “day in court,” summary determination must be used sparingly (*Wanger v. Zeh*, 45 Misc 2d 93, 256 NYS2d 227, 229, *affd* 26 AD2d 729 [1966]). 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, supra*, 543 NYS2d at 990). If any material facts are in dispute, if the existence of a triable issue of fact is “arguable,” or if contrary inferences may be reasonably drawn from undisputed facts, the motion must be denied (*Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881 [1960]).

B. From all the evidence submitted on this Motion, there is no doubt that a material and triable issue of fact exists which is both profound and rests at the very heart of this case.

Petitioner has presented affidavits that assert that all books and records were made available to the Division and that those records were not utilized or inspected in arriving at the Notice of Determination issued.

The Division has presented evidence, in the affirmation of Mr. Jack and the auditor’s affidavit, that directly contradicts petitioner’s arguments. Without making any determination of credibility, it is concluded that this most important issue alone warrants a hearing.

C. Petitioner’s motion for summary determination is denied, and a hearing on the issues will be scheduled in due course.

DATED: Troy, New York  
November 15, 2007

/s/ Joseph W. Pinto, Jr.  
ADMINISTRATIVE LAW JUDGE