

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
ANTHONY STELLA	:
for Revision of Determinations or for Refund of	:
Sales and Use Taxes under Articles 28 and 29 of	:
the Tax Law for the Period June 1, 1995 through	:
November 30, 1995.	:

DETERMINATION
DTA NO. 821916

Petitioner, Anthony Stella, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1995 through November 30, 1995.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion, filed March 21, 2008, seeking an order of summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5 and 3000.9(b)(1). Petitioner, appearing pro se, did not submit a response to the Division's motion, although permitted to do so by April 21, 2008. Thus, the 90-day period for issuance of this determination began on April 21, 2008. After due consideration of the documents and arguments presented, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation is entitled to summary determination in this matter.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Anthony Stella, two notices of determination dated April 12, 1996. The notices bear assessment identification numbers L-011848790 and L-011848791 and assert a total amount of tax due of \$8,323.76, plus penalty and interest.

3. Petitioner mailed his initial petition to the Division of Tax Appeals on September 26, 2000.

4. On June 14, 2001, the Division of Tax Appeals issued its determination in the *Matter of Stella*, which held, in part, that the Division had presented sufficient proof to establish that the notices of determination were mailed to petitioner on April 12, 1996. The determination concluded that, as the petition was mailed on September 26, 2000, the petition was deemed untimely pursuant to Tax Law § 1138(a)(1), and the petition was dismissed. Petitioner did not file an exception to the determination with the Tax Appeals Tribunal.

5. Petitioner filed a Request for Conciliation Conference on June 29, 2007 with regard to the notices of determination issued on April 12, 1996, which was dismissed as untimely by the Bureau of Conciliation and Mediation Services (BCMS) on July 20, 2007. Petitioner filed a second petition on the same assessments, which was received by the Division of Tax Appeals on October 12, 2007.

CONCLUSIONS OF LAW

A. 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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal 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, 487 NYS2d 316, 317 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Inasmuch 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, 293 NYS2d 93 [1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177 [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, 206 NYS2d 879, 881 [1960]).

“To defeat a motion for summary judgment, the opponent must also produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 449, 582 NYS2d 170, 173 [1992], *citing Zuckerman v. City of New York*).

C. Here, petitioner did not respond to the Division’s motion. Since petitioner did not appear on this motion and presented no evidence to contest the facts alleged in the affidavits submitted by the Division, those facts are deemed admitted (*see Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *Whelan*, 582 NYS2d at 173).

D. Petitioner did not file an exception to the determination of the administrative law judge, which concluded that petitioner had not timely petitioned the notices of determination dated April 12, 1996. Tax Law § 2010(4) provides that:

[a] determination issued by an administrative law judge shall finally decide the matters in controversy unless any party to the hearing takes exception by timely requesting a review by the tax appeals tribunal as provided for in section two thousand six of this article. (*See also* 20 NYCRR 3000.15[e][2].)

Therefore, it is concluded that the issue of the timely filing of petitioner's petition with regard to the notices of determination issued on April 12, 1996 was finally decided in the determination of the *Matter of Stella*, issued on June 14, 2001, in favor of the Division. As that determination concluded that the Division of Tax Appeals has no jurisdiction over this matter and is precluded from hearing the merits of the case, the Division is entitled to a granting of its motion for summary determination.

E. The petition of Anthony Stella is dismissed.

DATED: Troy, New York
July 21, 2008

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE