STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **CONNECTICUT INSULATION DISTRIBUTORS CORPORATION** 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, 2008 through February 28, 2011.	: : : : : :	DETERMINATION DTA NO. 831258

Petitioner, Connecticut Insulation Distributors Corporation, 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, 2008 through February 28, 2011.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Aliza J. Chase, Esq., of counsel), brought a motion on April 10, 2024, seeking an order dismissing the petition or, in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, did not file a response by May 10, 2024, which date commenced the 90-day period for issuance of this determination. 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 determination.

ISSUE

Whether the Division of Taxation's motion to dismiss or for summary determination should be granted.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Connecticut Insulation Distributors Corporation, a notice of determination bearing assessment number L-042823005, dated May 1, 2015, asserting sales and use taxes due in the amount of $56,345.26, plus interest and penalty, for the period December 1, 2008 through February 28, 2011 (notice).

2. On September 21, 2015, petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice. On October 9, 2015, BCMS issued a conciliation order dismissing request, CMS No. 267976 (first conciliation order), to petitioner. The first conciliation order determined that petitioner's protest of the notice was untimely and stated, in part:

> "The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on May 1, 2015, but the request was not mailed until September 21, 2015, or in excess of 90 days, the request is late filed."

3. On January 4, 2016, petitioner filed a timely petition with the Division of Tax Appeals in protest of the first conciliation order (first petition). The first petition references the assessment number of the notice and the amount of tax asserted due in the notice. This matter was assigned DTA number 827415.

4. The Division filed a motion seeking an order dismissing the first petition or, in the alternative, seeking summary determination in DTA number 827415.

5. In a determination dated December 21, 2017, Administrative Law Judge Winifred M. Maloney granted the Division's motion for summary determination, denied the first petition, and sustained the notice in DTA number 827415.

6. Petitioner did not file an exception to the determination in DTA number 827415.

7. On November 21, 2022, petitioner filed a second request for conciliation conference with BCMS in protest of the notice. On January 6, 2023, BCMS issued a conciliation order dismissing request, CMS No. 000348085 (second conciliation order), to petitioner. The second conciliation order determined that petitioner's protest of the notice was untimely and stated, in part:

> "The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on May 1, 2015, but the request was not mailed until November 21, 2022, or in excess of 90 days, the request is late filed."

8. On February 28, 2023, petitioner filed a timely petition with the Division of Tax Appeals in protest of the second conciliation order (second petition). The second petition references the assessment number of the notice. This matter was assigned DTA number 831258 and is the subject of the current determination.

9. Accompanying the Division's motion is the affirmation of Aliza J. Chase, dated April 9, 2024, with attached exhibits. In her affirmation, Ms. Chase asserts that the second petition protests a notice that was the subject of a final determination.

10. Petitioner did not file a response to the Division's motion.

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). A motion to dismiss the petition may be granted, as pertinent here, if the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition (***see*** 20 NYCRR 3000.9 [a] [1] [ii]). The standard of review on a motion to dismiss is the same as that for summary determination (***Matter of Nwankpa***, Tax Appeals Tribunal, October 27, 2016). A motion for summary determination is properly 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 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 (***Gerard v Inglese***, 11 AD2d 381, 382 [2d Dept 1960]). "To defeat a motion for summary judgment, the opponent must . . . produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim'" (***Whelan v GTE Sylvania***, 182 AD2d 446, 449 [1st Dept 1992], citing ***Zuckerman v City of New York***, 49 NY2d at 562).

C. Petitioner did not respond to the Division's motion. As such, petitioner is deemed to have conceded that no question of fact requiring a hearing exists (***see John William Costello Assoc. v Standard Metals Corp.***, 99 AD2d 227, 229 [1st Dept 1984], ***appeal dismissed*** 62 NY2d 942 [1984]; ***Kuehne & Nagel v Baiden***, 36 NY2d 539, 544 [1975]). Furthermore, as petitioner has presented no evidence to contest the facts alleged in the Division's motion papers, the facts

alleged therein are deemed admitted (***see Whelan v GTE Sylvania***, 182 AD2d at 449, citing ***Kuehne & Nagel v Baiden***, 36 NY2d at 544).

D. Pursuant to Tax Law § 2010 (4), a determination issued by an administrative law judge shall finally decide the matters in controversy before the Division of Tax Appeals unless one of the parties takes exception by timely requesting review of the matter before the Tax Appeals Tribunal (***see*** 20 NYCRR 3000.15 [e] [2]).

In this case, the determination of the administrative law judge in DTA number 827415, issued on December 21, 2017, sustained the notice and petitioner did not take exception to it. Accordingly, that determination "finally decide[d] the matters in controversy" (Tax Law § 2010 [4]). Since the second petition seeks to challenge the same statutory notice as in DTA number 827415, the Division of Tax Appeals lacks subject matter jurisdiction and the petition must be dismissed (***see Matter of Moyler***, Tax Appeals Tribunal, October 13, 2022 [petitioner cannot relitigate matters finally resolved in a previous litigation]; ***Matter of Yim***, Tax Appeals Tribunal, October 7, 2021 [petitioner cannot contest a previous determination by filing another petition protesting the same assessment]; ***Matter of Mostovoi***, Tax Appeals Tribunal, May 23, 2019 [petitioner cannot relitigate the validity of an assessment that has been the subject of a prior proceeding]).

E. The Division of Taxation's motion to dismiss is granted, and the petition of Connecticut Insulation Distributors Corporation is dismissed.

DATED: Albany, New York
July 25, 2024

/s/ Jennifer L. Baldwin
ADMINISTRATIVE LAW JUDGE