

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
FERRY EXPRESS V, LLC : DETERMINATION
for Review of a Denial, Suspension, Cancellation or : DTA NO. 850973
Revocation of a License, Permit or Registration under :
Article 20 of the Tax Law for the Year 2024. :

Petitioner, Ferry Express V, LLC, filed a petition for review of a denial, suspension, cancellation or revocation of a license, permit or registration under article 20 of the Tax Law for the year 2024.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Brian Evans, Esq., of counsel), filed a motion on August 26, 2024, seeking an order dismissing the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5 and 3000.9 (b). Petitioner, by its representative, Weber Law Office, LLC (Deborah J. Weber, Esq., of counsel) did not respond to the motion by September 25, 2024, which date commenced the 90-day period for the issuance of this determination.

Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation has established that no material issues of fact exist such that summary determination may be granted in its favor for its refusal to issue a cigarettes and

tobacco products certificate of registration to petitioner.

FINDINGS OF FACT

1. Petitioner, Ferry Express V, LLC, filed form DTF-716-WEB-AP, cigarettes and tobacco products registration for the year 2024, dated November 24, 2023, with the Division of Taxation (Division).

2. By a notice of proposed refusal to issue a retail dealer certificate of registration for cigarettes and tobacco products (notice of proposed refusal), dated December 6, 2023, the Division informed petitioner that it would not be issuing petitioner a cigarettes and tobacco products certificate of registration pursuant to Tax Law §§ 480-a (2) (d) and 1134 (a) (4) (B) on the grounds that both petitioner and an officer, owner, or other person required to collect tax on behalf of petitioner, had unpaid New York State tax debts. Attached to the notice of proposed refusal was a consolidated statement of tax liabilities, dated December 6, 2023, listing petitioner's tax assessment ID L-052806545 as subject to collection.

3. The Division filed form DTF-977, tax warrant, ID E-036393965-W002-9, dated December 28, 2023, against petitioner with the Erie County Clerk's Office. The tax warrant indicated that it created a lien against petitioner for the liability of assessment ID L-052806545.

4. Petitioner filed a request for conciliation conference, dated January 28, 2024, with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice of proposed refusal.

5. On May 17, 2024, BCMS issued a conciliation order, CMS No. 000358501, to petitioner (conciliation order). The conciliation order determined that "[a]fter giving due consideration to the evidence presented, the request is denied, and the statutory notice(s) is sustained."

6. On June 5, 2024, petitioner timely filed a petition with the Division of Tax Appeals in protest of the conciliation order. In its petition, petitioner asserts that there was a delay in filing the request for conciliation conference with BCMS contesting the conciliation order, and that petitioner filed for bankruptcy protection under chapter 13 of the United States Bankruptcy Code. Petitioner did not provide any proof with regard to its bankruptcy claim in its petition or in response to the Division's motion.

7. The Division argues that petitioner has fixed and final liabilities and thus the conciliation order should be sustained. Furthermore, in its motion papers, the Division asserts that petitioner did not file for bankruptcy protection.

CONCLUSIONS OF LAW

A. The Division alternatively seeks dismissal of the petition, or summary determination in its favor under sections 3000.5 and 3000.9 (b) of Tax Appeals Tribunal's Rules of Practice and Procedure (Rules). As the Division of Tax Appeals has subject matter jurisdiction in the instant matter, the Division's motion will be treated as one for summary determination (*see Matter of Liaquat Ali, Inc.*, Tax Appeals Tribunal, January 22, 2015).

B. A motion for summary determination may 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]). Section 3000.9 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]). 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, 441 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572, 573 [2d Dept 1989]). “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). In particular, in its motion papers, the Division asserts that petitioner did not file for bankruptcy protection and is otherwise not protected by bankruptcy law, and petitioner failed to challenge these assertions.

D. Tax Law § 480-a requires that all retail cigarettes or tobacco products dealers and vending machine operators must apply for a certificate of registration to conduct such business.

Tax Law § 1134 (a) (4) (B) provides, in relevant part, as follows:

“Where a person files a certificate of registration for a certificate of authority under this subdivision and in considering such application the commissioner ascertains that (i) any tax imposed under this chapter or any related statute, as defined in section eighteen hundred of this chapter, has been finally determined to

be due from such person and has not been paid in full . . . the commissioner may refuse to issue a certificate of authority.”

Thus, if petitioner has fixed and final liabilities that have not been paid in full, the Division may appropriately refuse to issue a certificate of registration.

E. A consolidated statement of tax liabilities reports a taxpayer’s past-due tax liabilities, and the assessed taxpayer no longer has any right to any administrative or judicial review with regard to the propriety, or the amount, of the tax assessments listed on the consolidated statement of tax liabilities (*see Matter of Balkin*, Tax Appeals Tribunal, February 10, 2016; *see also Matter of Mostovoi*, Tax Appeals Tribunal, May 23, 2019). Therefore, such liabilities are fixed and final and properly the subject of the notice of proposed refusal (*id.*). Petitioner has not asserted or offered proof that its past-due liabilities have been paid in full or that there is any doubt as to the existence of a triable or material issue of fact. Accordingly, petitioner has failed to establish that the notice of proposed refusal was improper and should be cancelled.

F. The Division of Taxation’s motion for summary determination is granted, the petition of Ferry Express V, LLC, is denied, the BCMS conciliation order, CMS No. 000358501, dated May 17, 2024, is sustained, and the notice of proposed refusal to issue a certificate of registration, dated December 6, 2023, is sustained.

DATED: Albany, New York
December 19, 2024

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE