STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TOWNHOUSE BUILDERS INC.	:	ORDER DTA NO. 831580
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 March 1, 2018 through May 31, 2023.	:	
	:	

Petitioner, Townhouse Builders 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 March 1, 2018 through May 31, 2023.

On December 26, 2024, petitioner, appearing by Herschel Friedman, CPA, brought a motion seeking summary determination in the above-captioned matter pursuant to section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. On January 24, 2025, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Elizabeth Lyons, Esq., of counsel), submitted its response in opposition to the motion for summary determination. Petitioner requested and was granted time to file a reply, and timely did so by February 14, 2025, which date began 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, Anita K. Luckina, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner 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 or about November 22, 2023, petitioner, Townhouse Builders Inc., filed with the Division of Taxation (Division) form AU-11, application for credit or refund of sales or use tax, requesting a refund in the amount of $260,137.73 for the period March 1, 2018 through May 31, 2023 (refund claim). The cover letter thereto indicates that the refund claim is related to "Audit # X189590115" and states, in pertinent part, that:

> "[t]he [petitioner] is under audit for the period of 03/01/2018 through 05/31/2023.
>
> Over the course of the audit, it has become apparent to the [petitioner] that [it] has overpaid sales and use taxes and is due credits and refunds.
>
> Attached please find [an] AU-11 attached with the required documents for the claim."

2. Attached to the refund claim are audit workpapers, dated November 17, 2023, identified as follows:

> "TOWNHOUSE BUILDERS INC
> B-26-4448404; X189 590 115
> AUDIT PERIOD[:] 03/01/2018 – 02/28/2021
> UPDATED AUDIT PERIOD: 03/01/2018 – 05/31/2023
> ALTHEA ALEXANDER"

The audit workpapers bear the following stamp:

> "WORK COPY
> FOR DISCUSSION ONLY
> SUBJECT TO POSSIBLE
> REVIEW & REVISION"

The workpapers include a "SUMMARY OF TAX DUE FROM AUDIT PER DOCUMENTS PROVIDED FOR TEST REVIEW" (summary of tax due) and indicate that the period reviewed was "March '19 – Feb '20" (test period). The workpapers for the test review of "subcontractors" bear reference number "6100," and the workpapers for the test review of "other expense" bear reference number "6350."

3. The source documents for the audit workpapers—the basis for petitioner's refund claim—were also attached to the refund claim. A review of those documents reveals that many of the invoices predate the test period from which the summary of tax due was derived, including several 2018 invoices. One multi-part document was not an invoice but instead labeled a "*FINAL QUOTE – READY FOR CONTRACT - 3/26/19 v3*."

4. On January 10, 2024, the Division sent petitioner a letter stating, in relevant part:

> "**We need more information before we can finish reviewing your application for a refund of sales or use tax.**
>
> As we discussed on **12/15/2023**, please have the items listed on the attached *Information Document Request* (IDR) available for me to review at our next scheduled appointment."

The letter was signed by Ms. Althea Alexander, Auditor.

The enclosed IDR requested that petitioner provide the following additional information:

> "1. Detail schedule for the Refund Claim, for the period 03.01.18 – 05.31.23, along with proof of payment of sales and use tax.
>
> 2. Documentation/records to verify that New York State, [sic] sales and use tax was not due on Subcontractors work done (#6100) or on Other Expense purchases (#6350)."

5. On January 26, 2024, petitioner responded to the IDR indicating it disagreed with the need to process the refund claim separately from the audit and "respectfully suggest[ing] that if [the Division is] going to deny the refund claim, it should be done sooner rather than later so that the protest could run on the same track as the protest of the audit determination notice."[1]

[1] On February 6, 2025, at petitioner's request, the related audit matter (DTA No. 851292) was associated with this matter. However, petitioner's motion for summary determination was made with respect to only DTA No. 831580.

6. On February 14, 2024, the Division issued to petitioner a refund claim determination notice denying petitioner's refund claim (refund denial). The refund denial advises petitioner, in part, that:

> "**We've denied your refund application.**
> We've reviewed your application and have concluded that you're not eligible for this refund.
>
> Additional information needed.
> (1) Detail schedule for the Refund Claim, for the period 03.01.18 – 05.31.23, along with proof of payment of sales and use tax. (2) Documentation/records to verify that New York State, [sic] sales and use tax was not due on Subcontractors work done (#6100) or on Other Expense purchases (#6350). This was requested but was not provided in your email response dated 1.26.24."

7. On December 26, 2024, petitioner filed a motion for summary determination. Included with petitioner's motion, among other items, is the affidavit of Herschel Friedman, CPA. Mr. Friedman avers that petitioner is a "General Contractor in the business of ground up capital improvement construction projects and has no taxable sales" and that petitioner "pays sales tax on its purchases to its vendors" and "was not required to register and file." Mr. Friedman avers that the Division "conducted a detailed review of the records" and "found the records adequate" and that the Division improperly split the audit into two parts "in order to deny the Petitioner, [sic] the benefit of the projection of the sample period over the full audit period." Mr. Friedman provided no specifics regarding the claimed transactions and the payment therefor by any person with firsthand knowledge of the same.

Also included with petitioner's motion is the Division's audit file for the related audit of petitioner—case ID: X189590115 (***see*** finding of fact 1). The sales tax audit report contained therein indicates that no waivers extending the statute of limitations on

the time to assess additional tax were received from petitioner because petitioner was not registered as a vendor for sales and use tax purposes.

8. On January 24, 2025, the Division filed a response in opposition to petitioner's motion contending that petitioner has not established that it is entitled to the claimed refund. However, after further review, the Division concedes that the documents provided by petitioner are sufficient to demonstrate that tax was paid in the amount of $60,564.44.[2] The Division does not explain how it arrived at this concession.

9. In reply, petitioner continues to maintain that its documentation establishes that tax was paid and there are no material questions of fact.

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 the moving party is entitled to a favorable determination as a matter of law (20 NYCRR 3000.9 [b] [1]). 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 (***see*** 20 NYCRR 3000.9 [c]). "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]). It is well established that, as the procedural equivalent of a trial, summary judgment is a drastic remedy that should be denied if there is any doubt as to the

[2] The Division's response includes a July 11, 2024, email to Mr. Friedman memorializing the Division's concession. The email provides no detail regarding the basis for this decision other than to identify by category or vendor name the transactions for which the documentation provided was insufficient.

existence of a triable issue or where a material fact is arguable (***see 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 (***see Gerard v Inglese***, 11 AD2d 381, 382 [2d Dept 1960]). "In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party" (***Stukas v Streiter***, 83 AD3d 18, 22 [2d Dept 2011], citing ***Pearson v Dix McBride, LLC***, 63 AD3d 895 [2d Dept 2009]). Only after the moving party has met its initial burden does the burden shift to the nonmoving party (***see Alvarez v Prospect Hosp.***, 68 NY2d 320, 324 [1986], citing ***Zuckerman v City of New York***, 49 NY2d at 562).

B. Tax Law § 1139 (a) provides, in relevant part, that:

> "the [commissioner] shall refund or credit any tax … erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the [commissioner] (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the [commissioner] as provided in [Tax Law § 1137]" (***see also*** 20 NYCRR 534.2 [b] [1] [i]).

C. In proceedings before the Division of Tax Appeals, a presumption of correctness attaches to a statutory notice properly issued by the Division—here, the refund denial—and petitioner bears the burden of proving by clear and convincing evidence that the Division's denial of its sales tax refund claim was erroneous (***see*** 20 NYCRR 3000.15 [d] [5]; ***Matter of Kroll Bond Rating Agency***, Tax Appeals Tribunal, October 1, 2018). Petitioner must demonstrate that it is entitled to the refund claimed (***see*** Tax Law § 1139 [a]; 20 NYCRR 534.2; ***Matter of Kroll Bond Rating Agency***).

D. Based on the record, it cannot be concluded that petitioner has made a prima facie showing that summary determination in its favor is warranted. A determination that a refund is due requires that petitioner establish that it made a timely application therefor and that the tax in fact was erroneously paid—petitioner must clearly demonstrate entitlement to the refund. From the documents provided, there is plainly a factual question whether tax was actually paid on at least one transaction (***see*** findings of fact 3 and 6) and summary determination is not warranted on that basis alone. However, there is also seemingly an overarching question of fact whether the entire refund claim—or what portion thereof—was timely made within the three-year period set forth in Tax Law § 1139 [a]. The formal refund claim was submitted on or about November 22, 2023, and includes a request for, and documents purportedly evidencing, tax paid by petitioner to its vendors as much as five years before that refund claim (***see*** findings of fact 1 and 3). This question of fact is further complicated by the Division's unexplained concession that petitioner provided sufficient documentation with respect to part of the refund claim (***see*** finding of fact 8). Summary determination is not appropriate where there are unresolved issues of material fact or contrary inferences may be drawn from the evidence (***see Gerard v Inglese***, 11 AD2d at 382).

E. Townhouse Builders Inc.'s motion for summary determination is denied and a hearing will be scheduled in due course.

DATED: Albany, New York
May 15, 2025

/s/ Anita K. Luckina
ADMINISTRATIVE LAW JUDGE