

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GABRIEL BROGAN-DILLON : ORDER
for Revision of a Determination or for Refund of Sales and : DTA NO. 850127
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period June 1, 2007 through February 28, 2009. :

Petitioner, Gabriel Brogan-Dillon, 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 of June 1, 2007 through February 28, 2009.

On November 6, 2023, petitioner, appearing by Sales Tax Defense LLC (Jennifer Koo, Esq.), brought a motion seeking summary determination in his favor, pursuant to section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. On December 5, 2023, the Division of Taxation, appearing by Amanda Hiller, Esq. (Elizabeth Lyons, Esq., of counsel), filed a response to the motion. On January 12, 2024, petitioner filed a reply to the response, which date began the 90-day period for the issuance of this order.

Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Alexander Chu-Fong, Administrative Law Judge, renders the following order.

ISSUE

Whether summary determination should be granted because no triable issues of facts exist, and the law requires judgment in petitioner's favor.

FINDINGS OF FACT

1. On June 28, 2010, the Division of Taxation (Division) issued to petitioner, Gabriel Brogan-Dillon, a notice of determination, bearing assessment number L-034231408, for the periods of June 1, 2007 through February 28, 2009 (notice).

2. On August 11, 2021, petitioner requested a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). On February 11, 2022, BCMS issued a conciliation order dismissing request (CMS No. 000335722), which provided, in pertinent 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 6/28/10, but the request was not mailed until 8/11/21, or in excess of 90 days, the request is late filed.”

3. On April 20, 2022, petitioner then filed a timely petition with the Division of Tax Appeals.

4. With his motion, petitioner submitted the following: (i) an affidavit from himself, Gabriel Brogan-Dillon, notarized on November 6, 2023; (ii) a photocopy of a social security card (SS card) bearing petitioner's name and the date “10/23/2013”; and (iii) an alleged consolidated statement of tax liabilities, dated July 21, 2021 (statement).

5. The notice asserted additional tax due from petitioner in his capacity as the owner of a Brooklyn, New York, business named, “Slim Lamb, LLC,” which for the period at issue, did business as “Miracle Grill.”

6. A form DTF-17-R, application to renew sales tax certificate of authority (application), dated January 8, 2009, lists petitioner as the owner of Slim Lamb LLC.

7. The application also lists petitioner's social security number (SSN). The fourth digit is listed as “3.”

8. In his affidavit, petitioner stated that the fourth digit in his SSN is a “5,” which conforms to the SS card.

9. Petitioner asserts that when he first received the notice from the Division, he contacted them, gave them his SSN, and that the Division told him that there was no tax assessment associated with his name and SSN. Petitioner stated that he assumed the assessment was issued in error and that he stopped receiving notices. When he began to receive them again, he contacted his current representatives, who checked his online account with the Division, which indicated no tax assessment.

10. The statement indicates that petitioner has a liability of \$0.00.

11. Petitioner states that the assessment period was almost 14 years ago. He avers that he is prejudiced because he no longer has records or documentation from the assessed period, and that his memories of that time are now vague and “not as sharp as it was back then.” Petitioner argues that based on these facts, he was prejudiced against his ability to defend against the assessment. Therefore, he argues that summary determination should be granted in his favor, and that the notice be cancelled.

CONCLUSIONS OF LAW

A. Petitioner brought a motion for summary determination under section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). 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]).

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.

Thus, the movant “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 the Tax Appeals Tribunal noted in *Matter of United Water New York*:

“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]). If material facts are in dispute, or if contrary inferences may be reasonably drawn 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]). Upon such a motion, 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*, 147 AD2d 312, 317 [2d Dept 1989])” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

C. Here, material factual issues remain unresolved, which require a hearing. The record is insufficient to establish or clarify key facts, including: (i) the validity of the SS card, dated October 23, 2013; (ii) whether petitioner’s SSN contained the fourth digit of “3” or “5” during the relevant periods; (iii) whether petitioner, in fact, contacted the Division after initially receiving the notices; and (iv) whether petitioner, in fact, relied upon the claimed advice of the Division to his detriment. Therefore, it must be concluded that petitioner failed to tender sufficient evidence to eliminate material factual issues in this matter.

D. The motion for summary determination by Gabriel Brogan-Dillon is denied and this matter will be scheduled for a hearing in due course.

DATED: Albany, New York
April 4, 2024

/s/ Alexander F. Chu-Fong
ADMINISTRATIVE LAW JUDGE