STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **BTI COMMUNICATIONS INC.** for Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9 of the Tax Law for the Years 2018, 2019 and 2020.	:	ORDER DTA NO. 850408

Petitioner, BTI Communications Inc., filed a petition for redetermination of a deficiency or for refund of corporation tax under article 9 of the Tax Law for the years 2018, 2019 and 2020.

On July 28, 2025, petitioner, appearing by H. Friedman & Associates, CPA (Herschel Friedman, CPA), filed 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. The Division of Taxation, appearing by Amanda Hiller, Esq. (Daniel Olika, Esq., of counsel), filed its response. Petitioner requested, and was granted, permission to file a reply to the Division's response. The last filing in this matter was due October 31, 2025, which date commenced 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, Nicholas A. Behuniak, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner has established that no material and triable issues of fact exist such that summary determination may be granted in its favor.

FINDINGS OF FACT

1. Petitioner, BTI Communications Inc., a communications service provider with an office located in Brooklyn, New York, filed New York State forms CT-3, general business corporation franchise tax returns, for its fiscal years ending August 31, 2018, August 31, 2019, August 31, 2020 and August 31, 2021.

2. On September 7, 2022, the Division of Taxation (Division) initiated an audit of petitioner's filing history for tax years 2018 through 2020 and determined that petitioner had not filed New York State form CT-186-E, telecommunications tax return and utility services tax return, for the years of 2018, 2019 or 2020. Petitioner does not contest that it should have filed forms CT-186-E for the years of 2018, 2019 and 2020. The parties agree that the reporting period for form CT-186-E covers a taxpayers' calendar year (January 1st – December 31st).

3. The Division's auditor estimated petitioner's additional New York State tax liability due on its forms CT-186-E for 2018, 2019 and 2020, by utilizing available information from petitioner's filed forms CT-3 for its fiscal years ending August 31, 2018, August 31, 2019, August 31, 2020 and August 31, 2021.

4. Since the information included on petitioner's filed forms CT-3 for 2018, 2019 and 2020 do not reconcile exactly with the calendar year financial data sought for the completion of form CT-186-E, the Division utilized portions of data from petitioner's filed forms CT-3 in attempt to estimate the New York State (NYS) gross charges to be reported on petitioner's forms CT-186-E. For example, to estimate petitioner's calendar year 2018 NYS gross charges, the

Division used 8/12 of petitioner's reported New York receipts from its filed form CT-3 for the fiscal year ended August 31, 2018 (estimating petitioner's January to August 2018 NYS gross charges), and 4/12 of petitioner's reported New York receipts from its filed form CT-3 for the fiscal year ended August 31, 2019 (estimating petitioner's September to December 2018 NYS gross charges).

5. The Division's auditor estimated petitioner's metropolitan commuter transportation district (MTA) surcharge due to be reported on its forms CT-186-E for 2018, 2019 and 2020, by utilizing available information from petitioner's New York State forms ST-810, New York State and local quarterly sales and use tax returns for part-quarterly (monthly) filers, filed by petitioner for the quarters ended February 28, 2018 through November 20, 2020.

6. Since the information included on petitioner's filed forms ST-810 for the quarters ended February 28, 2018 through November 20, 2020 does not reconcile exactly with the calendar year financial data sought for the form CT-186-E calendar year estimates, the Division utilized only certain quarterly financial data from petitioner's filed forms ST-810 in an attempt to estimate the data needed for petitioner's forms CT-186-E.

7. The Division prepared and mailed to petitioner a consent to field audit adjustment, dated September 15, 2022 (consent), which included a computation of additional tax and MTA surcharge due in the amount of $381,909.00 plus penalty and interest, for the years 2018, 2019 and 2020, and a copy of publication 130-F, entitled "The New York State Tax Audit – Your Rights and Responsibilities."

8. On October 11, 2022, the Division sent petitioner form AU-1, consent extending period of limitations for assessment of tax(es) under article(s) 9 (except section 180), 9-A, 13, 32, 33 & 33A of the Tax Law, and a cover letter which instructed petitioner to sign and return

the completed form within 10 days to the Division's physical mailing address. Petitioner failed to return to the Division a signed original copy of the form AU-1.[1]

9. On October 20, 2022, petitioner and the Division's auditor had a phone conversation about the audit findings and the auditor explained the related form CT-186-E filing requirements for petitioner and the resulting liability. During the October 20, 2022, phone conversation, petitioner's then representative asserted that petitioner is making sales for resale, and the Division explained the documentation it needed from petitioner to substantiate that claim. The Division subsequently offered to prepare a list of documentation that petitioner would need to provide to support its claims.

10. On October 26, 2022, the Division sent petitioner an information document request (IDR), requesting petitioner provide certain books and records including those relating to claims it made regarding the taxation of some of its sales. The IDR indicated that responses were due by November 30, 2022.

11. Petitioner never provided the Division with any documents in response to the IDR.

12. Since petitioner did not submit any additional documentation, the Division issued to petitioner a notice of deficiency, assessment identification number L-057516762, dated December 6, 2022 (notice), asserting tax in the amount of $381,909.00, plus penalty and interest, for the years 2018, 2019 and 2020.

13. On July 28, 2025, petitioner filed a motion for summary determination (motion) seeking cancellation of the notice. In support of his motion, petitioner submitted the following

[1] It appears petitioner's then representative sent a copy of the signed form AU-1 to the Division by facsimile machine but failed to send the original signed form back to the Division as instructed. The Division subsequently instructed petitioner that form AU-1 with the original signature must be returned to the Division because it would not except a copy returned by facsimile machine. It does not appear that petitioner ever sent the Division the original signed form AU-1.

papers: (i) the affirmation of its representative, Herschel Friedman, CPA, dated July 28, 2025; (ii) a copy of the petition filed in this matter; (iii) a copy of the Division's answer and accompanying cover letter, each dated April 12, 2023; (iv) a copy of certain website pages from the entity TelzeqOffice; and (v) a copy of all, or significant portions, of the Division's audit file for this matter. In its motion papers, petitioner argues that the Division calculated its tax liability in advance of ever requesting any books and records from petitioner and then rushed the issuance of the notice without ever considering or adjusting the notice. Petitioner argues, in its reply brief, that the Division "engaged in an arbitrary process, resulting in an assessment that lacked a rational basis at the time it was created" and, therefore, it is void as a matter of law. Petitioner's motion does not include any documentation or other compelling evidence establishing the inaccuracy of the Division's assessment.

14. In opposition to petitioner's motion, the Division submitted the following papers: (i) a letter brief dated September 11, 2025; (ii) the affirmation of the Division's representative, Daniel Olika, Esq., dated September 2025;[2] and (iii) the affidavit of the Division's auditor, Heather Marciszewski, sworn to on September 11, 2025, with attachments thereto. In its response, the Division avers that the timing of the issuance of the notice was in part driven by the fact that the Division believed the statute of limitations for assessing petitioner for the tax year 2018 was potentially expiring around the time the notice was issued. The Division also represents that absent detailed documentation from petitioner, the Division used available information.

[2] Mr. Olika's affirmation does not provide the specific day of the month it was affirmed.

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" (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 Civil Practice Laws 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]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (***id.***, citing ***Matter of Redemption Church of Christ of Apostolic Faith v Williams***, 84 AD2d 648, 649 [3d Dept 1981]; ***Greenberg v Manlon Realty***, 43 AD2d 968, 969 [2d Dept 1974]). Summary determination is a "drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (***Moskowitz v Garlock***, 23 AD2d 943, 944 [3d Dept 1965]; ***see Daliendo v Johnson***, 147 AD2d 312, 317 [2d Dept 1989]). 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 a 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 different inferences may reasonably be drawn from facts themselves undisputed, a motion for summary judgment must be denied" (***Supan v Michelfeld***, 97 AD2d 755, 756 [2d Dept 1983], citing ***Moskowitz v***

Garlock, 23 AD2d at 943-944; ***Gerard v Inglese***, 11 AD2d 381, 382 [2d Dept 1960]). Furthermore, in reviewing the evidence submitted by petitioner, the facts must be viewed in the light most favorable to the nonmoving party (***see Matter of Hulteen***, Tax Appeals Tribunal, September 29, 2022, citing ***Matsushita Elec. Indus. Co. v Zenith Radio Corp.***, 475 US 574, 587 [1986]).

C. There is a presumption of correctness that attaches to a notice of deficiency issued by the Division to a taxpayer (***see Matter of Greenfeld***, Tax Appeals Tribunal, March 7, 2019, citing ***Matter of Leogrande v Tax Appeals Trib***., 187 AD2d 768, 769 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]). Petitioner bears the burden of proving by clear and convincing evidence that the assessment on such notice is erroneous (***see id.***; ***see also Matter of O'Reilly***, Tax Appeals Tribunal, May 17, 2004). An estimated audit of a taxpayers' income, whether under personal income tax or corporation tax, requires only a rational basis to be sustained on review (***see Matter of MediaBuss Systems, Inc.***, Tax Appeals Tribunal, March 18, 2014). If a taxpayer fails to file a tax return, the Division may estimate the taxpayer's New York tax liability from any information in its possession (***see*** Tax Law § 1081 [a]; ***Matter of Rujak Trucking Corp.***, Tax Appeals Tribunal, April 1, 1993).

In this case, petitioner failed to file forms CT-186-E for the years 2018, 2019 and 2020. As a result thereof, the Division estimated petitioner's calendar year gross charges for the years at issue based upon the gross receipts that petitioner provided on the forms CT-3 it filed for its related August 31st fiscal year-ends. Similarly, in determining the additional MTA surcharge due, the Division utilized the information petitioner provided on the forms ST-810 it filed for the quarters ended February 28, 2018 through November 20, 2020. The Division and petitioner communicated and discussed the scope of the tax and allowable deductions. The Division issued

an IDR to petitioner on October 26, 2022, requesting documentation to support a potential adjustment to the liability reflected on the consent, however, petitioner failed to provide the Division with any of the documentation requested or other support for an adjustment to the liability. After the expiration of the IDR response due date, the Division finalized the assessment and issued the notice on December 6, 2022.

Petitioner offers no citation to any authority that the IDR response date was too soon after issuance thereof. Petitioner offers no citation to any authority establishing that the Division's audit must remain open in perpetuity or for an extended period of time. Furthermore, petitioner offers no citation to any authority establishing that the Division cannot estimate a taxpayer's liability, inform the taxpayer of that estimate and, subsequently, finalize that estimate if additional information is not forthcoming.

D. Petitioner further argues that since the computation of the liability reflected in the notice could have been different, the audit results must lack a rational basis. The law does not support petitioner's theory. As noted above, a presumption of correctness attaches to notices issued by the Division. That presumption can be overcome by a taxpayer if it is established, by clear and convincing evidence, that the notices are erroneous (***see*** Tax Law 1089 [e]; ***Matter of Greenfeld***; ***see also Matter of O'Reilly***). In this case, petitioner failed to provide the documentation requested by the Division in the IDR, or any evidence in its motion papers establishing the inaccuracy of the liability asserted in the notice. It is well established that estimates may be used to arrive at a taxpayer's tax liability (***see*** Tax Law § 1081 [a]; ***Matter of Rujak Trucking Corp.***; ***Matter of Mountain Star Co.***, Tax Appeals Tribunal, March 13, 2008). By statute, when a taxpayer fails to file returns, as in this case, the Division may estimate a taxpayer's liability from "any information in its possession" (Tax Law § 1081 [a]).

Petitioner has failed to establish that the Division's notice lacked a rational basis at the time it was created and therefore is void as a matter of law. There are remaining unresolved questions of fact regarding petitioner's assertions pertaining to the calculations of the liability at issue.

E. The motion of BTI Communications Inc., for summary determination is denied, and the hearing will be scheduled in due course.

DATED: Albany, New York
January 29, 2026

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE