

STATE OF NEW YORK
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
	:	
of	:	
	:	
GEOFFREY GELMAN	:	ORDER
	:	DTA NO. 850923
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax	:	
Law for the period June 1, 2021 through February 28,	:	
2023.	:	

Petitioner, Geoffrey Gelman,¹ filed a petition for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period June 1, 2021 through February 28, 2023.

On November 15, 2024, petitioner, appearing pro se, filed a motion for summary determination in the above-referenced matter pursuant to section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) and New York Civil Practice Law and Rules (CPLR) 3212, and “to dismiss all of the Tax Department’s defenses” under CPLR 3211 (a) and (b) “or whatever the court may deem appropriate.” The Division of Taxation, by its representative, Amanda Hiller, Esq. (Brendan Roche, Esq., of counsel) requested and was granted an extension of time to respond to petitioner’s motion, and timely responded by January 3, 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, Winifred M. Maloney, Administrative Law Judge, renders the following order.

¹ Petitioner is also known as Geoffrey M. Gelman in some documents in the record.

ISSUE

Whether issues of fact mandating a hearing are present such that petitioner's motion for summary determination should be denied.

FINDINGS OF FACT

1. On June 21, 2023, the Division of Taxation (Division) issued to petitioner, Geoffrey Gelman, as officer/responsible person of Zignage LLC (Zignage), the following 7 statutory notices:

(a) notice of determination, notice number L-058456212, asserting penalty due in the amount of \$889.48, plus interest, for the period June 1, 2021 through August 31, 2021;

(b) notice of determination, notice number L-058456213, asserting penalty due in the amount of \$1,111.37, plus interest, for the period September 1, 2021 through November 30, 2021;

(c) notice of determination, notice number L-058456211, asserting tax due in the amount of \$23,005.48, plus penalty of \$5,626.74, and interest, for the period December 1, 2021 through February 28, 2022;

(d) notice of determination, notice number L-058456210, asserting tax due in the amount of \$7,198.12, plus penalty of \$1,611.59, and interest, for the period March 1, 2022 through May 31, 2022;

(e) notice of estimated determination, notice number L-058456209, asserting tax due in the amount of \$7,685.16, plus penalty and interest, for the period June 1, 2022 through August 31, 2022;

(f) notice of estimated determination, notice number L-058456208, asserting tax due in the amount of \$15,370.32, plus penalty and interest, for the period September 1, 2022 through

November 30, 2022; and

(g) notice of estimated determination, notice number L-058456207, asserting tax due in the amount of \$23,055.48, plus penalty and interest, for the period December 1, 2022 through February 28, 2023.

2. Petitioner filed a timely request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the above 7 statutory notices. A conciliation conference was conducted via telephone on March 7, 2024.

3. On April 26, 2024, BCMS issued a conciliation order, CMS No. 000354885, that recomputed the statutory notices as follows:

Notice number	Tax	Penalty	Interest
L-058456212	\$0.00	\$889.48	Computed at applicable rate
L-058456213	\$0.00	\$1,111.37	Computed at applicable rate
L-058456211	\$23,005.48	\$6,890.32	Computed at applicable rate
L-058456210	\$7,198.12	\$2,259.41	Computed at applicable rate
L-058456209	\$0.00	\$578.28	Computed at applicable rate
L-058456208	\$0.00	\$657.87	Computed at applicable rate
L-058456207	\$0.00	\$263.18	Computed at applicable rate

4. On May 30, 2024, petitioner filed a petition with the Division of Tax Appeals, in which he protested the conciliation order and sought a redetermination of the 7 statutory notices. In his petition, petitioner asserts, among other things, that he was not an officer/responsible person of Zignage during the period June 1, 2021 through February 28, 2023. Petitioner alleges that, as of August 3, 2016, he owned a 16.05320% interest in Zeppelin Group, LLC (Zeppelin) that owned a 90% interest in Zignage. Petitioner argues that he is eligible for relief under Tax

Law § 1133 (a) (2), and requests that his tax liability be reduced to no more than his 16.05320% interest in Zeppelin. Petitioner also asserts that he “is wholly unfamiliar with the basis” of Zignage’s tax liability for the period June 1, 2021 through February 28, 2023 and seeks a reduction in the overall amount of such tax liability.

5. The Division served its answer on August 7, 2024. Subsequently, on August 29, 2024, petitioner served a demand for bill of particulars on the Division. The Division served its bill of particulars on October 4, 2024.

6. By his motion, petitioner moved for summary determination pursuant to 20 NYCRR 3000.9 (b) and CPLR 3212, for dismissal of all the Division’s defenses under CPLR 3211 (a) and (b), or any other relief that may be deemed appropriate. Petitioner requested summary determination on the grounds that the Division’s assertion that petitioner is a person required to collect and pay tax for Zignage: (i) is precluded by collateral estoppel and res judicata under CPLR 3211 (a) (5); (ii) is “utterly refuted by an explicit agreement” between petitioner and the Division, in which the Division allegedly agreed to remove petitioner as a “responsible person of the business for the collection and remittance of New York sales and use tax;” (iii) is otherwise refuted by documentary evidence; and (iv) the Division “has otherwise given no reason why Petitioner is not entitled to relief under [Tax Law] § 1133 (a) (2).” The relief sought by petitioner’s motion includes the cancellation of the 7 statutory notices (*see* finding of fact 1), and a finding that petitioner does not have any liability under such notices; or, in the alternative, relief under Tax Law § 1133 (a) (2) and a reduction in his liability, with respect to the notices, to his pro-rata share of the total outstanding liability, which such pro-rata share would reflect petitioner’s membership interest in Zeppelin and “leave the amount of the outstanding liability to be resolved at the hearing.”

7. In support of his motion, petitioner included the purported affidavit of Geoffrey Gelman, dated November 15, 2024, a “MEMORANDUM,” affirmed by petitioner on November 15, 2024; and the following exhibits: (i) a copy of the 7-page petition, without any statutory documents attached; (ii) copies of the 7 statutory notices (*see* finding of fact 1); (iii) a copy of the request for conciliation conference, dated August 22, 2023, protesting the 7 statutory notices, without any referenced attachments; (iv) a copy of form DTF-8, application for relief from responsible person liability under the sales tax law, dated August 23, 2023; (v) a copy of form DTF-8-ATT, attachment to form DTF-8, a copy of a two-page document entitled “REMARKS,” signed and dated by petitioner on August 22, 2023, a copy of a schedule K-1 (form 1065), partner’s share of income, deductions, credits, etc. (schedule K-1), for tax year 2019 allegedly issued by Zeppelin to a named individual general partner or LLC member-manager, a copy of a schedule K-1 for tax year 2019 allegedly issued by Zeppelin to a second named individual general partner or LLC member-manager, a copy of a schedule K-1 for tax year 2019 allegedly issued by Zeppelin to a third named individual general partner or LLC member-manager, a copy of a schedule K-1 for tax year 2019 allegedly issued by Zeppelin to a fourth named individual general partner or LLC member-manager, a copy of a schedule K-1 for tax year 2019 allegedly issued by Zeppelin to petitioner, as an individual general partner or LLC member-manager, a copy of a schedule K-1 for tax year 2019 allegedly issued by Zeppelin to a fifth named individual general partner or LLC member-manager, a copy of a schedule K-1 for tax year 2019 allegedly issued by Zeppelin to a sixth named individual general partner or LLC member-manager, a copy of a schedule K-1 for tax year 2019 allegedly issued by Zeppelin to a seventh named individual general partner or LLC member-manager, and a copy of a schedule K-1 for tax year 2022 allegedly issued by Zeppelin to petitioner, as an individual limited partner or other

LLC member; (vi) a copy of an email sent to petitioner by a BCMS conciliation conferee, Sean P. Kerins, dated Tuesday, March 12, 2024 at 4:21 PM; (vii) a copy of the BCMS order, CMS No. 000354885, and cover letter, dated April 26, 2024, that recomputed the 7 statutory notices at issue; (viii) a copy of the Division's answer and cover letter, each dated August 7, 2024; (ix) an unsigned and undated copy of petitioner's demand for bill of particulars; (x) a copy of the Division's bill of particulars and the cover letter transmitting the same, each dated October 4, 2024; (xi) a copy of a notice of determination, notice number L-052397803, dated November 16, 2020, issued to petitioner, as an officer/responsible person of Zignage, asserting tax due in the total amount of \$130,336.75, plus interest for the period June 1, 2016 through February 28, 2019; (xii) a copy of a one-page letter, dated July 25, 2023, from BCMS conciliation conferee, Thomas R. Smith, to petitioner regarding CMS No. 000327200; (xiii) a copy of a BCMS consent, CMS No. 000327200, in the matter of the request for conciliation conference of petitioner for review of the notice of determination under articles 28 and 29 of the Tax Law for the tax period "06/01/2016 - 02/28/2019," and notice number L-052397803, dated "11/16/2020," signed and dated by petitioner on July 30, 2023; (xiv) a copy of a one-page letter, dated July 19, 2023, from petitioner to the "New York Department of Taxation and Finance;" (xv) a copy of a two-page printout of an email dated Tuesday, August 23, 2016 at 3:48 PM; (xvi) a copy of a "To whom it may concern" letter electronically signed by Zignage's alleged chief executive officer (alleged CEO), on July 17, 2023; (xvii) a copy of a form DTF-95, business tax account update, for Zeppelin, dated and signed by petitioner on April 16, 2024, a copy of a form DTF-95, business tax account update, for Zignage, dated and signed by petitioner on April 17, 2024, a copy of a letter to "New York Department of Taxation and Finance," dated and signed by petitioner on April 17, 2024, a copy of a "To whom it may concern" letter electronically signed by Zignage's

alleged CEO on July 17, 2023, and a copy of a three-page document entitled “**Geoffrey Gelman** Zeppelin, LLC Agreement for the Withdrawal of a Member”; (xviii) a copy of an unsigned letter, dated May 5, 2017, from a third-party entity to petitioner; (xix) a copy of a two-page form W-2, wage and tax statement (form W-2), for the year 2017 allegedly issued to petitioner by a third-party corporation (third-party corp.), a copy of a form W-2 for the year 2018 allegedly issued to petitioner by the third-party corp., and a form W-2 for the year 2019 allegedly issued to petitioner by the third-party corp.; (xx) a copy of a form 1099-NEC, nonemployee compensation (form 1099-NEC), for the year 2020 allegedly issued to petitioner by a third-party limited liability company (third-party LLC), a copy of a form 1099-NEC for the year 2021 allegedly issued to petitioner by the third-party LLC, a copy of a form W-2 for the year 2021 allegedly issued to petitioner by the third-party LLC, a copy of a form W-2 for the year 2022 allegedly issued to petitioner by the third-party LLC, and a copy of a W-2 for the year 2023 allegedly issued to petitioner by the third-party LLC; (xxi) a copy of a two-page printout from petitioner’s LinkedIn account; (xxii) a copy of a schedule K-1 for tax year 2016 allegedly issued by Zeppelin to petitioner, as an individual limited partner or other LLC member, a copy of a schedule K-1 for tax year 2017 allegedly issued by Zeppelin to petitioner, as an individual general partner or LLC member-manager, a copy of a schedule K-1 for tax year 2018 allegedly issued by Zeppelin to petitioner, as an individual general partner or LLC member-manager, a copy of a schedule K-1 for tax year 2019 allegedly issued by Zeppelin to petitioner, as an individual general partner or LLC member-manager, a copy of a schedule K-1 for tax year 2020 allegedly issued by Zeppelin to petitioner, as an individual limited partner or other LLC member, a copy of a schedule K-1 for tax year 2021 allegedly issued by Zignage to Zeppelin, as a partnership limited partner or other

LLC member, and a copy of a schedule K-1 for tax year 2022 allegedly issued by Zeppelin to petitioner, as an individual limited partner or other LLC member.

8. The opening paragraph of the affidavit states, “Geoffrey Gelman, being duly sworn, deposes and says.” The concluding paragraph of the affidavit states, “I affirm this 15th day of November, 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law” signed “Geoffrey Gelman Petitioner Pro Se.” Petitioner’s signature after the concluding paragraph was not notarized.

9. On January 3, 2025, the Division filed its response to petitioner’s motion. As part of its response, the Division submitted, among other items, the affirmation of Brendan Roche, Esq., dated January 3, 2025. The opening paragraph of the affirmation states, “BRENDAN ROCHE, an attorney duly licensed to practice law in the State of New York, hereby affirms under penalties of perjury.” Paragraph 2 of the affirmation states that “[a]ll matters in this affirmation are based on my personal knowledge, my review of the relevant files and records maintained by the Division in the ordinary course of its business, and communications with employees of the Division.”

CONCLUSIONS OF LAW

A. Section 3000.9 (b) (1) of the Rules provides that, after issue has been joined, any party may move for summary determination. “Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof” (*id.*). In support of his motion for summary determination, petitioner’s purported affidavit was submitted. As noted above, petitioner’s signature on the purported affidavit was not notarized; rather, petitioner’s signature appears after an affirmation on the last page of such affidavit. CPLR 2106, effective January 1,

2024, provides that:

“[t]he statement of any person wherever made, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in New York in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:

I affirm this ____ day of _____, _____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

(Signature)”

Subsequently, State Administrative Procedure Act (SAPA) § 302 was amended, effective December 21, 2024, to provide for the use of an affirmation of truth of statement in an administrative proceeding, such as those conducted by the Division of Tax Appeals.

Specifically, SAPA § 302 was amended by adding a new subdivision that provides:

“4. Affirmation of truth of statement. The statement of any person wherever made, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an administrative proceeding in New York in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:

I affirm this ____ day of _____, _____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true and I understand that this document may be filed in an administrative hearing.

(Signature)”

B. Petitioner’s affirmation at the end of his purported affidavit complies with the form provided in CPLR 2106. Therefore, petitioner’s purported affidavit will be treated as an affirmation. In as much as SAPA § 302 (4) provides that an affirmation of truth of statement may be used in lieu of and with the same force and effect as an affidavit, and petitioner’s affirmation is in substantial compliance with the form set forth in SAPA § 302 (4), petitioner’s papers supporting his motion for summary determination comply with the requirements of

section 3000.9 (b) (1) of the Rules.

C. A motion for summary determination “shall be granted if, upon all 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” (*id.*).

D. 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” (*Winegard 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]).

E. The Division issued 7 notices to petitioner as an officer/responsible person of Zignage for the period June 1, 2021 through February 28, 2023, pursuant to Tax Law §§ 1131 (1) and 1133. In support of his motion for summary determination, petitioner made factual assertions regarding his responsibility as a person required to collect and pay tax for Zignage, his relationship with Zeppelin, and Zignage’s relationship with Zeppelin, however, there is insufficient evidence to determine the accuracy of such assertions. Moreover, petitioner presented no evidence regarding the underlying tax liability of Zignage for the period at issue

other than asserting that a hearing is necessary to determine the amount of such tax liability. The complexity of the issues raised by petitioner's motion clearly necessitates a hearing in this matter, and a denial of petitioner's motion.

F. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853). If such a showing is made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial (*Zuckerman v City of New York*, 49 NY2d at 562). Here, petitioner failed to submit sufficient evidence to demonstrate the absence of any material issues of fact (*see* conclusion of law E), and the denial of petitioner's motion for summary determination is warranted. Although petitioner's motion is denied, it is necessary to comment on Mr. Roche's affirmation submitted as part of the Division's responding papers. The purported affirmation does not contain the affirmation language of CPLR 2106. Although Mr. Roche states that he "affirms under penalties of perjury," this is insufficient (*see Matter of Grandsard v Hutchison*, 2024 WL 1957086 [Sup Ct, New York County 2024], *affd* 227 AD3d 491 [1st Dept 2024]; *R.F. v L.K.*, 82 Misc 3d 1221[A] [Sup Ct, Westchester County 2024]; *Diego Beekman Mut. Hous. Assn. Hous. Dev. Fund Corp. v Hammond*, 81 Misc 3d 1244[A] [Civ Ct, Bronx County 2024]).

G. Petitioner's motion for summary determination is hereby denied and a hearing in this matter will be scheduled in due course.

DATED: Albany, New York
April 03, 2025

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE