

NEW YORK CITY TAX APPEALS TRIBUNAL  
ADMINISTRATIVE LAW JUDGE DIVISION

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In the Matter of the Petition	:	DETERMINATION & ORDER
	:	
of	:	TAT(H)15-16(UB)
	:	
Morrison & Wagner LLP	:	
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Mulligan, C.A.L.J.:

On or about March 25, 2015, Petitioner, Morrison & Wagner LLP, filed a petition for a redetermination of a deficiency (Petition) of New York City (City) Unincorporated Business Tax (UBT) under Title 11, Chapter 5, of the City Administrative Code (Administrative Code), for its tax years ended December 31, 2008, and December 31, 2009. The deficiency was asserted in a Notice of Determination (NOD or Notice) issued by Respondent, the Commissioner of the City Department of Finance (DOF), dated February 28, 2013, and the DOF's Conciliation Bureau issued a Conciliation Decision dated December 31, 2014, discontinuing the Conciliation proceeding.

On or about July 23, 2015, Respondent served and filed an answer to the Petition. The parties through their representatives entered into a Stipulation dated April 17, 2024. Stewart Sternbach (Mr. Sternbach), the Petitioner's representative at that time, signed the Stipulation on behalf of the Petitioner.

On June 5, 2024, Respondent filed a motion for summary determination pursuant to the Rules of Practice and Procedure of the City Tax Appeals Tribunal (Tribunal), (20 RCNY) (Tribunal Rules) section 1-05(d). In support of the motion, Respondent submitted an affirmation of Respondent's attorney and a memorandum

of law. Subsequently, Petitioner submitted a new power of attorney form dated July 25, 2024 listing Richard S. Kestenbaum, Esq. and Scott L. Kestenbaum of the law firm Kestenbaum & Mark as Petitioner's new representatives. In opposition to the Respondent's motion, Petitioner submitted an affirmation of Richard S. Kestenbaum, Esq. and a memorandum of law dated October 1, 2024. Attached to Mr. Kestenbaum's affirmation was a declaration, dated September 30, 2024, of Mr. Sternbach, who was Petitioner's now former representative in this matter. Respondent's attorney filed a reply affirmation dated November 15, 2024 in further support of the motion.

Petitioner was represented by Mr. Sternbach, an enrolled agent allowed to practice before the Internal Revenue Service (IRS) and authorized to practice before the Tribunal pursuant to Tribunal Rules 20 RCNY section 1-03(a)(2)(iv), throughout this matter until the filing of the above-mentioned new power of attorney form. Petitioner is now represented as described above. Respondent has been represented by various attorneys of the City Law Department, the most recent is Stephanie M. Fitos, Esq., since early 2023.

#### **ISSUES**

- (1) Whether, in light of the Stipulation, issues of material fact exist with respect to the allocation of taxable income outside the City to preclude the granting of Respondent's motion for summary determination?
- (2) Whether the Stipulation is binding on Petitioner?
- (3) Whether other issues of material fact exist which preclude the granting of Respondent's motion?

## **STATEMENT OF FACTS**

The following facts were included in the Stipulation and accepted by the undersigned. The Stipulation's very first paragraph stated the following with respect to such facts: "[t]he parties agree that this Stipulation is complete and that any motion, either for summary determination or a motion on submission, shall be limited to the facts contained in this Stipulation. Should this matter proceed to a hearing, the parties agree that additional evidence may be submitted, so long as such evidence does not contradict anything contained in this Stipulation."

1. Petitioner is a law firm specializing in personal injury law.
2. During the Years at Issue, Petitioner was made up of three partners: Eric H. Morrison, Stuart Wagner, and Stuart H. Siegel.
3. During the Years at Issue, Petitioner maintained an office at 49 West 38th St., 15<sup>th</sup> Floor, New York, New York 10018 (the "Manhattan Office").
4. Petitioner continues to maintain the Manhattan Office through to the April 17, 2024 date of the Stipulation.
5. Petitioner sent mail from the Manhattan Office address.
6. Copies of various items, each concerning the Petitioner with the Manhattan Office address, were attached to the Stipulation as exhibits. These include:
  - A. An envelope addressed to DOF postmarked September 4, 2012 bearing the Manhattan Office address.
  - B. A sample of the Petitioner's retainer agreement with clients listing the Manhattan Office address.
  - C. A 2008 Form W-3 Transmittal of Wage and Tax Statements, listing Petitioner as the employer with

the Manhattan office address.

- D. Three 2009 Forms 1099-Misc Miscellaneous Income from different payers each listing Petitioner as the recipient with the Manhattan Office address.
  - E. The Petitioner's Lawyers Professional Liability Insurance Policy covering the period May 30, 2020 to May 30, 2021, listing the Manhattan Office address.
  - F. The front page of Petitioner's website bearing a 2021 copyright listing the Manhattan Office address and the telephone number 212-343-8000 and the telefax number 212-343-2621.
  - G. New York State Unified Court System Detail Reports as of September 8, 2022 for Petitioner's partners Eric H. Morrison and Stuart Wagner indicating each of them are with Petitioner at the Manhattan Office address.
7. Copies of the Petitioner's 2008 and 2009 Unincorporated Business Tax (UBT) Returns along with the 2008 and 2009 UBT filing extension forms were also attached to the Stipulation as exhibits. These tax returns and forms listed the Petitioner's address as:
- Morrison and Wagner LLP
  - P.O. Box 445
  - Merrick NY 11566
8. Copies of a few other items, each concerning Stuart H. Siegel, one of Petitioner's partners during the tax years, were also attached to the Stipulation as exhibits. These are:
- A. A business card for "Stuart H. Siegel, Attorney at Law" bearing an address of "2891 Harbor Road, Merrick, New York, 11556".
  - B. The letterhead of "Stuart H. Siegel, Attorney at

Law", bearing the same Merrick, New York address as above.

- C. A 2014 form 1099-Misc Miscellaneous Income from an insurance company payer indicating the recipient as "Law Office of Stuart H. Siegel" at that same Merrick, New York address.
- D. A New York State Unified Court System Detail Report as of September 8, 2022 for Stuart H. Siegel with that same Merrick, New York address.

As indicated in the 2014 Form 1099-Misc in 7C and the New York State Unified Court System Detail Report in 7D, above, Mr. Siegel appears to have left Petitioner at some point subsequent to the tax years.

#### **POSITIONS OF THE PARTIES**

In its Petition, Petitioner alleges that Respondent "did not allow the proper amount of allocation between business conducted inside [New York City] and business conducted outside [New York City]." The Petitioner further claims, without substantiation, that "work outside NYC included client meetings, medical appointments, witness meetings[,], court filings, court conferences, witness preparation for depositions[,], trial preparation and trial activity."

Respondent asserts that "the parties are limited to the facts and exhibits in the Stipulation" and that there is insufficient evidence to raise a triable issue of fact within the Stipulation demonstrating that Petitioner carried on business outside of New York City during the tax years.

Petitioner, in turn, alleges that the Stipulation was unfairly obtained. Specifically, Petitioner alleges that "Respondent's [c]ounsel duped Petitioner's prior representative [Mr. Sternbach] into believing that even though a Stipulation was being signed, Petitioner would still be able to submit additional facts at a hearing." In particular, Petitioner's current representative alleges that the Stipulation should be set aside and ignored because it was signed on behalf of Petitioner by an accountant rather than a lawyer, and the accountant was "not aware of the consequences of signing the Stipulation" and was "under the albeit mistaken impression that even if there was a Stipulation, there would still be a 'hearing.'" Petitioner attached to its brief two emails regarding the Stipulation from Respondent's representative to Petitioner's former representative in support of its claim false representation on the part of Respondent's representative. In the first email, dated December 11, 2023, Respondent's representative made the following statement: "I cannot agree to the statements proposed regarding the alleged court cases and work outside of the City, as that is your argument that you are free to prove at a hearing." The second email, dated December 14, 2023, included the following statement from Respondent's representative: "We can stipulate to more facts before the hearing if there are things we can agree to, or otherwise, there will be fact finding at the hearing."

Petitioner also claims to have "documents and other evidence to support the amount, dates and source of their income that was earned outside of New York City." Petitioner attached to its Memorandum of Law In Opposition an affidavit from Mr. Siegel in which Mr. Siegel claimed to have performed work outside of the City in Nassau and Suffolk Counties on cases.

Attached to this affidavit was a list of the cases on which Mr. Siegel claimed this work was performed. Petitioner also alludes to the existence of certain oral testimony that it wishes to present at a hearing in support of its claims.

Petitioner also asserts that the portion of the deficiency asserted in the NOD attributable to the tax year 2008 is time barred and therefore should be cancelled. Finally, if such portion of the deficiency is deemed to be timely asserted, Petitioner makes two further assertions regarding the 2008 tax year. First, DOF's addback of UBT in the amount of \$105,000 deducted on Petitioner's federal return for the 2008 tax year was improper. Second, Petitioner's overstated its 2008 unincorporated business taxable income because Petitioner erroneously included \$95,875 as income on its 2008 UBT return, which were loans to cover certain checks and not income.

In its Reply Affirmation, Respondent counters that the Stipulation is binding and that Petitioner, a law firm, and Mr. Sternbach, an enrolled agent who represented Petitioner for 9 years in this proceeding, should be and were well aware of the consequences of signing the Stipulation. Respondent also emphatically denies that its counsel coerced Mr. Sternberg, Petitioner's former representative, into signing the Stipulation. Further, Respondent states that Mr. Sternberg and Law Department attorneys began corresponding on the Stipulation in August 2022, giving him plenty of time to review the Stipulation and discuss it with Petitioner. Attached to the Reply affirmation are emails from a now former Law Department attorney to Mr. Sternberg. Accordingly, Respondent asserts there is no basis for setting aside the Stipulation or relieving Petitioner from its consequences.

Respondent also asserts that Mr. Siegel's business card and letterhead attached to the Stipulation, which do not mention the Petitioner, are not sufficient to create a triable issue of fact on whether Petitioner's income during the tax years 2008 and 2009 should be subject to allocation. Respondent further asserts that the Siegel affidavit, which was not part of the Stipulation, and which should not be considered on this motion for that reason, is essentially a list of cases without citations and settlement amounts that another Law Department attorney had some years earlier rejected, as insufficient to support the allocation of Petitioner's income, and is not sufficient to raise an issue of fact requiring a hearing.

Respondent further asserts that the timeliness of the 2008 deficiency issue and the two other issues Petitioner is raising, the addback of deducted UBT issue and the overstated income issue were not included in the Petition and were not raised or included in the Stipulation. Hence, these issues cannot be raised and should not be considered on this motion. Respondent also states that the 2008 deficiency was timely. Attached to Respondent's Reply Affirmation is a consent extending the limitations period for the 2008 tax year until April 30, 2013, which was signed by one of Petitioner's partners. Also attached are fax transmittal forms suggesting this consent was sent to Stuart Wagner, one of Petitioner's partners, and Mr. Sternbach. Further, Respondent asserted the addback of Petitioner's federal UBT deduction as proper under Administrative Code section 11-507(4). Finally, Respondent asserted that Petitioner failed to present any proof to substantiate either the addback claim or the overstated income claim.

## CONCLUSIONS OF LAW

### Standard for Summary Determination

Tribunal Rule § 1.05(d) (1) provides that 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 that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows sufficient basis to require a hea[r]ing of any issue of fact.”

Thus, “[t]he proponent of a summary [determination] motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues from the case” (*Matter of CT 157-162 LLC, et al.*, TAT (E) 21-5 (RP) and 21-6 (RP) [NYC Tax Appeals Tribunal, Appeals Division, 2023], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]. See also *53 Spenser Realty, LLC v. Fidelity Nat’l Title Ins. Co.*, 236 AD3d 716, 719 [2<sup>nd</sup> Dept. 2025]).<sup>1</sup>

To defeat a motion for summary determination, the party opposing the motion must show the existence of a triable issue of

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<sup>1</sup>Tribunal Rule § 1.05(d) (1) is based on the Civil Practice Law & Rules of New York (CPLR) § 3212(b), which governs summary judgment, the functional equivalent under the CPLR of summary determination. Each of *Winegrad*, *Zuckerman*, and *53 Spenser Realty* interpret CPLR § 3212(b).

fact. (See *53 Spenser Realty*, 236 AD3d at 719). If the nonmoving party has the ultimate burden of proof on a claim, the moving party must show "an absence of evidence to support the nonmoving party's case." (*Tibbits v. Verizon New York, Inc.*, 40 AD3d 1300, 1301 [3<sup>rd</sup> Dept. 2007]). Here, Petitioner, the nonmoving party, has the ultimate burden of proving it did business outside the City and was thus entitled to allocate some of its income outside the City. Under Tribunal Rules section 1-12(d)(4), the burden of proof at hearing is on the party seeking relief, except as otherwise provided by law. Of course, Petitioner is the party seeking relief, here, and there is no other provision in the law to shift the ultimate burden of proof to Respondent. On a motion of summary determination, evidence must be considered in a light most favorable to the nonmoving party (See *Matter of Murphy & O'Connell*, TAT (E) 06-18(UB) [NYC Tax Appeal Tribunal, Appeals Division, 2011], citing *Hickey v Arnot-Ogden Medical Center*, 79 AD 3d 1400 (2d Dept 2010)).

The UBT is imposed "on the unincorporated business taxable income of every unincorporated business wholly or partly carried on within the [C]ity." Admin. Code § 11-503(a). An "unincorporated business" includes a partnership. Admin. Code §11-502(a). If an unincorporated business is carrying on business both inside and outside the City, it must allocate a "fair and equitable portion" of its business income to the City as set forth in Admin Code § 11-508. For the tax years ended December 31, 2008 and December 31, 2009, ("the tax years at issue"), Admin. Code § 11-508(c) allocated the taxpayer's business income to the City based upon the average of the percentages within the City that the taxpayer's property (including property rented to the taxpayer), payroll, and gross income bear to the total of taxpayer's property, payroll and

gross income everywhere. These three percentages are referred to as "allocation factors" and respectively as the "property factor," "payroll factor" and "receipts factor."

Here, Respondent has made the prima facie showing it is entitled to judgment as a matter of law. Petitioner maintained the Manhattan Office where it received mail. Further, Petitioner's retainer agreement with clients listed the Manhattan Office address. Moreover, a 2008 federal W-3 form, Transmittal of Wage and Tax Statements, shows the Petitioner's Manhattan Office address. In addition, three 2009 Forms 1099-Misc Miscellaneous Income from different payers each list Petitioner as the recipient with the Manhattan Office address.

The exhibits attached to the Stipulation which do not show Petitioner's Manhattan Office address include "a business card and letterhead for Mr. Siegel at an address in Merrick, New York." These non-Manhattan exhibits also include Petitioner's UBT returns for the 2008 and 2009 tax years in issue, which show Petitioner's address at a post office box outside the City in Merrick, New York. These non-Manhattan Office exhibits, without more, are simply not sufficient to raise a triable issue of fact to defeat Respondent's motion.

The business card and letterhead for Mr. Siegel do not show the Merrick address is in any way connected to Petitioner during the tax years in issue. Indeed, it is unclear whether these documents involve the tax periods in question, or a period after Mr. Siegel left Petitioner which was subsequent to the 2008 and 2009 tax years in issue. Further, while the UBT returns show a post office box outside the City, they do not, without more, indicate that Petitioner actually did any business with respect

to that post office box or anywhere else outside the City.

Critically, none of these documents can be said to suggest that Petitioner had property, payroll or receipts outside of the City during the tax years in question. Noticeably absent are time records or other records or documents showing Petitioner performed any services or work or had receipts or assets outside of the City during the tax years in question. Accordingly, even looking at the Stipulation Exhibit documents in the light most favorable to Petitioner, they fall far short of what is necessary to raise an issue of fact requiring a hearing on whether Petitioner did business inside and outside the City. Hence, Respondent has successfully shown an absence of evidence to support Petitioner's case, given that Petitioner has the ultimate burden of proving it did business both inside and outside the City.

#### Effect of Stipulation

Perhaps realizing the lack of evidence to support its case if the Stipulation is binding, Petitioner seeks to set aside the Stipulation executed by its former representative. As discussed below, these arguments also fail.

The Stipulation's very first paragraph included the following provision: "[t]he parties agree that this Stipulation is complete and that any motion, either for summary determination or a motion on submission, shall be limited to the facts contained in this Stipulation."

There is no dispute between the parties that this

provision, on its face, precludes the consideration of facts that are not contained within the Stipulation and exhibits thereto. However, Petitioner asserts that the Stipulation should be rendered non-binding because "Respondent's [c]ounsel duped Petitioner's prior representative into believing that even though a Stipulation was being signed, Petitioner would still be able to submit additional facts at a hearing." Petitioner further states in their brief that the Stipulation was "unfairly obtained" under "false pretenses."

A "stipulation is generally binding on parties that have legal capacity to negotiate, do in fact freely negotiate their agreement and . . . reduce their stipulation to a properly subscribed writing" (*McCoy v Feinman*, 99 NY2d 295, 302 [2002]).

When a stipulation meets the above requirements, "courts should construe it as an independent contract subject to settled principles of contractual interpretation. As with a contract, courts should not disturb a valid stipulation absent a showing of good cause," including, but not limited to, fraud. (*Id.* [internal citations removed]). Petitioner essentially asserts that the Stipulation should be voidable on the grounds of fraud in the inducement committed by Respondent's counsel.

The elements of a claim of fraud in the inducement are "a misrepresentation or a material omission of material fact which was false and known to be false by [the liable party], made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission and injury" (*United States Life Ins. Co. v. Horowitz*, 192 AD3d 613, 614 (1<sup>st</sup> Dept. 2021) quoting *Lama Holding Co. v. Smith Barney*, 88 NY2d 413, 421 (1996)). See *Canbe*

*Properties LLC v. Curatola*, 227 AD3d 654, 656 (2<sup>nd</sup> Dept. 2024). See also *Frankel v. ICD Holdings S.A.*, 930 F.Supp. 54, 65 [S.D.N.Y.1996]). As discussed below, Petitioner's claim of fraud in the inducement fails.

Petitioner attached to their brief two emails regarding the Stipulation from Respondent's representative to Petitioner's former representative which purportedly evidence false representation on the part of Respondent's representative. In the first email, dated December 11, 2023, Respondent's representative made the following statement: "I cannot agree to the statements proposed regarding the alleged court cases and work outside of the City, as that is your argument that you are free to prove at a hearing." The second email, dated December 14, 2023, included the following statement from Respondent's representative: "We can stipulate to more facts before the hearing if there are things we can agree to, or otherwise, there will be fact finding at the hearing." In both instances, Respondent's representative referred to Petitioner's ability to prove additional facts at a hearing. While the first paragraph in the Stipulation precluded the parties from submitting additional evidence with respect to the Motion for Summary Determination, the statements made in the emails are entirely consistent with the Stipulation, which also included the following provision: "Should this matter proceed to a hearing, the parties agree that additional evidence may be submitted, so long as such evidence does not contradict anything contained in this Stipulation." The statements were therefore not false, and a material element - indeed, the most critical element - to prove fraud in the inducement is not present.<sup>2</sup> Therefore, the

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<sup>2</sup>To the extent Petitioner suggests its former representative was unaware of

Stipulation is binding on the parties and the consideration of the motion for summary determination is limited to the facts contained in the Stipulation.

#### Other Issues

On this motion, Petitioner has raised three additional issues in opposition to Respondent's request for summary determination. They are: (1) Respondent's deficiency determination with respect to the 2008 tax year is untimely; (2) Respondent's addback of the UBT deducted on Petitioner's federal tax return was improper; and (3) Petitioner mistakenly overstated its income due to the inclusion of certain loans to cover checks as income on Petitioner's 2008 UBT return. None of these issues were mentioned in the petition.

Tribunal Rules (20 RCNY) section 1-04(a)(1) sets forth various requirements regarding a starting a case in the Tribunal. Among other things, the Rule clearly states a petition must contain "separately numbered paragraphs stating, in clear and concise terms, *each and every error of fact or law*, which the petitioner alleges has been made by the commissioner of finance ...." Tribunal Rules (20 RCNY) § 1-04(a)(1)(vi). It is clear Petitioner failed to include these issues in the Petition. Further, at no time did Petitioner seek to amend the Petition pursuant to Tribunal Rules (20 RCNY) section 1-04(e). Accordingly, the Tribunal should not consider these issues in deciding this motion.

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the consequences of signing the Stipulation and, therefore, the Stipulation should not be enforced, any such suggestion is unavailing. As an Enrolled Agent representing a law firm that did personal injury litigation, the representative and his client should each have been well aware the effect of signing the Stipulation.

Moreover, as discussed above, the Stipulation limited the facts that may be considered on any motion for summary determination to those included in the Stipulation, and the Stipulation did not mention these issues or any related facts. Hence, the Tribunal cannot consider the three additional issues Petitioner has raised for this reason as well.

In addition, even if the Tribunal could consider these issues, each one appears to lack any merit. Petitioner claims the deficiency for 2008 was untimely because Petitioner filed its 2008 UBT return on September 10, 2009, and Respondent's Notice was dated February 28, 2013, after the expiration of the three-year limitations period. Petitioner also asserts that there was nothing in the record to show the parties agreed to extend the limitations period. However, this claim is inaccurate. Attached to Respondent's Reply Affirmation is a consent form extending the limitations period for the 2008 tax year until April 30, 2013, which was signed by one of Petitioner's partners. Also attached are fax transmittal forms indicating this consent form was sent to Stuart Wagner, one of Petitioner's partners, and Petitioner's former representative, Mr. Sternbach. The addback of the UBT Petitioner deducted on its 2008 federal tax return appears proper. Taxpayers must add back any state or local taxes, including UBT, deducted on the federal return. See Administrative Code § 11-507(4). Further, Petitioner failed to present any proof to substantiate this addback claim. Finally, Petitioner failed to present any proof to substantiate its overstated income claim.

In sum, (1) the Stipulation is binding on Petitioner; (2) given the Stipulation's applicability, Petitioner has failed to

