

**BOP One N. End, LLC v New York State Dept. of
Taxation & Fin.**

2023 NY Slip Op 31745(U)

May 23, 2023

Supreme Court, New York County

Docket Number: Index No. 656502/2021

Judge: Lyle E. Frank

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK **PART** **11M**

Justice

-----X

BOP ONE NORTH END, LLC,

Plaintiff,

- v -

NEW YORK STATE DEPARTMENT OF TAXATION AND
FINANCE, COMMISSIONER OF THE NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE

Defendant.

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INDEX NO. 656502/2021

MOTION DATE 05/19/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendants’ motion to dismiss is granted in its entirety.

Facts

Plaintiff BOP ONE NORTH END, LLC (BOP) brought this suit in parallel with its pending appeal of the Administrative Law Judge’s decision to the Tax Appeals Tribunal (TAT) against defendant NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE (DTF). The present suit arises out of the dispute between BOP and Consolidated Edison (ConEd), a third-party stakeholder over electricity bills. ConEd is plaintiff’s utility provider and BOP alleged it was double charged by ConEd for the Gross Receipts Tax (GRT) and the city sales tax. BOP is seeking a declaratory judgment that the tax law does not allow ConEd to double charge the GRT and New York City is not allowed to impose the sales tax because it is preempted by the state exemption law. Defendants filed the motion to dismiss the complaint pursuant to CPLR § 3211(a)(1) & (a)(7), claiming that plaintiff is enjoined from bringing the suit because it has not exhausted the

administrative remedies provided by the tax department and exceptions to the general rule do not apply here. Plaintiff disagrees, claiming that it is attacking the constitutionality and applicability of the tax law, thus not restricted by the exhaustion of remedies doctrine.

Motion to dismiss general standard

On a motion to dismiss the court “merely examines the adequacy of the pleadings”, the court “accept as true each and every allegation made by plaintiff and limit our inquiry to the legal sufficiency of plaintiff’s claim.” *Davis v Boenheim*, 24 N.Y.3d 262, 268 (internal citations omitted).

CPLR § 3211(a)(1)

Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted *conclusively* establishes a defense to the asserted claims as a matter of law. *Leon v. Martinez*, 84 N.Y.2d 83, 88 (emphasis added). “[S]uch motion may be appropriately granted only where the documentary evidence *utterly refutes* plaintiff’s factual allegations.” *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 326 (emphasis added). A paper will qualify as “documentary evidence” only if it satisfies the following criteria: (1) it is “unambiguous”; (2) it is of “undisputed authenticity”; and (3) its contents are “essentially undeniable”. *VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 A.D.3d 189, 193 [1st Dept 2019].

CPLR § 3211(a)(7)

“In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” *Leon v. Martinez*, 84 N.Y.2d 83, 88. “What the Court of Appeals has consistently said is that evidence in an affidavit used by a defendant to attack the sufficiency of a pleading “will seldom if ever warrant the relief [the defendant] seeks unless [such evidence] establish[es] conclusively that

plaintiff has no cause of action”. *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 134 [1st Dept 2014]. “[T]he Court of Appeals has made clear that a defendant can submit evidence in support of the motion attacking a well-pleaded cognizable claim.” *Id.*

Judicial Review of Taxing Officer’s Decision

“Actions by taxing officers can be reviewed only in the manner prescribed by statute. There are two exceptions to this exclusive remedy requirement: when a tax statute is alleged to be unconstitutional, by its terms or application; or where the statute is attacked as wholly inapplicable. In these two circumstances, the invalidity or total inapplicability affects the entire statute, including the limitations and restrictions on the remedy provided in it.” *Bankers Trust Corp. v NY City Dept. of Fin.*, 1 NY3d 315, 317 [2003]. To challenge a statute as wholly inapplicable, a taxpayer must allege that an agency had no jurisdiction over the taxpayer or the matter that was taxed. *Id.* The exceptions can only be applied when there are no factual issues raised. See *Dennis v 44th Enters. Corp.*, 192 AD3d 402, 403 [1st Dept 2021] (“This argument presents a factual issue that precludes a judicial determination.”)

Here, Plaintiff claimed that the parallel suit is not precluded by non-exhaustion of the administrative remedies prescribed by the tax law because it is challenging the constitutionality of the Tax Law § 186-A and the inapplicability of the sales tax, not the decision of the Administrative Law Judge (ALJ). The Court finds these arguments unavailing.

Firstly, the complaint is missing any allegation of the tax statute violating the Commerce Clause of the United States Constitution. Plaintiff only raised the argument in its memo of law in opposition to the motion. NYSCEF Doc. No. 39, page 3. Accordingly, the court does not know whether it is the terms of the statute, or its application is at issue here. “It is well settled that facial constitutional challenges are disfavored. Legislative enactments enjoy a strong presumption of

constitutionality and parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt. Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional." *Overstock.com, Inc. v NY State Dept. of Taxation & Fin.*, 20 NY3d 586, 590 [2013] (emphasis added). Here, plaintiff failed to satisfy its initial burden of proof. As such, the constitutional attack of the tax statute has to be dismissed pursuant to CPLR § 3211(a)(7).

Second, factual issues remain to be resolved and that precludes a judicial determination here. The basis for the first claim relies on the allegation that plaintiff was charged twice by Con Ed for the Gross Receipts Tax (GRT). The critical proof for this allegation is from ConEd's annual report, which states in pertinent part that "ConEd collected \$330,000,000 in GRT on \$7,972,000,000 in revenue". NYSCEF Doc. No. 48, page 5. Plaintiff regards this information as its smoking gun because the GRT represents 4.14% of Con Ed's revenue and the ratio *almost* doubles the tax rate that is supposed to be paid by plaintiff, which is 2.35%. But this is just plaintiff's supposition and it sure is not definitive evidence proving that plaintiff was double charged. Besides, the ALJ's determination has established the consensus that both parties "appear to agree that the statute at issue does not allow corporations to bill customers two times for the GRT." NYSCEF Doc. No. 47, page 7. Therefore, until the allegation of double-dipping can be substantiated by concrete evidence, the court sees no need to read the law and entertain the declaratory judgment relief.

Third, regarding the sales tax, plaintiff failed to establish that DTF has no jurisdiction over it. "To challenge a statute as wholly inapplicable, a taxpayer must allege that an agency had *no jurisdiction* over the taxpayer or the matter that was taxed." *Bankers Trust Corp. v NY City Dept. of Fin.*, 1 NY3d 315, 317 [2003]. But the fact that plaintiff pressed on with the appeal of the ALJ's

decision to the Tax Appeals Tribunal, the appellate mechanism acknowledged by DTF means that plaintiff has consented to DTF’s jurisdiction over the issue, thus waiving its right to contest the statute’s applicability. Therefore, the second claim must be dismissed pursuant to CPLR § 3211(a)(7). Since the exception to the exhaustion of remedies doctrine does not apply here, plaintiff should not be allowed to continue the suit. It is therefore

ADJUDGED that defendants’ motion to dismiss pursuant to CPLR § 3211(a)(1) & (a)(7) is granted in its entirety; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

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5/23/2023

DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE