

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition  
of  
**JOSEPH E. AND LAURIE J. BROWNSTEIN**  
for Redetermination of a Deficiency or for Refund of  
New York State and New York City Personal Income Tax  
under Article 22 of the Tax Law and the New York City  
Administrative Code for the Year 2001.

DETERMINATION  
DTA NO. 823198

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Petitioners, Joseph E. and Laurie J. Brownstein, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under article 22 of the Tax Law and the New York City Administrative Code for the year 2001.

The Division of Taxation appearing by Amanda Hiller, Esq. (Kathleen D. Chase, Esq., of counsel), brought a motion, dated March 7, 2022, seeking an order dismissing the petition for lack of jurisdiction pursuant to Tax Law § 2006 (6) and section 3000.9 (a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal or for such other relief as may be just and proper. Petitioners, appearing pro se,<sup>1</sup> did not respond to the Division’s motion. The 90-day period for issuance of this determination commenced on April 6, 2022. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

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<sup>1</sup> Petitioners’ previous representative advised the Division of Tax Appeals that as of January 2, 2022, he no longer represented petitioners in this matter.

***ISSUE***

Whether the Division of Taxation's motion to dismiss the petition or for such other relief as may be just and proper should be granted.

***FINDINGS OF FACT***

1. Petitioners, Joseph E. and Laurie J. Brownstein, timely filed a form IT-203 New York State non-resident personal income tax return for tax year 2001 on April 15, 2002. The return indicates that petitioners were New Jersey residents.

2. On March 14, 2008, the Division of Taxation (Division) issued a notice of deficiency (notice) asserting additional tax due for tax year 2001 in the amount of \$570.00, plus penalties and interest.

3. The notice indicates that petitioners are limited to their cash basis for their losses in High Island Drilling Company, an oil and gas exploration and production partnership (Partnership). As a result, the Division disallowed \$117,515.00 of the Partnership losses claimed by petitioners on their federal schedule E.

4. The notice also asserts a negligence penalty of 5% of the deficiency pursuant to Tax Law § 685 (b) (1) and a penalty pursuant to Tax Law § 685 (b) (2) in an amount equal to 50% of any interest due on the deficiency or portion of the deficiency attributable to negligence or intentional disregard of the Tax Law or regulations. The notice further asserts a penalty in an amount equal to 100% of any interest due on the deficiency or portion of the deficiency attributable to failure to participate in the Division's voluntary compliance initiative (VCI), pursuant to Chapter 61 of the Laws of 2005, Part N, section 11 (1).

5. Petitioners requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) to contest the notice.

6. BCMS issued a conciliation order, dated May 15, 2009, sustaining the notice in full.

7. Petitioners timely filed a petition with the Division or Tax Appeals challenging the BCMS order.

8. Petitioners allege that they acquired an interest in the Partnership by contributing cash in the amount of \$100,000.00 and signing a promissory note in the amount of \$220,000.00.

Petitioners further allege that their promissory note was secured by their interest in the Partnership and their rights to profits therefrom. Additionally, petitioners assert that they were required to purchase a financial instrument such as a zero-coupon bond with a value at maturity equal to a substantial percentage of the unpaid promissory note and with a maturity date that was no later than the end of the term of the promissory note.

9. Petitioners allege that the Partnership entered into a turnkey contract with a drilling contractor to drill oil and gas wells and to turn over to the Partnership completed operating wells. Petitioners allege that pursuant to the turnkey contract, the Partnership paid the turnkey driller for a portion of its drilling services partly in the form of cash contributed by petitioners and their fellow partners and partly in the form of a driller promissory note which had the same maturity date and interest rate as petitioners' note to the Partnership. Petitioners also assert that the driller promissory note was secured by the Partnership assets, including the unpaid balances of the promissory notes executed by petitioners and other partners.

10. The notice was issued because the Division concluded that the Partnership was an abusive tax avoidance transaction, and the promissory note issued to the Partnership by petitioners was not a bona fide indebtedness, petitioners' involvement with the Partnership lacked economic substance other than the attendant tax benefits, the indebtedness allegedly assumed by petitioners from the Partnership was not a bona fide indebtedness, and petitioners'

participation in the Partnership is subject to the six-year statute of limitations for assertion of a deficiency provided for under Tax Law § 683 (c) (11) (B).

11. On or about October 27, 2010, the parties submitted to the Division of Tax Appeals an agreement titled: “Stipulation to Hold Case in Abeyance and Resolute in Accordance with *Matter of Marc S. and Jeanette Sznajderman*, DTA#823177” (Stipulation).<sup>2</sup> The Stipulation was executed by the representatives of both parties and provided that the instant matter should be held in abeyance pending resolution of the *Sznajderman* case. The Stipulation provided that the final resolution of the *Sznajderman* case would “adequately resolve all of the issues in the present matters.” The Stipulation defined “final resolution” as “the final holding of the Division of Tax Appeals in the *Sznajderman* matter and of any subsequent appeals, administrative or judicial, determining the tax liability of [the taxpayers] in the *Sznajderman* Matter.”

12. On March 6, 2014, the Division of Tax Appeals issued a determination in *Sznajderman* dismissing the petition, sustaining the Division’s denial of refund requested and upholding all of the penalties at issue (*see Matter of Sznajderman*, DTA 824235, Division of Tax Appeals, March 6, 2014). On July 11, 2016, the Tax Appeals Tribunal issued a decision dismissing the petition and denying petitioners’ refund request and upholding all of the penalties

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<sup>2</sup> The DTA number noted in the heading of the Stipulation dealt with a Division of Tax Appeals’ administrative law judge determination that addressed a preliminary jurisdictional issue before the underlying merits of the transaction at issue were subsequently addressed (*see Matter of Sznajderman*, DTA 823177, Division of Tax Appeals, January 6, 2011). The parties’ explicit agreement that the *Sznajderman* matter would “adequately resolve all of the issues” for petitioners in this case is a clear acknowledgement by them that they sought to apply the “final holding” of the case addressing the merits of the underlying transaction and resulting additional tax due, the applicable statute of limitations and the assessment of penalties as such pertained to the *Sznajderman* taxpayers. Although the same taxpayers and transaction were at issue, the Division of Tax Appeals utilized a different DTA number for the case addressing such underlying issues (*see Matter of Sznajderman*, DTA 824235, Division of Tax Appeals, March 6, 2014).

at issue (*see Sznajderman*, Tax Appeals Tribunal, July 11, 2016). On appeal, the Appellate Division, Third Department, affirmed the Tax Appeals Tribunal's decision dismissing the petition and upholding all of the penalties at issue (*see Sznajderman v Tax Appeals Trib.*, 90 NYS3d 687 [3d Dept 2019]). In the affidavit of Kathleen D. Chase, Esq., the Division's representative, filed with its motion, she stated that the Division has not been served with a motion for permission to appeal the decision of the Appellate Division in the *Sznajderman* matter and the time in which the litigants needed to request an appeal has elapsed.

### ***CONCLUSIONS OF LAW***

A. The Division brings a motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) or for such other relief as may be just and proper. As the petition in this matter was timely filed (*see* finding of fact 7), the Division of Tax Appeals has jurisdiction over the petition.

Instead of a motion to dismiss the petition, a motion for summary determination under section 3000.9 (b) of the Rules is the proper vehicle to address the issue raised by the Division. 20 NYCRR 3000.9 (a) (2) (i) provides:

“Either party may submit any evidence that could properly be considered on a motion for summary determination. Whether or not issue has been joined, the administrative law judge, after adequate notice to the parties, may treat the motion as a motion for summary determination.”

Based upon the documents submitted, the undersigned deems that the Division's motion will be treated as a motion for summary determination under section 3000.9 (a) (2) (i) of the Rules.<sup>3</sup>

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<sup>3</sup>The affidavit of Kathleen D. Chase, Esq., filed with the Division's original motion, requests that the motion also be considered a motion for summary determination in the alternative to a motion to dismiss.

B. 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 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]).

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” (*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 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, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [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]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], citing *Zuckerman*).

C. Petitioners did not respond to the Division's motion. Accordingly, petitioners are deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v Standard Metals Corp.*, 99 AD2d 227 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]).

D. In the matter at hand, the parties have stipulated that the final resolution of the *Sznajderman* case would resolve all of the issues in this matter. The taxpayers in *Sznajderman* appealed the adverse Division of Tax Appeals determination and subsequently the adverse Tax Appeals Tribunal decision to the Appellate Division where they lost their appeal (*see Sznajderman*, 90 NYS3d 687 [3d Dept 2019]). The time period in which to challenge that decision has passed (*see* finding of fact 12). Accordingly, the Appellate Division's decision in *Sznajderman* is the "final decision" to which the matter at hand is bound to as agreed upon by the parties.

The *Sznajderman* case, like the instant matter, centered on three major issues. First, the taxpayers in *Sznajderman* argued that the notice of deficiency was barred pursuant to the three-year statutes of limitations set forth in Tax Law § 683 (a), while the Division maintained that the six-year statute of limitation for assertion of a deficiency attributable to an abusive tax avoidance transaction was applicable, pursuant to Tax Law § 683 (c) (11) (b) (*see Sznajderman*, Tax Appeals Tribunal, July 11, 2016). Second, in *Sznajderman*, the taxpayers disagreed with the Division's disallowance of the losses relating to the oil and gas partnership in which they were partners (*id.*). Finally, the taxpayers argued that if the notice of deficiency were sustained, they had demonstrated reasonable cause for the abatement of the penalties asserted by the Division pursuant to Tax Law §§ 685 (b) (1), (2) and penalty for failure to participate in the VCI (*id.*). The Appellate Division in *Sznajderman* denied the taxpayers' petition and affirmed the Division's notice of deficiency, specifically concluding that the six-year statute of limitations was appropriate, the partnership at issue was an abusive tax avoidance transaction, the losses the taxpayers attempted to claim for the partnership at issue were denied and all of the penalties asserted by the Division should be sustained (*see Sznajderman*, 90 NYS3d 687 [3d Dept 2019]).

In accordance with the parties' stipulation in this matter, the applicable statute of limitations is six years because the partnership at issue is an abusive tax avoidance scheme, the losses petitioners attempted to claim relating to the partnership are denied in full and the penalties asserted by the Division pursuant to Tax Law §§ 685 (b) (1), (2) and for failure to participate in the VCI are sustained.

E. Accordingly, the Division's motion for summary determination is granted, the petition of Joseph E. and Laurie J. Brownstein is denied, and the notice of deficiency dated March 14, 2008, is sustained.

DATED: Albany, New York  
June 30, 2022

/s/ Nicholas A. Behuniak  
ADMINISTRATIVE LAW JUDGE