

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ERIKA D. RODRIGUEZ	:	DETERMINATION DTA NO. 827935
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2012.	:	

Petitioner, Erika D. Rodriguez, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law for the year 2012.

On April 12, 2018, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Charles Fishbaum, Esq., of counsel), filed a motion seeking summary determination in its favor pursuant to 20 NYCRR 3000.5 and 3000.9 (b). Accompanying the motion was the affirmation of Charles Fishbaum, Esq., with attached exhibits. Petitioner, appearing pro se, did not file a response to the motion. The 90-day period for issuance of this determination commenced on May 15, 2018. After due consideration of the motion papers, attached affidavits and annexed exhibits, and all pleadings and proceedings had herein, Kevin R. Law, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation has established that summary determination is warranted upon the basis that there are no material and triable issues of fact presented in this matter, such that, as a matter of law, a determination can be made in its favor.

FINDINGS OF FACT

1. On or about April 15, 2013, Erika D. Rodriguez (petitioner) filed a New York State Nonresident and Part-Year Resident Income Tax Return for the year 2012. The return was filed from an address in California, and indicated that petitioner moved out of New York on August 31, 2012. On this return, petitioner reported \$15,350.00 as her adjusted gross income in both the federal amount column and the New York State amount column.

2. On February 1, 2016 the Division of Taxation (Division) issued a statement of proposed audit changes that explained that New York State exchanges information with the Internal Revenue Service (IRS) and that adjustments were made to petitioner's New York tax liability based upon a comparison of the federal information with petitioner's New York return. The Division explained that information provided by the IRS showed that petitioner's federal gross income was \$36,283.00 and that this amount should have been entered on the New York return in the federal amount column rather than the \$15,350.00 originally reported by petitioner. The Division recomputed petitioner's New York State personal income tax liability on the basis of the information provided by the IRS. No adjustment was made to petitioner's New York income as reported in the New York column. The statement explained that the amount of allocated New York State tax was calculated by multiplying petitioner's base tax by the income percentage. According to the statement, the amount of tax asserted due was \$383.00 plus interest.

3. On March 21, 2016, a notice of deficiency was issued to petitioner asserting tax due plus interest as determined by the statement of proposed audit changes.

4. Petitioner filed a request for a conciliation conference. In a conciliation order dated August 26, 2016, the request was denied and the notice of deficiency was sustained.

5. In her petition, petitioner concedes that the tax asserted by the Division is correct, but contends that the notice of deficiency should nonetheless be cancelled based upon the passage of time between the date her return was filed and the date when the Division alerted her that her return was incorrect.

CONCLUSIONS OF LAW

A. This matter proceeds by way of the Division's motion for summary determination under 20 NYCRR 3000.9 (b). 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]). Section 3000.9 (c) of the Tax Appeals Tribunal's Rules of Practice and Procedure 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 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 [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* at 562). Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (*Matter of Alvord & Swift v Muller Constr. Co.*, 46 NY2d 276 [1978]).

B. Pursuant to Tax Law § 601 (e) (1), a part-year resident of New York is subject to tax on the income received from New York sources while a nonresident and on all income received while a New York State resident. The tax is computed by first determining the tax that would be imposed as if the taxpayer were a New York resident for the full year, reduced by certain credits, and then multiplied by the New York source fraction (Tax Law § 601 [e] [2], [3]). The New York source fraction is equal to the individual's income from New York sources while a nonresident and on all income received while a New York State resident divided by the individual's New York adjusted gross income from all sources for the entire year (Tax Law § 601 [e] [3]). Here, although petitioner reported all of her New York income, she erroneously omitted her total income from the federal column of the return, the result of which was petitioner reported New York income taxed at a lower tax rate than that required by the statute. The Division found this error upon audit and properly computed the tax due at the appropriate tax rate. It appears that petitioner has conceded that the Division's calculation of tax due is correct, but now asserts that she should not be held liable for the additional tax and interest based upon the nearly three years that elapsed between the filing of her 2012 return and the issuance of the notice of deficiency. Petitioner's argument has no merit.

C. First, the Legislature has seen fit to provide the Division with a three-year statute of limitations within which to assert a deficiency (*see* Tax Law § 683). Although the notice of deficiency was issued on the eve of the statute of limitations for assessment expiring, it was issued within this three year window and there is no mechanism in such a case to cancel it. With

regard to the interest imposed, interest on an underpayment of tax is mandatory. As stated in *Matter of Rizzo* (Tax Appeals Tribunal, May 13, 1993), assessing interest is intended “to compensate the State for its inability to use funds and to encourage the timely remittance of tax due.” While interest may be abated upon a showing of certain unreasonable errors or delay of the Division (*see* Tax Law § 3008), petitioner has made no such showing here. Accordingly, there is no legal basis to cancel or modify the notice of deficiency.

D. The Division’s motion for summary determination is granted, the petition of Erika D. Rodriguez is denied, and the notice of deficiency dated March 21, 2016 is sustained.

DATED: Albany, New York
August 9, 2018

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE