

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JUNG J. YIM	:	DETERMINATION
	:	DTA NO. 829864
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 Administrative	:	
Code of the City of New York for the Year 2010 and a	:	
Review of a Notice Proposed Driver's License	:	
Suspension Referral under Tax Law § 171-v.	:	

Petitioner, Jung J. Yim, 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 Administrative Code of the City of New York for the year 2010 and for review of a notice of proposed driver's license suspension under Tax Law § 171-v.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Hannelore F. Smith, Esq, of counsel) filed a motion, dated August 28, 2020, seeking dismissal of the petition or summary determination in its favor pursuant to 20 NYCRR 3000.5 and 3000.9 (a) and (b). Accompanying the motion was the affirmation of Hannelore F. Smith, Esq., dated August 28, 2020, and annexed exhibits supporting the motion. Petitioner, appearing pro se, did not file a response in opposition to the motion. The 90-day period for issuance of the determination commenced on September 28, 2020. After due consideration of the motion papers and all pleadings and proceedings had herein, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation's motion to dismiss the petition or for summary determination should be granted.

FINDINGS OF FACT

1. Petitioner, Jung J. Yim, filed a petition with the Division of Tax Appeals on February 14, 2020. The petition protests: (i) a notice of proposed driver's license suspension dated December 18, 2019, and (ii) a consolidated statement of tax liabilities, also dated December 18, 2019, and apparently sent along with the notice of proposed driver's license suspension. The subject of the consolidated statement of tax liabilities is assessment number L-042993413 for personal income tax due for the tax year 2010.

2. The Division of Taxation (Division) filed a motion, dated August 28, 2020, seeking dismissal of the petition or summary determination in its favor pursuant to 20 NYCRR 3000.5 and 3000.9 (a) and (b). In the motion, the Division contended that petitioner has not raised any of the grounds provided under Tax Law § 171-v for challenging the proposed suspension of her driver's license. The Division noted that assessment number L-042993413, the assessment number listed on the consolidated statement of tax liabilities and challenged in the petition, was previously protested by the filing of a petition in *Matter of Yim*, Division of Tax Appeals, June 27, 2019, and that the four-month statutory time period in which petitioner may have challenged the Tax Appeals Tribunal's (Tribunal's) related decision has elapsed without petitioner filing an appeal. The Division asserts that petitioner is barred from relitigating the validity of notice L-042993413.

3. Petitioner did not file a response to the Division's motion.

4. During a pre-hearing conference held on November 24, 2020, between the undersigned

and the parties, the Division represented that it cancelled the notice of proposed driver's license suspension issued to petitioner.

5. Petitioner previously filed a petition with the Division of Tax Appeals challenging notice of deficiency L-042993413. The Division of Tax Appeals issued a determination dismissing the petition and sustaining notice of deficiency L-042993413. Petitioner filed an exception to the administrative law judge's determination with the Tribunal; however, the Tribunal dismissed the exception as late filed (*see Matter of Yim*, Tax Appeals Tribunal, March 16, 2020). Petitioner did not file an article 78 proceeding with the Appellate Division.

CONCLUSIONS OF LAW

A. As the Division cancelled the notice of proposed driver's license suspension, the issue now is whether the Division of Tax Appeals should grant the Division's motion for summary determination as to the liabilities reflected in assessment number L-042993413, referenced in the consolidated statement of tax liabilities.

B. The Division brings a motion for summary determination under section 3000.9 (b) of the Rules of Practice and Procedure (Rules). 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]).

C. 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 v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]; *Museums at Stony Brook v Village 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 [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*).

D. Petitioner did not respond to the Division's motion. Accordingly, she is 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]). Petitioner has presented no evidence to contest the facts alleged in the Division’s motion papers; consequently, those facts are deemed admitted (*Kuehne & Nagel v Baiden*, at 544; *Whelan v GTE Sylvania*).

E. Petitioner in this matter already protested the Division’s notice L-042993413 and the notice was sustained by the Division of Tax Appeals (*see Matter of Yim*, Division of Tax Appeals, June 27, 2019). Petitioner filed an exception to the Division of Tax Appeals’ determination with the Tribunal; however, the Tribunal dismissed the exception as late filed (*see Matter of Yim*, Tax Appeals Tribunal, March 16, 2020). The validity of the statutory notice for the assessment listed on the consolidated statement of tax liabilities has already been adjudicated by a prior decision of the Tribunal and the four-month statutory time period in which to

challenge the Tribunal's decision has elapsed without petitioner having filed an appeal (*see* 20 NYCRR 3000.20). Thus, petitioner has exhausted, or failed to utilize, her administrative remedies or judicial review with respect to the assessment and cannot relitigate the validity of the notice (*see* Tax Law § 2016; *see also Matter of Mostovoi*, Tax Appeals Tribunal, May 23, 2019; *Matter of Kyte*, Tax Appeals Tribunal, October 9, 2014; *Matter of Am. Home Assur. Co.*, Tax Appeals Tribunal, August 8, 2002).

F. The Division's August 28, 2020 motion for summary determination is granted and the petition of Jung J. Yim is dismissed.

DATED: Albany, New York
December 23, 2020

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE