

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KRISTIN NERO	:	DETERMINATION
	:	DTA NO. 831460
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Year 2022.	:	

Petitioner, Kristin Nero, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law for the year 2022.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Brian A. Kristel, Esq., of counsel), brought a motion on June 22, 2026, seeking an order dismissing the petition in the above-referenced matter pursuant to Tax Law § 2006 and sections 3000.5 and 3000.9 (a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, did not file a response to the motion by July 22, 2026, which date commenced the 90-day period for the issuance of this determination.

Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Alexander Chu-Fong, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Tax Appeals has jurisdiction to address the merits of the petition.

FINDINGS OF FACT

1. On June 21, 2023, the Division of Taxation (Division) issued a notice of disallowance, bearing case number X-191094245, to petitioner, Kristin Nero, for tax year 2022 (notice).

2. On October 18, 2023, petitioner filed a petition with the Division of Tax Appeals in protest of the notice.

3. On the same date, petitioner also filed a request for a conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice.

4. On December 11, 2023, the Division of Tax Appeals notified petitioner of her concurrent matters with the Division of Tax Appeals and BCMS, stating that petitioner cannot have a petition pending before the Division of Tax Appeals and a pending request before BCMS. The Division of Tax Appeals provided petitioner with form TA-135, withdrawal of petition for matter currently pending in the Bureau of Conciliation and Mediation Services, and instructed petitioner to withdraw her petition at the Division of Tax Appeals and advised that petitioner could file a petition if she was not satisfied with the outcome at BCMS. Petitioner did not respond or return the form.

5. On May 14, 2024, a conciliation conference for petitioner was held before BCMS. By conciliation order, CMS number 000356023, dated August 16, 2024, BCMS sustained the notice.

6. On June 22, 2026, the Division filed a motion to dismiss the petition, because it was filed prematurely. In support of its motion, the Division submitted the affirmation of Brian A. Kristel, Esq., dated June 22, 2026, with attached exhibits, including copies of: the notice; the

petition; the request; the conciliation order; and the Division's answer, dated October 30, 2024. In his affirmation, Mr. Kristel avers that the petition is premature, given petitioner's simultaneous request filed with BCMS, and, therefore, the Division of Tax Appeals is without jurisdiction to review the merits of the petition.

7. Petitioner did not respond to the Division's motion to dismiss the petition.

CONCLUSIONS OF LAW

A. As noted, 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). Section 3000.9 (c) of the Rules provides that a motion to dismiss is subject to the same provisions as a motion to dismiss filed pursuant to Civil Practice Law and Rules (CPLR) 3211, and a motion for summary determination is subject to the same provisions as a motion for summary judgment under CPLR 3212. The standard of review for a motion to dismiss and a motion for summary determination is the same (*see Matter of Nwankpa*, Tax Appeals Tribunal, October 27, 2016). "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 to the existence of a triable issue or where a 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, the issue is for the fact finders to decide on trial, and not for determination by a judge on 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], quoting *Zuckerman v City of New York*, 49 NY2d at 562).

B. As an alternate to proceeding directly to a formal hearing with the Division of Tax Appeals, a taxpayer may request a conciliation conference with BCMS (*see* Tax Law § 170 [3-a] [b]). BCMS is responsible for providing a conference as an option to any taxpayer that has received a statutory notice if the time to file a request has not elapsed (*see* Tax Law § 170 [3-a] [a]). A conciliation conference is intended to provide the parties an opportunity to resolve disagreements, with the goal of “narrowing the scope of or eliminating the need for a hearing in the division of tax appeals” (20 NYCRR 4000.5 [c] [1] [i]). The conciliation conferee has the power to waive or modify additional tax due, interest and penalties, and receive testimony and evidence in an informal manner in order to get “a just and equitable result” (Tax Law § 170 [3-a] [c]). Once a conciliation order has been issued, such order will be binding on both the Division and the taxpayer unless the taxpayer files a petition for a hearing with the Division of Tax Appeals within 90 days of the issuance of the conciliation order (*see* Tax Law § 170 [3-a] [e]).

C. The Tax Appeals Tribunal (Tribunal) held in *Matter of Sawlani* (Tax Appeals Tribunal, September 14, 1995) that maintaining concurrent matters before the Division of Tax Appeals and BCMS creates questions of finality with Tribunal decisions and, “[i]n order to avoid such uncertainty, petitions filed prematurely must be rejected as untimely.”

Here, petitioner filed a request and a petition concurrently. By requesting a conciliation conference and participating in that proceeding, petitioner chose to have her refund claim first addressed at BCMS. As the proceeding at BCMS had not concluded, i.e., a conciliation order

had not yet been issued at the time of filing her petition, it must be determined that the petition was prematurely filed (*see id.*). Accordingly, it is concluded that the Division of Tax Appeals lacks jurisdiction to consider the merits of the petition.

D. The Division of Taxation's motion to dismiss is granted and the petition of Kristin Nero is dismissed.

DATED: Albany, New York
October 15, 2026

/s/ Alexander Chu-Fong
ADMINISTRATIVE LAW JUDGE