

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

PATRICK MURPHY :

for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax Law :
and the New York City Administrative Code for the :
Year 2006. :

ORDER
DTA NO. 825277

In the Matter of the Petition :

of :

KATHLEEN MURPHY :

for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax Law :
and the New York City Administrative Code for the :
Year 2006. :

Petitioners, Patrick and Kathleen Murphy, filed petitions¹ for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 2006.²

¹Petitioners Patrick and Kathleen Murphy filed separate petitions challenging the same Notice of Deficiency, which was issued to them jointly. For purposes of judicial economy, the petitions have been consolidated under DTA Number 825277.

² The captions on the pleadings filed after the petitions have added the year 2007 to the period at issue. This change appears to have been a repeating error originating with the Division of Taxation's answer. The sole year at issue, as evidenced by the petitions and subject notice, is 2006.

Petitioner Kathleen Murphy brought a motion, filed September 13, 2013, seeking an order pursuant to 20 NYCRR 3000.4(b)(3) and (4) deeming all material allegations of fact contained in her petition admitted. The Division of Taxation, by its representative, Amanda Hiller, Esq. (Marvis A. Warren, Esq., of counsel), submitted an affirmation in opposition to the motion, dated October 9, 2013.

After due consideration of the motion, the supporting affidavit of Kathleen Murphy, the affirmation in opposition submitted by the Division of Taxation, and all the pleadings and proceedings had herein, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether the material allegations in Kathleen Murphy's petition should be deemed admitted because the Division of Taxation failed to file an answer pursuant to 20 NYCRR 3000.4.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued a Notice of Deficiency, number L-035037360-3, dated November 22, 2010 to petitioners, Patrick and Kathleen Murphy, at 8901 Shore Road, Brooklyn, New York 11209, asserting personal income tax due under Article 22 of the Tax Law and the New York City Administrative Code for the year 2006. The essence of the deficiency comes from the Division's determination that petitioners failed to properly report and pay tax on flow-through gains from the sale of real property. The subject notice asserted tax due in the amount of \$229,057.00, plus penalty of \$70,134.50 and interest of \$71,559.01, and was sustained by a conciliation order dated July 20, 2012.

2. Petitioners simultaneously filed separate petitions on October 18, 2012, each seeking cancellation of the subject notice on various bases. The petitions were served upon the Division in the same FedEx envelope. Kathleen Murphy's petition indicated that she would proceed pro se and listed her address as 8901 Shore Road, Brooklyn, New York 11209. Patrick Murphy's petition listed his personal address as "8901 Shore Road," but indicated that he was representing himself in this matter as a member of the law firm of Murphy & O'Connell, with an address of 40 Wall Street, New York, New York 10005. It is uncontroverted that petitioners both resided at 8901 Shore Road, Brooklyn, New York at all relevant times.

3. Each petitioner listed the factual allegations in support of their petition in section six of the standard petition form or an attachment thereto.

4. On December 19, 2012, the Division filed a responsive pleading to the petitions. This four-page document contained a separate caption for each petition with the title "ANSWER" adjacent to each caption. The Division identified this document as its answer to the petitions.

5. The first substantive line of the Division's answer reads:

The Division of Taxation (hereinafter the "Division") answers the above petitions as follows:

. . . DENIES all the allegations, assertions, and positions contained in the statements and addendum attached to section (6) of the petitions.

6. The Division's answer also contains 16 affirmative statements regarding the substance of its audit. Throughout its affirmative statements, the Division continually refers to both petitioners.

7. The Division's answer was sent to the 8901 Shore Road, Brooklyn, New York, address under one cover letter addressed to both petitioners. The Division's cover letter stated that the enclosed was its "answer to the petitions."

SUMMARY OF THE PARTIES' POSITIONS

8. Petitioner, Kathleen Murphy, maintains that the Division served an answer to the petition of Patrick Murphy, but failed to serve a separate and distinct answer to her petition. She adds that although the answer was sent to petitioners' joint address, it was treated by petitioner Patrick Murphy as served upon him alone. As a result, she argues that the Division's failure requires that all allegations in her petition must be deemed admitted. Also, she states that by failing to receive an answer from the Division, she has been deprived of her rights to due process and equal protection under the United States and New York constitutions.

9. The Division asserts that it appropriately served an answer addressing all of both petitioners' allegations, assertions, and positions.

CONCLUSIONS OF LAW

A. 20 NYCRR 3000.4(b)(1) requires that the Division serve an answer on a petitioner or its representative within 75 days of acknowledgment of receipt of a properly filed petition. The answer must advise the petitioner and the Division of Tax Appeals of the defense and, among other things, contain "a specific admission or denial of each statement contained in the petition" (20 NYCRR 3000.4[b][2][i]). "Material allegations of fact set forth in the petition which are not expressly admitted or denied in the answer shall be deemed to be admitted" (20 NYCRR 3000.4[b][3]).

B. In the instant case, the Division has complied with the requirements of 20 NYCRR 3000.4. Contrary to petitioner Kathleen Murphy's assertions, the Division's answer plainly addresses both petitions, and even separately captions them at the top of its pleading. Critically, the answer denies the allegations in each petition. The general denial provided by the Division is acceptable under the circumstances and certainly does not "lend an aura of sham" to the

proceedings that would give rise to the sanctions sought by petitioner (*see Matter of Anonymous B. v. Anonymous R.*, 37 Misc 3d 756 [2012]). Furthermore, the Division's answer was sent to both petitioners at the exact address listed on Kathleen Murphy's petition. Her position that she was not provided with an answer because her fellow petitioner, Patrick Murphy, chose to treat the answer as his own borders on the frivolous. In sum, the Division has advised petitioner Kathleen Murphy of its position with regard to the material allegations in her petition, and contrary to her assertions, she has not been denied any due process or equal protection rights in this matter. Simply put, the sanction sought by petitioner in this motion would be inappropriate and unreasonable.

C. Petitioner Kathleen Murphy's Motion for an Order Deeming All Material Allegations of Fact in Her Petition to be Admitted is denied.

DATED: Albany, New York
December 19, 2013

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE