

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SHOSHANNAH SUMMERS : ORDER
 : DTA NO. 826453
for Redetermination of a Deficiency or for Refund of New :
York State and New York City Personal Income Taxes :
under Article 22 of the Tax Law and the New York City :
Administrative Code for the Year 2013. :

Petitioner, Shoshannah Summers, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 2013.

Petitioner, by her representative, Waverly Lane, EA, brought a motion dated January 19, 2015, seeking an order for summary determination in favor of petitioner pursuant to Tax Law §§ 2006(6) and 3000.9(b)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. The Division of Taxation, appearing by Amanda Hiller, Esq. (Kent J. Gebert, Esq., of counsel), did not respond to petitioner's motion. Accordingly, the 90-day period for the issuance of this order began on February 19, 2015, the due date of the Division of Taxation's response. Based upon the motion papers, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner's motion for summary determination should be granted.

FINDINGS OF FACT

1. Petitioner, Shoshannah Summers, filed a petition, dated August 18, 2014, that challenged an Account Adjustment Notice, dated July 10, 2014, issued by the Division of Taxation (Division) for tax year 2013, denying petitioner's New York State and City earned income credits and the college tuition credit, in the total amount of \$1,436.00.¹

2. On August 20, 2014, the Division issued an account adjustment notice that allowed an additional partial refund in the amount of \$1,236.00 and denied the balance of the refund request, i.e., \$200.00.

3. Petitioner did not submit any affidavit or a copy of the pleadings along with her motion for summary determination.

4. In the cover letter that accompanied petitioner's motion for summary determination, petitioner's representative asserted that petitioner already submitted to the Division and the Division's representative "valid evidence to establish" petitioner's "entitlement to the Claim for College Tuition Credit" for the year 2013.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

"Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor" (20 NYCRR 3000.9[b][1]; *see also* Tax Law § 2006[6]).

"The motion shall be granted if, upon all papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no

¹ The Account Adjustment Notice allowed a partial refund of \$352.00, i.e., refund of the Empire State child credit in the amount of \$289.00, and refund of the New York City school tax credit in the amount of \$63.00.

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. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact” (20 NYCRR 3000.9[b][1] *see also* Tax Law § 2006[6]).

B. Petitioner’s motion for summary determination is technically defective because it is not supported by an affidavit or a copy of the pleadings (*see* 20 NYCRR 3000.9[b][1]; *see also* Tax Law § 2006[6]). Furthermore, to the extent that petitioner appears to raise an allegation that she submitted sufficient proof to the Division, the sufficiency of the same presents a material issue of fact. Where there exists a material issue of fact, the issue must be addressed at a hearing, and the matter cannot be determined by a motion for summary determination (*see Gerard v. Inglese*, 11 AD2d 381 [1960]). Therefore, in any event, petitioner’s motion must be denied.

C. Petitioner’s motion for summary determination is denied, and a hearing will be scheduled in due course.

DATED: Albany, New York
May 7, 2015

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE