

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**DANIEL OLIVA** : ORDER  
for Redetermination of a Deficiency or for Refund of : DTA NO. 827262  
New York State Personal Income Tax under Article 22 :  
of the Tax Law for the Year 2013. :

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Petitioner, Daniel Oliva, 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 2013.

On November 22, 2017, petitioner, appearing by Jhonatan Mondragon, E.A., filed a motion to strike the notice of refund denial from the Division of Taxation’s pleadings and expurgate it from the record, pursuant to 20 NYCRR 3000.5 and CPLR 3024, and for summary determination pursuant to 20 NYCRR 3000.9. Together with the notice of motion, petitioner filed an affidavit of Jhonatan Mondragon, E.A., dated November 19, 2017, with a memorandum of law within the affidavit, and annexed exhibits in support of the motion. The Division of Taxation appearing by Amanda Hiller, Esq. (Christopher O’Brien, Esq., of counsel) submitted an affirmation, dated December 20, 2017, of Christopher O’Brien, Esq., the affidavit of Michael Foley, dated December 18, 2017, with attached exhibits, and a letter brief in opposition to petitioner’s motion on December 20, 2017, which date commenced the 90-day period for issuance of this order. After due consideration of the affidavits, annexed exhibits, the affirmation, and all pleadings and proceedings had herein, Winifred M. Maloney, Administrative Law Judge, renders the following order.

***ISSUES***

I. Whether petitioner's motion to strike the notice of refund denial from the Division of Taxation's pleadings and expurgate it should be granted.

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

***FINDINGS OF FACT***

1. Petitioner, Daniel Oliva, timely filed a Form IT-201, New York State income tax return, for the year 2013 seeking a refund in the amount of \$2,438.00. A copy of petitioner's 2013 Form IT-201 is not part of the record. However, documents in the record indicate that petitioner claimed two dependent exemptions, and the following credits on his 2013 Form IT-201: an Empire State child credit; a New York State earned income credit; a New York City school tax credit in the amount of \$63.00; and a New York City earned income credit.

2. By its letter dated April 10, 2014, the Division of Taxation's (Division) Income/Franchise Desk Audit Bureau AG-1 (Income/Franchise Desk Audit Bureau) notified petitioner that additional information was needed in order to process his 2013 income tax return and determine the amount of his tax refund. Specifically, the letter requested information about the money petitioner "earned by working for [himself]," and petitioner's children or dependents. Information and documentation requested included the following: a copy of petitioner's federal Schedule C: Profit or Loss from Business for 2013; copies of any license, registration, or certification for petitioner's business; copies of summary documents used to calculate the income and expenses reported on petitioner's tax return, such as ledgers, spreadsheets, or income and expense journals for the entire 2013 tax year; copies of detailed documentation, such as sales slips, invoices, bank statements, or receipts supporting the business income for at least two months of 2013; completion of an enclosed self-employed questionnaire; proof of petitioner's

relationship to each child or dependent for whom a credit was claimed, consisting of copies of the birth certificate for each child for whom petitioner was claiming a credit, or if not listed on the birth certificate, documentation showing petitioner's relationship to the child or dependent; and proof that the child or dependent lived with petitioner for more than half the year, consisting of a letter from the child's doctor or school showing the child's name, date of birth, address, and the name of the custodial parent.

3. By an "Account Adjustment Notice - Personal Income Tax" (refund denial), dated April 9, 2015, the Division's Income Franchise Desk Audit Bureau disallowed the earned income credit and the empire state child credit claimed by petitioner on his 2013 resident income tax return.<sup>1</sup> The "Explanation" section of the notice of refund denial contained, in pertinent part, the following paragraphs:

"The following adjustment(s) has been made to your New York State income tax return.

In order to qualify for the earned income credit, you must be able to document that you received earned income during the tax year. For business income, you must be able to provide records that support when the income was earned, to whom services were provided, and the exact amount of compensation received from each transaction. You did not provide the required documentation to verify the business income claimed on your return. . . .

In our previous correspondence, we asked you to provide documentation to verify the relationship of the qualifying child(ren) claimed on your return. You either did not submit birth certificate(s) or we were unable to determine relationship from the birth certificate(s) provided.

Since your response to our inquiry did not include the required documentation to verify the business income reported and the qualifying child(ren) claimed on your return, the earned income credit and the empire state child credit has been disallowed.

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<sup>1</sup> A refund of the New York City School Tax Credit in the amount of \$63.00 was allowed by the notice of refund denial.

You have been allowed the New York City School Tax Credit.”

4. In protest of the notice of refund denial, petitioner filed a request for conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (BCMS). The record does not include a copy of petitioner’s request.

5. A BCMS conciliation conference was held on July 29, 2015. Petitioner appeared pro se at the conference. Subsequently, BCMS issued a conciliation order, CMS No. 266087, dated October 23, 2015, denying the request and sustaining the statutory notice, i.e., the refund denial.

6. Petitioner timely filed a petition challenging the conciliation order and the refund denial,<sup>2</sup> and seeking a refund of \$2,438.00. Petitioner’s petition sets forth 23 enumerated items, including allegations of fact and error, legal statements and interpretations of law. Attached to petitioner’s petition were seven documents related to Levi Oliva-Gomez and Junior Antonio Oliva-Gomez, and a power of attorney, dated September 23, 2015, appointing Jhonatan Mondragon, enrolled agent, as petitioner’s representative.

7. On March 16, 2016, the Division filed its answer to the petition. Paragraphs 1, 2, 3, and 4 of the answer state:

“1. DENIES the statements contained in paragraphs numbered five, seven, nine, twelve, fourteen, and sixteen in section six of the petition.

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<sup>2</sup> Petitioner filed his petition on September 25, 2015. By letter dated October 2, 2015, addressed to petitioner’s representative and petitioner copied, the Division of Tax Appeals advised that the petition could not be processed further until the following items were corrected or provided: missing information regarding the representative’s address on page 1 of the petition; and missing information on page 3 of the petition - the conciliation order was not attached. The letter requested the submission of the requested information within 30 days of the date of the same, and advised that the failure to timely provide or correct this information could result in the petition being dismissed. On November 20, 2015, a notice of intent to dismiss petition (NOI) was issued to petitioner because the petition did not contain a legible copy of the statutory notice or the conciliation order. On January 7, 2016, petitioner’s representative submitted correspondence and a copy of the conciliation order dated October 23, 2015. By letter dated January 13, 2016, then-Supervising Administrative Law Judge Daniel J. Ranalli notified Mr. Mondragon that the NOI was rescinded. He further advised that the petition was considered timely filed from the date of the conciliation order, and an acknowledgment letter would be issued shortly.

2. DENIES HAVING KNOWLEDGE OR INFORMATION sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs seventeen through twenty-three in section six of the petition, therefore DENIED.

3. DENIES any other allegation not heretofore covered.

4. The statements in paragraphs one through four, six, eight, ten, eleven, thirteen, and fifteen constitute legal statements and interpretations of law, therefore no response required as they are not factual allegations. To the extent that the court may view the same as factual allegations, however, then DENIED.”

The remaining two separately numbered paragraphs of the answer set forth affirmative statements in support of the Division’s denial of petitioner’s refund.

8. In support of petitioner’s motion to strike the notice of refund denial from the Division’s pleadings (motion to strike the refund denial), and for summary determination, petitioner submitted the affidavit of Jhonatan Mondragon, E.A. petitioner’s representative, with attached exhibits.

9. In his affidavit, Mr. Mondragon asserts that petitioner’s motion to strike the refund denial should be granted because the conciliation order sustaining the refund denial did not include any facts developed at the “BCMS proceeding.” With respect to petitioner’s motion for summary determination, Mr. Mondragon, in his affidavit, asserts that there are no issues of fact and summary determination should be granted to petitioner. He avers that the Division “has waived and executed its waiver that the taxpayer is entitled to his dependents,” and with the refund denial stricken from the record, “there are no facts that can be inferred” in the Division’s favor. Mr. Mondragon avers that petitioner’s “reconstruction of income, made at the BCMS level” is sufficient to prove his entitlement to the earned income credit and the empire state child credit for the year 2013.

10. Exhibits attached to Mr. Mondragon’s affidavit consisted of excerpts from

unidentified guidelines; and a document titled “RECONSTRUCTION OF DANIEL OLIVA INCOME INDIRECT METHOD” that included Mr. Mondragon’s “[d]isclaimer” indicating that the reconstruction was based upon information Mr. Mondragon “vaguely remember[ed] from conversations and from the BCMS hearing.”

11. In opposition to petitioner’s motion to strike the refund denial and for summary determination, the Division submitted the affirmation of Christopher O’Brien, Esq., the Division’s representative, and the affidavit of Michael Foley, a Tax Technician I in the Division’s Audit Division, with attached exhibits.

12. In his affirmation, Mr. O’Brien asserts that petitioner’s “motion to strike does not provide a procedural or factual basis upon which to strike any pleading filed by the Division.” He also asserts that petitioner’s motion for summary determination should be denied because material issues of fact exist.

13. In addition to his motion to strike the refund denial and for summary determination, petitioner included a two-page document entitled “SUPPLEMENTAL PLEADINGS,”<sup>3</sup> and requested leave to amend the pleadings to include the same. In a letter to both representatives, dated December 5, 2017, the undersigned administrative law judge granted petitioner’s request to amend the pleadings, and the “SUPPLEMENTAL PLEADINGS” were incorporated into the record as an amended petition. The letter also advised that service of the Division’s amended answer in this matter shall be made within 75 days after December 5, 2017, and service of a reply shall be made within 20 days after the service of the amended answer.

14. On February 7, 2018, the Division filed its amended answer to the “petition dated

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<sup>3</sup> The “SUPPLEMENTAL PLEADINGS” contained 18 separately numbered paragraphs.

September 23, 2015” and the “Supplemental Pleadings dated November 18, 2017.” In 9 separately numbered paragraphs, the amended answer states the following:

“1. DENIES the statements contained in paragraphs numbered five, seven, nine, twelve, fourteen, and sixteen in section six of the petition dated September 23, 2015.

2. DENIES HAVING KNOWLEDGE OR INFORMATION sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs seventeen through twenty-three in section six of the petition dated September 23, 2015, therefore DENIED.

3. DENIES any other allegation in the petition dated September 23, 2015 not heretofore covered.

4. The statements in paragraphs one through four, six, eight, ten, eleven, thirteen, and fifteen in the petition dated September 23, 2015 constitute legal statements and interpretations of law, therefore no response required as they are not factual allegations. To the extent that the court may view the same as factual allegations, however, then DENIED.

5. STATES that the Division correctly calculated the Earned Income Tax Credit and Empire State Child Care Credit in this case.

6. STATES that Petitioners have not met their burden of proving that the denial of income claims by the Division was erroneous and/or improper.

The Division further responds to the Supplemental Pleadings Dated November 18, 2017:

7. DENIES the statements contained in paragraphs numbered one through seventeen.

8. The statement in paragraph 18 constitutes a request for relief, therefore no response required. To the extent that the court may view the same as factual allegations, however, then DENIED.

9. Further DENIES any other allegation in the Supplemental Pleadings not otherwise addressed.”

The amended answer further requested that the statutory notice be sustained and the petition be denied in its entirety.

***CONCLUSIONS OF LAW***

A. Petitioner has brought a motion to strike the refund denial pursuant to 20 NYCRR 3000.5 and CPLR 3024. Mr. Mondragon, in his affidavit, asserts that the refund denial should be stricken from the Division's pleadings because it "was not done pursuant to guidelines" that require "reconstruction of income as proof of income and an impartial conferee at a BCMS proceeding." He further asserts that "the refund denial does not include undisputable findings and evidence" brought forth at the BCMS conference through the cross-examination of petitioner by both the auditor-advocate and the conciliation conferee, and a reconstruction of petitioner's income. Petitioner argues that the failure to include undisputed facts in the conciliation order sustaining the refund denial constitutes a due process failure and, as such, the refund denial should be stricken from the Division's answer and expurgated from the record.

B. Petitioner's motion to strike the refund denial from the Division's pleadings is denied. Pleadings are generally defined in 20 NYCRR 3000.3 and 20 NYCRR 3000.4, and consist of petitions, answers, amended petitions, amended answers and replies. In the instant matter, the Division filed an answer dated March 16, 2016 and an amended answer dated February 7, 2018. CPLR 3024 (b) provides that "[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." A notice of motion under CPLR 3024 "shall be served within twenty days after the service of the challenged pleading" (*see* CPLR 3024 [c]). It is noted that the Division's answer was served on March 16, 2016, and petitioner's motion to strike the refund denial from the Division's pleading was made on November 22, 2017, well in excess of twenty days after the service of the challenged pleading. While the circumstances of the refund denial are described in both the Division's answer and its amended answer, the notice of refund denial is not part of either the Division's answer or its amended answer. It is noted that



petitioner has not asserted that any scandalous or prejudicial matter was unnecessarily inserted in the Division's pleading. Rather, petitioner's motion to strike the refund denial is based upon the substance of the conciliation conference proceedings. The Bureau of Conciliation and Mediation Services is established within the Division of Taxation and is responsible "for providing conciliation conferences" (Tax Law § 170 [3-a] [a]). Such conferences are provided at the sole option of the taxpayer, are not quasi-judicial in nature and are not governed by "procedures substantially similar to those used in a court of law" (*Ryan v New York Telephone Co.*, 62 NY2d 494 [1984]). The conciliation conference is not an "adjudicatory proceeding" as defined in article 3 of the State Administrative Procedure Act (SAPA). Specifically, the conciliation conference process does not comply with record requirements for adjudicatory proceedings under SAPA § 302 (conciliation conferences are neither electronically nor stenographically recorded) and conciliation orders do not comply with requirements for decisions, determinations, and orders under SAPA § 307 (conciliation orders contain neither findings of fact nor conclusions of law). The conciliation conference process is, in essence, a settlement forum (*see* 20 NYCRR 4000.5 [c] [1] [i]), and discussions and proposed adjustments made at conciliation conferences are in the nature of settlement negotiations and may not be considered as precedent or be given any force or effect in any subsequent administrative proceeding (Tax Law § 170 [3-a] [f]; *see Matter of Petak v Tax Appeals Trib.*, 217 AD2d 807 [3d Dept 1995]; *Matter of Sandrich, Inc.*, Tax Appeals Tribunal, April 15, 1993).

C. 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 material and triable issue of fact is presented and that the administrative law judge can, therefor, 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]).

D. The standard with regard to a motion for summary determination is well settled. A motion for summary determination made before the Division of Tax Appeals is "subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR" (20 NYCRR 3000.9 [c]; *see also Matter of Service Merchandise, Co.*, Tax Appeals Tribunal, January 14, 1999). Summary determination is a "drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (*Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]; *see Daliendo v Johnson*, 147 AD2d 312 [2d Dept 1989]). Because it is the "procedural equivalent of a trial" (*Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572, 573 [2d Dept 1989]), undermining the notion of a "day in court," summary determination must be used sparingly (*Wanger v Zeh*, 45 Misc 2d 93 [1965], *affd* 26 AD2d 729 [3d Dept 1966]). If any material facts are in dispute, if the existence of a triable issue of fact is "arguable," or if contrary inferences may be reasonably drawn from the undisputed facts, the motion must be denied (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Gerard v Inglese*, 11 AD2d 381 [2d Dept 1960]).

E. Given the paucity of critical evidence submitted on the motion for summary determination, and the assertions in the Division's answer and amended answer, there is no doubt that material and triable issues of fact exist as to petitioner's entitlement to both the earned

income credit and the empire state child credit, and that a full hearing is warranted.

F. Petitioner's motion to strike the refund denial from the Division's pleadings is denied.

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

DATED: Albany, New York  
March 15, 2018

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE