

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JESSICA RICHTER	:	
	:	ORDER
	:	DTA NO. 830018
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax pursuant to Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 2019.	:	

Petitioner, Jessica Richter, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2019.

On November 27, 2020, petitioner, pro se, filed a motion entitled “Notice of Cross Motion to Strike Answer,” seeking to have the answer stricken and the Division of Taxation ordered to file a new answer pursuant to section 3000.5 of the Rules of Practice and Procedure of the Tax Appeals Tribunal and CPLR 3024 (a) and (b). In response to the motion, the Division of Taxation, by Amanda Hiller, Esq. (Jennifer Hink-Brennan, Esq., of counsel), submitted a letter requesting permission to file an amended answer and enclosed a proposed amended answer. The 90-day period for issuance of this order commenced on January 27, 2021. Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Jessica DiFiore, Administrative Law Judge, renders the following order.

ISSUES

I. Whether petitioner's motion to strike the Division of Taxation's answer and seeking an order requiring the Division of Taxation to submit an amended answer should be granted.

II. Whether the Division of Taxation's request to file an amended answer should be granted.

FINDINGS OF FACT

1. On August 7, 2020, the Division of Taxation (Division) issued a letter to petitioner, Jessica Richter, denying her income tax refund request for tax year 2019 (denial letter). The denial letter provided that the Division denied petitioner's claim for an income tax refund because it found that the information she submitted did not support her claim. The denial letter stated that the Division asked petitioner to submit documentation to support the amounts of wages and withholdings reported on her income tax return for tax year 2019. This information included copies of all W-2 forms issued to petitioner by her employers, copies of her last paycheck stubs from every employer that she worked for in tax year 2019, and a letter listing her wages and withholdings from Creative Circle LLC and 24 Seven LLC.

2. On August 24, 2020, petitioner filed a petition with the Division of Tax Appeals protesting the denial letter. In the petition, petitioner requested a refund of \$806.00 with interest, expenses related to the instant action, liquidated damages, and any other relief the Division of Tax Appeals determines to be proper. She also asserted that she provided all documents that were required under the law and that forms W-2 have not been required to be submitted with individual income tax returns since 2015.

3. The Division filed its answer on or about October 28, 2020. In it, the Division asserts that petitioner filed a 2019 New York State resident income tax return, form IT-201, on April 23,

2020 requesting a refund in the amount of \$806.00. The Division also asserted that in a letter dated May 6, 2020, it requested more information from petitioner regarding her withholding information for tax year 2019 before issuing the denial letter on August 7, 2020. Additionally, the Division stated that petitioner did not request a conciliation conference.

4. In her motion, petitioner asserts the Division's answer should be stricken pursuant to CPLR 3024 (a) and (b) because it is vague and contains prejudicial matter unnecessarily inserted. Petitioner asserts the Division's statement that she did not request a conciliation conference has no legal relevance to the petition and is prejudicial because it was inserted to suggest the petition was unreasonable or frivolous. Petitioner then asserts that the rest of the Division's answer is so vague that it does not constitute an answer. She states the Division contends that the burden of proof is on the petitioner and that the subject tax notice was issued correctly, but fails to address what the notice sought or what proof should have been provided. Petitioner concludes by asking that the Division's answer be stricken and that the Division be ordered to file a new answer in compliance with the CPLR.

5. In response to petitioner's motion, the Division asserted that its answer is legally sufficient. Nevertheless, the Division requested permission to file an amended answer pursuant to section 3000.4 (d) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). The amended answer includes additional information regarding the wages and withholdings claimed by the various entities where petitioner was employed in 2019, and identified a \$3,000.00 discrepancy between the wages reported by petitioner's employers and those reported on her 2019 return.

CONCLUSIONS OF LAW

A. Petitioner brings this motion seeking to have the Division's answer stricken or amended pursuant to 3000.5 (a) of the Rules and CPLR 3024 (a) and (b).

B. CPLR 3024 (c) requires that a motion made pursuant to CPLR 3024 (a) or (b) be made within 20 days of service of the challenged pleading. Here, the answer was served on or about October 28, 2020, but petitioner's motion was not filed until November 27, 2020. However, courts have discretion to consider a motion made more than 20 days after the service of a challenged pleading (*see* McKinney's CPLR Practice Commentary, C3024:5; *Szolosi v Long Island R. Co.*, 52 Misc.2d 1081 [Sup Ct, Suffolk County 1967]). Additionally, "[w]ith the exception of motions filed pursuant to section 3000.9 . . . the administrative law judge shall be guided but not bound by the CPLR in resolving motions made pursuant to [the Rules]" (20 NYCRR 3000.5 [a]). Accordingly, the undersigned has determined that the motion made in the instant action will be entertained.

C. Petitioner asserts the Division's answer should be stricken pursuant to CPLR 3024 (a) and (b) because it is vague and contains prejudicial matter unnecessarily inserted. These assertions are meritless.

D. CPLR 3024 (b) allows a party to strike from any pleading matter that is scandalous or prejudicial. The remedy provided by CPLR 3024 (b) is not that an entire answer may be stricken, only any scandalous or prejudicial matter that is unnecessarily inserted therein (*see Dong Wook Park v Michael Parke Dori Group, Inc.*, 12 Misc.3d 1182[A] at 4 [Sup Ct, Nassau County, 2006]). The party moving to have the matter stricken must show that it is scandalous or prejudicial and that the matter is not relevant (*see id.*). Material will be considered prejudicial where it impairs a substantial right of a party or causes unnecessary harm (*see id.*). Material

constituting unnecessary harm has been construed by the courts to mean irrelevant to the controversy (*see Wegmans v Dairylea Co-op, Inc.*, 50 AD2d 108, 111 [4th Dept 1975]).

Petitioner asserts the Division's statement that she did not request a conciliation conference has no legal relevance to the petition and is prejudicial because it was inserted to suggest the petition was unreasonable or frivolous. Petitioner has not shown how the Division's statement regarding petitioner's decision not to request a conciliation conference has impaired a substantial right or caused unnecessary harm. Petitioner has also not shown how it is irrelevant. It does not, as petitioner claims, suggest that the petition was unreasonable or frivolous. It also does not place petitioner in an unfavorable light. A taxpayer may protest a refund denial by filing a petition for a hearing with the Division of Tax Appeals or a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) (*see* Tax Law §§ 681 [b]; 689 [b]; 170 [3-a]). Petitioner cannot have both a petition and a conciliation conference pending at the same time (*see* Tax Law §§ 681 [b]; 689 [b]; 170 [3-a]). Accordingly, a statement by the Division providing that the taxpayer chose to protest the refund denial by filing a petition for a hearing with the Division of Tax Appeals instead of first pursuing a conference with BCMS is relevant. That is why the Division of Tax Appeals' own form for a petition, form TA-100, specifically asks whether a conciliation conference with BCMS was requested and an order issued.

E. Petitioner asserts that the rest of the Division's answer is so vague that it does not constitute an answer. A party can move for a more definite statement if "a pleading is so vague or ambiguous that a party cannot reasonably be required to frame a response" (CPLR 3024 [a]). However, the statements in the Division's answer were not so vague and ambiguous that petitioner could not reasonably frame a reply. In its answer, the Division provided that petitioner

filed a 2019 New York State resident income tax return, form IT-201, on April 23, 2020, requesting a refund in the amount of \$806.00. The Division then explained that after additional withholding information was requested but not provided, petitioner's request was denied. These statements are not vague or ambiguous.

F. Despite asserting that its answer is legally sufficient, the Division seeks permission to file an amended answer pursuant to section 3000.4 (d). When considering such request "[l]eave shall be freely given upon such terms as may be just . . ." (see 20 NYRCC 3000.4 [d]). Here, where the Division seeks to amend its answer to alleviate petitioner's concerns regarding the statements therein and provide further detail regarding the denial of petitioner's refund claim, such request is granted.

G. Petitioner's motion is hereby denied and the Division's request to file an amended answer is granted. The proposed amended answer is accepted and deemed filed on today's date.

DATED: Albany, New York
April 22, 2021

/s/ Jessica DiFiore
ADMINISTRATIVE LAW JUDGE