

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

ASKAR MUKHITDINOV AND SANA ABEUOVA

for Redetermination of a Deficiency or for Refund of
Personal Income Tax under Article 22 of the Tax Law
for the Year 2012.

ORDER
DTA NO. 830035

Petitioners, Askar Mukhitdinov and Sana Abeuova, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law for the year 2012.

On May 25, 2022, petitioners, by Dewey Golkin, Esq., filed a motion seeking summary determination in the above-captioned matter pursuant to sections 3000.5 and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. The Division of Taxation appearing by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), timely responded on July 12, 2022, after being granted an extension by which to file a response. The 90-day period for issuance of this order commenced on July 18, 2022. Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following order.

ISSUE

Whether issues of fact mandating a hearing are present such that petitioners' motion for summary determination should be denied.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioners, Askar Mukhitdinov and Sana Abeuova, a notice of deficiency, notice number L-051259625, dated July 29, 2020 (notice), asserting tax due in the amount of \$63,209.00, plus interest and penalty for the year 2012.

2. Petitioners timely filed a petition with the Division of Tax Appeals protesting the notice.

3. The Division filed its answer to the petition on December 2, 2020.

4. Petitioners filed the instant motion for summary determination on May 25, 2022.

Petitioners contend that in 2012 they were citizens of Kazakhstan, they worked and maintained a principal residence and garage in Kazakhstan, their children attended school in Kazakhstan, and that they were not residents of New York or subject to New York State jurisdiction in 2012.

Petitioners further argue that the notice for 2012 was issued beyond the statute of limitations for assessment. In support of their motion, petitioners submitted the affirmation of their attorney, Dewey Golkin, Esq., dated May 25, 2022, and exhibits attached thereto, and affidavits of petitioner Askar Mukhitdinov, dated May 2022,¹ Serge Rosenberg, dated May 23, 2022, Bibgul Nugumova, dated May 23, 2022, and Raquel Lorenzo, dated May 2022.²

5. According to Mr. Mukhitdinov's affidavit, "[a] Pro-forma New York State individual income tax return was prepared for 2012 but because my family and I had no New York State residence and lived and worked in Kazakhstan for the entire year this return was not filed." Mr. Mukhitdinov further states in the affidavit that he and his family were living and working abroad in 2012, that his wife resided with him and his children in Kazakhstan, and that the address that

¹ The day of the month in the notary public jurat is blank.

² The day of the month in the notary public jurat is blank.

appears on his 2012 U.S. federal income tax return, 845 U.N. Plaza, New York, NY, 10017, was the address of a limited liability corporation investment named Legal Research and Analysis that he purchased in July 2012.

6. Included with the exhibits submitted in support of petitioners' motion is their 2012 U.S. individual income tax return, form 1040 (2012 federal return). Page 1 of the 2012 federal return lists petitioners' home address as 845 U.N. Plaza, Apt. 9D, New York, NY 10017. Attached to the 2012 federal return is form 2555, foreign earned income. Mr. Mukhitdinov's name and social security number appear at the top of form 2555. Line 12a of form 2555 asks, "Did any of your family live with you abroad during any part of the tax year?" In response, the box for "No" is checked. Line 13A of form 2555 asks, "Have you submitted a statement to the authorities of the foreign country where you claim a bona fide residence that you are not a resident of that country?" In response, the box for "Yes" is checked. Line 15d of form 2555 asks, "Did you maintain a home in the United States while living abroad?" In response, the box for "Yes" is checked. Line 15e of form 2555 states, "If 'Yes,' enter address of your home, whether it was rented, the names of the occupants, and their relationship to you." In response, petitioners attached Statement 7, Form 2555 "Home in U.S. – Address and Occupant Information" listing the home address as 211 East 51ST Street, New York, New York 10022, the name of occupant as "Sana Abeuova," and relationship "spouse."

7. In opposition to petitioners' motion, the Division submitted an affirmation of the Division's attorney, Christopher O'Brien,³ and an affidavit, dated July 11, 2022, of Georgianna Teta, Tax Technician II in the Division's Income/Franchise Desk Audit Bureau, with exhibits attached thereto. Ms. Teta states that petitioners failed to file a New York State resident income

³ The affirmation states that it was "Affirmed this 12th day of July, at Albany, New York" and does not state the year.

tax return for 2012 and that the Division received information from the Internal Revenue Service (IRS) indicating that petitioners had sufficient income to require a personal income tax filing in New York State for that year. Ms. Teta further states that the Division was notified that petitioners' 2012 federal return used an address of 845 U.N. Plaza, Apartment 9D, New York, New York, and states upon information and belief that "this appears to be Trump Tower, which is a residential condominium complex." Ms. Teta further states that she reviewed petitioners' personal income tax return filing history in the Division's records, which indicates that petitioners filed New York State resident returns from 1999 to 2011, and 2014 to 2017, and then nonresident returns from 2018 to present. Ms. Teta also states that Mr. Mukhitdinov's 2012 income was reported from the partnership of Curtis, Mallet-Prevost, Colt and Mosle, LLP (partnership), which reported income to Mr. Mukhitdinov attributable to New York. The 2012 IT-204-IP Schedule K-1 for petitioner from the partnership is attached as an exhibit to Ms. Teta's affidavit and reports that petitioner earned income of \$825,000.00, of which \$485,124.00 was reported as attributable to New York.

CONCLUSIONS OF LAW

A. Petitioners bring a motion for summary determination under section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. A motion for summary determination "shall be granted if, upon all the 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 the moving party is entitled to a favorable determination as a matter of law (20 NYCRR 3000.9 [b] [1]). A motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212 (*see* 20 NYCRR 3000.9 [c]). It is well established that, as the procedural equivalent of a trial, summary judgment is a drastic

remedy that should be denied if there is any doubt as to the existence of a triable issue or where a material fact is arguable (*see 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 [2d 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a 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], citing *Zuckerman*). The party bringing such a motion bears the following burden:

“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 (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Matter of Redemption Church of Christ v Williams*, 84 AD2d 648, 649 [1981]; *Greenberg v Manlon Realty*, 43 AD2d 968, 969 [1974])” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

B. Petitioners have failed to make a prima facie showing of entitlement to judgment as a matter of law. Contrary to petitioners’ argument, their own evidence shows that material issues of fact exist such that summary determination is improper. Specifically, the statements in Mr. Mukhitdinov’s affidavit that in 2012 he and his family did not have a New York residence and that he, his wife and children resided in Kazakhstan are contradicted by petitioners’ form 2555, attached to their 2012 federal return, which reports that Mr. Mukhitdinov’s family did not live abroad with him, that he submitted a statement to the authorities of the foreign country that he is not a resident of that country, that he maintained a home at 211 East 51st Street, New York, New

York, in 2012, and that his, wife Sana Abeuova, was the occupant of the New York home. Thus, the evidence submitted by petitioners in support of their motion shows that there are material and triable issues of fact.

C. In opposition to petitioners' motion, the Division also raises several issues of fact, including the New York address reported on petitioners' 2012 federal return, whether the U.N. Plaza address reported as the home address on the first page of 2012 federal return was for a limited liability company as claimed by petitioners, or was a residential unit as stated in Ms. Teta's affidavit, petitioners' filing history as New York residents prior and subsequent to the year at issue, and Mr. Mukhitdinov's schedule K-1 from the partnership, which shows income attributable to New York State. The Division has thus produced evidence sufficient to require a trial of material questions of fact.

“A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*McKenna v McKenna*, 121 AD3d 864, 865 [2d Dept 2014] [internal quotation marks and citation omitted]). “Since it [summary determination] deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues” (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). It is not for the court to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist (*Daliendo v Johnson*, 147 AD2d 312, 317 [2d Dept 1989]). Where, as here, material facts are in dispute and contrary inferences may be drawn reasonably from undisputed facts, a full trial is warranted and the case should not be decided on a motion (*Gerard v Inglese*, 11 AD2d 381, 382 [2d Dept 1960]). Here, it is clear that there are material issues of fact warranting the denial of petitioners' motion for summary determination.

D. Regarding petitioners' argument that the notice was issued beyond the statute of limitations for assessments, it is noted that Tax Law § 683 (c) provides that there is no time limitation for assessing tax where no return was filed. Petitioners admit that they did not file a New York State income tax return for 2012. Thus, if the question of fact as to whether petitioners had income subject to New York State tax is determined in the Division's favor, the notice would not be barred by a time limitation on assessment.

E. Petitioners' motion for summary determination is denied and a hearing will be scheduled in due course.

DATED: Albany, New York
October 13, 2022

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE