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 2013.	:	ORDER DTA NO. 830083

Petitioners, Askar Mukhitdinov[1] 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 2013.

On June 21, 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 August 3, 2022, after being granted an extension by which to file a response. The 90-day period for issuance of this order commenced on August 5, 2022. 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.

[1] Mr. Mukhitdinov's surname is listed as Moukhitdinov on some documents submitted in support of petitioners' motion for summary determination.

ISSUE

Whether petitioners' motion for summary determination should be granted.

FINDINGS OF FACT

1. On February 14, 2020, the Division of Taxation (Division) issued to petitioners, Askar Mukhitdinov and Sana Abeuova, a statement of proposed audit change for the year 2013 that stated, in part:

> "We do not have a record of a New York State income tax return on file for you. Section 6103(d) of the Internal Revenue Code allowed us to get information from the Internal Revenue Service. This information indicates that you had sufficient income to require the filing of a New York State return. We could not issue this statement before now because of the time needed to obtain and process the federal information.
>
> We used federal and departmental information to compute your tax as a New York State resident. In cases where the Internal Revenue Service provided us with information reported on the federal return, that information was used to compute your New York State tax."

2. The Division issued to petitioners a notice of deficiency, notice number L-051259626, dated July 29, 2020 (notice), asserting tax due in the amount of $126,298.00, plus interest and penalty, for the year 2013.

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

4. The Division filed its answer to the petition on January 6, 2021.

5. Petitioners filed the instant motion for summary determination on June 21, 2022. Petitioners contend that in the year 2013 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. Petitioners argue that "[t]he Treaty between the United States of America and The

Government of the Republic of Kazakhstan enacted under Article 28 and enacted January 1, 1996" (U.S. – Kazakhstan Tax Treaty) controls this matter. Because they were Kazakhstan citizens, living and working in Kazakhstan in the year 2013, petitioners claim that the U.S. – Kazakhstan Tax Treaty prohibited the assessment of tax for such year. Petitioners further argue that the notice for the year 2013 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 June 20, 2022, and exhibits attached thereto, and affidavits of petitioner Askar Mukhitdinov, dated May 25, 2022, Serge Rosenberg, dated May 23, 2022, Bigel Nugumova, dated May 23, 2022, and Raquel Lorenzo, dated May 2022.[2]

6. According to Mr. Mukhitdinov's affidavit, "[n]o pro-forma New York State income tax return was prepared for 2013 because my family and I lived and worked in Kazakhstan for this year." Mr. Mukhitdinov further states in the affidavit that he and his family were living and working abroad in 2013, that his wife resided with him and his children in Kazakhstan, and that the address that appears on his 2013 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.

7. Included with the exhibits submitted in support of petitioners' motion is their 2013 U.S. individual income tax return, form 1040 (2013 federal return), attached to which are various schedules, forms, statements, and worksheets. Page 1 of the 2013 federal return lists petitioners' home address as 845 U.N. Plaza, Apt. 9D, New York, NY 10017. Attached to the 2013 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.

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

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." Mr. Mukhitdinov responded "See Stmt 6." However, no statement 6 for form 2555 is attached to the 2013 federal return.

8. In opposition to petitioners' motion, the Division submitted an affirmation of its attorney, Christopher O'Brien, dated August 3, 2022, and an affidavit, dated July 27, 2022, of Georgianna Teta, a 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 tax return for the year 2013 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' 2013 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 income tax returns from 1999 to 2011, and 2014 to 2017, and then nonresident returns from 2018 to present, except for the years 2012[3] and 2013. She states that an IRS form 1040-NR for the year 2013 "would be the appropriate tax return to be filed by a taxpayer claiming to be a non-resident [sic] of the United

[3] A petition for the year 2012 is currently pending before the Division of Tax Appeals under DTA No. 830035.

States" for such year. Ms. Teta also states that Mr. Mukhitdinov's 2013 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 2013 IT-204-IP schedule K-1 for Mr. Mukhitdinov from the partnership is attached as an exhibit to Ms. Teta's affidavit and reports that Mr. Mukhitdinov earned income in the amount of $1,110,973.00, of which $650,308.00 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 (Rules).

B. A motion for summary determination may 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, therefore, as a matter of law, issue a determination in favor of any party" (20 NYCRR 3000.9 [b] [1]).

C. Section 3000.9 (c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "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" (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853 [1985], citing ***Zuckerman v City of New York***, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (***Glick & Dolleck, Inc. v Tri-Pac Export Corp.***, 22 NY2d 439, 441 [1968]; ***Museums at Stony Brook v Vil. of Patchogue Fire Dept.***, 146 AD2d 572, 573 [2d Dept 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 v City of New York***). 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]; ***Silliman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 404 [1957]). Failure to make such a 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 at 853).

D. Petitioners claim that the U.S. – Kazakhstan Tax Treaty governs this matter. Residence conditions applicable under the U.S. – Kazakhstan Tax Treaty are set forth in Article 4, which states, in relevant part, that:

> "1. For purposes of this Convention, the term 'resident of a Contracting State' means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature.
>
> a) However, this term does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.
>
> b) In the case of income derived by a partnership, trust, or estate, residence is determined in accordance with the residence of the person liable to tax with respect to such income.
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> 2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:
>
> a) he shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (center of vital interests)
>
> b) if the State in which he has his center of vital interests cannot be determined, or if he does not have a permanent home available to him in

> either State, he shall be deemed to be a resident of the State in which he has an [sic] habitual abode;
>
> c) if he has an [sic] habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a citizen;
>
> d) if each State considers him as its citizen or if he is a citizen of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement."

E. 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 the year 2013 he and his family did not have a New York residence and that he, his wife and children resided in Kazakhstan are contradicted by the first page of petitioners' 2013 federal return that lists a home address of 845 U.N. Plaza, New York, New York, and petitioners' form 2555, attached to their 2013 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, and that he maintained an unidentified home in the United States that was occupied by unidentified individuals.[4] Thus, the evidence submitted by petitioners in support of their motion shows that there are material and triable issues of fact.

F. In opposition to petitioners' motion, the Division also raises several issues of fact, including the New York address reported on petitioners' 2013 federal return, whether the U.N. Plaza address reported as the home address on the first page of the 2013 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 for the years 1999 through

[4] As noted in finding of fact 7, statement 6 for form 2555 was not attached to the 2013 federal return submitted with the motion papers. As such, issues of fact exist regarding the unidentified United States home, and the identity of the occupants of same.

2011, and 2014 through 2017, 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.

G. In addition to the material and triable issues of fact raised in conclusions of law E and F, the application of the conditions for residence set forth under Article 4 of the U.S. – Kazakhstan Tax Treaty also raise material and triable issues of fact. It is clear from all the documents submitted by both parties hereto that material facts are in dispute and contrary inferences may be drawn from undisputed facts, a full trial is warranted and the case should not be decided on a motion (***see Gerard v Inglese***). Accordingly, summary determination is not warranted in favor of petitioners.

H. With respect to petitioners' argument that the notice was issued beyond the statute of limitations for an assessment of tax for the year 2013, 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 the year 2013. 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.

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

DATED: Albany, New York
November 3, 2022

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE