

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

HOWARD AND CARRIE POLONETSKY

for an Award of Costs Pursuant to Article 41, § 3030 of
the Tax Law for the Year 2020.

ORDER
DTA NOS. 830572
AND 830606

Petitioners, Howard and Carrie Polonetsky, filed an application pursuant to article 41 of the Tax Law, seeking administrative costs under section 3030, for the year 2020.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michelle M. Helm, Esq., of counsel), filed its response to the application for costs and brought a motion, on June 2, 2022, for dismissal of the application pursuant to section 3000.9 (a) (1) (ii) and (vi) of the Tax Appeals Tribunal’s Rules of Practice and Procedure. Petitioners did not respond to the Division of Taxation’s motion by July 5, 2022, which date commenced the 90-day period for issuance of this order.

Based upon petitioners’ application for costs, the Division of Taxation’s response, and its motion papers and documents submitted, and all pleadings and documents submitted in connection with this matter, Donna M. Gardiner, Administrative Law Judge, renders the following order.

ISSUE

Whether this proceeding should be dismissed for a failure to state a cause for relief.

FINDINGS OF FACT

1. Petitioners, Howard and Carrie Polonetsky, filed a 2020 New York State nonresident income tax return, form IT-203, on February 18, 2021.

2. On March 23, 2021, the Division of Taxation (Division) sent a request for information to petitioners regarding their filed 2020 form IT-203.

3. On March 30, 2021, petitioners replied to the Division's request for additional information.

4. The Division issued a notice responding to petitioners' reply to inquiry, dated April 21, 2021, stating that it was adjusting the wages reported by petitioners and noted that additional tax was due.

5. A statement of proposed audit changes was issued to petitioners on May 19, 2021, that denied the refund reported on petitioners' 2020 form IT-203 and asserted additional tax due of \$1,103.54, plus penalty and interest.

6. On July 22, 2021, petitioners filed a petition with the Division of Tax Appeals, protesting the denial of its refund for the tax year 2020. This petition was assigned number 830572.

7. The Division issued a notice of deficiency (notice), dated August 11, 2021, bearing assessment number L-053308946, asserting tax due in the amount of \$1,103.54 plus penalty and interest for the tax year 2020.

8. On August 19, 2021, petitioners filed a petition specifically protesting the notice. This petition was assigned case number 830606.¹

¹ Although the Division of Tax Appeals processed two petitions for the notice issued for the tax year 2020, the first petition was filed prematurely since no statutory document was issued that had protest rights (*see Matter of Ballis*, July 2, 1998, citing *Matter of West Mtn. Corp. v New York Dept. of Taxation & Fin.*, 105 AD2d 989 [3d

9. On November 10, 2021, the Division filed its answers to both petitions.

10. On March 4, 2022, the Division filed a notice of cancellation of deficiency and discontinuance of proceeding (stipulation). Such stipulation cancelled the notice for the tax year 2020 and granted petitioners a refund in the amount of \$17,225.00 plus interest.

11. On April 1, 2022, an order of discontinuance was issued to petitioners and constitutes the final judgment in these matters for purposes of Tax Law § 3030.

12. Petitioners filed the instant application for costs in the amount of \$988.64 with the Division of Tax Appeals on April 7, 2022.

13. The Division issued a check, dated May 25, 2022, in the amount of \$988.64 for the full amount of costs requested by petitioners in their application.

14. Pursuant to an extension of time within which to respond to petitioners' application for costs, the Division filed its response on June 2, 2022 and made a motion to dismiss the application.

15. The affirmation of Michelle M. Helm, Esq., states that petitioners filed an application for costs in the amount of \$988.64, which amount was paid in full by the Division. Therefore, the Division states that the proceeding should be dismissed for lack of jurisdiction of the subject matter of the petition pursuant to 20 NYCRR 3000.9 (a) (1) (ii) and (vi) since there is no longer a justiciable issue to be determined. Attached to her affirmation is a copy of a check payable to petitioners from the State of New York Department of Taxation and Finance, Division of the Treasury, dated May 25, 2022, in the amount of \$988.64 accompanied by a one sheet certified

Dept 1984], *affd* 64 NY2d 991 [1985]). Therefore, there is a single notice before the Division of Tax Appeals which is the notice protested in the petition designated DTA#830606.

mail record that indicates a piece of mail addressed to petitioners was delivered to the Stuyvesant Plaza Post Office in Albany, New York. The certified mail record is postmarked May 31, 2022.

CONCLUSIONS OF LAW

A. The Division has moved for dismissal of the petition pursuant to Tax Law § 2006 (5) and 20 NYCRR 3000.9 (a) (1) (ii) and (vi) upon the grounds that there is no justiciable issue in controversy.

The Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules), provide, in pertinent part, that:

“(a) Motion to dismiss. (1) Grounds. A party may move to dismiss a petition on the grounds that:

(ii) the division of tax appeals lacks jurisdiction of the subject matter of the petition;

* * *

(vi) the pleading fails to state a cause for relief” (emphasis in original).

B. Petitioners did not respond to the Division’s motion for dismissal and, thus, they have presented no evidence to contest the facts as alleged in the affirmation submitted by the Division. Accordingly, such facts may be deemed admitted (*Matter of Perez*, Tax Appeals Tribunal, November 12, 2015, citing *Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]).

C. Petitioners’ application requested an award of costs in the amount of \$988.64, which amount was paid in full by the Division. Therefore, there is no longer any issue remaining.

D. Accordingly, the Division of Taxation's motion to dismiss the application for costs is granted.

DATED: Albany, New York
September 29, 2022

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE