

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KANDI L. MCFARLAND	:	ORDER DTA NO. 831074
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 2021.	:	

Petitioner, Kandi L. McFarland, 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 2021.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Colleen McMahon, Esq., of counsel), brought a motion dated September 8, 2023, seeking an order dismissing the petition pursuant to sections 3000.5 and 3000.9 (a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, did not respond to the Division of Taxation's motion. The 90-day period for the issuance of this order commenced on October 10, 2023. Based upon the Division of Taxation's motion papers, the affidavit and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Jessica DiFiore, Administrative Law Judge, renders the following order.

ISSUES

- I. Whether the petition should be dismissed for lack of subject matter jurisdiction.
- II. Whether the petition should be dismissed for failure to state a cause for relief.

FINDINGS OF FACT

1. Petitioner, Kandi L. McFarland, timely filed with the Division of Taxation (Division), a New York State resident income tax return, form IT-201, for 2021 (return), on or about April 11, 2022. On the return, petitioner reported wages of \$9,377.00 and unemployment compensation of \$17,198.00. She claimed a New York State earned income credit of \$410.00, New York State tax withheld of \$373.00 and reported that she owed \$79.00 in New York State income tax. Petitioner also prepared a claim for earned income credit, form IT-215, for 2021. On this form, petitioner reported that she claimed a federal earned income credit of \$1,434.00, that her tentative New York State earned income credit was \$430.00, and that after reducing the credit due to a \$20.00 household credit, her allowable New York State earned income credit was \$410.00. Petitioner did not remit the \$79.00 in income tax due.

2. On May 13, 2022, the Division issued to petitioner a statement of proposed audit change (SOPAC) stating that petitioner owed interest pursuant to Tax Law § 684 (a) because she underpaid the tax due, and that the Division imposed a penalty for late payment of the tax shown on the return pursuant to Tax Law § 685 (a) (2). The SOPAC also stated that the Division denied petitioner's earned income credit claimed because her earned income or federal adjusted gross income reported was more than the amount allowed for her filing status. The computation section of the SOPAC showed the addition of the interest and penalty and the disallowance of the New York State earned income credit, and recomputed petitioner's tax due to be \$489.00, plus interest and penalty.

3. On June 29, 2022, the Division issued to petitioner notice of deficiency L-055968698 for 2021, assessing tax due of \$489.00 plus interest and penalty, for a total balance due of \$503.61.

4. On or about July 22, 2022, petitioner filed a timely petition asserting that she protested the tax determination because the Department of Labor should have withheld more state taxes from her unemployment compensation. She also asserted that she had a severe financial hardship, reduced unemployment benefits due to overpayments, and was unemployed. In the section entitled “Notice/Assessment Number(s),” petitioner listed the notice being challenged as notice ID number L-055968698. Additionally, in the section entitled “Tax Determination,” petitioner stated that the amount of tax determined was \$489.00 and that the amount contested was \$503.61. Petitioner also attached a copy of the notice of deficiency.

5. On September 8, 2023, the Division filed the instant motion seeking the dismissal of the petition pursuant to 20 NYCRR 3000.5 and 3000.9 (a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). In support of the motion, the Division provided, in relevant part, the following documents: (i) an affirmation of Colleen McMahon, an attorney in the Office of Counsel of the Division, dated September 8, 2023; (ii) an affidavit of Oscar Boomer II, a Tax Specialist II in the Office of Tax Processing at the Division, sworn to on September 5, 2023; (iii) a copy of petitioner’s return; (iv) a copy of petitioner’s claim for earned income credit; (v) the SOPAC issued to petitioner on May 13, 2022; and (vi) notice of deficiency L-055968698.

6. In her affirmation, Ms. McMahon states that in response to the statement on the petition requesting petitioner provide each error of the Commissioner of Taxation and Finance, petitioner stated that the New York State Department of Labor (DOL) failed to take out the correct amount of taxes and that she had a severe financial hardship. Ms. McMahon then asserts that because the notice was issued due to petitioner’s failure to pay self-assessed tax and because she was denied the earned income credit because her income was too high to qualify, petitioner failed to address any issues relating to the notice and, therefore, failed to state a cause for relief

that may be granted by the Division of Tax Appeals. Ms. McMahon also states that petitioner failed to indicate any error made by the Division, that petitioner implicitly acknowledged that she owed taxes because she stated the DOL should have taken more out, and that it was unclear how petitioner's current employment status is relevant to any error made by the Division. Ms. McMahon asserts that because petitioner failed to contest the reasonableness of the notice or argue that the computation of the assessment was incorrect, she failed to state a cause for relief and/or the Division of Tax Appeals lacks jurisdiction over the petition.

7. In his affidavit, Oscar Boomer II states that petitioner filed a return for 2021 claiming an earned income credit of \$410.00 and self-assessing income tax in the amount of \$79.00. He avers that the tax was not paid when the return was filed. He then reiterates the information provided for in the SOPAC, namely, that petitioner was found not to be entitled to the earned income credit because her income was too high, and that as a result of that denial and the failure to pay the self-assessed \$79.00, petitioner was found to have underpaid tax due and was assessed \$489.00 in tax, plus interest and penalty.

CONCLUSIONS OF LAW

A. A motion to dismiss a petition may be granted if the Division of Tax Appeals lacks jurisdiction over the subject matter of the petition (*see* § Tax Law 2006 [5] [ii]; 20 NYCRR 3000.9 [a] [1] [ii]). Tax Law § 689 (b) provides that a petition protesting a notice of deficiency may be filed within 90 days of the issuance of the notice. Here, the Division issued the notice of deficiency on June 29, 2022. As petitioner filed a petition protesting the notice on July 22, 2022, well within 90 days after the notice of deficiency was issued, the Division of Tax Appeals has subject matter jurisdiction to consider the merits of this case.

B. A motion to dismiss a petition may also be granted if the petition fails to state a cause for relief (*see* Tax Law § 2006 [5] [vi]; 20 NYCRR 3000.9 [a] [1] [vi]). The Rules require that petitions filed in the Division of Tax Appeals state:

“in clear and concise terms, each and every error which the petitioner alleges has been made by the division, bureau or unit (e.g. in issuing a notice of deficiency or in denying a refund application), together with a statement of the facts upon which the petitioner relies to establish each said error . . .” (20 NYCRR 3000.3 [b] [5]).

However, motions filed pursuant to 20 NYCRR 3000.9, unless otherwise in conflict with the Rules, are “subject to the same provisions as motions filed pursuant to section [3211] of the CPLR . . .” (20 NYCRR 3000.9 [c]). The Division bases its motion in this matter on the grounds that the petition fails to state a cause for relief pursuant to 20 NYCRR 3000.9 (a) (1) (vi). This provision is comparable to CPLR 3211 (a) (7), which authorizes a party to move to dismiss a cause of action on the grounds that “the pleading fails to state a cause of action . . .” A motion to dismiss under CPLR 3211 (a) (7) should only be granted where, even viewing the allegations as true, the plaintiff still cannot establish a cause of action (*see Matter of Medical Capital Corp.*, Tax Appeals Tribunal, July 25, 2013). The pleading should be given a liberal construction, and the plaintiff must receive the benefit of every possible inference, including the assumption that the facts alleged in the complaint are true, and the only question being whether the facts as alleged fit within any cognizable legal theory (*see id.*, citing *High Tides, LLC v DeMichele* (88 AD3d 954, 956-57 [2d Dept 2011] citing CPLR 3026, *EBCI, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005], and *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Sassi v Mobile Life Support Servs., Inc.*, 37 NY3d 236, 239 [2021])).

The arguments advanced in the petition are not entirely clear. However, providing petitioner the benefit of every possible favorable inference, and because she stated that she

protests the determination that tax is due, listed the notice of deficiency as the statutory notice being challenged and contested the amount stated therein, and attached the notice of deficiency, petitioner has sufficiently challenged the notice of deficiency and believes she is entitled to the earned income credit with no tax due. Accordingly, a controversy exists between petitioner and the Division over the notice of deficiency.

C. The Division's motion to dismiss is denied, and a hearing will be scheduled before the Division of Tax Appeals in due course.

DATED: Albany, New York
November 30, 2023

/s/ Jessica DiFiore
ADMINISTRATIVE LAW JUDGE