STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JON AND SUSAN NAGEL	:	ORDER DTA NO. 823705
for Redetermination of Deficiencies or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 2003 and 2004.	:	

Petitioners, Jon and Susan Nagel, filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 2003 and 2004.

On October 29, 2010, petitioners, appearing pro se, filed a motion seeking summary determination pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b). Accompanying the motion was the affidavit of Jon Nagel, dated October 28, 2010, and annexed exhibits in support of the motion. The Division of Taxation, appearing by Daniel Smirlock, Esq. (Kevin R. Law, Esq., of counsel), submitted an affirmation in opposition to petitioners' motion on November 30, 2010, and thus the 90-day period for issuance of this order commenced on such date. After due consideration of the affidavit, annexed exhibits, affirmation, and all pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following order.

ISSUE

Whether notices of deficiency issued to petitioners should be cancelled based upon petitioners' allegations of irregularity in the conduct and outcome of a conciliation conference with the Division of Taxation's Bureau of Conciliation and Mediation Services.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued notices of deficiency dated February 23, 2007 (Assessment ID No. L-028282493-5 pertaining to the year 2003) and March 19, 2007 (Assessment ID No. L-027101255-2 pertaining to the year 2004), asserting additional New York State and New York City personal income taxes due from petitioners, Jon A. Nagel and Susan E. Nagel, in the amounts of $24,747.45 (for 2003) and $8,630.83 (for 2004), plus interest.

2. Petitioners challenged these notices by filing a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS).

3. A conciliation conference was held on March 12, 2009, at which the Division was represented by a tax technician and at which petitioners appeared pro se. The conciliation conferee who conducted the conference thereafter retired from state service and, as a consequence, did not issue a conciliation order concerning the subject notices of deficiency. Rather, approximately one year later and apparently upon review of the information furnished during the conciliation conference, the conferee's supervisor issued two conciliation orders, each dated March 26, 2010, with respect to the two notices of deficiency, as follows:

> a) with respect to Assessment ID No. L-028282493-5 (pertaining to 2003), Conciliation Order CMS No. 219542 reduced the amount of tax asserted via the Notice of Deficiency from $24,747.45 to $18,588.00, plus interest.[1]
>
> b) with respect to Assessment ID No. L-027101255-2 (pertaining to 2004), Conciliation Order CMS No. 219813 sustained the amount of tax asserted via the Notice of Deficiency.

4. On June 21, 2010, petitioners continued their challenge by filing a petition with the Division of Tax Appeals. In addition to challenging the amount of tax asserted by the notices of

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[1] The premise upon which the noted reduction was made (allowance of a capital loss claimed on petitioners' tax return for 2003) is referenced in correspondence from the conferee's supervisor to petitioners dated February 9, 2010 and February 19, 2010, respectively

deficiency (as reduced for 2003 by the Conciliation Order pertaining to that year), petitioners assert that there were certain irregularities in the conciliation conference proceedings that should result in cancellation of the notices. In particular, petitioners maintain that because the conciliation conferee who conducted the conference did not write the conciliation orders that were issued, petitioners were "precluded" from having a conciliation conference. In this regard, petitioners maintain that the conciliation orders that were issued by the conferee's supervisor did not accurately represent what transpired during the conference.

5. Petitioners' complaint centers upon their claimed "distinct impression" that the conciliation conferee would contact petitioners "if there was any additional point of taxation that was not being resolved in favor of [petitioners]," and that absent such contact all issues had been resolved to the conferee's satisfaction in petitioners' favor. Since the conferee did not contact petitioners subsequent to the March 12, 2009 conference, petitioners claim to have anticipated the issuance of conciliation orders cancelling the notices of deficiency. In turn, however, the conciliation orders issued to petitioners clearly did not match petitioners' distinct impression or their expectation of resolution of the matters by cancellation of the notices.

6. Petitioners assert, on this motion, that they would not have participated in the conciliation conference process had they known that the conciliation orders resulting therefrom would or could be written by anyone other than the conciliation conferee who conducted the conference. Petitioners maintain that this departure from the expected course of conduct (notwithstanding the retirement of the conciliation conferee), coupled with the issuance of conciliation orders that did not comport with petitioners' expectation, constitutes a failure of due process sufficient to require cancellation of the subject notices of deficiency.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

> Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. (20 NYCRR 3000.9[b][1]; ***see also*** Tax Law § 2006[6].)

B. The standard in reviewing a motion for summary determination is well established. An administrative law judge is initially guided by the following regulation:

> The motion shall 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. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. (20 NYCRR 3000.9[b][1]; ***see also*** Tax Law § 2006[6].)

Furthermore, a motion for summary determination made before the Division of Tax Appeals is "subject to the same provisions as motions filed pursuant to section 3211 of the CPLR. . . " (20 NYCRR 3000.9[c]; ***see also Matter of Service Merchandise, Co.***, Tax Appeals Tribunal, January 14, 1999). Summary determination is a "drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (***Moskowitz v. Garlock***, 23 AD2d 943, 259 NYS2d 1003, 1004 [1965]; ***see Daliendo v. Johnson***, 147 AD2d 312, 543 NYS2d 987, 990 [1989]). Because it is the "procedural equivalent of a trial" (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572, 536 NYS2d 177, 179 [1989]), undermining the notion of "a day in court," summary determination must be used sparingly (***Wanger v. Zeh***, 45 Misc 2d 93, 256 NYS2d 227, 229 [1965], ***affd*** 26 AD2d 729 [1966]). 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 at 317, 543 NYS2d at 990). If any material facts are in dispute, if the existence of a triable issue of fact is "arguable," or if contrary inferences may be reasonably drawn from undisputed facts, the motion must be denied (***Gerard v. Inglese***, 11 AD2d 381, 206 NYS2d 879, 881 [1960]).

C. Petitioners maintain that their motion should be granted and the notices of deficiency canceled because they chose to participate in the conciliation conference process, were left with the impression that they would receive conciliation orders from the conciliation conferee resolving matters entirely in their favor, but instead received conciliation orders that were not issued by the conciliation conferee who conducted the conference and that sustained the notices (with only one adjustment in petitioners' favor, as described). Petitioners argue that this departure from the expected procedure constitutes a due process failure which should result in cancellation of the subject notices.

D. Petitioners' motion for summary determination and cancellation of the notices of deficiency based upon the manner of conduct and the outcome of conciliation conference proceedings must be denied. The Bureau of Conciliation and Mediation Services is established within the Division of Taxation and is responsible "for providing conciliation conferences" (Tax Law § 170[3-a][a]). Such conferences are provided at the sole option of the taxpayer, are not quasi-judicial in nature and are not governed by "procedures substantially similar to those used in a court of law" (***Ryan v. New York Telephone Co.***, 62 NY2d 494, 478 NYS2d 823 [1984]). The conciliation conference is not an "adjudicatory proceeding" as defined in Article 3 of the State Administrative Procedure Act (SAPA). Specifically, the conciliation conference process does not comply with record requirements for adjudicatory proceedings under SAPA § 302 (conciliation conferences are neither electronically nor stenographically recorded) and conciliation orders do

not comply with requirements for decisions, determinations, and orders under SAPA § 307 (conciliation orders contain neither findings of fact nor conclusions of law). The conciliation conference process is, in essence, a settlement forum (***see*** 20 NYCRR 4000.5[c][1][i]), and discussions and proposed adjustments made at conciliation conferences are in the nature of settlement negotiations and may not be considered as precedent or be given any force or effect in any subsequent administrative proceeding (Tax Law § 170[3-a][f]; ***see Matter of Petak v. Tax Appeals Tribunal,*** 217 AD2d 807 [1995]; ***Matter of Sandrich, Inc.***, Tax Appeals Tribunal, April 15, 1993).

E. Tax Law § 170(3-a)(e) provides that:

> [a] conciliation order . . . shall, in the absence of a showing of fraud, malfeasance or misrepresentation of a material fact, be binding upon the department and the person who requested the conference, except such order shall not be binding on such person if such person petitions for the hearing provided for under this chapter within ninety days after the conciliation order is issued, notwithstanding any other provision of law to the contrary.

Petitioners here elected to petition for a hearing in the Division of Tax Appeals. In light of the foregoing statutory language, the conciliation order issued with respect to 2003 is binding upon the Division to the extent of the adjustment agreed to therein, which reduced the asserted deficiency for such year. At the same time, however, there is no authority for an administrative law judge to pass on petitioners' claims with regard to what transpired at the conciliation conference, or to consider the validity of the claim that all matters in issue had been resolved in petitioners' favor. The result of the Division's examination of information, including the documents and explanations allegedly furnished by petitioners during the course of the conciliation conference, appears to have fallen short of being acceptable to the Division to resolve the matters and thus short of the result desired by petitioners. The very issuance of the

two conciliation orders, notwithstanding that the same were not issued by the conciliation conferee who conducted the conciliation conference and notwithstanding petitioners' allegation of their distinct impression that all matters had been resolved in their favor, makes clear the Division's position that such matters have not been so resolved.

F. Whether the presentation of additional documents or other evidence might overcome the Division's conclusions regarding the tax issues presented for the years in issue and support further adjustment or cancellation of part or all of the notices remains a factual dispute to be resolved at hearing. From all the evidence submitted on this motion, there is no doubt that material and triable issues of fact exist as to the tax in question, and summary determination will not be granted.

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

DATED: Troy, New York
February 24, 2011

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE