

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>JUNG J. YIM</b>	:	DECISION
	:	DTA NO. 829864
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income Tax	:	
under Article 22 of the Tax Law and the Administrative	:	
Code of the City of New York for the Year 2010 and a	:	
Review of a Notice of Proposed Driver's License	:	
Suspension Referral under Tax Law § 171-v.	:	

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Petitioner, Jung J. Yim, filed an exception to the determination of the Administrative Law Judge issued on December 23, 2020. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Hannelore Smith, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was denied. The six-month period for the issuance of this decision began on April 12, 2021, the date petitioner's reply brief was received.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether the Division of Taxation's motion to dismiss the petition or for summary determination should be granted.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except that we have

modified findings of fact 3 through 5 to better reflect the record. As so modified, the Administrative Law Judge's findings of fact appear below.

1. Petitioner, Jung J. Yim, filed a petition with the Division of Tax Appeals on February 14, 2020. The petition protests: (i) a notice of proposed driver's license suspension dated December 18, 2019, and (ii) a consolidated statement of tax liabilities, also dated December 18, 2019, and apparently issued with the notice of proposed driver's license suspension. The subject of the consolidated statement of tax liabilities is assessment number L-042993413 for personal income tax due for the tax year 2010.

2. The Division of Taxation (Division) filed a motion, dated August 28, 2020, seeking dismissal of the petition or summary determination in its favor pursuant to 20 NYCRR 3000.5 and 3000.9 (a) and (b). In the motion, the Division contended that petitioner has not raised any of the grounds provided under Tax Law § 171-v for challenging the proposed suspension of her driver's license. The Division noted that assessment number L-042993413, the assessment number listed on the consolidated statement of tax liabilities and challenged in the petition, was previously protested by the filing of a petition and that the four-month statutory time period in which petitioner may have challenged the Tax Appeals Tribunal's (Tribunal's) related decision had elapsed without petitioner filing an appeal. The Division asserted that petitioner is barred from relitigating the validity of notice L-042993413.

3. The Administrative Law Judge found that petitioner did not respond to the Division's motion for summary determination. In response to the Division's motion, however, petitioner did file a duplicate of the petition she filed with the Division of Tax Appeals on February 14,

2020 (*see* finding of fact 1).<sup>1</sup>

4. During a pre-hearing conference on November 24, 2020, held among petitioner, the Division, and the Administrative Law Judge, the Division advised that it had cancelled the December 18, 2019 notice of proposed driver's license suspension issued to petitioner. By letter dated December 23, 2020, the Division confirmed the cancellation.

5. Petitioner previously filed a petition with the Division of Tax Appeals challenging a notice of deficiency bearing assessment number L-042993413. That petition was assigned DTA No. 827687. Following a hearing, an Administrative Law Judge issued a determination that denied the petition and sustained the notice of deficiency. Petitioner filed an exception to the determination with the Tax Appeals Tribunal. The Tribunal dismissed the exception as late filed. Petitioner did not file an article 78 proceeding with the Appellate Division to appeal the Tribunal's decision.

#### ***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge observed that, as the Division cancelled the notice of proposed driver's license suspension, the only remaining issue concerns petitioner's protest of assessment number L-042993413. The Administrative Law Judge noted the well-established standard for granting a motion for summary determination; that is, the movant must establish that there are no material facts in dispute and entitlement to judgment as a matter of law. The Administrative Law Judge granted the Division's motion for summary determination because petitioner's previous protest of assessment number L-042993413 had been resolved by this Tribunal. According to the Administrative Law Judge, petitioner is not permitted to relitigate the

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<sup>1</sup> The petition filed on February 14, 2020 is dated February 14, 2020. The petition filed in response to the Division's motion is dated October 28, 2020. This appears to be the only difference between the two.

validity of that assessment. In reaching this conclusion, the Administrative Law Judge found that the four-month time period to challenge the Tribunal's decision had lapsed.

### ***ARGUMENTS ON EXCEPTION***

Petitioner asserts that the Administrative Law Judge erroneously found that there are no material and triable issues of fact in the present matter. She disputes the Administrative Law Judge's findings that she did not respond to the Division's motion; that she did not request a conciliation conference with the Bureau of Conciliation and Mediation Services; and that she did not raise new issues of material fact regarding her residency status for the 2010 tax year.

Petitioner also contends that the Administrative Law Judge wrongly found that she had exhausted her rights to administrative or judicial review with respect to the assessment. In support, she points to an executive order issued by former Governor Cuomo in response to the COVID-19 pandemic by which certain procedural deadlines were tolled. Petitioner thus contends that the time limit to seek judicial review of the Tribunal's March 16, 2020 decision had not expired as of the December 23, 2020 issuance of the Administrative Law Judge's determination.

Finally, petitioner contends that the motion was improperly granted because the Division garnished her wages between May 2018 and June 2019. As petitioner notes, this was prior to the March 16, 2020 Tribunal decision referenced above.

The Division agrees with the Administrative Law Judge that there are no relevant facts in dispute in the present matter regarding the fixed and final nature of the assessment under protest and that, accordingly, the determination should be sustained.

### ***OPINION***

As noted, the Division brought a motion for dismissal of the petition or for summary

determination (*see* 20 NYCRR 3000.9 [a], [b]). With the Division's cancellation of the notice of proposed driver's license suspension, the only remaining issue involves the validity of petitioner's protest of assessment number L-042993413 as listed in the consolidated statement of tax liabilities. This is a question of subject matter jurisdiction. Accordingly, the Division's motion is properly treated as a motion to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (1) (ii).

Although the Administrative Law Judge treated the Division's motion as one for summary determination, this is a harmless error, as the standard for granting a motion to dismiss for lack of subject matter jurisdiction is the same as that for a summary determination motion (*see Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012). Such a motion "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" (20 NYCRR 3000.9 [b] [1]). Additionally, a motion to dismiss or for summary determination is subject to the same provisions as a motion for summary judgment made pursuant to CPLR 3212 (20 NYCRR 3000.9 [c]). The moving party has the burden to show entitlement to such an accelerated determination (*Matter of Panco Equip. Corp.*, Tax Appeals Tribunal, May 24, 2021, *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The Division has met its burden here. Petitioner previously filed a petition protesting a notice of deficiency bearing assessment number L-042993413, the assessment number listed on the consolidated statement of tax liabilities and challenged in the petition in the present matter. Following a hearing, an Administrative Law Judge issued a determination that denied the petition and sustained the notice of deficiency (*Matter of Yim*, Division of Tax Appeals, June 27, 2019). Such a determination finally decides all matters in controversy unless a timely exception

is taken (Tax Law § 2010 [4]). This Tribunal issued a decision on March 16, 2020 that dismissed petitioner's exception to the previous determination as untimely filed (*Matter of Yim*, Tax Appeals Tribunal, March 16, 2020). A Tribunal decision "shall finally and irrevocably decide all issues" raised in a Division of Tax Appeals proceeding unless the petitioner timely petitions for judicial review pursuant to CPLR article 78 (Tax Law § 2016). A party may also bring a motion for reargument under our rules of practice and procedure to request that the Tribunal reconsider a decision (20 NYCRR 3000.16 [c]). These are the only procedures by which a Tribunal decision may be challenged. Accordingly, as petitioner essentially seeks to contest the previous determination and decision by filing another petition contesting the same assessment, her petition must be dismissed (*see Matter of Mostovoi*, Tax Appeals Tribunal, May 23, 2019 [petitioner cannot relitigate the validity of an assessment which has been the subject of a prior proceeding]). As we have stated in a related context, "[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final" (*Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991). Applying that principle to the present matter requires that we uphold the integrity of our Rules of Practice and Procedure and thereby uphold the integrity and finality of our determinations and decisions.

Contrary to petitioner's contention, it is irrelevant to the foregoing conclusion whether the statute of limitations to bring an article 78 proceeding was open or expired as of the date of the Administrative Law Judge's determination.<sup>2</sup>

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<sup>2</sup> Petitioner cites an Executive Order issued by former Governor Cuomo in response to the COVID-19 pandemic in support of her contention that the statutory four-month limitations period for the filing of an article 78 proceeding to appeal the March 16, 2020 decision in the previous matter was tolled as of March 20, 2020 and remained open as of the December 23, 2020 determination in the present matter (*see* Executive Order [Cuomo] No. 202.8 [March 20, 2020]). That Executive Order tolled procedural deadlines for commencing or filing certain civil actions or proceedings and was revised and extended several times in subsequent Executive Orders. The tolling was lifted and was no longer in effect as of November 4, 2020 (*see* Executive Order [Cuomo] No. 202.72 [November 3, 2020]).

The issues of fact that petitioner seeks to raise in her exception are also not relevant to the foregoing conclusion. While the issue of whether petitioner responded to the Division's motion might seem significant at first (*see Kuehne & Nagel v Baiden*, 36 NY2d 539 [1975] [respondent's failure to respond to summary determination motion deemed a concession that no question of fact requiring a hearing exists]), considering that petitioner's response was a duplicate of her petition, the original of which was reviewed by the Administrative Law Judge and the relevant substance of which was to contest the previously protested assessment number L-042993413, it is clear that this does not present a material issue of fact here. Petitioner's objection to the Division's comment in its motion papers below that she did not request a conciliation conference in the present matter is plainly irrelevant, as this fact has no bearing on whether assessment number L-042993413 was previously adjudicated. Additionally, issues of fact pertaining to petitioner's residency status for the 2010 tax year are irrelevant in the present proceeding, as all issues regarding such status were resolved by the determination and decision in *Matter of Yim*.

Additionally, petitioner's complaint regarding the Division's garnishment of petitioner's wages between May 2018 and June 2019 do not provide a basis to reverse the determination, as this Tribunal lacks statutory authority to review the Division's collection activities (*see Matter of Pavlak*, Tax Appeals Tribunal, February 12, 1998).

Finally, we note that an equally valid basis upon which to have brought a motion and to dismiss the present petition is that it protests a consolidated statement of tax liabilities. We have

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As we have determined that the status of the limitations period to commence an article 78 proceeding with respect to the March 16, 2020 decision is irrelevant in the present matter, we need not consider whether petitioner's claim that the article 78 limitations period was open is correct. Petitioner has offered no evidence and does not claim that she ever commenced an article 78 proceeding to contest the March 16, 2020 decision.

held that “a statement of consolidated tax liabilities does not confer jurisdiction on this Tribunal to consider the substantive merits of a taxpayer’s protest” (*Matter of Mostovoi*). A petition protesting such a statement is thus properly dismissed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jung J. Yim is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Jung J. Yim is dismissed.

DATED: Albany, New York  
October 7, 2021

/s/ Anthony Giardina  
Anthony Giardina  
President

/s/ Dierdre K. Scozzafava  
Dierdre K. Scozzafava  
Commissioner

/s/ Cynthia M. Monaco  
Cynthia M. Monaco  
Commissioner