

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SANDREA D. ROBERTSON : **ORDER**
 : **DTA NO. 825435**
for Redetermination of a Deficiency 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 Year 2011. :
:

Petitioner, Sandra D. Robertson, filed a petition for redetermination of a deficiency 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 year 2011.

Petitioner, by her representative, EA Accountancy Lane, Ltd. (Waverly Lane, Jr., EA), brought a motion dated November 29, 2013, seeking an order for summary determination in favor of petitioner pursuant to section 3000.9(b) of the Tax Appeals Tribunal's Rules of Practice and Procedure. The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michelle M. Helm, Esq., of counsel), filed a response in opposition to petitioner's motion, by its due date of December 30, 2013, at which time the 90-day period for the issuance of this determination commenced. After due consideration of the affidavit and documents presented by petitioner and the Division of Taxation, Catherine M. Bennett, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner's motion for summary determination concerning her 2011 refund based upon a dependent care credit should be granted.

FINDINGS OF FACT

1. The petition as originally filed by petitioner, Sandra Robertson, challenged a disallowance notice issued by the Division of Taxation (Division) for tax year 2011, dated September 21, 2012, denying petitioner's dependent care credit in the amount of \$2,223.00. The notice indicated that the Division had previously requested information needed to support the dependent care credit, and the Division had not been satisfied with the documentation supplied by petitioner, characterizing it as incomplete or insufficient.

2. Petitioner makes this motion for summary determination asserting that the requirements for claiming and proving the dependent care credit have been met, and petitioner is entitled to a refund for 2011.

3. The Division's response to the motion includes the affidavit of Cindy Gemmett, an Income Tax Technician II with the Audit Division of the New York State Department of Taxation and Finance, whose responsibilities include reviewing personal income tax returns, conducting audits and processing refund claims. Ms. Gemmett's affidavit outlines the Division's actions concerning petitioner's 2011 personal income tax return, as follows:

- a. An initial inquiry into petitioner's return took place in June 2012 when the 2011 return was selected for review.
- b. The Division sent an Account Adjustment Notice informing petitioner that all of the credits on petitioner's return were allowed except for the dependent care credit in the amount of \$2,223.00.
- c. The Division requested additional information from petitioner in correspondence dated June 18, 2012.

d. Petitioner provided several documents in support of her position that she was entitled to the credit, including a handwritten statement from Onika Lewis dated July 18, 2012, copies of birth certificates, and a completed Form DTF-973.74 that indicated that petitioner paid \$6,500.00 to Onika Lewis at a Bronx, New York, address.

e. The Division reviewed the documentation provided and concluded that the daycare expenses reported on petitioner's return were unverifiable. In addition, there were discrepancies with the name of the daycare provider given and the amounts paid to the provider.

f. The Division notified petitioner by correspondence dated September 21, 2012, that the dependent care credit and petitioner's remaining refund were disallowed.

g. Since the matter has been before the Division of Tax Appeals, petitioner has submitted additional documentation that was reviewed by Ms. Gemmett. The additional documentation consisted of receipts and a letter of explanation from petitioner's representative. The Division identified additional inconsistencies in this documentation, and the Division did not agree to issue the refund to petitioner.

SUMMARY OF THE PARTIES' POSITIONS

4. Petitioner maintains that she has carried her burden of proof in this matter and should be granted summary determination, since there are no material and triable issues of fact.

5. The Division argues that summary determination as a matter of law should be denied, since there are numerous questions of fact that are arguable and other facts requiring clarification.

CONCLUSIONS OF LAW

A. A motion for summary determination may 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 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]).

Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides

that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to Civil Practice Law and Rules § 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 [1980]). Inasmuch 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 v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572 [1989]).

B. The parties are not in agreement that the material facts as presented support petitioner’s claim for her 2011 dependent care credit and, thus, her refund. Accordingly, summary determination is not an appropriate vehicle to determine the merits of this matter and, as a matter of law, must be denied.

C. Petitioner’s motion for summary determination is denied and a hearing will be scheduled before the Division of Tax Appeals in due course.

DATED: Albany, New York
March 13, 2014

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE