

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>BRIAN L. BURKARD</b>	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 850256
New York State and New York City Personal Income	:	
Taxes under Article 22 of the Tax Law and the	:	
Administrative Code of the City of New York for the	:	
Year 2019.	:	

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Petitioner, Brian L. Burkard, 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 Administrative Code of the City of New York for the year 2019.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Maria Matos, Esq., of counsel), brought a motion on May 7, 2024, seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, did not file a response by June 6, 2024, which date commenced the 90-day period for the issuance of this determination.

Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Jennifer L. Baldwin, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation has established that no material facts exist such that summary determination may be granted in its favor.

***FINDINGS OF FACT***

1. On March 7, 2022, petitioner, Brian L. Burkard, filed form IT-201, New York State resident income tax return, for tax year 2019 (2019 return). The 2019 return is signed by petitioner and dated March 6, 2022. In relevant part, petitioner reported federal and New York adjusted gross income of \$11,980.00, New York State tax of \$498.00, New York City resident tax of \$122.00, and New York City school tax credit (fixed and rate reduction amounts) of \$84.00, for an amount owed of \$536.00. Petitioner did not include any payment with his 2019 return.

2. On April 12, 2022, the Division of Taxation (Division) issued a statement of proposed audit change, bearing assessment ID L-055609495, for tax year 2019 (statement) asserting that petitioner owes tax in the amount of \$156.00, plus interest and penalties. The statement explained that the New York State tax petitioner reported on his 2019 return reflected a computational error and the New York State household credit he claimed was lower than the amount permitted by the Tax Law based on his filing status, federal adjusted gross income and dependent exemptions reported, and that his return was adjusted to reflect these changes. The statement also informed petitioner that his return was adjusted to provide the maximum New York City household and school tax credits allowed. The statement notified petitioner that because he underpaid his tax, he owed interest pursuant to Tax Law § 684 (a) from the due date of the 2019 return.<sup>1</sup> Finally, the statement explained that penalties were imposed pursuant to Tax Law § 685 (a) (1) and (2) for late filing and late payment of the tax shown on the 2019 return.

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<sup>1</sup> In March 2020, the Division announced that personal income tax returns and related tax payments for tax year 2019, originally due on April 15, 2020, would be due on July 15, 2020 (*see* notice N-20-2, announcement regarding relief from certain filing and payment deadlines due to the novel coronavirus, COVID-19).

Specifically, the Division computed New York State tax of \$159.00 and allowed petitioner a New York State household credit of \$45.00. The Division computed New York City resident tax of \$122.00 and allowed petitioner a New York City household credit of \$10.00 and a New York City school tax credit (fixed and rate reduction amounts) of \$70.00.

3. On May 31, 2022, the Division issued a notice of deficiency, bearing assessment ID L-055609495 (notice), asserting that petitioner owes tax in the amount of \$156.00, plus interest and penalties, for tax year 2019. The notice also indicated that petitioner has other unpaid tax notices in the amount of \$6,024.72 as of the date of the notice.

4. Petitioner responded to the notice by letter, dated July 18, 2022, stating that he has been on disability since April 2022 and, after making child support payments in the amount of \$5,250.00, he has \$775.00 left on which to live.

5. Petitioner filed a timely petition with the Division of Tax Appeals on August 18, 2022. In section V of the petition, petitioner references the notice. In section VII, petitioner indicates that the amount of tax determined and the amount of tax contested is \$6,024.72. In section VIII of the petition, petitioner states the following:

“- I’m a 63 year old [sic] legally blind in one eye, forced into semi-retirement, and on SSDI as of April 1, 2022. After child support pilfers my monthly SSDI I’m left with \$781.00 to live on. My CSE monthly arrears is \$5,250.

- I have been plundered for 7 years fraudulently. I am being systematically murdered by my own gov’t. I thought a gov’t is suppose [sic] to protect it’s [sic] citizens – not route them into courthouses to be pilfered into destitution?

- I had to file taxes because it was required for my daughters to attend their schools. Now I’m being threatened by CSE and NYST&F. I’ve been living on couches in friends [sic] apartments to survive. I own nothing at this point, and am being forced into wondering what is coming next? Nothing good I’m sure!”

6. Accompanying the Division’s motion is the affirmation of Maria Matos, dated May 7, 2024, with attached exhibits. In her affirmation, Ms. Matos asserts that “[i]t is undisputed that

[p]etitioner late filed his return on March 7, 2022, and owes back taxes for tax year 2019.

Assuming the facts are true, the petition fails to assert any legal or factual basis demonstrating why the subject Notice of Deficiency issued by the Division for tax year 2019 should be set aside.” Therefore, Ms. Matos contends that “[a]s there are no material issues of fact and the petition fails to state a cause for relief, the Division is entitled to Summary Determination in the instant case as a matter of law.”

7. Petitioner did not file a response to the Division’s motion.

### ***CONCLUSIONS OF LAW***

A. As noted, the Division brings a motion for summary determination under section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). A motion for summary determination “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]).

B. Section 3000.9 (c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 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, 562 [1980]). 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, 441 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572, 573 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences

may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v Inglese*, 11 AD2d 381, 382 [2d Dept 1960]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], citing *Zuckerman v City of New York*, 49 NY2d at 562).

C. Petitioner did not respond to the Division’s motion. As such, petitioner is deemed to have conceded that no question of fact requiring a hearing exists (*see John William Costello Assoc. v Standard Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]; *Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]). Furthermore, as petitioner has presented no evidence to contest the facts alleged in the Division’s motion papers, the facts alleged therein are deemed admitted (*see Whelan v GTE Sylvania*, 182 AD2d at 449, citing *Kuehne & Nagel v Baiden*, 36 NY2d at 544).

D. Petitioner late filed his 2019 return, reporting that he owed \$536.00 in tax, but failing to provide any payment with his return. The Division recomputed petitioner’s 2019 return, providing the proper amount of tax due for petitioner’s taxable income and allowing petitioner certain credits to which he was entitled but did not claim. All in all, the Division determined that petitioner owed much less tax than petitioner himself reported as due. Petitioner then filed a petition contesting an amount of tax due many times more than that asserted in the notice<sup>2</sup> in which he does not dispute that he owes tax but claims, in essence, that he is unable to pay. Petitioner has not presented any evidence or even argument that the statutory notice is incorrect

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<sup>2</sup> While the notice indicates that petitioner has other unpaid tax notices totaling \$6,024.72, petitioner did not include any other statutory notice (but for the subject notice asserting \$156.00 in tax due, plus interest and penalties) with his petition and, therefore, the Division of Tax Appeals is without jurisdiction to consider them (*see Matter of Richardson*, Tax Appeals Tribunal, November 17, 2022).

(*see* Tax Law § 689 [e]; 20 NYCRR 3000.15 [d] [5]). Furthermore, the Division of Tax Appeals does not have authority to cancel a notice of deficiency based on the difficult circumstances petitioner has endured or his current financial situation (*see Matter of Williams*, Tax Appeals Tribunal, September 1, 1994 [wherein the Tax Appeals Tribunal determined that it lacked statutory authority to consider an offer in compromise]). Accordingly, the facts are undisputed and a determination may be entered in favor of the Division as a matter of law.

E. The Division of Taxation's motion for summary determination is granted, the petition of Brian L. Burkard is denied, and the notice of deficiency, dated May 31, 2022, is sustained.

DATED: Albany, New York  
August 29, 2024

/s/ Jennifer L. Baldwin  
ADMINISTRATIVE LAW JUDGE