STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition<br>of<br>**DOUGLAS C. SCHOTTENSTEIN**<br>for Redetermination of a Deficiency or for Refund of New York State Personal Income Taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 2019. | :<br>:<br>:<br>:<br>:<br>: | ORDER<br>DTA NO. 851062 |

Petitioner, Douglas C. Schottenstein, filed a petition for redetermination of a deficiency or for refund of New York State 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. (Laureen McCloskey, Esq., of counsel), brought a motion on April 14, 2026, seeking summary determination in its favor and for other relief as deemed just and proper in the above-referenced matter pursuant to sections 3000.5 and 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Jerome Schwartz, CPA, did not file a response by May 14, 2026, which date commenced the 90-day period for the issuance of this order.

Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Alejandro Taylor, Administrative Law Judge, renders the following order.

## *ISSUE*

Whether the Division of Tax Appeals has jurisdiction to address the merits of the petition filed in this matter.

## *FINDINGS OF FACT*

1. Petitioner, Douglas C. Schottenstein, filed a New York State resident personal income tax return, form IT-201, for tax year 2019.

2. On May 18, 2022, the Division of Taxation (Division) issued a notice of deficiency (assessment ID L-055354400) (notice) to petitioner asserting $79,452.90 in tax, plus penalties and interest.

3. On or about June 23, 2022, petitioner filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice. On March 14, 2023, Tax Conference Conciliator Kathleen Loos sent a letter to petitioner's representative proposing a modification of the notice by abating the penalties and included two copies of a consent form reflecting the proposed modification. Ms. Loos's letter instructed petitioner's representative to sign and return one copy of the consent form if he agreed with the proposed modification.

4. On May 31, 2023, petitioner timely filed a petition with the Division of Tax Appeals. Included with his petition was a signed copy of form POA-1, *Power of Attorney*, dated May 9, 2022, designating Jerry Schwartz as his representative.

5. On October 16, 2024, the Division filed its answer to the petition. Therein, Colleen McMahon, Esq., the Division's former representative, alleged that on August 27, 2021, the Division requested information from petitioner regarding income withholding. She also stated that on February 9, 2022, the Division issued a statement of proposed audit change to petitioner,

wherein the Division determined that petitioner owed $79,452.90 in personal income tax, plus interest and penalties, for 2019.

6. On April 14, 2026, the Division filed a motion in this matter seeking summary determination. Attached to the notice of motion was the affirmation of Ms. McMahon, dated April 2, 2026, made in support of the Division's motion together with attachments. Included in the attachments to the Division's motion was the petition in this matter, the Division's answer to the petition, a copy of petitioner's request for conciliation conference dated June 21, 2022 and signed by Mr. Schwartz, a copy of correspondence to Mr. Schwarz from BCMS proposing a modification to the notice of deficiency, and a signed BCMS consent dated April 6, 2023.

7. According to the BCMS consent, BCMS proposed modifying the notice by canceling the penalties, but sustained the $79,452.90 in tax due, plus interest. According to the terms of the consent, the taxpayer may accept the modifications to the notice by waiving any right to a hearing in the Division of Tax Appeals concerning the notice.

8. An executed power of attorney designating Mr. Schwartz as petitioner's representative was not included in the attachments to Ms. McMahon's affirmation in support of the motion.

9. Petitioner did not respond to the Division's motion.

## *CONCLUSIONS OF LAW*

A. The Division submitted a motion for summary determination in this matter asking for a determination in its favor or other relief due to petitioner's waiver of a right to a hearing before the Division of Tax Appeals pursuant to petitioner's agreement with the BCMS consent. Thus, as the Division argues that this forum lacks jurisdiction over the subject matter of the petition, a motion to dismiss, rather than a motion for summary determination, is the proper procedural vehicle (***see Matter of Liaquat Ali, Inc.***, Tax Appeals Tribunal, January 22, 2015; Tax Law § 2006 [5] [ii]; 20 NYCRR 3000.9 [a] [1] [ii]).

B. Section 3000.9 (c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) 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 (CPLR) 3212 and that a motion to dismiss a petition is subject to the same provisions as motions filed pursuant to CPLR 3211. The standard of review for both such motions is the same (***see Matter of Nwankpa***, Tax Appeals Tribunal, October 27, 2016). "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]). Failure to make such showing requires denial of the motion (***see id.***) "If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, the issue is for the fact finders to decide on trial, and not for determination by a judge on 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. The documents submitted with the Division's motion establish that petitioner requested a conciliation conference before BCMS, but falls short of conclusively demonstrating that Mr. Schwartz had the authority to execute the consent on behalf of petitioner. BCMS is tasked with providing conferences to taxpayers who request them and has been delegated the authority to modify notices (***see*** Tax Law § 170 [3-a] [c]). An attorney, certified public accountant, public accountant, or enrolled agent may act on behalf of a taxpayer in a conciliation conference before BCMS if authorized by a proper power of attorney (***see*** 20 NYCRR 4000.2 [b]). Under the Division's regulations pertaining to BCMS conferences, after reviewing the testimony, evidence and comments, the conciliation conferee will serve on the requester a proposed resolution in the form of a consent (***see*** 20 NYCRR 4000.5 [c] [3] [i]). If the requestor agrees with the proposed consent, the requestor may only accept the modification of the notice subject to a waiver of any right to petition for a hearing in the Division of Tax Appeals concerning the notice (***see*** 20 NYCRR 4000.5 [c] [3] [ii]).

D. Here, the Division did not submit a form POA-1, *Power of Attorney*, with its motion clearly showing that Mr. Schwartz had been designated as petitioner's representative and thereby been granted the authority to execute a BCMS consent on his behalf. While it may appear from the documents submitted in support of the Division's motion that Mr. Schwartz had such authority, merely appearing to have such authority does not rise to the level of "eliminating any material questions of fact" necessary to entitle the Division to summary determination in its favor (***see Winegrad v New York Univ. Med. Ctr.***, 64 NY2d at 853).

E. As set forth in the findings of fact, petitioner did not respond to the Division's motion. As such, it remains to be determined whether petitioner agreed to the consent issued by BCMS, thereby rendering the modified notice fixed and final, and waiving any hearing rights in the Division of Tax Appeals that attach to the notice.

F. The Division of Taxation's motion to dismiss is denied and a hearing on the merits will be scheduled in due course.

DATED: Albany, New York
August 6, 2026

/s/ Alejandro Taylor
ADMINISTRATIVE LAW JUDGE