

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>THOMAS AND VICTORIA R. FICCO</b>	:	DETERMINATION
	:	DTA NO. 814293
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law for	:	
the Year 1988.	:	

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Petitioners, Thomas Ficco and Victoria R. Ficco, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1988.

The Division of Taxation, by its representative, Steven U. Teitelbaum, Esq. (Laura J. Witkowski, Esq., of counsel), filed a motion on September 28, 1998, seeking an order of summary determination with prejudice, pursuant to 20 NYCRR 3000.9(b) and Tax Law § 687(a). Petitioners did not respond to the motion. Accordingly, the 90-day period for the issuance of this determination under section 3000.5(d) of the Rules of Practice and Procedure of the Tax Appeals Tribunal began on the date for the response to this motion, or October 28, 1998. Based upon the motion papers and the pleadings, Jean Corigliano, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioners filed a claim for refund of taxes paid for 1988 within the statutory period of limitation.

***FINDINGS OF FACT***

1. On July 12, 1995, petitioners, Thomas and Victoria R. Ficco, filed a petition with the Division of Tax Appeals seeking the refund of personal income taxes paid for the year 1988 and cancellation of assessments issued to petitioners for the years 1990, 1991 and 1992.

2. On April 28, 1998, the Division of Taxation (“Division”) delivered to the Division of Tax Appeals a copy of a Notice of Cancellation of Deficiency and Discontinuance of Proceeding with respect to assessments issued to petitioners for the years 1990 (L-007956178-7), 1991 (L-009160896-3) and 1992 (L-010509402-7). Therefore, this determination will address the 1988 tax year only.

3. The Division filed the instant motion for summary determination seeking denial of the petition on the ground that petitioners failed to file a claim for refund of taxes paid for 1988 within the statutory time period provided for in Tax Law § 687(a). The basic facts relating to petitioners’ claim were summarized in an affirmation submitted by the Division’s representative. Ms. Witkowski’s affirmation is based on her review of the Division’s records. The relevant facts asserted by Ms. Witkowski are as follows:

(a) Petitioners filed their 1988 personal income tax return on or before April 15, 1989.

(b) The Division issued a Notice and Demand, dated September 23, 1991, to petitioners for 1988 personal income taxes due in the amount of \$120.34 plus interest.

(c) Petitioners paid the tax assessment, including interest due, on or about September 26, 1991.

(d) Petitioners did not file a claim for refund of taxes paid for 1988 with the Division. The first claim for refund made by petitioners was contained in the petition filed in the instant proceeding.

4. Petitioners did not respond to the Division’s motion for summary determination.

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

A. To obtain summary determination, the moving party must submit an affidavit, made by a person having knowledge of the facts, a copy of the pleadings and other available proof. The documents must 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]). There are no facts in dispute in this proceeding. Petitioners did not respond to the Division's motion or challenge the Division's assertion that petitioners did not file a refund claim for 1988 before filing their petition. Accordingly, the allegations of fact made in Ms. Witkowski's affirmation may be deemed to have been conceded by petitioners (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667). Inasmuch as there are no material and triable issues of fact presented, a determination may be issued, as a matter of law, in favor of any party.

B. The time limitations for filing of refund claims are clear and precise. Tax Law § 687(a) provides as follows: "Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later. . . ." Tax Law § 687(e) explicitly prohibits the payment of refunds where a claim is not filed within the prescribed time period. With two exceptions not relevant here, that provision provides:

No credit or refund shall be allowed or made . . . after the expiration of the applicable period of limitation specified in this article, unless a claim for credit or refund is filed by the taxpayer within such period. Any later credit shall be void and any later refund erroneous. No period of limitations specified in any other law shall apply to the recovery by a taxpayer of moneys paid in respect of taxes under this article.

Inasmuch as petitioners did not file a claim for refund of their 1988 taxes until filing their petition in July of 1995, a refund may not be granted.

C. The petition of Thomas and Victoria R. Ficco is denied.

DATED: Troy, New York  
January 07, 1999

/s/ Jean Corigliano  
ADMINISTRATIVE LAW JUDGE