

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petitions :  
of :  
**CAROL J. WAKEFIELD** : DETERMINATION  
for Redetermination of a Deficiency or for Refund of : DTA NOS. 822512 AND  
New York State and New York City Personal Income : 822513  
Taxes under Article 22 of the Tax Law and the New York :  
City Administrative Code for the Years 1997 through :  
2000. :

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Petitioner, Carol J. Wakefield, filed petitions 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 years 1997 through 2000.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (Sarah Dasenbrock, Esq., of counsel), brought two motions dated December 23, 2008, seeking summary determination in the above-referenced matters pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b) on the basis that there are no material issues of fact or, in the alternative, that the facts herein mandate a determination in favor of the Division of Taxation. Petitioner, appearing pro se, had 30 days, or until January 22, 2009, to respond to the Division of Taxation's motions, but failed to do so. Accordingly, January 22, 2009 began the 90-day period for the issuance of this determination. Based upon the motion papers, the affidavits of the Division of Taxation's representative and an employee thereof, the documents submitted therewith and all pleadings and documents submitted in connection with this matter, Brian L. Friedman, Administrative Law Judge, renders the following determination.

**ISSUE**

Whether the Division of Taxation properly disallowed petitioner's claims for refund for the years in issue because they were filed beyond the statute of limitations.

**FINDINGS OF FACT**

1. On December 23, 2008, the Division of Taxation (Division) filed two notices of motion with respect to petitioner, Carol J. Wakefield. As to the tax years 1997 and 1998 (DTA# 822513), the Division submitted the following: an affidavit of its representative, Sarah Dasenbrock, Esq.; an affidavit of Michael Palage, Tax Technician I in the Division's Personal Income Tax Desk Audit Unit; copies of petitioner's 1997 and 1998 resident income tax returns filed on February 4, 2004 and March 2, 2004, respectively; copies of the petition filed with respect to the 1997 and 1998 tax years and the Division's answer thereto;<sup>1</sup> an amended 1998 return filed on April 5, 2007 and notices of disallowance for each of the years 1997 and 1998 issued to petitioner by the Division.

The motion filed by the Division pertaining to tax years 1999 and 2000 (DTA# 822512) contained the following: affidavits from Ms. Dasenbrock and Mr. Palage; a copy of petitioner's 1999 resident income tax return and a consolidated transcript of petitioner's 2000 resident income tax return; a copy of petitioner's amended return for 1999 filed on April 5, 2007; and copies of the petition filed with respect to the 1999 and 2000 tax years and the Division's answer thereto.

2. Petitioner made estimated tax payments for the years 1997 and 1998; the payments were made to her estimated tax account for 1997 on January 5, 1998 and for 1998 on January 5,

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<sup>1</sup> The Division erroneously attached to this motion, copies of the petition filed with respect to the 1999 and 2000 tax years. However, since the file of the Division of Tax Appeals contains the petition filed for the 1997 and 1998 tax years, it is that petition which shall be considered for the years 1997 and 1998.

1999. She filed a claim for refund of an overpayment of personal income tax based on her excess payments into estimated tax accounts for the years 1997 and 1998. Her total overpayment of tax for 1997 was \$5,368.00 and for 1998 was \$4,803.15. Petitioner filed her 1997 return on February 4, 2004 (this return which indicated that petitioner had overpaid tax in the amount of \$5,368.00 is considered to be her claim for refund for the 1997 tax year) and her return for 1998 on March 2, 2004.

On April 5, 2007, petitioner filed an amended return for the tax year 1998. The amended return claimed an estimated tax payment of \$7,000.00, made on December 30, 1998, which had not been included on her original return. Because of the additional information provided on the amended return for 1998, the Division canceled a Notice of Deficiency that had been issued to petitioner for that year and returned the amount of tax which had been paid pursuant to that Notice of Deficiency.

3. On May 6, 2005, the Division issued a Notice of Disallowance to petitioner in response to her claim for refund for the 1997 tax year which stated, in part, as follows:

The New York State Tax Law does not permit us to allow the refund or credit claimed on your return(s).

The Tax Law provides for the granting of a refund or credit if the request is filed within three years from the time the return was required to be filed or within two years from the time the tax was paid, whichever is later.

Our records show the return on which you requested a refund or credit was filed beyond the statute of limitations as prescribed by the Tax Law.

Unfortunately, we must deny your claim for refund or credit.

4. In response to petitioner's claim for refund of the amount of \$7,000.00 for the 1998 tax year as set forth in her amended return for that year, the Division issued a Notice of

Disallowance<sup>2</sup> which allowed a refund of \$2,208.85, but disallowed the balance (\$4,803.15) of the amount claimed. The Notice of Disallowance stated, in pertinent part, as follows:

The New York State Tax Law does not permit us to allow the balance of your requested refund or credit in the amount of \$4,803.15 as claimed on your tax 1998 New York amended income tax return.

The Tax Law provides for the granting of a refund or credit if the request is filed within three years from the time the return was required to be filed or within two years from the time the tax was paid, whichever is later.

Our records show the return on which you requested a refund or credit was filed beyond the statute of limitations as prescribed by the Tax Law. Unfortunately, we must deny your claim for refund or credit for the amount not previously allowed in the amount of \$4,803.15.

COMPUTATION SECTION

New York State Tax	\$2,305.00
Less: Resident Tax Credit	<u>1,257.00</u>
Net New York State Tax	\$1,048.00
New York City Tax	1,688.00
Total Taxes	\$2,736.00
Plus: Gift to All	<u>20.00</u>
Total Taxes and Gift	\$2,756.00
Less: Withholding Tax	547.15
Less: New York City School Tax Credit	12.00
Less: Estimated Tax Paid	7,000.00
Less: Late Paid with Original Return	<u>2,208.85</u>
Overpayment computed	7,012.00
Less: Late Payment Refunded 2/11/2005	<u>2,208.85</u>
Personal Income Tax Refund Denied	\$4,803.15

5. In her petition filed with the Division of Tax Appeals with respect to the 1997 and 1998 tax years, petitioner indicated that in the summer of 1994, she suffered a stroke and, as a result, she sustained some memory loss. She stated that she paid \$7,000.00 in estimated taxes for 1998

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<sup>2</sup> This Notice of Disallowance was undated but was apparently issued subsequent to petitioner's filing, on April 7, 2007, of an amended return for the 1998 tax year.

which was not listed on her original return. The penalties and interest which were assessed were later returned to her when she found the canceled check and filed an amended return.

6. Petitioner filed her personal income tax returns for 1999 and 2000 on April 9, 2003 and September 11, 2003, respectively. As a result of the late filing of returns and late payment of tax, notices of deficiency asserting tax, penalties and interest were issued to petitioner by the Division. On November 13, 2003, petitioner made full payment of the amounts set forth on the notices of deficiency, i.e., \$4,611.21 for 1999 and \$179.20 for 2000.

7. On April 5, 2007, petitioner filed an amended personal income tax return for 1999 which showed a lesser amount of federal adjusted gross income, thereby resulting in a claimed refund of \$1,471.17. On May 2, 2007, at the time that she requested a conciliation conference with the Division's Bureau of Conciliation and Mediation Services, petitioner also requested a refund for payments made for the 2000 tax year.

8. In her petition filed with the Division of Tax Appeals, petitioner stated that her 1999 tax return was filed on April 8, 2003 and that she was assessed penalties and interest totaling \$4,766.41. She indicated that with her return, she enclosed a letter asking if the penalty could be waived since, in 2000, her mother suffered a stroke and petitioner was her sole caregiver. Because she had overpaid her taxes for 1999, she filed an amended return on April 5, 2007 which was accepted by the Division; however, her refund request was denied.

9. The facts set forth in Findings of Fact 2 through 4, 6 and 7 were established through the affidavits of Sarah Dasenbrock, Esq., the Division's representative in this proceeding, and Michael Palage, Tax Technician I in the Division's Personal Income Tax Desk Audit Unit, along with the exhibits attached to the notices of motion filed herein.

10. Petitioner did not file a reply to either of the motions made by the Division herein.

**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]).

B. 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 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, 487 NYS2d 316, 317 [1985], citing *Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [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” (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177 [1989]). “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,’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173 [1992] citing *Zuckerman v. City of New York*).

C. Petitioner did not respond to the Division’s motion; she is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *Costello Assocs. v. Standard Metals*, 99 AD2d

227, 472 NYS2d 325 [1984]). Petitioner has thus presented no evidence to contest the facts alleged in the Dasenbrock and Palage affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden*, at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania*).

D. Tax Law § 687(a) provides that a claim for a 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 latest. However, if the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim. If the claim is not filed within the three year period, but is filed within the two year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim.

Tax Law § 687(i) provides that any income tax withheld from the taxpayer during any calendar year and any amount paid by the taxpayer as estimated income tax for a taxable year shall be deemed to have been paid on the fifteenth day of the fourth month (April 15<sup>th</sup>) following the close of the taxable year.

E. For 1997, petitioner made payments to her estimated tax account on January 5, 1998 and filed her 1997 tax return on February 4, 2004 whereon she indicated that she overpaid tax in the amount of \$5,368.00. Therefore, this return is considered to be her claim for refund. Clearly, petitioner's claim for refund was not filed within two years from the time the tax was paid since the tax was paid in 1998 and the claim for refund was not filed until 2004.

Pursuant to Tax Law § 687(a), while petitioner's claim for refund was filed at the same time that her return was filed and was, therefore, filed within three years from the time the return was filed, such claim is limited to the amount of tax paid within the three years immediately

preceding the filing of the claim. In the present matter, petitioner paid no tax within the three years immediately preceding the filing of the claim; her last payment for 1997 was made in early 1998 (and deemed, pursuant to Tax Law § 687[i], to have been made on April 15, 1998). Therefore, pursuant to Tax Law § 687(a), since she paid no tax within the three years immediately preceding the filing of the claim, she is not entitled to any refund of tax even though her claim for refund was filed within three years from the date the return was filed. Accordingly, petitioner's claim for refund for 1997 was properly denied by the Division.

F. For the 1998 tax year, petitioner made payments to her estimated tax account on December 30, 1998 and on January 5, 1999 and filed her 1998 return on March 2, 2004. She then filed an amended return seeking a refund of tax for 1998 on April 5, 2007. Tax Law § 687(a) bars petitioner's claim for refund since the claim was filed (April 5, 2007) more than three years after her return was filed (March 2, 2004) and more than two years after the tax was paid (December 30, 1998 and January 5, 1999). Accordingly, petitioner's claim for refund for 1998, beyond that which was refunded on February 11, 2005 (*see* Finding of Fact 4), was properly denied by the Division.

G. For the 1999 tax year, petitioner filed her return on April 9, 2003. Due to the late filing of the return and late payment of tax due, the Division issued a Notice of Deficiency to petitioner who made full payment of the amount due (\$4,611.21) on November 13, 2003. On April 5, 2007, petitioner filed an amended personal income tax return for 1999 on which she indicated that she had a lesser amount of federal adjusted gross income than she had reported on her original return. Accordingly, the amended return served as a claim for refund which claim was denied by the Division.

As noted previously, Tax Law § 687(a) provides that a claim for a credit or refund of an overpayment of income tax must be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever is later. On her original return filed for 1999, it is indicated that a total of \$3,347.78 (\$2,054.75 in State tax and \$1,293.03 in City tax) had been withheld by petitioner's employer and that petitioner owed an additional \$7,143.67 in tax for 1999 which was paid upon the filing of the return on April 9, 2003. On her amended return, there is no indication that any additional tax payments were made; in fact, since there was a reduced amount of adjusted gross income, petitioner's amended return sought a refund of \$1,471.17. She did, however, pay additional tax, penalty and interest, as asserted by a Notice of Deficiency, on November 13, 2003.

Therefore, it is clear that petitioner's claim for refund filed on April 5, 2007 was filed more than three years after the filing of her 1999 return on April 9, 2003 and more than two years after payment of tax for 1999 which, pursuant to Tax Law § 687(i) is deemed to have been paid on April 15, 2000. While petitioner did make additional payments pursuant to a Notice of Deficiency, these payments were made on November 13, 2003, a date which is more than two years prior to her refund claim on April 5, 2007. Accordingly, petitioner's claim for refund for the 1999 tax year was properly denied by the Division.

H. For the 2000 tax year, petitioner filed her return on September 11, 2003. As a result of the late filing of the return and late payment of tax, a Notice of Deficiency was issued to petitioner by the Division. On November 13, 2003, petitioner made full payment due in the sum of \$179.20 for the 2000 tax year. Unlike the 1999 tax year, petitioner did not file an amended return or file a claim for refund; however, on May 2, 2007, she requested a conciliation conference with the Division's Bureau of Conciliation and Mediation Services at which time she

requested a refund for payments made for the 2000 tax year. It is unclear from the documents set forth in the record whether petitioner was requesting a refund of tax paid upon the filing of her return on September 11, 2003 or of the amount paid pursuant to the Notice of Deficiency on November 13, 2003. In any event, however, her claim for refund on May 2, 2007 was made more than three years after filing her 2000 tax return on September 11, 2003 and more than two years after payment of tax due. Therefore, the Division's denial of petitioner's refund claim for the 2000 tax year was proper.

I. As the basis of its motion, the Division asserts that there are no material issues of fact remaining in this matter which would necessitate a hearing. By virtue of the holdings set forth in Conclusions of Law E, F, G and H, it must be found that the Division's assertion is correct, i.e., there are no triable issues of fact presented herein and, accordingly, the Division is, as a matter of law, entitled to a determination in its favor.

J. The Division of Taxation's motion for summary determination is granted and the petitions of Carol J. Wakefield are denied.

DATED: Troy, New York  
April 2, 2009

/s/ Brian L. Friedman  
ADMINISTRATIVE LAW JUDGE