

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ROSEMARY LAFRANCA</b>	:	<b>DETERMINATION</b>
		<b>DTA NO. 823071</b>
for Revision of a Determination or for Refund of	:	
Mortgage Recording Tax under Article 11 of the	:	
Tax Law for the Period July 25, 2005	:	

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Petitioner, Rosemary LaFranca, filed a petition for revision of a determination or for refund of mortgage recording tax under Article 11 of the Tax Law for the period July 25, 2005.

The Division of Taxation, by its representative Daniel Smirlock, Esq. (Maria Di Costanzo, Esq., of counsel), brought a motion filed December 7, 2009, with supporting documentation, seeking summary determination in the above-referenced matter pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b). Petitioner, appearing pro se, had until January 7, 2010 to respond in opposition to the motion but did not do so, and thus such date began the 90-day period for issuance of this determination.

After due consideration of the motion and supporting documents, and all pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following Determination.

***ISSUE***

Whether the Division of Taxation has established its entitlement to summary determination and that there is no material and triable issue of fact such that, as a matter of law, a determination can be made in its favor.

***FINDINGS OF FACT***

1. On December 16, 2004 petitioner, Rosemary LaFranca, purchased a home in Queens, New York, and paid \$5,225.00 in mortgage recording tax on a loan taken for this purchase with Quicken Loans. Shortly thereafter, petitioner refinanced this loan, and on July 25, 2005 paid mortgage recording tax in the amount of \$6,063.00 on a loan amount of \$338,500.00. In April 2009, petitioner again refinanced her mortgage loan with a different lender. In connection with this refinancing, petitioner was advised that if the refinancing involved a consolidation, extension or modification of her existing loan, she would be required to pay mortgage recording tax only on the amount of “new” debt undertaken.

2. On April 9, 2009, petitioner filed a claim seeking refund of the mortgage recording tax she paid in the amount of \$6,063.00 on July 25, 2005. Petitioner stated that she would have structured her refinancing in 2005 as a consolidation, extension or modification so as to minimize her mortgage recording tax liability but was unaware that she could do so and received no advice or information in this regard from the lender with whom she refinanced her loan.

3. On April 14, 2009, the Division of Taxation (Division) issued a letter denying petitioner’s claim for refund on the basis that the same was barred as not filed within the requisite period of limitation set by Tax Law § 263. This letter further advised that the two loans in question were evidenced by separate and distinct instruments with no consolidation, extension or modification of the earlier loan into or with respect to the later loan.

4. The Division brought the subject motion seeking summary determination on the premise that regardless of the substantive basis upon which petitioner claims a refund, the claim itself was not filed within two years from the date of payment of the tax, and thus the relief sought by petitioner is barred by operation of law.

5. Petitioner does not assert, and there is no evidence, that any claim for refund was filed prior to the April 9, 2009 claim described herein.

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

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all material facts and 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]; *see also* Tax Law § 2006[6]).

The motion shall be granted if, upon all 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, therefor, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact (20 NYCRR 3000.9[b][1]; *see also* Tax Law § 2006[6]).

B. The standard with regard to a motion for summary determination has been set forth numerous times. A motion for summary determination made before the Division of Tax Appeals is "subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR." (20 NYCRR 3000.9[c]; *see also Matter of Service Merchandise, Co.*, Tax Appeals Tribunal, January 14, 1999.) Summary determination is a "drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (*Moskowitz v. Garlock*, 23 AD2d 943 [1965]; *see Daliendo v. Johnson*, 147 AD2d 312 [1989]). Because it is the "procedural equivalent of a trial" (*Museums at Stony brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572 [1989]), undermining the notion of a "day in court," summary determination must be used sparingly (*Wanger v. Zeh*, 45 Misc 2d 93, *affd* 26 Ad2d 729 [1966]). If any material facts are in dispute, if the existence of a triable issue of fact is "arguable," or if

contrary inferences may be reasonably drawn from the undisputed facts, the motion must be denied (*Gerard v. Inglese*, 11 AD2d 381 [1960]).

C. Tax Law § 263 provides that no refund of tax paid under Tax Law Article 11 (tax on mortgages) shall be allowed unless an application for refund is made within two years from the time the erroneous payment of tax was received. Here, it is undisputed that the tax was paid on July 25, 2005, but petitioner's claim for refund was not filed until April 9, 2009. Since petitioner's claim was filed more than two years after the tax was paid, such claim must be denied as untimely as a matter of law. Accordingly, with no dispute as to the facts and no basis in law upon which to grant petitioner's claim, summary determination will be granted in the Division's favor.

D. The Division's motion for summary determination is hereby granted, the petition of Rosemary LaFranca is denied, and the Division's denial of petitioner's claim for refund is sustained.

DATED: Troy, New York  
March 25, 2010

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE