STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JAMES AND JAN KAPLAN	:	DETERMINATION DTA NO. 826757
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2008.	:	

Petitioners James and Jan Kaplan 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 2008.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Tobias A. Lake, Esq., of counsel), brought a motion dated October 8, 2015, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i), (vi) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners, appearing by Barclay Damon LLP (David G. Burch, Jr., Esq., of counsel), filed an affirmation with attached exhibits in opposition to the Division of Taxation's motion. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioners' claim for a refund based upon the QEZE credit for real property taxes on the basis that petitioners' failed to file a timely refund claim.

FINDINGS OF FACT

1. Petitioner James Kaplan[1] is a partner in 450 South Salina Street Partnership (450 South Salina). 450 South Salina is a New York Limited Partnership that owns and operates real property that is located at 450 South Salina Street, Syracuse, New York (the property). The partnership invested more than 4.2 million dollars to renovate the property.

2. 450 South Salina filed a timely New York State Partnership Return for the year 2008 wherein it claimed a QEZE Credit for Real Property Taxes in the amount of $142,218.62. The partnership return included a New York Partner's Schedule K-1 for James Kaplan wherein he was allocated a portion of the QEZE credit for real property taxes in the amount of $14,222.00.

3. In April of 2009, the Legislature enacted modifications, effective for New York's 2009 fiscal year, to the New York General Municipal Law that required, among other things, a review of all existing Empire Zone certified businesses to verify that they qualified for continued certification, under new criteria, under the Empire Zones Program. Businesses were required to obtain an EZ Retention Certificate in order to receive Empire Zone benefits for tax years beginning on or after January 1, 2008. A business that did not qualify for continued certification would receive written notification of revocation of its Certificate of Eligibility, the reason for the revocation and the information on the process for an appeal.

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[1] It appears that Jan Kaplan is a petitioner in this matter only by virtue of having filed a joint return with James Kaplan.

4. As a result of the amendments to the General Municipal Law, the Division of Taxation (Division) required, for tax years beginning on or after January 1, 2008, that individuals claiming credits through a pass-through entity, such as a partnership, file an EZ Retention Certificate with their credit claim forms.

5. On April 15, 2009, the Department of Taxation and Finance's Office of Tax Policy Analysis, Taxpayer Guidance Division, issued TSB-M-09(4)I, setting forth its interpretation of the legislative changes to the Empire Zones Program stating:

> "Businesses must obtain the EZ Retention Certificate to receive any Empire Zone benefits for tax years beginning on or after January 1, 2008. This includes receiving benefits from claims for new credits and claims utilizing carryovers of EZ credits from prior tax years. **Accordingly, when filing a tax return claiming an EZ Credit (including carryovers) for a tax year that begins on or after January 1, 2008, you must attach an Empire Zone Retention Certificate to your tax return.**"

6. In April 2009, the Division modified its form IT-606, Claim for QEZE Credit for Real Property Taxes, for the 2008 tax year, to include a new instruction providing that:

> "Please Note: Recent legislation requires all taxpayers filing this form to attach a retention certificate issued by Empire State Development.
>
> See TSB-M-09(5)C, (4)I, Legislative Changes to the Empire Zones Program, for details.
>
> Form IT-606, Claim for QEZE Credit for Real Property Taxes, continues below."

7. In June 2009, the Department of Economic Development issued a Notice of Decertification notifying 450 South Salina that its certification was revoked because it did not provide economic returns to the state greater in value than the tax benefits used and refunded to it.

8. In August 2009, 450 South Salina appealed the Notice of Decertification contending that the Department of Economic Development did not consider 450 South Salina's investment of more than $4.5 million when it was decertified from the Empire Zones Program. A copy of the appeal was given to all of the members of the Empire Zone Designation Board, including the Commissioner of Economic Development, and Scott Palladino, Assistant Deputy Commissioner of the Department of Taxation and Finance. On the appeal, 450 South Salina argued that the amendment of the Tax Law was unconstitutional and that continued certification of the company was warranted.

9. The appeal was denied by the Empire Zone Designation Board in the fall of 2009.

10. Petitioners filed their New York State income tax return pursuant to an extension on or about October 1, 2009. This filing was after TSB-M-09(4)I was issued by the Division and after the Notice of Intent to Revoke Certification was received by 450 South Salina. Consequently, when petitioners filed their New York State income tax return, they believed that they were legally barred from claiming the QEZE credit for real property taxes.

11. The position of the Department of Economic Development and the Division was challenged by numerous businesses and decided by a Court of Appeals decision issued in ***James Sq. Assoc. LP v. Mullen*** (21 NY3d 233 [2013]). In this decision, the Court ruled that the retroactive application of the 2009 amendments to the Empire Zones Program was unconstitutional; that the amendment at issue was prospective only and not retroactive to the 2008 tax year; and that the revocation of certifications made retroactive to January 1, 2008 was void.

12. After the Court of Appeals decision was issued in June of 2013, the Division permitted the application of tax credits under the Empire Zones Program for the 2008 tax year

provided that taxpayers had filed protective claims. Consequently, the Division processed refunds for many individuals who were members or partners of Empire Zone entities that had received notices of decertification.

13. On or around July 11, 2013, petitioners filed an amended New York State income tax return for 2008 claiming the QEZE credit for real property taxes. From the time petitioners filed their amended return through April of 2014, petitioners' representatives had repeated conversations and correspondence with the Division regarding the payment of the requested refunds.

14. On May 14, 2014, the Division issued a Notice of Disallowance denying the credits claimed because the amended return was filed after the expiration of the statute of limitations for claiming a refund.

CONCLUSIONS OF LAW

A. The Division brings a motion to dismiss the petition under section 3000.9(a) of the Tax Appeals Tribunal Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9(b). As the petition in this matter was timely filed, the Division of Tax Appeals has jurisdiction over the petition and, accordingly, a motion for summary determination under section 3000.9(b) of the Rules is the proper vehicle to consider the timeliness of petitioners' request for a conciliation conference. This order will address the instant motion as such.

B. 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]).

C. 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. Vil. 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*** at 562).

D. As relevant to this proceeding, Tax Law § 687, entitled, "Limitations on credit or refund," provides as follows:

> "(a) General. - - 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 latest . . . .
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> * * *
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> (e) Failure to file claim within prescribed period. - - 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."

E. Here, petitioners' original tax return for 2008, which did not claim the QEZE credit in issue, was filed on or about September 17, 2009. The amended tax return, which claimed the tax credit for the first time, was filed on or about July 11, 2013. Since the claim for the tax credit was filed more than three years from the time the original return was filed, the Division properly concluded that the claim for a refund was barred by Tax Law § 687(a).

F. Petitioners argue that their claims are not barred by the statute of limitations because, on two occasions, they timely filed an informal claim for a refund of the QEZE credit for real property taxes for the 2008 tax year. First, petitioners argue that the New York State partnership return of 450 South Salina included as part of its return, before TSB-M-09(4)I was issued, a copy of the Schedule K-1 which allocated their portion of the QEZE credit for real property taxes. Second, petitioners submit that they filed an informal refund claim through their appeal of the Notice of Decertification which included providing a copy of the appeal to Mr. Palladino, an official of the Division. This appeal specifically challenged the constitutionality of the retroactive decertification of 450 South Salina. It is submitted that these two instances were sufficient to place the Division on notice that petitioners intended to claim a refund for 2008 and allow it to begin an investigation of these claims. Petitioners note that after the denial of the refund, counsel for petitioners sent correspondence to the Division stating that petitioners had placed it on notice of their claim.

G. The Tax Appeals Tribunal has recognized that a claim for refund may be informally made (***Matter of Greenburger,*** Tax Appeals Tribunal, September 8, 1994; ***Matter of Glover Bottled Gas Corp.***, Tax Appeals Tribunal, September 27, 1990; ***Matter of Rand***, Tax Appeals

Tribunal, May 10, 1990). No single form of a request is required as several different forms of requests have been found to be valid by the Federal courts (***Matter of Rand***). In ***Rand***, the Tribunal recognized the principle that an informal claim only requires a written document that adequately advises the Division that a refund is sought and of the tax period in question (***see also Matter of Greenburger***). The ***Rand*** decision also noted that an informal claim is required to contain enough information to permit the Division to initiate an investigation of the matter if it so desires (***see also Matter of Greenburger***).

H. The question presented is whether the filing of a partnership return with a Schedule K-1 showing a distribution to Mr. Kaplan or providing a copy of the appeal of the Notice of Decertification to an official of the Division may be considered an informal claim for a refund. The arguments raised by petitioners were presented in ***Rothman v. United States*** (75-2 US Tax Cases ¶ 9720 [D NJ 1975]). In ***Rothman***, the Internal Revenue Service (IRS) disallowed certain depreciation deductions on a partnership return. A timely protest of the adjustment, which was signed by a different partner, was filed. The protest by the partnership was successful and the IRS applied the allowance to the return of the partner who signed the protest of the partnership. However, the court held that the protest by the partnership may not be considered an informal claim for a refund by the remaining partner, Mr. Rothman. Rather, a taxpayer must make his own refund claim. Further, the fact that the IRS allowed the adjustment on the partner's return was of no consequence.

Similarly, in this instance, the filing of the partnership return, with a Schedule K-1, may not be considered an informal claim for a refund by petitioners because a partnership return is merely informational (***Rothman***). Each partner's tax return is independently examined as to whether there is a timely claim for a refund (***id***).

As noted, petitioners also argue that the partnership's filing of the appeal of the Notice of Decertification also constitutes an informal claim for refund. This argument is also rejected. The filing of an appeal with the Empire Zone Designation Board does not put the Division on notice that petitioners were claiming a refund regardless of whether an official of the Division is a member of the Board.

I. Petitioners contend that they could not have filed an income tax return claiming the QEZE credit after the issuance of TSB-M-09(4)I and the enactment of the corresponding statutory provision. It is submitted that after Empire State Development sent 450 South Salina a Notice of Decertification, any claim of the QEZE credit would have amounted to knowingly filing a false or fraudulent tax return with the attendant civil and criminal penalties.

J. Petitioners' contention that they were prevented from filing a protective claim is without merit. New York recognizes that when an area of the Tax Law is unsettled, a taxpayer may file a protective claim to protect an interest (***see e.g. Matter of Jones***, Tax Appeals Tribunal, January 9, 1997; TSB-M-89(9)I [pertaining to New York's prior position on the taxation of federal pension benefits]). Similarly, if petitioners had filed a protective refund claim that fully disclosed the facts, nature and basis for the protective claim, the tax return would not have been false or fraudulent.

K. Lastly, relying upon ***McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*** (496 US 18 [1990]), petitioners argue that the Division violated the Due Process Clause when it denied the refund claimed in petitioners' amended return after the Court of Appeals held the retroactive application of the 2009 amendments unconstitutional. According to petitioners, the Division failed to provide them a meaningful opportunity for post-payment relief for taxes already paid pursuant to an unconstitutional tax scheme. As noted by petitioners, in ***McKesson***,

the Supreme Court held that Florida violated the Due Process Clause after it refused to pay refunds of taxes already paid pursuant to a statutory scheme that was later declared unconstitutional. Petitioners submit that the Division failed to give them a meaningful opportunity for relief for taxes paid pursuant to an unconstitutional tax scheme.

L. The scheme for obtaining a refund set forth in Tax Law § 687(a) satisfies the Due Process Clause of the 14th Amendment because it provides "meaningful backward-looking relief to rectify any unconstitutional deprivation" (***McKesson,*** at 31). ***McKesson*** required that a state "might . . . provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint" (***id*** at 45). The procedure set forth in Tax Law § 687 addresses the state's obligation to refund the funds that were unconstitutionally collected while also satisfying the state's need for a fiscal resolution of its finances (***see Matter of Burkhardt***, Tax Appeals Tribunal, January 9, 1997; ***Matter of Boyce***, Tax Appeals Tribunal, April 24, 1997).

M. The Division's motion for summary determination is granted and the petition of James and Jan Kaplan is denied.

DATED: Albany, New York
February 4, 2015

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE