

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOEL PETITTI	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 850057
New York State Personal Income Taxes under Article	:	
22 of the Tax Law for the Year 2014.	:	
	:	

Petitioner, Joel Petitti, 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 2014.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Colleen McMahon, Esq., of counsel), filed a motion, on August 1, 2023, for summary determination in the above-referenced matter pursuant to section 3000.9 (b) of the Tax Appeals Tribunal's Rules of Practice and Procedure. Petitioner did not reply to the motion by September 1, 2023, which date commenced the 90-day period for issuance of this determination.

Based upon the Division of Taxation's motion, and all pleadings and documents submitted in connection with this matter, Alexander Chu-Fong, Administrative Law Judge, renders the following determination.

ISSUE

Whether the denial of petitioner's claimed refund of 2014 personal income tax should be sustained because it was untimely filed.

FINDINGS OF FACT

1. Petitioner, Joel Petitti, filed his 2014 New York State resident income tax return (return),¹ form IT-201 in the year 2021. On line 78 of his return, petitioner requested a refund in the amount of \$22,573.00.

2. On June 10, 2021, the Division of Taxation (Division) issued an account adjustment notice (notice), with the document locator number PF2100503822. This notice shows a “return file date” of April 28, 2021. The notice’s computation section indicates a total amount due of \$73,026.08, total withholding of \$86,766.00, and a prepayment of \$2,500.00, yielding an excess payment of \$16,239.92. In the notice, the Division disallowed the requested refund:

“We denied your claim for refund or credit because it was filed too late. The tax law allows a refund or credit if the taxpayer makes the claim 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.”

3. Petitioner requested a conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (BCMS), which was conducted on October 8, 2021. On January 7, 2022, BCMS issued CMS No. 330596, that sustained the notice and the denial of petitioner’s refund claim.

4. On January 31, 2022, petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order.

5. On August 1, 2023, the Division filed a motion for summary determination. To establish entitlement to judgment, the Division, by affirmation of Colleen McMahon, Esq., dated August 1, 2023, submitted the following items, among others, with its motion papers:

(i) an affidavit, dated July 25, 2023, of Oscar Boomer II, a Tax Specialist II in the Division’s Office of Tax Processing;

¹ Petitioner filed a joint return with his spouse, who, otherwise, is not involved in this matter.

(ii) a copy of petitioner's 2014 form IT-370, application for automatic six-month extension of time to file for individuals;

(iii) a copy of petitioner's 2014 form IT-201; and,

(iv) a copy of the notice, dated June 10, 2021, issued to petitioner.

6. Mr. Boomer serves as a Tax Specialist II in the Division's Office of Tax Processing.

He has held his current position for four years and has worked for the Division for nine years.

Mr. Boomer's responsibilities include supervising and assisting taxpayer services specialists with taxpayer requests for review of adjustments made to their tax returns, including credits, residency issues, or penalties.

7. In performing his responsibilities, Mr. Boomer reviewed the file and filing history for petitioner and his 2014 return, which were kept in the ordinary course of business. Mr. Boomer affirms that on April 10, 2015, the Division received a form IT-370 from petitioner for 2014. He affirms that on January 29, 2021, the Division received petitioner's 2014 form IT-201, requesting a refund of personal income tax in the amount of \$22,573.58. Mr. Boomer affirms that on May 20, 2021, the Division issued a statement of proposed audit changes, bearing the identification number L-053313906, informing the petitioner that the Division corrected several computational errors. He affirms that the same statement informed petitioner that it had imposed interest on the underpayment of tax, and penalties for the late filing of the 2014 return, which would be added to the assessment of \$70,526.08.

8. Mr. Boomer affirms that on June 10, 2021, the Division issued a notice of adjustment assessment that reduced the prior assessed balance to \$0.00. He affirmed that petitioner's incorrect reporting of withholdings on his return led to an error, which the Division corrected. Mr. Boomer affirmed that, as a result, petitioner no longer owed the assessment, and no payments were made to the Division related to it or any other tax related to 2014.

9. Mr. Boomer also affirms that on June 10, 2021, the Division issued the notice at issue herein, which disallowed the refund claimed on petitioner's 2014 return, because it was not filed within the relevant statutory period.

10. Petitioner did not respond to the motion.

CONCLUSIONS OF LAW

A. 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]). Section 3000.9 (c) of the Tax Appeals Tribunal's Rules of Practice and Procedure provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212.

B. "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, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Village 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 v City of New York*).

C. Petitioner did not respond to the Division’s motion. Accordingly, petitioner is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v Standard Metals Corp.*, 99 AD2d 227 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts alleged in the affirmation of Ms. McMahon or the affidavit of Mr. Boomer. Therefore, those facts are deemed admitted (*Kuehne & Nagel v Baiden*, 36 NY2d at 544; *Whelan v GTE Sylvania*).

D. Tax Law § 687 (a) requires taxpayers to file a claim for refund within the later of three years from the time his return was filed or two years from the time the tax was paid. For tax year 2014, petitioner’s payments of taxes were accomplished through amounts withheld from his wages and a prepayment. Under Tax Law § 687 (i), both those amounts were deemed paid on April 15, 2015. Petitioner’s income tax return for tax year 2014, as filed on January 28, 2021, or April 28, 2021, included a refund claim. Thus, while petitioner’s claim for credit or refund was not filed within two years after the tax was paid, it was filed within three years after the return was filed. Accordingly, pursuant to Tax Law § 687 (a), petitioner timely filed a claim for credit or refund.

E. Where, as here, the refund claim is made within three years from the filing of the return, Tax Law § 687 (a) limits the amount of any refund to the amount of tax paid within the three years immediately preceding the filing of the claim (look back period). In this case, the look back period, construed most favorably to petitioner, extends from January 28, 2021, through January 28, 2018. Petitioner made no tax payments for tax year 2014 apart from the withholding

and prepayment. Since these items were deemed paid on April 15, 2015 (*see* conclusion of law D), and no portion of petitioner's claimed overpayment of tax was paid within the look back period, the amount of the refund is limited to zero. It must be concluded that the Division properly denied petitioner's claim for refund for tax year 2014 (*see* Tax Law § 687 [a], [e], [i]; *see also Matter of Petrovich*, Tax Appeals Tribunal, January 20, 2000).

F. Accordingly, the Division of Taxation's motion for summary determination is granted. The petition of Joel Petitti is denied, and the account adjustment notice, dated June 10, 2022, denying petitioner's refund claim, is sustained.

DATED: Albany, New York
November 16, 2023

/s/ Alexander Chu-Fong
ADMINISTRATIVE LAW JUDGE