STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RICHARD LEVY	:	DETERMINATION DTA NO. 850336
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 Administrative Code of the City of New York for the Year 2014.	:	

Petitioner, Richard Levy, filed a petition 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 Administrative Code of the City of New York for the year 2014.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Amy Seidenstock, Esq., of counsel), brought a motion on September 20, 2024, seeking summary determination in the above-captioned matter pursuant to sections 3000.5 and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). Petitioner, appearing by RSM US LLP (John J. Fielding, CPA), did not file a response by October 21, 2024, which date commenced the 90-day period for the issuance of this determination.

Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Kevin R. Law, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner's claim for refund for the 2014 tax year, filed following a federal change in his taxable income, was filed within the limitations period provided for in Tax Law § 687 (c).

FINDINGS OF FACT

1. On February 10, 2021, petitioner, Richard Levy, filed a 2014 New York State amended resident income tax return, form IT-201-X, in which he claimed a refund in the amount of $21,248.00. The refund claim was the result of a federal audit change that reduced his 2014 federal schedule E income.

2. By notice of disallowance, dated August 17, 2021, the Division of Taxation (Division) disallowed petitioner's refund claim. The notice of disallowance states in pertinent part that:

> "We have received your amended New York State personal income tax return for 2014. While we accept the calculation of this return, we have denied your refund request because it is out of statute.
>
> New York State law requires you to report federal audit changes to the state within 90 days after the final determination of change.
>
> Any claim for an overpayment attributable to that federal change has to be filed within 2 years from the time the federal change is required to [be] filed. Since your documentation shows 09/21/18 as the date of the federal audit change, and any federal records we could access did not show a date within [statute] (a total of 2 years and 90 days from the determination) your refund is denied."

3. On November 10, 2022, following the issuance of a conciliation order, dated August 12, 2002, by the Division's Bureau of Conciliation and Mediation Services sustaining the notice of disallowance, petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order.

4. In support of its motion, the Division submitted the affidavit of Craig Driggs, a Tax Technician 3, in the Division's personal income tax audit bureau. Mr. Driggs' responsibilities

include reviewing New York State personal income tax returns, supervising an audit group consisting of four teams, reviewing of files and documentation during the course of personal income tax audits, overseeing and providing assistance to his team members during the audit or protest resolution process, planning and managing the work of all audit teams, and selecting audits.

5. Mr. Driggs averred that he reviewed the information in the Division's systems including correspondence, case contacts, filing history, and other documents for petitioner, including his amended New York State personal income tax return for tax year 2014. This affidavit is based upon his personal knowledge of the facts in this matter and based upon a review of the Division's official records which are kept in the ordinary course of business.

6. Mr. Driggs reviewed petitioner's Internal Revenue Service (IRS) account transcript for tax year 2014. According to his review of the transcript, the date of the final federal determination was November 5, 2018.

7. Petitioner did not file a response to the Division's 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]). Under the Rules, a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212 (20 NYCRR 3000.9 [c]). "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 whether a material issue of fact exists or if there is even arguably such an issue (***see Bershaw v Altman***, 100 AD2d 642, 643 [3d Dept 1984]). 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 by motion (***see Gerard v Inglese***, 11 AD2d 381, 382 [2nd 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' . . . 'mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient'" (***Whelan v GTE Sylvania***, 182 AD2d 446, 449 [1st Dept 1992], citing ***Zuckerman v City of New York***, 49 NY2d at 562).

B. Petitioner did not respond to the Division's motion. Accordingly, he is deemed to have conceded that no question of fact requiring a hearing exists (***see Kuehne & Nagel v Baiden***, 36 NY2d 539, 544 [1975]; ***John William Costello Assoc. v Standard Metals Corp.***, 99 AD2d 227, 229 [1st Dept 1984], ***appeal dismissed*** 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts alleged in the Division's motion papers. Therefore, those facts are deemed admitted (***see Whelan v GTE Sylvania***, 182 AD2d at 449, citing ***Kuehne & Nagel v Baiden***, 36 NY2d at 544).

C. Tax Law § 659 provides that, where a taxpayer's federal taxable income is changed or corrected by the IRS the taxpayer must report such change or correction to the Division within 90 days after "the final determination of such change or correction." Tax Law § 687 (c) provides that a refund claim attributable to a federal change [or] correction required to be reported under Tax Law § 659 must be filed within two years from the time the notice of such change or correction was required to be filed with the Division. By the combined operation of Tax Law §§

659 and 687 (c), petitioner had two years and 90 days from the date of the final determination by the IRS of petitioner's 2014 federal taxable income in which to file his refund claim (***see also*** 20 NYCRR 159.6 [c]). The date of the final determination was November 5, 2018. Thus, petitioner had until February 4, 2021, to timely claim a refund. Petitioner's claim for refund was not filed until February 10, 2021. Accordingly, as it was late filed, the claim was properly denied by the Division.

D. The Division of Taxation's motion for summary determination is granted, the petition of Richard Levy is denied, and the notice of disallowance, dated August 17, 2021, is sustained.

DATED: Albany, New York
January 16, 2025

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE