

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
YEVGENIY VARSHAVSKIY : ORDER
for Redetermination of a Deficiency or For Refund of : DTA NO. 828292
New York State Personal Income Tax Under Article 22 :
of the Tax Law for the 2012. :

Petitioner, Yevgeniy Varshavskiy, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law for the year 2012.

On October 25, 2018, the Division of Taxation, by Amanda Hiller, Esq. (Stephanie M. Lane, Esq., of counsel), filed a motion seeking an order granting summary determination pursuant to Tax Law § 2006 (6), and 20 NYCRR 3000.5 and 3000.9 (b). Accompanying the motion was the affirmation of Stephanie M. Lane, Esq., its annexed exhibits, and the affidavit of Darrell Wright. Petitioner, appearing pro se, did not respond to the motion. Accordingly, the 90-day period for issuance of this order began on November 26, 2018, the due date for petitioner's response. After due consideration of the documents submitted, Winifred M. Maloney, Administrative Law Judge, renders the following order

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for credit or refund of personal income tax for the year 2012 on the basis that the claim was filed after the expiration of the applicable statute of limitations for credit or refund.

FINDINGS OF FACT

1. On or about April 15, 2013, petitioner, Yevgeniy Varshavskiy, filed a New York State application for automatic six-month extension of time to file for individuals (form IT-370) for the year 2012, and remitted \$7,000.00 with his request for an extension. On this form IT-370, petitioner indicated that he was subject to New York State and New York City personal income taxes.

2. On January 30, 2017, petitioner mailed to the Division of Taxation (Division) a New York State resident income tax return (form IT-201), for the year 2012, requesting an overpayment in the amount of \$6,118.00 to be applied to his estimated tax account for the year 2013. Petitioner's signature and the printed date "09-01-2013" appear on page 4 of this return.

3. The Division's OPS-Liability Correspondence Section-Income issued an "Account Adjustment Notice - Personal Income Tax" for the year 2012 (notice of account adjustment), dated February 22, 2017, to petitioner disallowing the claimed refund/overpayment of tax requested to be applied to the next period (the year 2013) in the amount of \$6,118.00, in full. The "Explanation" section of the notice of account adjustment contained, in pertinent part, the following paragraph:

"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 tax 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."

4. On October 25, 2018, the Division filed this motion for summary determination on the ground that petitioner failed to timely file a claim for refund or credit of personal income tax for the year 2012.

In support of its motion, the Division submitted: (i) the affirmation, dated October 25,

2018, of Stephanie M. Lane, Esq., an attorney employed in the Office of Counsel of the Division; (ii) the affidavit, dated October 23, 2018, of Darrell Wright, a Tax Technician 3 in Audit Group 15 in the Income Franchise Desk Audit Bureau (IFDAB); (iii) a copy of petitioner's New York State application for automatic six-month extension of time to file for individuals for the year 2012, and a copy of the accompanying check remitting \$7,000.00; (iv) a copy of petitioner's New York State resident income tax return for the year 2012, and a copy of the envelope in which it was mailed on January 30, 2017; (v) a "Certification," dated October 1, 2018, of Thomas Engel, Deputy Tax Commissioner, Office of Budget and Management Analysis, Disclosure and Government Exchange; (vi) a copy of the notice of account adjustment for the year 2012; (vii) a copy of the petition stamped received by the Division of Tax Appeals on August 1, 2017, and a copy of the envelope in which it was sent by Fed Ex Express Saver on July 29, 2017; and (viii) a copy of the Division's answer, dated October 4, 2017.¹

5. In her affirmation in support of the motion for summary determination, Ms. Lane claims, among other things, that petitioner did not file a 2012 New York State income tax return requesting a refund prior to January 30, 2017. She further claims that the certification of Mr. Engel demonstrates "petitioner's late filing for tax year 2012."

6. Attached to Ms. Lane's affirmation as exhibit "D" is a "Certification" sealed and signed by Mr. Engel on October 1, 2018. Review of that certification indicates that on October 1, 2018, the Division searched its personal income tax files for petitioner's personal income tax filings for the year 2012 and found "no such *amended* return(s) have been filed prior to January 30, 2017 (emphasis added)."

¹ An incorrect year of 2003 appears in the caption of the Division's original answer, dated October 4, 2017. A review of the file indicates that the Division's then representative faxed a revised first page, listing the year 2012 in the caption, to the Division of Tax Appeals on October 10, 2017.

CONCLUSIONS OF LAW

A. Tax Law § 687 (a) provides, in relevant part, as follows:

“Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within (i) three years from the time the return was filed; (ii) two years from the time the tax was paid, . . . whichever of such periods expires the latest, or if no return was filed, within two years from the time the tax was paid. 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 plus the period of any extension of time for filing the return 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 Except as otherwise provided in this section, if no claim is filed, the amount of a credit or refund shall not exceed the amount which would be allowable if a claim had been filed on the date the credit or refund is allowed.”

B. 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]).

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. Thus, the movant “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 the Tax Appeals Tribunal noted in *Matter of United Water New York* (Tax Appeals Tribunal, April 1, 2004):

“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’ (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). If material facts are in dispute,

or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v Inglese*, 11 AD2d 381 [1960]). Upon such a motion, it is not for the court ‘to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist’ (*Daliendo v Johnson*, 147 AD2d 312 [1989]).”

C. The Division filed its motion on the ground that petitioner filed an untimely claim for credit or refund of personal income tax for the year 2012. The record, as developed to this point, contains ambiguities regarding petitioner’s tax filings for the year 2012. The Division’s Certification references an amended return, suggesting the possibility of an earlier original return. As material and triable issues of fact exist in this matter, the Division’s motion for summary determination must be denied.

D. The Division of Taxation’s motion for summary determination is denied, and a hearing will be scheduled in due course.

DATED: Albany, New York
February 21, 2019

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE