STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **JENNIFER S. GODDARD AND ALFRED A. HUETE** 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 2017.	:	ORDER DTA NO. 850316

Petitioners, Jennifer S. Goddard and Alfred A. Huete, 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 2017.

On January 3, 2025, the Division of Taxation, appearing by Amanda Hiller, Esq. (Colleen McMahon, Esq., of counsel), filed a motion seeking summary determination in the above-captioned matter pursuant to Tax Law § 2006 (6) and section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners, appearing by Gerald S. Cohen, CPA, did not respond by February 3, 2025, which date commenced the 90-day period for the issuance of this order. Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Anita K. Luckina, Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Taxation has established that no material and triable issue of fact exists such that summary determination may be granted in its favor.

FINDINGS OF FACT

1. On May 17, 2021, petitioners, Jennifer S. Goddard and Alfred A. Huete, filed with the Division of Taxation (Division) a New York State resident income tax return, form IT-201, for tax year 2017 with a joint filing status (return). Petitioners did not report any special condition codes in item G of the return. On the return, petitioners reported total New York State and New York City payments of $20,040.00, including a New York State and New York City child and dependent care credit of $51.00, a college tuition credit of $200.00, a New York City school tax credit (fixed and rate reduction amounts) of $456.00, and New York State and New York City tax withholdings of $19,333.00; total New York State and New York City tax of $15,309.00; and requested a refund of $4,731.00. The return included a filing instruction sheet from the return preparer to petitioners as follows:

"Gerald S. Cohen, CPA
. . .
Plainview, NY 11803
Tel: 516 433-6841
Fax: 516 908-5099

JENNIFER S. GODDARD & ALFRED A. HUETE
INSTRUCTIONS FOR FILING
FORM IT-201
2017 NEW YORK INCOME TAX RETURN

THE ORIGINAL RETURN SHOULD BE SIGNED (USE FULL NAME) AND DATED ON PAGE 4 BY THE TAXPAYER AND SPOUSE.

COPY 2 OF THE WITHHOLDING STATEMENT(S), FORM W-2, SHOULD BE ATTACHED TO THE STATE/CITY RETURN BEFORE FILING.

YOUR RETURN SHOWS A $4,731 OVERPAYMENT. OF THIS AMOUNT, $4,731 WILL BE REFUNDED TO YOU.

AT YOUR REQUEST, YOUR STATE INCOME TAX REFUND WILL BE ELECTRONICALLY DEPOSITED DIRECTLY INTO YOUR ACCOUNT WITH THE FINANCIAL INSTITUTION YOU DESIGNATED.

FILE YOUR SIGNED RETURN BY OCTOBER 15, 2018[,] WITH:

STATE PROCESSING CENTER
PO BOX 61000
ALBANY, NY 12261-0001[1]

TO DOCUMENT THE TIMELY FILING OF YOUR TAX RETURN, WE SUGGEST THAT YOU OBTAIN AND RETAIN PROOF OF MAILING. PROOF OF MAILING CAN BE ACCOMPLISHED BY SENDING THE TAX RETURN BY REGISTERED OR CERTIFIED MAIL (METERED BY THE U.S. POSTAL SERVICE).

IN ACCORDANCE WITH YOUR INSTRUCTIONS, WE HAVE NOT PREPARED NEW YORK INDIVIDUAL ESTIMATED TAX VOUCHERS. THE INCOME TAX WITHHELD FROM ALL WAGES IN 2018 MUST AMOUNT TO AT LEAST $16,840, OR IF LESS, 90% OF YOUR TOTAL 2018 INCOME TAX. OTHERWISE, YOU MAY BE LIABLE FOR A NONDEDUCTIBLE PENALTY FOR UNDERPAYMENT OF ESTIMATED TAX."

2. On July 29, 2021, the Division issued an account adjustment notice (notice) to petitioners. The notice recomputed petitioners' return by disallowing petitioners' claim for the college tuition credit in the amount of $200.00, because the return was missing the social security or taxpayer identification number for the student for whom the credit was claimed. This adjustment resulted in a corresponding reduction in petitioners' refund claim to $4,531.00. The notice disallowed the adjusted refund and stated, in relevant part, that:

> "[w]e denied your claim for the 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."

[1] This instruction is circled, and a hand-written notation therewith states: "Attach W-2's."

3. On November 29, 2021, the Division issued a notice of disallowance (statutory notice) to petitioners disallowing the adjusted refund of $4,531.00 for the reasons set forth in the notice.

4. Petitioners requested a conciliation conference with the Division's Bureau of Conciliation and Mediation Services, which was held on June 14, 2022.

5. On July 28, 2022, the Division issued a second account adjustment notice (second notice) to petitioners. The second notice indicated that the Division recomputed the return to include petitioners' claim for the college tuition credit in the amount of $200.00. Petitioners' refund claim was correspondingly adjusted to $4,731.00, and the adjusted refund was disallowed. The second notice stated, in relevant part, that:

> "[w]e denied your claim for the 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."

6. By conciliation order, dated October 14, 2022 (CMS No. 000340243), the conciliation conferee recomputed the statutory notice to provide a refund in the amount of $51.00.

7. On October 21, 2022, petitioners timely filed a petition with the Division of Tax Appeals protesting the conciliation order.

8. On January 4, 2023, the Division filed an answer to the petition.

9. On January 3, 2025, the Division filed a notice of motion for summary determination and supporting documents, including an affirmation of Colleen McMahon, Esq., dated January 2, 2024 [sic]. The opening paragraph of the affirmation states that Ms. McMahon "affirms under penalty of perjury."

10. The Division's motion also included an affidavit of John Verba, Taxpayer Services Specialist 4, sworn to on January 2, 2025, and attachments, including petitioners' return (***see*** finding of fact 1). Mr. Verba attests that [i]n my review of [the] Division's official records kept

in the ordinary course, I found that the petitioners did not file a New York State Resident Personal Income Tax Return for the tax year 2017 prior to May 17, 2021." There is no assertion that the Division likewise searched its official records to ascertain if petitioners filed an application for automatic six-month extension of time to file for individuals, form IT-370, for tax year 2017.

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" and the moving party is entitled to a favorable determination as a matter of law (20 NYCRR 3000.9 [b] [1]). A motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to Civil Practice Law and Rules (CPLR) 3212 (***see*** 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]). It is well established that, as the procedural equivalent of a trial, summary judgment is a drastic remedy that should be denied if there is any doubt as to the existence of a triable issue or where a material fact is arguable (***see Glick & Dolleck 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 (***see Gerard v Inglese***, 11 AD2d 381, 382 [2d Dept 1960]). "In determining a motion for summary judgment, the court must view the

evidence in the light most favorable to the nonmoving party" (***Stukas v Streiter***, 83 AD3d 18, 22 [2d Dept 2011], citing ***Pearson v Dix McBride, LLC***, 63 AD3d 895, 895 [2d Dept 2009]). Only after the moving party has met its initial burden does the burden shift to the nonmoving party (***see Alvarez v Prospect Hosp***., 68 NY2d 320, 324 [1986], citing ***Zuckerman v City of New York***, 49 NY2d at 562).

As detailed hereafter, the Division has not made a prima facie showing of entitlement to judgment as a matter of law.

B. Initially, the affirmation of Ms. McMahon submitted in support of the Division's motion does not comply with CPLR 2106 and cannot be relied upon as proof of any facts asserted therein. CPLR 2106, as amended effective January 1, 2024, allows any person to submit an affirmation in lieu of an affidavit and provides the following:

> "The statement of any person wherever made, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in New York in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:
>
> I affirm this ___ day of _____, ___, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.
>
> (Signature)"

Courts have strictly interpreted the language of CPLR 2106 which requires that affirmations "shall be" substantially in the form quoted above, and rejected affirmations that did not contain that precise language (***see Great Lakes Ins. v American Steamship Owners Mut. Protection & Indem. Assn.***, 2024 NY Slip Op 30148[U], *7 [NY Sup Ct, New York County 2024], ***affd*** 228 AD3d 429 [1st Dept 2024]; ***Grandsard v Hutchison,*** 2024 WL 1957086 [Sup

Ct, New York County 2024], ***affd*** 227 AD3d 491 [1st Dept 2024]; ***R.F. v L.K.***, 82 Misc 3d 1221[A] [Sup Ct, Westchester County 2024]).

Ms. McMahon's affirmation does not acknowledge that it may be filed in an action or proceeding in a court of law, and it is not made after the "foregoing" statements and immediately preceding her signature, thus, it fails to comply with the particularized requirements of CPLR 2106 and cannot be relied upon as proof of the facts asserted therein (***Great Lakes Ins. v American Steamship Owners Mut. Protection & Indem. Assn.***, 2024 NY Slip Op 30148[U] at *7, ***affd*** 228 AD3d 429; ***Grandsard v Hutchinson,*** 2024 WL 1957086, ***affd*** 227 AD3d 491; ***R.F. v L.K.***, 82 Misc 3d 1221[A]). Therefore, the Division's motion is denied to the extent that the inadequate affirmation cannot be relied upon as proof of the asserted facts. In addition, as discussed below, there is a factual issue precluding summary determination.

C. Tax Law § 687 (a) provides in relevant part, that:

> "[c]laim 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 [or] (ii) two years from the time the tax was paid … whichever of such periods expires the latest … 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[.]"[2]

The Division "denied [petitioners'] claim for the refund or credit because it was filed too late" (***see*** findings of fact 2 and 5). However, petitioners filed their return on May 17, 2021, and made their refund claim on that return. Therefore, petitioners' refund claim was timely filed within three years from the time the return was filed. Tax Law § 687 (a) operates here only to limit the refund to the amount of tax paid by petitioners within the three-year period before the filing of the refund claim plus the period of any extension of time for filing the return.

[2] ***See also*** Tax Law § 1312 (incorporating and applying Tax Law § 687 to tax imposed pursuant to the authority of Article 30).

D. Pursuant to Tax Law § 687 (i), any tax paid by a taxpayer, income tax withheld from a taxpayer, and any amount paid by a taxpayer as estimated income tax for a taxable year is deemed paid on the fifteenth day of the fourth month following the close of the taxable year with respect to which such amount constitutes a credit or payment. Thus, the 2017 payments that comprise petitioners refund claim (***see*** findings of fact 1 and 6) were deemed paid on April 15, 2018. Petitioners' May 17, 2021, refund claim, though timely filed, would exceed the amount of tax paid within the three year period before the claim was made—i.e., May 17, 2018 through May 17, 2021—unless petitioners had an extension of time to file their return (***see*** Tax Law § 687 [a]; ***Matter of Brenhouse***, Tax Appeals Tribunal, September 4, 2008 [the period of an extension of time for filing a return is added to the three-year period for determining any limitation on the amount of the refund even if the taxpayer did not file the return within the extended period of time for filing]).

E. Here, there is a material question of fact regarding whether petitioners had an extension of time to file their return. The return filed with the Division contained the detailed filing instructions from the return preparer to petitioners, including the specific instruction that the return be filed by October 15, 2018 (***see*** finding of fact 1)—a date that coincided with the extended filing date pursuant to a six-month extension of time to file a 2017 form IT-201 (***see*** New York State Department of Taxation and Finance instructions for form IT-201 full-year resident income tax return, form IT-201-I [2017], available at https://www.tax.ny.gov/pdf/2017/inc/it201i_2017.pdf). The Division pointedly searched its records to determine whether petitioners filed a 2017 return prior to May 17, 2021, but seemingly did not determine whether petitioners had a six-month extension of time to file for tax year 2017 (***see*** finding of fact 10). Accordingly, there is a material question of fact whether petitioners had an extension of time to

file their return such that their timely refund claim requested an amount of tax paid within three years of said claim plus the period of that extension and should be granted. Thus, the Division has not made a prima facie showing of entitlement to judgment as a matter of law.

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

DATED: Albany, New York
May 01, 2025

/s/ Anita K. Luckina
ADMINISTRATIVE LAW JUDGE