STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **REGENERON PHARMACEUTICALS, INC. AND COMBINED AFFILIATES** for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Year 2016.	:	ORDER DTA NO. 850722

Petitioner, Regeneron Pharmaceuticals, Inc. and Combined Affiliates, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under article 9-A of the Tax Law for the year 2016.

On September 25, 2024, the Division of Taxation, appearing by Amanda Hiller, Esq. (David Markey, Esq., of counsel), filed a motion 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. Petitioner, appearing by Baker & McKenzie LLP (Michael C. Tedesco, Esq., Maria P. Eberle, Esq., and Lindsay M. LaCava, Esq., of counsel), timely responded on October 25, 2024, and filed a cross-motion for summary determination pursuant to sections 3000.5 and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. The Division of Taxation requested and was granted an extension of time to respond to petitioner's cross-motion, and timely responded by December 24, 2024, which date commenced the 90-day period for issuance of this order. Based upon the motion papers and all

pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following order.

ISSUE

Whether issues of fact mandating a hearing are present such that the Division of Taxation's motion for summary determination and petitioner's cross-motion for summary determination should be denied.

FINDINGS OF FACT

1. Petitioner, Regeneron Pharmaceuticals, Inc. and Combined Affiliates, is a corporation organized under the laws of the State of New York, with its principal place of business in Tarrytown, New York.

2. Petitioner applied for and was granted Excelsior jobs program tax credits by the New York State Department of Economic Development and New York State Urban Development Corporation, acting jointly and collectively referred to as Empire State Development (ESD).

3. Petitioner and ESD entered an incentive agreement on May 12, 2015, for project number 125,519 for tax years 2014 through 2023. Appended to the incentive agreement for project number 125,519 is a preliminary schedule of benefits outlining the maximum amount of credits available for each benefit year in the ten-year period. As indicated in the preliminary schedule, the maximum credits available for project number 125,519 in tax year 2016 was $1,250,000.00. The incentive agreement provides that to claim the tax credit for each of the benefit years in the ten-year period, petitioner must satisfy the applicable job and investment requirements in accordance with the incentive agreement. For each year of the ten-year period that petitioner meets the eligibility requirements, petitioner would be issued a certificate of tax

credit based on the interim job, investment or research and development milestones indicated in the investment proposals up to the limits established in the preliminary schedule of benefits.

4. Petitioner and ESD entered an incentive agreement on December 13, 2012, for project number 129,887 for tax years 2015 through 2024. Appended to the incentive agreement for project number 129,887 is a preliminary schedule of benefits outlining the maximum amount of credits available for each benefit year in the ten-year period. As indicated in the preliminary schedule, the maximum credits available for project number 129,887 in tax year 2016 was $1,000,000.00. The incentive agreement provides that to claim the tax credit for each of the benefit years in the ten-year period, petitioner must satisfy the applicable job and investment requirements in accordance with the incentive agreement. For each year of the ten-year period that petitioner meets the eligibility requirements, petitioner would be issued a certificate of tax credit based on the interim job, investment or research and development milestones indicated in the investment proposals up to the limits established in the preliminary schedule of benefits.

5. Petitioner was issued an Excelsior jobs program certificate of tax credit for project number 125,519, dated February 20, 2016, for tax year 2014 for Excelsior jobs program tax credits in the amount of $450,000.00. This was the maximum amount of Excelsior jobs program tax credits available to petitioner for 2014 as indicated in the preliminary schedule of benefits attached to the incentive agreement for project number 125,519. The 2014 Excelsior jobs program certificate of tax credit indicates that it is for benefit period 1 of 10.

6. After receiving the 2014 Excelsior jobs program certificate of tax credit, petitioner filed form CT-3-A, amended general business corporation franchise tax return (amended 2014 return) for that year with the Division of Taxation (Division), claiming a refund of the Excelsior

jobs program tax credits for project number 125,519. Petitioner mailed the amended 2014 return to NYS Corporation Tax, Processing Unit, PO Box 22095, Albany, New York 12201-2095.

7. The Division granted all Excelsior jobs program tax credit refunds requested by petitioner for tax year 2014.

8. Petitioner was issued an Excelsior jobs program certificate of tax credit for 2015 for project number 125,519, dated June 4, 2020, for a tax credit in the amount of $900,000.00. This was the maximum amount of Excelsior jobs program tax credits available to petitioner for 2015 as indicated in the preliminary schedule of benefits attached to the incentive agreement for project number 125,519. The 2015 Excelsior jobs program certificate of tax credit indicates that it is for benefit period 2 of 10.

9. Petitioner was issued an Excelsior jobs program certificate of tax credit for 2015 for project number 129,887, dated February 5, 2018, for tax credits totaling $2,000,000.00. This was the maximum amount of Excelsior jobs program tax credits available to petitioner for 2015 as indicated in the preliminary schedule of benefits attached to the incentive agreement for project number 129,887. The 2015 Excelsior jobs program certificate of tax credit indicates that it is for benefit period 1.

10. After receiving the 2015 Excelsior jobs program certificate of tax credits for project numbers 125,519 and 129,887, petitioner filed a 2015 form CT-3-A, amended general business corporation franchise tax return (amended 2015 return) claiming a refund of the Excelsior jobs program tax credits for the amounts reflected on the certificates of tax credits. Petitioner mailed the amended 2015 return to NYS Corporation Tax, Processing Unit, PO Box 22095, Albany, New York 12201-2095.

11. The Division granted the Excelsior jobs program tax credit refunds requested by petitioner for tax year 2015 with respect to project number 129,887 but denied the Excelsior jobs program tax credit refund requested by petitioner for project number 125,519 because petitioner did not include the 2015 Excelsior jobs program certificate of tax credit for project number 125,519 with the amended 2015 return.

12. Petitioner requested a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS), in protest of the Division's denial of the 2015 refund request in relation to project number 125,519. The Division subsequently granted petitioner's refund request for the full amount of Excelsior jobs program tax credits claimed for 2015.

13. Petitioner filed its 2016 form CT-3-A, general business corporation combined franchise tax return, and form CT-3-M, general business corporation MTA surcharge return (collectively, the original 2016 return), on December 15, 2017.

14. The Division conducted an audit of petitioner's original 2016 franchise tax return (the audit period or period at issue). The audit was conducted by Yaroslav Lutsiv, Tax Auditor 1.

15. In opposition to the Division's motion and in support of petitioner's cross-motion, petitioner submitted an affidavit, sworn to on October 23, 2024, of Dale M. Fanning, petitioner's Executive Director, Tax Operations. Mr. Fanning averred that during the audit for the period at issue, petitioner informed Mr. Lutsiv on at least three separate occasions that it would be filing an amended return for 2016 to report and claim a refund of its Excelsior jobs program tax credits related to Project Numbers 125,519 and 129,887.

16. The Division's audit log for the audit period contains, in relevant part, the following entries:

- 7/12/2018: "Taxpayer informed that they will be filling [sic] amended returns for 2015-2016 tax years that are under audit."

- 11/7/2018: "Received a call from taxpayer. Discussed the case. Explained the [statutes]. Was informed that taxpayer is planning to file amended returns. Explained to taxpayer that amended returns should be filed with Albany office."

- 11/19/2018: "Called taxpayer and mailed the letter with schedules to taxpayer. Discussed the case with taxpayer and explained the procedure of finishing the audit. Taxpayer inquired about how the amended returns will be handled. Explained that it should be filed with Albany office."

17. Petitioner was issued an Excelsior jobs program certificate of tax credit for 2016 for project number 125,519, dated June 4, 2020, for a tax credit in the amount of $1,250,000.00. This was the maximum amount of Excelsior jobs program tax credits available to petitioner for 2016 as indicated in the preliminary schedule of benefits attached to the incentive agreement for project number 125,519. The 2016 Excelsior jobs program certificate of tax credit indicates that it is for benefit period 3 of 10.

18. Petitioner was issued an Excelsior jobs program certificate of tax credit for 2016 for project number 129,887, dated December 11, 2020, for tax credits totaling $1,000,000.00. This was the maximum amount of Excelsior jobs program tax credits available to petitioner for 2016 as indicated in the preliminary schedule of benefits attached to the incentive agreement for project number 129,887. The 2016 Excelsior jobs program certificate of tax credit indicates that it is for benefit period 2 of 10.

19. Petitioner amended its original 2016 return to claim the Excelsior jobs program tax credits and request a refund of $2,250,000.00. On December 15, 2020, petitioner mailed the

2016 amended return to the following address: NYS Corporation Tax, Processing Unit, PO Box 22095, Albany, New York 12201-2095 (December 15, 2020, mailing).

20. The Division's instructions for the filing of general business corporation combined franchise tax returns for the year 2016 list the address where such returns are to be filed as NYS Corporation Tax, PO Box 15181, Albany, NY 12212-5181. The Division's instructions for the filing of general business corporation combined franchise tax returns for the year 2015 list the same address. For 2014, the Division's instructions for the filing of general business corporation combined franchise tax returns state that returns with payment should be mailed to NYS Corporation Tax, Processing Unit, PO Box 1909, Albany, NY 12201-1909, and returns without payment should be mailed to NYS Corporation Tax, Processing Unit, PO Box 22095, Albany, New York 12201-2095.

21. On or about February 10, 2021, the United States Postal Service returned to petitioner the December 15, 2020, mailing with a label affixed stating "UNABLE TO FORWARD" and "RETURN TO SENDER."

22. On February 23, 2021, petitioner filed its amended 2016 return requesting a refund in the amount of $2,250,000.00 with the Division at the following address: NYS Corporation Tax, Processing Unit, PO Box 15181, Albany, NY 12212-5181.

23. The Division conducted an audit of petitioner's amended 2016 return and refund claim. The audit of petitioner's amended 2016 return and refund claim was conducted by Mr. Lutsiv.

24. On August 29, 2022, the Division issued to petitioner a notice of disallowance, disallowing petitioner's refund claim for 2016 on the basis that the claim was not timely filed.

25. Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services protesting the Division's notice of disallowance. By order, dated August 4, 2023, the conciliation conferee sustained the statutory notice. Petitioner thereafter filed a timely petition with the Division of Tax Appeals.

26. The Division filed an answer to the petition on February 14, 2024.

27. On September 25, 2024, the Division filed a motion seeking summary determination. In support of its motion, the Division submitted, among other items, an affirmation of David Markey, Esq., dated September 25, 2024. The opening paragraph of the affirmation states that Mr. Markey "affirms under penalty of perjury pursuant to CPLR § 2106 and under the laws of New York, which penalties may include a fine or imprisonment." Paragraph 2 of the affirmation states that "[t]he statements made in this Affirmation are true to my knowledge, except as to those statements made upon information and belief and, as to those statements, I believe them to be true."

28. On October 25, 2024, petitioner filed a response opposing the Division's motion and cross-moved for summary determination. In support of its cross-motion for summary determination, petitioner submitted, among other items, an affirmation of Michael C. Tedesco, Esq., dated October 25, 2024. The opening paragraph of the affirmation states, "I, Michael C. Tedesco, an attorney admitted to practice in the state of New York, hereby affirm under penalty of perjury pursuant to CPLR § 2106." Paragraph 3 of the affirmation states that "[t]he statements contained in this affirmation are true to the best of my knowledge, except as to those matters alleged on information and belief and, as to those matters, I believe them to be true."

CONCLUSIONS OF LAW

A. It is initially noted that both the affirmation of Mr. Markey submitted in support of the Division's motion, and the affirmation of Mr. Tedesco submitted in support of petitioner's cross motion, do not comply with CPLR § 2106. CPLR § 2106 was amended, effective January 1, 2024, and applies in all actions pending on that date or commenced thereafter (***see*** Seigel, N.Y. Practice § 205 [6th ed.]). The amended CPLR § 2106 allows any person to submit an affirmation in lieu of an affidavit and provides:

> "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 [Sup Ct, New York County 2024] [rejecting affirmations in support of a motion for summary judgment as not sufficient under CPLR § 2106, where the affirmations stated they were "under the penalties of perjury under the laws of the United States pursuant to 28 U.S.C. § 1746" and "affirm[ed] that the following is true and correct"], ***affd*** 228 AD3d 429, 429 [1st Dept 2024]); ***Grandsard v Hutchison***, 2024 WL 1957086 [Sup Ct, New York County 2024] ["petitioner's attorney submitted a 'Verification/Affirmation' with the petition that merely affirmed 'under the penalty of perjury.'

Subsequent to January 1, 2024, courts have found that a statement simply affirming the following under the penalties of perjury fails to acknowledge the laws of New York and the possibility of fines or imprisonment and as a result is not in admissible form and cannot be relied upon"], ***affd*** 227 AD3d 491 [1st Dept 2024]; ***R.F. v L.K.***, 82 Misc 3d 1221[A] [Sup Ct, Westchester County 2024] ["Although [defendant] stated that he 'affirms the following under the pains and penalties of perjury,' this is insufficient and does not encompass the requisite language [of CPLR 2106], or language substantially reflective of that required in the statute. There is no acknowledgement of the laws of New York or the possible penalties of fine or imprisonment if the statements made therein are not true. Thus, Defendant's Affirmation is not in admissible form and cannot be relied upon as proof of facts set forth therein"]).

In this case, Mr. Tedesco's affirmation in support of petitioner's cross-motion does not acknowledge the possible penalties of fine or imprisonment if the statements made therein are not true, and further does not contain the requisite language acknowledging that the document may be filed in an action or proceeding in a court of law. Similarly, the affirmation of Mr. Markey in support of the Division's motion does not acknowledge that the document may be filed in an action or proceeding in a court of law. As such, neither affirmation complies with the requirements of CPLR § 2106 and cannot be relied upon as proof of the facts asserted therein (***see id.***). The Division's motion and petitioner's cross-motion are thus denied to the extent that the inadequate affirmations cannot be relied upon as proof of the asserted facts. In addition, as discussed below, I find that there are questions of fact precluding summary judgment for either party.

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" 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 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 (***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***, 49 NY2d at 562).

As detailed hereafter, neither party has made a prima facie showing of entitlement to judgment as a matter of law since there are material and triable issues of fact warranting a hearing.

C. Tax Law § 1087 (a) provides that a claim for refund of an overpayment of tax under article 9-A must be filed by the taxpayer within three years from the time the return was filed or

within two years from the time the tax was paid, whichever period expires the latest (***see*** Tax Law § 1087 [a] [i] and [ii]). In this case, petitioner filed its original 2016 return on December 15, 2017. The Division argues that because petitioner did not file its amended 2016 franchise tax return and refund claim with the Division at the proper address until February 23, 2021, that such refund claim is beyond the three-year limitation period set forth in Tax Law § 1087 (a) (i) and therefore untimely.[1]

Petitioner argues that the filing of its amended 2016 return and refund claim was timely based on three grounds: i) petitioner asserts that Executive Order 202.8 tolled the three-year statute of limitations period of Tax Law § 1087; ii) that it made a timely informal refund claim for 2016; and iii) that the limitations period of Tax Law § 1087 (a) should be equitably tolled.

D. Petitioner's argument that Executive Order 202.8 tolled the statute of limitations period of Tax Law § 1087 is rejected. Executive Order 202.8, dated March 20, 2020, provided, in part, as follows:

> "In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule or regulation, or part thereof, is hereby tolled from the date of this Executive Order until April 19, 2020" (Executive Order [A. Cuomo] No. 202.8 [9 NYCRR 202.8]).

The language of the Executive Order that states "[i]n accordance with the directive of the Chief Judge of the State to limit operations to essential matters" indicates that such provisions do

[1] There is no dispute that petitioner's December 15, 2020, mailing of the amended 2016 return and refund claim was not sent to the address listed in the Division's instructions for the filing of corporate franchise tax returns for the year 2016 and that petitioner re-mailed its amended 2016 return and refund claim to the proper address on February 23, 2021.

not apply to filing of refund claims seeking overpayments of tax. Furthermore, then-Governor Cuomo also issued Executive Order 202.12, allowing the Division to extend certain filing dates (Executive Order [A. Cuomo] No. 202.12 [9 NYCRR 202.12]). In accordance with this executive order, the Division extended the April 15, 2020, due date to July 15, 2020, for New York State personal income tax and corporation tax returns originally due on April 15, 2020, and for all related tax payments, including estimated tax payments, that were due on April 15, 2020 (***see*** NY State Dept of Taxation & Fin Notice N-20-2 [March 2020]). This notice specifically applies to personal income tax returns and corporation tax returns that were originally due on April 15, 2020, and does not apply to refund requests for prior years. Based upon the foregoing, petitioner's argument that the statute of limitations for the filing of its 2016 refund claims was tolled is rejected.

E. Petitioner next argues that it made an informal refund claim for 2016 within the statutory timeframe set forth in Tax Law § 1087. The Tax Appeals Tribunal has applied the federal informal refund claim doctrine to the question of whether a taxpayer has timely filed a refund claim under the Tax Law (***see Matter of Accidental Husband Intermediary***, Tax Appeals Tribunal, April 11, 2019; ***Matter of Rand***, Tax Appeals Tribunal, May 10, 1990; ***see also Matter of Crispo***, Tax Appeals Tribunal, April 13, 1995 and ***Matter of Lehal Realty Assoc.***, Tax Appeals Tribunal, May 18, 1995 [informal refund claim doctrine applied to informal request for a conciliation conference and informal petition, respectively]). Pursuant to this doctrine, "courts have held that under certain circumstances, it is sufficient that the taxpayer submit a so called 'informal claim' within the statutory period, and then, outside of the limitation period, submit a formal claim" (***Donahue v United States***, 33 Fed Cl 600, 608 [1995]). The Tax Appeals Tribunal described the informal claim rule as "a compromise that allows a taxpayer to informally

satisfy time restrictions for a refund claim, while also protecting the State's interest by requiring the taxpayer to follow the prescribed procedure to obtain a refund" (***Matter of Accidental Husband Intermediary***, citing ***Matter of Greenburger***, Tax Appeals Tribunal, September 8, 1994).

An informal refund claim has three elements: (1) it must provide the taxing authority with notice that the taxpayer is asserting a right to a refund; (2) it must describe the legal and factual basis for the requested refund; (3) it must have a written component (***see Matter of Accidental Husband Intermediary***; ***New England Elec. Sys. v United States***, 32 Fed Cl 636, 641 [1995]; ***American Radiator & Sanitary Corp. v United States***, 162 Ct Cl 106, 113-114 [1963]). "The determination of whether a taxpayer has satisfied the requirements for an informal claim is made on a case-by-case basis and is based on the totality of the facts" (***Matter of Accidental Husband Intermediary***, quoting ***Donahue v United States***, 33 Fed Cl at 608). Further,

> "[t]he sufficiency of the written component of an informal refund claim must be considered in the context of the surrounding circumstances (***Am. Radiator & Sanitary Corp.***, 162 Ct Cl at 114), but the writing must give the taxing authority 'fair notice that a refund of taxes is sought for specified years and of the basis for the claim' (***Hollie v Commr.***, 73 TC 1198, 1213 [1980]). The ultimate question is one of notice: whether the taxing authority knew or should have known that a refund claim was being made (***see Krape v Commr.***, TC Memo 2007-125)" (***Matter of Accidental Husband Intermediary***).

In this case, there is a question of fact as to whether the Division knew or should have known that a refund claim was being made for tax year 2016. While Mr. Fanning's affidavit states that during the audit of petitioner's original 2016 return, "Regeneron informed Auditor Lutsiv on at least three separate occasions that it would be filing an amended return for the Period at Issue to report and claim a refund of its Excelsior Jobs Program tax credit related to Project Numbers 125,519 and 129,887," the audit log merely indicates that on July 12, 2018, November 7, 2018, and November 19, 2018, petitioner stated that they would be filing amended

returns for the year at issue. Although such dates would be within the statutory timeframe for requesting a refund pursuant to Tax Law § 1087, the entries in the audit log do not indicate whether petitioner stated that a refund would be requested or explained the basis for such refund or amount claimed. While an informal refund claim "may include information gained during an audit" (***id.***) and a written memorialization by an auditor of a taxpayer's statement regarding a refund may be sufficient to satisfy the written component element (***see id***.; ***New England Elec. Sys. v United States***, 32 Fed Cl at 643), there are numerous questions of fact regarding the discussions petitioner had with the auditor during the audit about the amended returns and to what extent such discussions included information about the refund claims for the years at issue. As such, there are material questions of fact in dispute which require a full hearing.

F. Petitioner further argues that it satisfied the elements of an informal refund claim for 2016 by way of its 2014 and 2015 amended returns which claimed the Excelsior jobs program tax credits and included the 2014 and 2015 Excelsior jobs program certificates of tax credit with the amended returns for each respective year. Petitioner contends that because the 2014 and 2015 Excelsior jobs program certificates of tax credit demonstrate that it was entitled to claim the tax credit with respect to project numbers 125,519 and 129,887 in 2014 and 2015, and because the certificates demonstrate that the credits may be claimed over a 10-year period, that the 2014 and 2015 certificates show that it was eligible to claim the Excelsior jobs tax credit for project numbers 125,519 and 129,887 in 2016. The Division correctly argues that to be eligible for the Excelsior jobs program tax credit for a specific year, a taxpayer must be issued a certificate of tax credit for *that* taxable year and is only allowed to claim the amount listed on the certificate for that year (***see*** Tax Law § 31 [b]). Thus, while the 2014 and 2015 Excelsior jobs program certificates of tax credit filed with petitioner's amended returns for those years put the

Division on notice that it may be eligible to claim such credits over a 10-year period, such certificates, alone, are not sufficient to satisfy the elements of an informal refund claim for 2016. However, there is a question of fact as to when the Division became aware that petitioner applied for and was issued the 2016 Excelsior jobs program certificates of tax credit. Tax Law § 31 (d) "direct[s]" the Department of Economic Development and the Division to share and exchange information regarding the components of the credit applied for, allowed, or claimed pursuant to this section and taxpayers who are applying for or claiming the credit, and information contained in or derived from applications for admission into the excelsior jobs program. There is thus a question of whether ESD exchanged with the Division, in accordance with these provisions, information contained in petitioner's incentive agreements, including the preliminary schedule of benefits showing the maximum amount of credits available for the year at issue, any information petitioner presented to ESD to show that it satisfied the applicable job and investment requirements in 2016 when applying for the credits for that year, and information that ESD issued the 2016 Excelsior jobs program certificates of tax credit to petitioner. The Division's awareness of such information is properly considered in determining whether the Division knew or should have known that a claim for the Excelsior tax credits was being made (***see Matter of Accidental Husband Intermediary, Inc.***). Because "[t]he determination of whether a taxpayer has satisfied the requirements for an informal claim is made on a case-by-case basis and is based on the totality of the facts" (***id.***, quoting ***Donahue v United States***, 33 Fed Cl at 608), a hearing is necessary to develop a complete record, with testimony and additional documentary evidence, to address these factual questions.[2]

[2] Petitioner also argues that a proceeding before BCMS for tax year 2015 regarding the petitioner's refund request for the 2015 Excelsior jobs program tax credit in relation to project number 125,519 provided the Division with notice that it would be filing a refund request for 2016. However, petitioner presented no evidence or explanation as to how a BCMS proceeding for 2015 provided the Division with notice of a refund for 2016.

G. Petitioner also argues that its 2016 refund claim should be considered timely under the doctrine of equitable tolling. The Tax Appeals Tribunal has rejected this doctrine as a basis for tolling the statute of limitations on refund claims (***see Matter of Levine***, Tax Appeals Tribunal, August 7, 2008). In ***Matter of Levine***, the Tax Appeals Tribunal cited ***United States v Brockamp***, 519 US 347 (1997) in support of its decision. In ***Brockamp***, the Supreme Court held the equitable tolling did not apply to the statutory time limitation on refund claims under Internal Revenue Code (IRC) (26 USC) § 6511 (***see United States v Brockamp***, 519 US at 352).

Petitioner cites ***Boechler, P.C. v Commissioner***, 596 US 199 (2022) as the basis for its argument that the statutory time limitation for filing a refund claim should be equitably tolled. However, in ***Boechler***, the Court was addressing what it determined to be a "nonjurisdictional" deadline under IRC (26 USC) § 6330 (d) (1) to file a petition for review of a collection due process determination (***Boechler, P.C. v Commissioner***, 596 US at 204). Indeed, the Court in ***Boechler*** did not overrule its decision in ***Brockamp***, and specifically distinguished the jurisdictional deadline imposed on refund claims by IRC (26 USC) § 6511 from the language of IRC (26 USC) § 6330 (d) (1) (***see Boechler, P.C. v Commissioner***, 596 US at 209-210). As such, the Tribunal's holding in ***Matter of Levine*** remains controlling and petitioner's argument for equitably tolling of the statute of limitations on its refund claim for 2016 is rejected.

H. Neither party has made a prima facie showing of entitlement to judgment as a matter of law. Material issues of fact exist such that summary determination is improper. "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (***McKenna v McKenna***, 121 AD3d 864, 865 [2d Dept 2014] [internal quotation marks and citation omitted]). "Since [summary determination] deprives the litigant of his day in court it is

considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (***Andre v Pomeroy***, 35 NY2d 361, 364 [1974]). 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, 317 [2d Dept 1989]). Where, as here, material facts are in dispute and contrary inferences may be drawn reasonably from undisputed facts, 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]). It is clear that there are material issues of fact warranting the denial of the Division's and petitioners' motions for summary determination.

I. The Division's motion for summary determination and petitioner's cross-motion for summary determination are denied and a hearing will be scheduled in due course.

DATED: Albany, New York
March 20, 2025

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE