STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PHYLIS MASONE	:	
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 1996.	:	DETERMINATION DTA NO. 818985

Petitioner, Phylis Masone, 72-10 112th Street, Apt. 5-L, Forest Hills, New York 11375, 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 1996.

On July 22, 2002, the Division of Taxation filed a motion for an order dismissing the petition and granting summary determination to the Division of Taxation on the ground that there are no material issues of fact and that the facts mandate a determination in favor of the Division of Taxation. Petitioner's response was due August 22, 2002, which started the 90-day period for issuing this determination. The Division of Taxation appeared by Barbara G. Billet, Esq. (Michelle M. Helm, Esq., of counsel). Petitioner appeared *pro se*. Based upon the pleadings and motion papers, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for refund as untimely.

FINDINGS OF FACT

1. Petitioner, Phylis Masone, filed a New York State income tax return and paid New York State income tax for the year 1996 on or before April 15, 1997. The tax paid on the 1996 return was entirely from withholding tax.

2. In November 2000, the City of New York Office of Payroll Administration received a determination from the City of New York Law Department Workers' Compensation Division which stated that a certain amount of compensation received by petitioner represented wages received in lieu of workers' compensation. It was explained that petitioner was entitled to this amount as a workers' compensation benefit for the year 1996. In December 2000, the Office of Payroll Administration generated and mailed to petitioner a 1996 W-2c form which reduced her taxable wages.

3. On March 30, 2001, petitioner filed an Amended Resident Income Tax Return for the year 1996 which requested a refund in the amount of $596.00. The claim for refund was premised upon the reduction in petitioner's taxable wages and a corresponding reduction in her New York adjusted gross income.

4. The Division of Taxation ("Division") mailed a letter to petitioner, dated August 10, 2001, which denied the claim for a refund. According to the Division, the request for a refund was untimely because it was not made within the later of three years from the time the tax return was required to be filed or within two years from the time the tax was paid.

SUMMARY OF THE PARTIES' POSITIONS

5. Petitioner did not respond directly to the motion for summary determination. However, in her petition, she notes that she did not receive the documentation regarding her 1996 taxes until January 2001. Thereafter, she gave it to her accountant to process along with her taxes for

the year 2000. The accountant mailed the materials back to her in March 2001 and she then mailed them to the Division. Petitioner submits that she should not be penalized because the late filing of the refund application was not her fault. It is further submitted that she should not be denied a refund because of circumstances created by departments of the City of New York.

6. The Division asserts that the claim for relief is untimely and that since the petition fails to state a cause for relief and there are no material issues of fact, it is entitled to summary determination as a matter of law.

CONCLUSIONS OF LAW

A. A party may move for summary determination pursuant to 20 NYCRR 3000.9(b)(1) after issue has been joined. The regulation provides, in pertinent part, that:

> Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, *shall recite all the material facts and show that there is no material issue of fact*, and that the facts mandate a determination in the moving party's favor. The *motion 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 that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact (emphasis added).

B. Section 3000.9(c) provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "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, 487 NYS2d 316, 317, citing ***Zuckerman v. City of New York***, 49 NY2d 557, 427 NYS2d 595).

C. 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, 293 NYS2d 93; ***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572, 536 NYS2d 177). 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, 206 NYS2d 879).

D. Here, petitioner did not respond to the Division's motion; she is therefore deemed to have conceded that no question of fact requiring a hearing exists (***see***, ***Kuehne & Nagel v. Baiden***, 36 NY2d 539, 544, 369 NYS2d 667, 671; ***Costello v. Standard Metals***, 99 AD2d 227, 472 NYS2d 325, 326). Moreover, petitioner did not offer any evidence contesting the facts alleged in the affirmation of Michelle M. Helm, Esq.; consequently, those facts may be deemed admitted (***see***, ***Kuehne & Nagel v. Baiden***, ***supra***, at 544, 369 NYS2d at 671; ***Whelan By Whelan v. GTE Sylvania***, 182 AD2d 446, 582 NYS2d 170, 173).

E. Tax Law § 687 provides, in pertinent part, that:

> (a) General. – Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later . . .
>
> (e) Failure to file claim within prescribed period. – No credit or refund shall be allowed or made . . . after the expiration of the applicable period of limitation specified in this article, unless a claim for credit or refund is filed by the taxpayer within such period. Any later credit shall be void and any later refund erroneous. No period of limitations specified in any other law shall apply to the recovery by a taxpayer of moneys paid in respect of taxes under this article.

F. As set forth above, the question presented is whether the claim for a refund was filed by petitioner within three years from the time the return was filed or two years from the time the

tax was paid. Here, it is undisputed that petitioner's tax return for the year in issue was filed on or before April 15, 1997. Therefore, under the first criterion she had until on or before April 15, 2000 to file the claim for refund. Since the claim for refund was filed on March 30, 2001, the claim for a refund was not filed within the prescribed time limit.

The question remains whether the return was filed within two years of the time the tax was paid. In this case, withholding tax was deemed paid by April 15 of the succeeding taxable year, that is, April 15, 1997 (Tax Law §687[i]). It follows that the claim for refund which was made on March 30, 2001, was not filed within two years of the time the tax was paid and was untimely under the second criterion.

G. Petitioner has argued that she should not be punished for the delays caused by certain agencies of the City of New York. This is a mischaracterization of the conclusion reached. The invocation of the statute of limitations is based on the need to prevent stale claims (***see generally***, 75 NY Jur 2d, Limitations and Laches, § 2). If petitioner had wished to preserve her opportunity to claim a refund, she could have filed a claim for refund with the Division while the proceedings before the Workers' Compensation Board were pending.

H. The motion of the Division of Taxation for summary determination is granted, the denial of the refund dated August 10, 2001 is sustained and petitioner's claim for a refund is denied.

DATED: Troy, New York
October 10, 2002

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE