STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MICHAEL K. KAZIM	:	
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 2002.	:	DETERMINATION DTA NO. 822145

Petitioner, Michael K. Kazim, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 2002.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (Michele W. Milavec, Esq., of counsel), brought a motion, filed May 21, 2008, seeking an order of summary determination in the above-referenced matter pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b)(1). Petitioner, appearing pro se, did not submit a response to the Division's motion, although permitted to do so by June 20, 2008, the date the 90-day period for issuance of this determination began. After due consideration of the documents and arguments presented, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for credit or refund of personal income tax for the year 2002 on the basis that the claim was filed after the applicable statute of limitations had expired.

FINDINGS OF FACT

1. Petitioner, Michael K. Kazim, timely filed his New York State and City of New York resident income tax return, form IT-201, for the year 2002 and paid New York State and City of New York tax in the total sum of $621.50.

2. On or about April 10, 2007, petitioner filed an amended resident income tax return for the year 2002, dated April 9, 2007, in which he claimed a refund of $621.50.

3. On or about June 12, 2007, petitioner filed a second amended resident income tax return for the year 2002, dated June 12, 2007, which added a summary of federal changes with the hand-written notation, "My 1099 R's, totaling $9800 were filed with my IT-201X (2002) on 4/9/07." All the other entries on the second amended resident income tax return for the year 2002 were identical to the one filed on April 10, 2007, including the request for a refund of $621.50.

4. Nothing in the Division of Taxation's (Division) files indicated that another amended resident income tax return for the year 2002 had been filed by petitioner at a time earlier than April 10, 2007.

5. In a letter to petitioner, dated August 3, 2007, the Division disallowed petitioner's refund application in full, stating in part:

> The New York State Tax Law does not permit us to allow the refund claimed on your return.
>
> The Tax Law provides for the granting of a refund or credit if it is applied for within three 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.
>
> Your claim was received on 4/10/07.

SUMMARY OF PETITIONER'S POSITION

6. Although petitioner did not respond to the Division's motion for summary determination, he did state in his petition that he was unaware of the deduction allowed for contributions to an individual retirement account (IRA); that the term IRA was not found in the index to the instructions for the 2002 New York State personal income tax return; that its inclusion in the instruction under the heading "Pensions and Annuities" was misleading and different from treatment on the federal form 1040, where the term IRA was mentioned on two separate lines which were separate and distinct from "Pensions and Annuities."

7. Petitioner conceded that he failed to take the allowable deductions within the statutory three-year limitation.

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 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]).

B. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal 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, 853, 487 NYS2d 316, 317 [1985], ***citing Zuckerman v. City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). 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 [1968]; ***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572, 536 NYS2d 177 [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, 206 NYS2d 879, 881 [1960]).

"To defeat a motion for summary judgment, the opponent must also produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim' and 'mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient'" (***Whelan v. GTE Sylvania***, 182 AD2d 446, 449, 582 NYS2d 170, 173 [1992], ***citing Zuckerman*** at 562).

C. Here, petitioner did not respond to the Division's motion. Since petitioner did not appear on this motion and presented no evidence to contest the facts alleged in the affidavits submitted by the Division, those facts are deemed admitted (***see Kuehne & Nagel, Inc. v. Baiden***, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; ***Whelan*** at 449, 582 NYS2d at 173).

D. As relevant to this proceeding, Tax Law § 687(a), entitled "Limitations on credit or refund," provides as follows:

> 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 . . . . 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 . . . .

E. For the year 2002, petitioner paid personal income tax of $621.50 with his New York State and City of New York resident income tax return which was timely filed by the April 15, 2003 deadline, although the exact filing date was not disclosed in the record. The three-year period of limitations is therefore applicable in this case. Petitioner's claim for refund for 2002, filed April 10, 2007,[1] was not made within three years of the date the return was filed and was therefore untimely.

F. While it may appear harsh that Tax Law § 687(a) places a three-year statute of limitations on taxpayers to claim a refund, it must be noted that the Division, once a return has been filed, generally has a similar three-year period to issue a notice of deficiency to a taxpayer asserting that additional taxes are due. Therefore, it cannot be found that the statutory scheme is unfair since it provides both parties with the same three-year time frame. Both the Tax Appeals Tribunal, in ***Matter of Jones*** (January 9, 1997), and the Appellate Division, in ***Matter of Brault v. Tax Appeals Tribunal*** (265 AD2d 700, 696 NYS2d 579 [1999]), have upheld the validity of applying a three-year statute of limitations for refund. By establishing time frames for the issuance of notices of deficiency and the filing of claims for refund, the Tax Law provides both the State of New York and its taxpayers with the financial stability and security that comes from knowing that a specific tax year is closed. (***See also Matter of Nierenstein***, Tax Appeals Tribunal, April 21, 1988.)

G. Petitioner's arguments that he failed to file his refund application in a timely manner due to his confusion about the deductibility of IRA contributions and the lack of clarity in the instructions to form IT-201 amount to nothing more than ignorance of the law, which is not a

[1]Petitioner's second amended return, filed on June 12, 2007, appears to have been filed in an attempt to clarify his New York adjustments and was not used in determining the three-year statute of limitations.

valid excuse or defense. (***Genesee Brewing Co. v. Village of Sodus Point***, 126 Misc 2d 827, 834, 482 NYS2d 693, 700, ***affd*** 115 AD2d 313, 496 NYS2d 720; ***accord Matter of Nathel v. Commissioner of Taxation & Fin.***, 232 AD2d 826, 649 NYS2d 196 [ignorance of the law is no excuse and a taxpayer is charged with knowledge of the law, including subsequent judicial interpretation thereof].)

Tax Law § 612(c)(3-a), in effect during 2002, provided for a modification reducing federal adjusted gross income which subtracted distributions received by an individual having reached 59 ½ years old from an individual retirement account to the extent the distributions were included in gross income for federal income tax purposes, but not in excess of $20,000.00. The provisions of Tax Law § 612(c)(3-a) were incorporated on form IT-201, line 28, as a New York subtraction. In light of the clear statutory provisions and the Division's instructions and forms, it is clear that petitioner's error emanated from a lack of familiarity with the Tax Law.

H. The petition of Michael K. Kazim is denied, and the Division of Taxation's Notice of Disallowance, dated August 3, 2007, is sustained.

DATED:Troy, New York
August 7, 2008

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE