

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NANCY S. BERENT	:	ORDER
	:	DTA NO. 822459
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Years 2001 through 2003.	:	

Petitioner, Nancy S. Berent, 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 years 2001, 2002 and 2003.

The Division of Taxation by its representative Daniel Smirlock, Esq. (Sarah Dasenbrock, Esq., of counsel), brought a motion dated November 17, 2008 for an order granting summary determination in its favor pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b).

Accompanying the motion was the affidavit of Sarah Dasenbrock, Esq., dated November 17, 2008, and attached exhibits supporting the motion. Petitioner, appearing on her own behalf, filed a letter and attached documents in opposition to the motion for summary determination on November 28, 2008, which date commenced the 90-day period for issuance of this order.

After due consideration of the motion and the papers filed in opposition, and all pleadings and proceedings had herein, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Taxation properly disallowed petitioner's refund claims for the years in issue.

FINDINGS OF FACT

1. On October 19, 2007, the Division of Taxation (Division) received from petitioner, Nancy S. Berent, forms IT-201-X, amended resident income tax returns for the years 2001 and 2002, which claimed refunds of New York State personal income tax in the amounts of \$408.00 and \$1,927.00, respectively. The amended returns for 2001 and 2002 eliminated income in the amounts of \$5,930.00 and \$49,620.00, respectively. No reason for the claimed reduction in income was indicated on the amended return for the year 2001. However, the amended return for the year 2002 indicated that the reduction was the result of petitioner's receipt of "a new W-2 after workers compensation case settled." No amended W-2 is part of the record.

2. On January 25, 2008, the Division issued a Notice of Disallowance, which advised petitioner that her claims for refund for the years 2001 and 2002 had been disallowed, in full, because:

The New York State Tax Law does not permit us to allow the refunds claimed on your returns.

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 claims were received on 10/19/2007.

3. On October 19, 2007, the Division received from petitioner, form IT-201-X, an amended resident income tax for the year 2003. The record does not include the amended personal income tax return for the year 2003.

4. By letter dated June 30, 2008, the Division notified petitioner that based upon her amended personal income tax return for the year 2003, the assessment (L-027492356-7) was cancelled and an adjusted refund of \$189.53 was computed. The explanation and computation of the refund follows:

You have been allowed the New York subtractions from your New York State pension and taxable Social Security benefits. To take the pension and annuity exclusion for a distribution from a government section 457 deferred compensation plan, you must have reached age 59 ½ at the time the distribution was received.

Your amended return has been corrected to include the refund or overpayment credit issued from your original return.

Federal agi		\$17,799
Less: NYS pension	(\$11,348)	
SS benefits	(335)	
		(11,683)
NY agi		5,861
NY taxable income		0
Overpayment= \$338.00 withholding + \$182.53 paid on bill - \$331.00 refund= \$189.53		
This overpayment will be refunded to you in installments of \$7.00 and \$182.53 with appropriate interest under separate covers.		

The record does not include a copy of assessment number L-027492356-7.

5. On June 30, 2008, the Division issued a statement of tax refund to petitioner in the amount of \$7.00 for the year 2003.

6. By Conciliation Order dated August 8, 2008, the refund denials for the years 2001 and 2002 were sustained, and the claim for credit or refund for the year 2003 partially granted in the amount of \$190.00 was reaffirmed.

7. On August 20, 2008, petitioner filed a petition contesting the disallowance of her claims for refund for the years 2001 through 2003. In her petition, petitioner asserts that she was injured on the job sometime in 2001 and her worker's compensation case was settled sometime in

February 2005. Petitioner further asserts that she filed her amended personal income tax returns for the years 2001 through 2003 as soon as she received corrected forms W-2 from her former employer, New York State. She claims that the erroneously held taxes for the years 2001 through 2003 should be refunded to her.

8. In support of its motion for summary determination, the Division submitted: a copy of the petition; a copy of the answer; copies of petitioner's 2001 and 2002 amended New York State personal income tax returns; letters dated January 22 and 28, 2008 from the Division denying petitioner's refund claims for the years 2001 and 2002; the affidavit of Sarah Dasenbrock, Esq., the Division's representative; and the affidavit of Philip Horgan, an employee of the Division.

9. In her affidavit, Ms. Dasenbrock asserts that petitioner's amended returns requesting refunds for the years 2001 and 2002 were not filed until 2007, more than three years from the filing dates of the original returns, and therefore, the Division properly denied her refund claims. Ms. Dasenbrock maintains that petitioner's refund claims cannot be excused from the statute of limitations because of a delay in petitioner's receipt of amended W-2 forms due to a Social Security dispute. As such, Ms. Dasenbrock contends that there are no genuine issues of fact and that summary determination should be granted in favor of the Division.

10. In her letter in opposition to the motion for summary determination, petitioner asserts that she needs to obtain additional clarification from the New York State Comptroller's Bureau of State Payroll Services (Bureau of State Payroll Services) regarding its handling of her worker's compensation case in order to properly address the arguments raised by the Division in its motion. Petitioner maintains that the documents attached to her letter clearly indicate that she has been in contact with the Bureau of State Payroll Services regarding this matter.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

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 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. (20 NYCRR 3000.9[b][1]; *see also* Tax Law § 2006[6].)

In reviewing a motion for summary determination, an administrative law judge is initially guided by the following regulation:

The motion shall be granted if, upon all 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. (20 NYCRR 3000.9[b][1]; *see also* Tax Law § 2006[6].)

Furthermore, a motion for summary determination made before the Division of Tax Appeals is “subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR.” (20 NYCRR 3000.9[c]; *see also Matter of Service Merchandise, Co.*, Tax Appeals Tribunal, January 14, 1999.) Summary determination is a “drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Moskowitz v. Garlock*, 23 AD2d 943, 259 NYS2d 1003, 1004 [1965]; *see Daliendo v. Johnson*, 147 AD2d 312, 543 NYS2d 987, 990 [1989]). Because it is the “procedural equivalent of a trial” (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179 [1989]), undermining the notion of “a day in court,” summary determination must be used sparingly (*Wanger v. Zeh*, 45 Misc 2d 93, 256 NYS2d 227, 229, *affd* 26 AD2d 729 [1966]). 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, supra*, 543 NYS2d at 990). If any material facts are in dispute, if the existence of a triable issue of fact is “arguable,” or if contrary inferences may be reasonably drawn from undisputed facts, the motion must be denied (*Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881 [1960]).

B. From all the evidence submitted on this motion, there is no doubt that material and triable issues of fact exist. In support of its contention that petitioner’s claims for refund for the years 2001 and 2002 were filed long after the expiration of the statute of limitations, the Division submitted the affidavit of Philip Horgan, a Division employee. In his affidavit, Mr. Horgan claims that, based upon his review of “the Division’s official records,” petitioner “timely filed her personal income tax returns for the years 2001 and 2002.” The official records which Mr. Horgan claims to have reviewed are not attached to his affidavit. Given the vagueness of Mr. Horgan’s affidavit and the lack of supporting documentation, I am unable to determine the dates on which petitioner filed her personal income tax returns for the years 2001 and 2002 or the dates on which she paid the tax due on such returns. Therefore, it is impossible to determine when, or if, the statute of limitations expired for the years 2001 and 2002 (Tax Law § 687[a]). Moreover, the Division’s motion papers fail to address the issue of whether it is erroneously holding moneys paid by petitioner for the years 2001 through 2003. Accordingly, the Division’s motion is denied.

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

DATED: Troy, New York
February 26, 2009

/s/ Winifred M. Maloney _____
ADMINISTRATIVE LAW JUDGE