STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHARLES AND SUSAN VAN NESS	:	DETERMINATION DTA NO. 823316
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 2005.	:	

Petitioners, Charles and Susan Van Ness, 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 2005.

On February 8, 2011 and February 24, 2011, respectively, petitioners, appearing by Buck, Danaher, Ryan and McGlenn (John J. Ryan, Jr., Esq., of counsel), and the Division of Taxation by Mark F. Volk, Esq. (David Gannon, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based upon documents and briefs to be submitted by July 8, 2011, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). After due consideration of the evidence and arguments submitted, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioners' claim for credit or refund for the 2005 tax year on the basis that the claim was filed after the applicable statute of limitations for credit or refund had expired.

FINDINGS OF FACT

1. During 2005, Charles and Susan Van Ness (petitioners), sold real property located in California that resulted in a capital gain of $425,330.00, while they were New York residents. Petitioners reported the sale of the property on their federal income tax return for 2005.

2. In April 2006, petitioners timely filed their 2005 New York State Resident Income Tax Return and included the capital gain from the sale of the California property thereon and paid the tax due of $32,191.00.

3. In 2008, petitioners were notified by the California Department of Taxation that California income tax was due for tax year 2005 attributable to the sale of the same real property.

4. A California nonresident income tax return for 2005 was prepared for petitioners by Sy Marks, petitioners' tax consultant, on or about December 31, 2008, which calculated California tax due in the amount of $34,620.00, plus interest and penalties of $8,732.00, for a total of $43,352.00. Petitioners paid this amount to California.

5. Along with the California nonresident return, Mr. Marks prepared an amended New York State resident income tax return, Form IT-201-X, for 2005, claiming a refund of $28,739.00, representing the computed New York resident credit on the tax paid to California. The amended return was signed by petitioners and Mr. Marks on December 31, 2008, and was mailed to the Division of Taxation (Division) by Susan Van Ness by U.S. Postal Service first class mail during January 2009. Petitioners did not submit written proof of mailing.

6. A separate issue also arose concerning petitioners' 2005 New York State income tax return, which petitioners were addressing with the Division between February 2009 and October 2009. The matter in dispute was represented by assessment L-031318435, dated February 17,

2009, and was based on information furnished to the Division by the Internal Revenue Service (IRS) asserting that petitioners' adjusted gross income was underreported by $7,000.00. Updated information later provided to the Division ultimately led to the conclusion that assessment L-031318435 should be cancelled. In October 2009, petitioners executed a withdrawal of protest showing the tax due as zero.

7. Petitioners received a Correspondence Acknowledgment Notice from the Division dated February 23, 2009, indicating that correspondence had been received from petitioners or their representative regarding assessment L-031318435, concerning the tax period ending December 31, 2005. It stated that petitioners would be notified of the resolution and that no further correspondence was necessary unless petitioners were going to submit additional information or respond to an inquiry from the Division.

8. Mrs. Van Ness construed the February 23, 2009 correspondence as pertaining to the amended 2005 tax return she had mailed in January 2009.

9. Petitioners received a preprinted form entitled Request for Conciliation Conference, dated February 17, 2009, bearing assessment no. L-031318435. Their tax consultant, using the form provided, filed a request for conference bearing the following information:

> Amended return filed for 2005 indicating an overpayment of refund of $28,739- plus interest please adjust your assesment [*sic*] accordingly

According to the date stamp borne by the document, this request for a conciliation conference was received by the Bureau of Conciliation and Mediation Services (BCMS) on April 2, 2009.

10. By correspondence dated June 15, 2009, the Division acknowledged receipt of petitioners' request for a conciliation conference, including petitioners' statement that an amended return for tax year 2005 had been filed and that petitioners were requesting a refund in

the amount of $28,739.00. The correspondence also indicated that the Division had no record of an amended tax return having been filed for tax year 2005.

11. Mr. Marks mailed a copy of the amended return that he had prepared for petitioners to the Division with correspondence dated September 8, 2009. According to the Division's records, the return and correspondence were received on September 14, 2009, and this was the date that the Division deemed the return first filed.

12. By Notice of Disallowance dated October 9, 2009, the Division disallowed petitioners' claim for refund in full, explaining that the deadline for filing the amended return had expired on April 15, 2009, and since the return had not been received by the Division until September 14, 2009, the refund must be denied.

SUMMARY OF THE PARTIES' POSITIONS

13. Petitioners assert that as early as February 2009, and again in April 2009, there was activity regarding petitioners' 2005 tax return. Petitioners particularly point to the request by Mr. Marks to adjust the assessment for 2005, referencing petitioners' filing of the amended return for 2005 and an overpayment of $28,739.00 plus interest, and petitioners' request for conciliation conference. Further, petitioners argue, there is no rationale to support a finding that petitioners waited over nine months from its preparation to file a return requesting a sizable refund, having already paid tax on the property transaction to both New York and California.

14. The Division maintains that petitioners' claim for refund for the 2005 tax year was not made within three years of the date the tax was paid and was filed after the statute of limitations for a refund claim had expired. The Division argues that the reference to the pending refund claim on petitioners' request for a conciliation conference, without the inclusion of supporting documentation, is insufficient.

CONCLUSIONS OF LAW

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

> (a) General. --
>
> Claim 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, (ii) two years from the time the tax was paid . . . whichever of such periods expires the latest, or if no return was filed, within two years from the time the tax was paid. 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. . . .

B. Petitioners assert that their claim for refund was mailed in January 2009, in a timely fashion, and request that, in part, this be viewed with the common sense approach that a person would not likely delay filing for a near $29,000.00 refund. However, petitioners provided no written proof of such filing, having mailed the claim by U.S. Postal Service first class mail. In cases of this kind, the taxpayer bears the burden of proving that the claim for refund was timely filed (Tax Law § 689[e]). It has been well established by the Tax Appeals Tribunal that where a taxpayer uses ordinary mail, the taxpayer bears the risk that a postmark may not be timely fixed by the Postal Service or that the document may not be delivered at all (***Matter of Messinger***, Tax Appeals Tribunal, March 16, 1989; ***Matter of Sipam Corporation***, Tax Appeals Tribunal, March 10, 1988). Accordingly, petitioners have not met their burden of proving that the amended return was mailed to the Division in January 2009 on the basis of Mrs. Van Ness's mere statement as to when she mailed the claim for refund.

C. Petitioners further maintain that the Division had actual notice of petitioners' claim for refund by virtue of the statement made on petitioners' April 2, 2009 request for a conciliation conference, which indicated an amended return had been filed for 2005 and that an overpayment in the amount of $28,739.00 plus interest was being sought by them. The Division counters with the argument that the mere reference to a pending refund claim absent the inclusion of supporting documentation is insufficient to be deemed timely. The issue of whether a valid claim for refund has been filed requires that this matter be viewed in conjunction with a body of federal case law that generally holds that there are circumstances under which a taxpayer's informal claim for refund may be sufficient to meet the jurisdictional prerequisite for a timely-filed claim for refund.

The leading case on this topic is ***United States v. Kales*** (314 US 186 [1941]). In ***Kales***, the taxpayer, prior to the deadline for filing a formal refund claim, wrote a letter to the Commissioner advising him that if the Internal Revenue Service revised the valuation of certain stock she would insist on a higher valuation and would claim the right to a refund. The letter did not comply with the IRS's regulations because it was not filed on the correct form. The taxpayer subsequently filed an untimely amended return that complied with the regulations for a formal claim for refund. The Court held that the letter to the Commissioner constituted a valid, although informal, claim for refund. The Court stated:

> a notice fairly advising the Commissioner of the nature of the taxpayer's claims, which the Commissioner could reject because too general or because it does not comply with the formal requirements of the statute and regulations, will nevertheless be treated as a claim where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period (citations omitted) (***id.*** at 194).

A second frequently cited case holding that an informal claim for refund may, under some circumstances, stop the running of the statute of limitations on refund claims is ***American***

Radiator & Standard Sanitary Corp. v. United States (318 F2d 915 [1963]). On the subject of informal claims, the ***American Radiator*** Court stated:

> Informal refund claims have long been held valid [citing ***Kales*** and cases cited therein]. But they must have a written component, and should adequately apprise the Internal Revenue Service that a refund is sought and for certain years. . . . In addition to the writing and some form of request for a refund, the only essential is that there be made available sufficient information as to the tax and the year to enable the Internal Revenue Service to commence, if it wishes, an examination into the claim (***id.*** at 920; citations omitted).

The United States Court of Federal Claims, in a more recent case, ***New England Electric System v. United States*** (32 Fed Cl 636 [1995]), more succinctly sets forth the three components to an informal claim, acknowledging the longstanding principles of ***Kales*** and ***American Radiator***, as follows:

> First, an informal claim must provide the Commissioner of the IRS with notice that the taxpayer is asserting a right to a refund. Second, the claim must describe the legal and factual basis for the refund. Finally, an informal claim must have some written component (***American Radiator, supra*** at 113-114). An informal claim, however, requires a court to go beyond the written component and examine the facts and circumstances which are presented in every case (***id*** at 641 [citation omitted]).

The court concluded that although in a perfect world the informal claim would contain all the elements, it will not necessarily fail to be valid in their absence, since the written component alone need not provide the entire framework for the informal refund claim (citing ***American Radiator***, at 114). Instead, the elements of the informal claim may be provided through oral communications and other writings (***see New England Electric System*** at 644).

Since the request for conference, i.e., the informal claim for refund, contained references to an amended return for tax year 2005 seeking a refund in the amount of $28,739.00, by a writer who clearly believed the return had already been properly filed, the amended return and its attachments amount to writings that may be referenced in order to satisfy the elements of the

informal claim. Once the amended return was provided to the Division, for what petitioners believed was the second time, any defects in the informal claim were remedied.

D. The Tax Appeals Tribunal has also long recognized the same principles relying on federal case law, that an informal claim for refund may be recognized if the claim has a written component that adequately apprises the taxing authority that a refund is requested and the tax year in question. It must contain enough information to enable the taxing authority to begin an investigation of the matter if it so chooses and be filed within the statutory period for filing such a claim (***Matter of Battaglia***, April 18, 2002; ***Matter of Rand,*** May 10, 1990). Based on the foregoing, the statements contained on the request for conciliation conference satisfied the elements for a timely informal refund claim that was perfected with the mailing of another copy of the amended return after the statute had expired. The Division's argument that the original statement failed as a claim for refund since it was lacking supporting documentation at the time, is rejected as ignoring the principles that allow for a timely informal claim to be made, placing the Division on notice of the claim, and thereafter perfected. Accordingly, the refund claim is deemed timely.

E. The petition of Charles and Susan Van Ness is granted, the Division's Notice of Disallowance dated October 9, 2009 is canceled, and petitioners' refund in the amount of $28,739.00 plus interest shall be remitted to them.

DATED: Troy, New York
November 23, 2011

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE