

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROBERT AND PATRICIA HUNT	:	DETERMINATION
		DTA NO. 823365
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 2003.	:	

Petitioners, Robert and Patricia Hunt, 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 2003.

On June 3, 2010, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (Maria Di Costanzo, Esq., of counsel), filed a motion seeking summary determination in its favor pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b). Accompanying the motion was the affirmation of Ms. Di Costanzo, dated June 3, 2010, the affidavit of Philip Horgan, dated June 1, 2010, and annexed exhibits in support of the motion. Petitioners, appearing pro se, did not respond to the motion of the Division of Taxation within 30 days thereafter (Tax Law § 3000.5[b]). Accordingly, the 90-day period for issuance of this determination commenced on July 6, 2010, the date on which petitioners' time to serve a response to the Division of Taxation's motion expired.¹ After due consideration of the affirmation, affidavit, annexed exhibits, and all pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

¹ Thirty days after June 3, 2010 was July 3, 2010, a Saturday, leaving petitioners' response due by Monday, July 5, 2010. However, since that date was a state recognized holiday on which the offices of the Division of Tax Appeals were closed, petitioners' response to the Division's motion was due by Tuesday, July 6, 2010.

ISSUE

Whether petitioners' request for a refund of personal income tax paid for the year 2003 was properly denied by the Division of Taxation as not filed within the applicable period of limitations.

FINDINGS OF FACT

1. Petitioners, Robert and Patricia Hunt, filed a New York State resident income tax return (Form IT-201) for the year 2003, and paid tax in the amount of \$18,195.00. This return was timely filed, i.e., on or before April 15, 2004.

2. Petitioners thereafter filed an amended New York State resident income tax return (Form IT-201-X) for the year 2003, requesting a refund in the amount of \$12,650.00. This return was dated as signed by petitioners on April 10, 2008 and was filed on April 14, 2008.

Petitioners' refund claim was made on the premise that they erroneously paid tax to New York State based on their 2003 sale of real property that was located in New Jersey.

3. On January 23, 2009, the Division of Taxation (Division) issued a Notice of Disallowance to petitioners denying their request for refund upon the basis that the same had not been timely filed.

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. In the instant matter, petitioners did not respond to the Division's motion or submit any evidence to contest the facts set forth in the Division's affirmation, affidavit and attached

exhibits. Consequently those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984], *appeal dismissed* 62 NY2d 942 [1984]) Accordingly, upon the conclusion that no question of fact requiring a hearing exists, summary determination may be granted in this matter

C. Tax Law § 687(a) pertaining to limitations on credit or refund requires that a claim for refund must be filed within the later of either three years from the time the tax return was filed or two years from the time the tax was paid. Tax Law § 687(e), in turn, bars the allowance of any credit or refund where the claim therefor is not made within the foregoing period of limitation. Here, petitioners' tax return for the year 2003 was timely filed and payment of the tax shown due thereon was made, at the latest, by April 15, 2004. In turn, petitioners' request for refund was made on April 14, 2008, when they filed their amended personal income tax return for 2003. No other requests for refund were made by petitioners for 2003, nor was any tax paid with respect to the year 2003, during the time frame between April 15, 2004 and April 14, 2008. Since petitioners' claim for refund was not made within three years from the time their return for 2003 was filed or within two years from the time the tax for such year was paid, petitioners' request for refund must be denied.

D. The Division of Taxation's motion for summary determination is granted and the petition of Robert and Patricia Hunt is hereby denied.

DATED: Troy, New York
September 30, 2010

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE