STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EDWARD L. IRVIN	:	DETERMINATION DTA NO. 824144
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1984.	:	

Petitioner, Edward L. Irvin, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1984.

The Division of Taxation, by its representative, Mark F. Volk, Esq. (Michelle M. Helm, Esq., of counsel), brought a motion, filed March 15, 2012, seeking an order of summary determination in the above-referenced matter pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.5 and 3000.9(b)(1). Petitioner, appearing pro se, did not submit a response to the Division's motion, although permitted to do so by April 16, 2012, the date the 90-day period for issuance of this determination began. After due consideration of the documents and arguments presented, Donna M. Gardiner, 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 1984 on the basis that the claim was filed after the applicable statute of limitations had expired.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of

petitioner's claim for refund of payments made to satisfy a tax warrant for the year 1984.

2. Petitioner, Edward L. Irvin, was notified of his nonfiling of his New York State personal income tax return for the year 1984 via notice number A8805136861 dated May 13, 1988. The nonfiling was discovered by the Division when it ran a tape match of taxpayers who filed a federal tax return from a New York State address. Using the address provided on his federal tax return, the aforementioned bill was mailed to petitioner at an Ithaca, New York, address. A follow-up Notice of Deficiency dated July 30, 1988 was mailed to petitioner at the same address. Although the original assessment number was A8805136861, the assessment number was changed to L-000356546 when converted to the Division's Case and Resource Tracking System (CARTS) computer system on March 3, 1989.

3. Petitioner failed to respond to the Notice of Deficiency within the statutory period. Therefore, the assessment became fixed and final and it proceeded through the Division's Collections Unit. On February 1, 1991, a tax warrant was filed. On February 7, 1991, a levy secured $2,010.99 from petitioner's bank account.

4. On March 4, 1991, petitioner's bank contacted the Division with respect to the monies levied. The bank informed the Division that petitioner claimed that this money taken from his checking account was not, in fact, his money. The Division informed the bank that petitioner must contact the Division regarding the levy.

5. On March 20, 1991, petitioner contacted the Division regarding the levy, but at no point did petitioner attempt to resolve the issue of the 1984 assessment.

6. In addition to monies received through bank levies and other collection actions, refunds were also retained from petitioner's personal income tax returns for the years 2002 through 2008

as follows:

DATE POSTED	AMOUNT APPLIED TO 1984 LIABILITY
5/1/03	$ 59.48
3/25/04	$ 80.00
5/12/05	$103.00
4/6/06	$ 43.00
5/10/07	$ 33.16
4/24/08	$158.00
4/29/09	$ 23.00

7. On or about August 25, 2009, petitioner submitted a protest letter for the tax year 1984 in which he requested a refund of the $2,819.23 that was applied to the outstanding 1984 assessment. Said refund claim included proof that petitioner had adequate New York State tax withholdings in 1984 such that his 1984 assessment should be adjusted to zero. Even though petitioner's protest rights had long expired, the Division nonetheless reviewed the documentation and canceled the assessment.

8. Once the assessment was canceled, the Division processed a refund of payments applied, subject to the two-year statute of limitations as provided in Tax Law § 687. As set forth above, petitioner did not file any protest or claim for refund prior to his protest letter of August 25, 2009. Therefore, the Division issued a Response to Taxpayer Inquiry to petitioner on February 9, 2010 canceling the subject assessment and approving a refund in the amount of $181.00, which reflected the amount of tax that was paid within two years from the August 25, 2009 date.

9. Petitioner filed his petition with the Division of Tax Appeals on January 26, 2011 for

the tax year 1984. The petition seeks a refund in the amount of $2,638.23 plus interest for the monies collected by the Division over the years.

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© 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 [1985], ***citing Zuckerman v. City of New York***, 49 NY2d 557 [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 [1968]; ***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572 [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 [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 [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 [1975]; ***Whelan*** at 449).

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. As outlined in Findings of Fact 6 and 7, the Division offset outstanding amounts due under the tax levy against petitioner's personal income tax returns for the years 2002 through 2008. Petitioner filed his protest on August 25, 2009. Therefore, petitioner was entitled to and received refunds for payment made on April 24, 2008 in the amount of $158.00 and for payment made on April 29, 2009 in the amount $23.00. Any payments made prior to August 25, 2007 fall outside the two-year statute of limitations set forth in Tax Law § 687 and, as such, were properly denied.

F. The petition of Edward L. Irvin is denied.

DATED: Albany, New York
June 28, 2012

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE