STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
YOEL & SARA GOLDENBERG	:	
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for Tax Year 2016.	:	DECISION DTA NO: 850090
	:	

Petitioners, Yoel and Sara Goldenberg, filed an exception to the determination of the Administrative Law Judge issued on February 1, 2024. Petitioners appeared by Herschel Friedman and Associates (Herschel Friedman, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Michele Milavec, Esq., of counsel).

Petitioners filed a brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a letter brief in reply. Oral argument was heard in Albany, New York on January 30, 2025, which date began the six-month period for issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Administrative Law Judge erred in finding that the Division of Taxation has established that no material facts exist such that summary determination may be granted in its favor.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact 3, which has been modified to reflect the record below. As so modified, these findings of fact are set forth herein.

1. Petitioners, Yoel and Sara Goldenberg, filed a 2016 New York State resident income tax return (form IT-201) on July 15, 2020, (2016 income tax return) and requested a refund in the amount of $115,750.00, representing New York State and City refundable credits, including the Empire State child credit, New York City school tax credit and a Qualified Empire Zone Enterprise (QEZE) credit for real property taxes.

2. The Division of Taxation (Division) has no record of petitioners filing an application for an automatic six-month extension of time to file for individuals, form IT-370, for tax year 2016.

3. An affirmation by the Division of Taxation indicated that on February 27, 2019, the Division issued an account adjustment notice to petitioners disallowing their claimed refund of $115,750.00 for tax year 2016 in full.[1]

4. On March 1, 2021, the Division issued a notice of disallowance to petitioners, disallowing petitioners' claimed refund of $115,750.00, for tax year 2016.

5. Petitioners requested a conciliation conference before the Bureau of Conciliation and Mediation Services (BCMS), which was conducted by teleconference on November 19, 2021. By conciliation order dated March 4, 2022 (CMS No. 000328331), the conferee sustained the notice of disallowance dated March 1, 2021.

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[1] The record below contains no document dated February 27, 2019. The record does include an account adjustment notice dated September 9, 2020 (exhibit A).

6. Following issuance of the conciliation order, petitioners filed a timely petition with the Division of Tax Appeals on March 23, 2022, protesting the conciliation order issued on March 4, 2022.

7. On October 10, 2023, the Division filed a notice of motion for summary determination, accompanied by the affirmation of Michele W. Milavec, Esq., the Division's representative. In support of its motion, the Division submitted the affidavit of its employee, Samantha Hepp, a Taxpayer Services Specialist 2 in the Individual Liability Resolution Center of the Division. Ms. Hepp has been employed by the Division since 2007 and has held her current position since April 2023. Her job duties include managing staff devoted to resolving protests of personal income tax returns and advocating on behalf of the Division at BCMS conferences. In performing her job duties, Ms. Hepp reviewed the Division's correspondence, case contacts, filing history and other documents regarding petitioners' 2016 personal income tax return and refund claim as kept in the regular course of business.

8. Ms. Hepp avers that petitioners first filed a refund claim for tax year 2016 with the filing of their personal income tax return, form IT-201, on July 15, 2020. According to Ms. Hepp, the Division has no record of petitioners filing a request for extension to file, form IT-370, for tax year 2016. Ms. Hepp explains that pursuant to Tax Law § 687 (a) , any refund is limited to the amount of taxes paid within the three-year period immediately preceding the filing of the refund claim, plus the period for any extension of time to file the return. Furthermore, the amounts that petitioners requested as a refund consisted solely of refundable credits, which, in the absence of any extension of time to file, are deemed to have been paid as of April 18, 2017, pursuant to Tax Law § 687 (i).

9. Based on her review of the Division's records and her personal knowledge of the Division's policies and procedures, Ms. Hepp concluded that petitioners were not entitled to their claimed refund for tax year 2016 because the amount of any such refund was subject to the limitation set forth in Tax Law § 687 (a). Similarly, Ms. Hepp concluded that the Division's records did not indicate that any monies had been illegally or erroneously collected from or paid by petitioners and, thus, the special refund authority set forth in Tax Law § 697 (d) would be inapplicable to this matter.

10. In their response in opposition to the Division's motion, petitioners state that there are critical facts in dispute that counter-indicate granting summary determination. Specifically, petitioners assert that they were led to believe that they had been granted an extension of time to file their 2016 personal income tax through an exchange of emails between petitioners' accountant and an employee of the Division.

11. In support of their opposition, petitioners submitted the affidavit of petitioner Yoel Goldenberg. Therein, Mr. Goldenberg recounted that on March 23, 2020, petitioners' accountant, Robert Moster, asked for an extension to file petitioners' 2016 tax return via an email to a Division employee, Kristen Belli, on account of Mr. Moster's office closing due to COVID-19. Ms. Belli replied via email that she understood and would need an update in 60 days, or around May 26, 2020. Attached to Mr. Goldenberg's affidavit is a two-page printout of an email string involving Mr. Moster, Ms. Belli, and a person named Jack Goldenberg. Based on that email communication, Mr. Goldenberg avers that both petitioners believed that they had been granted an extension of time to file their 2016 income tax return.

12. Mr. Goldenberg states that petitioners' belief that New York State had extended deadlines for tax filings from April 15, 2020 to July 15, 2020, was reinforced by Mr.

Goldenberg's review of New York Executive Order No. 202.12 and the Announcement Regarding Relief from Certain Filing and Payment Deadlines Due to the Novel Coronavirus, COVID-19, Notice N-20-2. Mr. Goldenberg avers that, based on the March 23, 2020 email communication with the Division employee, petitioners understood that the deadline for filing their 2016 income tax return had been extended to July 20, 2020, and that they would be entitled to the QEZE credit and refund claimed in their 2016 return. Mr. Goldenberg offers no explanation for the discrepancy between the dates given in Ms. Belli's email (May 26, 2020), the extended due date given in the Division notice (July 15, 2020) and the date that petitioners ultimately believed to be the extended filing deadline for their 2016 income tax return (July 20, 2020).

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began the determination by setting forth the regulations regarding summary determination and noted that the burden upon the proponent of a summary judgment motion to make a prima facie showing of entitlement to judgment as a matter of law, with sufficient evidence to eliminate any material issues of fact. The Administrative Law Judge noted that the Division's motion was properly deemed a motion for summary determination under our Rules of Practice and Procedure (Rules) and should be granted if it has been sufficiently established that no material and triable issue of fact is presented and that, as a matter of law, a determination should be issued in the Division's favor. Citing Tax Law § 687 (a), the Administrative Law Judge noted that the limitation periods for claiming a credit or refund of personal income tax is three years from the date the return was filed or two years from the date the tax was paid, whichever is later. The Administrative Law Judge further noted that Tax Law § 687 (a) limits the refund allowed to the amount of taxes paid within the three-year period

preceding the filing of the refund claim plus the period for any extension of time for filing the return. The Administrative Law Judge found that under Tax Law § 687 (i), any tax paid by a taxpayer, income tax withheld from a taxpayer and any amount paid by a taxpayer as estimated income tax for a taxable year is deemed to have been paid on the fifteenth day of the fourth month following the close of the taxable year with respect to which such amount constitutes a credit or payment.

The Administrative Law Judge rejected petitioners' assertion that considering their accountant's communication with the Division regarding an extension of time to file petitioners' 2016 tax return, to avoid a manifest injustice, the circumstances here demand that the Division be estopped from disallowing their refund claim for timeliness.

The Administrative Law Judge noted that petitioners are not entitled to relief as they have not demonstrated that they were suffering from a mistake of fact as much as a mistake of law, they have failed to demonstrate applicability of the special refund authority relief under Tax Law § 697 (d). Accordingly, the Administrative Law Judge denied the petition and sustained the disallowance of the refund by the Division.

ARGUMENTS ON EXCEPTION

On exception, petitioners assert that considering their accountant's communication with the Division regarding an extension of time to file petitioners' 2016 tax return, the Division should be estopped from disallowing their refund claim for timeliness. Petitioners concede that while they did not take exception to the Administrative Law Judge's determination related to their estoppel claim and the reasonableness of their reliance on the email communication with the Division employee, new evidence discovered by petitioners pursuant to a FOIL request now supports estoppel. Petitioners assert that the refund application was made timely as the refund

was first denied on February 27, 2019 (affirmation of Michele W. Milavec, exhibit A, attachment 3, pp 48-52). For the first time in their brief, petitioners raise an informal refund claim argument. Petitioners assert that their refund claim meets all the elements required under the informal refund claim authority, i.e., (1) it provides a written notice to the taxing entities; (2) it describes the legal and factual basis for the requested refund; and (3) it meets the requirement for a written component as it was an email communication.

The Division, in their reply letter brief, asserts that the Administrative Law Judge correctly determined that the Division properly denied petitioners' refund claim for tax year 2016 pursuant to Tax Law § 687 (a). The Division concedes that the affirmation of Michele W. Milavec, exhibit A, attachment 3, pp 48-52 in the second sentence of paragraph 5, the date of February 27, 2019, is indicated instead of September 9, 2020. However, the Division asserts that the February 27, 2019 date was merely a typographical error. The Division contends that petitioners fail to meet the burden of proof pursuant to Tax Law § 689 (e) as petitioners did not come forward with any evidence of a refund claim for the tax year 2016 prior to July 15, 2020.

The Division asserts that petitioners' claim for tax year 2016 is untimely as it is outside the three-year period set forth under Tax Law § 687. The Division argues that petitioners' reliance on the email communication was not reasonable and does not rise to the level of unusual circumstances warranting invocation of estoppel (***see Matter of Winners Garage, Inc. v Tax Appeals Trib. of the State of N.Y.***, 89 AD3d 1166, 1169 [3d Dept 2011], ***lv denied*** 18 NY3d 807 [2012]). The Division asserts that the Administrative Law Judge properly denied petitioners' argument that they are entitled to relief under the special refund authority pursuant to Tax Law § 697 (d) as petitioners were aware of the facts but may have been mistaken as to the legal consequences following from the facts. The Division also argues that petitioners' demand for

an informal refund claim must be denied as petitioners did not provide the Division with notice that petitioners were asserting a right to refund in the March 23, 2020 email or any other communication prior to the filing of their return on July 15, 2020.

OPINION

Under our Rules, a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212 (***see*** 20 NYCRR 3000.9 [c]). It is well-established that "[t]he 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, 562 [1980]). 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, 441 [1968]; ***Museums at Stony Brook v Village of Patchogue Fire Dept.***, 146 AD2d 573 [2d Dept 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 [2d Dept 1960]). "To defeat a motion for summary judgment, the opponent must . . . produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim . . .'" (***Whelan v GTE Sylvania***, 182 AD2d 446, 449 [1st Dept 1992], citing ***Zuckerman***).

Tax Law § 687 (a) provides as follows:

> "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 . . . . 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 . . . "
>
> (***see also Matter of Durkin***, Tax Appeals Tribunal, October 25, 2001).

Petitioners concede that they did not file a request for an automatic extension to file their 2016 New York State personal income tax return and that they first filed that return on July 15, 2020. However, petitioners assert that in order to avoid a manifest injustice, the circumstances here demand that the Division be estopped from disallowing their refund claim for timeliness, in light of their accountant's communication on March 23, 2020 with the Division regarding an extension of time to file petitioners' 2016 tax return. We disagree.

"Estoppel is an equitable doctrine invoked to avoid injustice in particular cases" (***Heckler v Community Health Servs.***, 467 US 51, 59 [1984]). Equitable estoppel is not available as a defense to governmental acts absent a showing of *exceptional facts* which require its application to avoid a manifest injustice (***see Matter of Attea***, Tax Appeals Tribunal, November 18, 1999, citing ***Matter of Sheppard-Pollack, Inc. v Tully***, 64 AD2d 296 [1978]) (emphasis added). Exceptions to the doctrine are rare and limited to unusual fact situations.

In denying petitioners' claim of estoppel, the Administrative Law Judge noted that the Tax Appeals Tribunal (Tribunal) has held that in order to impose an estoppel on a governmental actor, it must be established that: 1) there was a misrepresentation made by the government to a party and the government had reason to believe that the party would rely upon the misrepresentation; 2) the party's reliance on the government's misrepresentation was reasonable; and 3) prior to the party discovering the truth, the party acted to its detriment based upon the misrepresentation (***see Heckler v Community Health Servs.***, 467 US at 59-61).

We agree with the Administrative Law Judge that petitioners' estoppel claim lacks merit insofar as it is based on the March 23, 2020 email. That email communication between the Division and petitioners' representative does not indicate a misrepresentation of fact or law. The emails are evident that there was no grant of an extension to the filing of the 2016 tax returns. Rather, the emails are an acknowledgement of petitioners' representative's stated intention of seeking an extension to file a return. Additionally, there is no specific mention of a claim for a refund in that email.[2] Accordingly, petitioners' reliance on the email communication is not reasonable. Petitioners also assert that Executive Order 202.12 and DTF Notice N-20-2 further support their position. They do not. Both the Executive Order and DTF Notice specifically extended the due date for New York State personal income tax and corporation tax returns originally due on April 15, 2020. The New York State personal income tax return here at issue was originally due on April 18, 2017, and thus not subject to the three-month extension granted in DTF Notice N-20-2 (***see generally*** Tax Law § 651 [a] [providing the time for filing of income tax returns as the fifteenth day of the fourth month following the close of the taxable year]).

Nor are petitioners entitled to relief under the special refund authority pursuant to Tax Law § 697 (d), which states:

> "Special refund authority. - Where no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person, under a mistake of facts, pursuant to the provisions of this article, the tax commission at any time, without regard to any period of limitations, shall have the power, upon making a record of its reasons therefor in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certificate to the comptroller."

[2] The relevant text of that email is in the record as part of exhibit XX and states, "I would like to ask for an extension to file the 2016 NYS taxes and credits for Chartwell, and its member, Yoel Goldenberg."

The Tribunal has stated that a mistake of fact was "an understanding of the facts in a manner different [than] they actually are" (***Matter of Wallace***, Tax Appeals Tribunal, October 11, 2001). In contrast, a mistake of law was defined as an "acquaintance with the existence or nonexistence of facts, but ignorance of the legal consequences following from the facts" (***id.***). Here, petitioners were clearly operating under a mistake of law in that they were acquainted with the facts (i.e., that they had not yet filed their 2016 income tax return) but were unaware of the legal consequences following from the facts (i.e., that the limitation period for claiming a refund for tax year 2016 was unaffected by the filing deadline extensions for 2020). As petitioners have not demonstrated that they were suffering from a mistake of fact as much as a mistake of law, they have failed to demonstrate applicability to their claim of the special refund authority relief under Tax Law § 697 (d).

Next, we address petitioners' argument, made for the first time on exception, that they had properly filed an informal refund claim within the time required to do so, and thus the refund they claimed was not limited by Tax Law § 687. The Tribunal enunciated the standards for application of the informal refund claim doctrine as follows:

> "This Tribunal has applied the federal informal refund claim doctrine to the question of whether a taxpayer has timely filed a refund claim under the Tax Law (***see Matter of Rand***, Tax Appeals Tribunal, May 10, 1990; ***see also Matter of Crispo***, Tax Appeals Tribunal, April 13, 1995 and ***Matter of Lehal Realty Assoc.***, Tax Appeals Tribunal, May 18, 1995 [informal refund claim doctrine applied to informal request for a conciliation conference and informal petition, respectively]). Pursuant to this doctrine, "courts have held that under certain circumstances, it is sufficient that the taxpayer submit a so called 'informal claim' within the statutory period, and then, outside of the limitation period, submit a formal claim' (***Donahue v United States***, 33 Fed Cl 600, 608 [1995]). We have described the informal claim rule as a compromise that allows a taxpayer to informally satisfy time restrictions for a refund claim, while also protecting the State's interest by requiring the taxpayer to follow the prescribed procedure to obtain a refund (***Matter of Greenburger***, Tax Appeals Tribunal, September 8,

1994).

> An informal refund claim, i.e., one that does not conform with regulatory requirements or that contains formal defects, has three elements: (1) it must provide the taxing authority with notice that the taxpayer is asserting a right to a refund; (2) it must describe the legal and factual basis for the requested refund; (3) it must have a written component (***New England Elec. Sys. v United States***, 32 Fed Cl 636, 641 [1995] citing ***Am. Radiator & Sanitary Corp. v United States***, 162 Ct Cl 106, 113-114 [1963]).”(***Matter of Accidental Husband Intermediary, Inc.***, Tax Appeals Tribunal, April 11, 2019).”

At issue here is whether petitioners provided the Division with notice that they are asserting a right to a refund. Petitioners here rely on the email communication between their bookkeeper and the Division’s employee. Based on the record, the email communication does not refer to petitioners claiming a refund, rather it only mentions their intention to make a request for an extension to file a return for the tax year 2016. The 2016 New York State personal income tax return could have reported tax due or could have resulted in a refund of an overpayment.

Alternatively, petitioners argue that based on ***Accidental Husband***, the Division should be affirmatively charged with the knowledge of a refund claim for the subsequent year as they were engaged in an audit for the previous year. We note that ***Accidental Husband*** is clearly distinguishable from the present situation. In ***Accidental Husband***, the petitioner was seeking application of film production credits. Here, petitioners are seeking application of QEZE credits. In accordance with Tax Law § 24, the film production credits in question, were required to be taken over multiple years because they exceeded $5 million. It was, in effect, a single credit that was already under audit by the Division and, if fully granted, would have had implications for the tax year at issue in that matter. Here, QEZE credits have no such limitation and do not generally rely on the results of a previous year’s applicability to the following year.

Each year stands alone (***see*** Tax Law § 16). It would, therefore, be inappropriate to apply the same constructive knowledge ascribed to the Division in ***Accidental Husband*** to the Division in the present matter.[3] Accordingly, there is no evidence that the Division had notice of petitioners' refund claim, informal or otherwise, for the tax year 2016 and that doctrine is inapplicable here.

We now turn to the question raised surrounding the recitation of a specific date contained in the Division's affirmation. The Division does not dispute that an affirmation was offered into evidence below that asserted that an account adjustment notice was issued on February 27, 2019. On exception, the Division claims that it was merely a typographical error, contradicted by documentation and other evidence in the record and asserts, therefore, that the date is clearly erroneous and should be ignored. Also, while petitioner concedes that they have no evidence to refute the claim that it was an erroneous entry, they assert the burden of proving so is upon the Division and, while other documents point to other dates, that does not rule out the possibility that other documents may exist.

Additionally, petitioners assert that the Division's admission of the date and its subsequent inclusion in the findings of facts below raised the existence of a triable issue or where the material issue of fact is "arguable." Petitioners assert that, as cited earlier, "[i]f material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts," then a full hearing is warranted and the case should not be decided on a motion (***see Gerard v Inglese***, 11 AD2d at 382). Petitioner asserts, therefore, that the matter should be remanded for a hearing.

[3] Just as the QEZE credit is determined on an annual basis, so too are the Empire State child credit and the New York City school tax credit that were included on petitioners' 2016 return (Tax Law § 606).

The Tribunal considered and ignored undisputed typographical errors that were otherwise inconsistent with the record (***see Matter of Titanium Constr. Corp.***, Tax Appeals Tribunal, May 5, 2011). There petitioner was seeking a hearing beyond the 90-day statutory period allowed. The date in that case was cited by a BCMS conferee as being February 9, 2009 as the date of the issuance of an assessment notice. The notice itself was in evidence and the date on it was February 2, 2009. A mailing log, also in evidence, corroborated the February 2, 2009 date. Finding the error immaterial, the Tribunal noted that it would not have made a difference in that the petition was filed on June 19, 2009, using either date, more than a month after the expiration of the statutory period for doing so.

A different outcome was reached in another case involving inconsistent dates and a motion to dismiss a petition as untimely (***see Matter of Marrero***, Tax Appeals Tribunal, May 21, 2020). There, the matter was remanded because the affidavits establishing proof of mailing in the record were inconsistent (***id.***). One affidavit, originally offered by the Division in support of a notice of intent to dismiss indicated that the notice was mailed on August 22, 2016, even though the date of the notice was October 20, 2016. As a result of the inconsistency, the notice of intent to dismiss was withdrawn, the petition was accepted and the Division subsequently brought a motion to dismiss or alternatively, for summary determination based on the petition being late. The Division provided additional affidavits indicating and fully supporting October 20, 2016 as the date the notice was issued. The Administrative Law Judge granted the Division's motion.

On exception by petitioner, the Tribunal reversed, declaring the issue in a summary determination is not to resolve issues of fact or credibility, but to merely determine whether such issues exist. Acknowledging that the inconsistency might well be the result of a clerical error,

the Tribunal declared that it would still be inappropriate to resolve that issue in the context of a motion to dismiss. Accordingly, the Tribunal remanded the matter for further proceedings and, if appropriate, a ruling on the merits (***see Matter of Marrero***).

The ***Titanium Constr. Corp.*** decision concludes that minor inconsistencies in the record are considered errors and do not affect the determination of whether the petitioner met the statutory timeliness requirements. In contrast, the ***Marrero*** case highlights the significance of conflicting evidence that casts doubt on the commencement of the statutory period.

In the present case, these affidavits create a foundational issue that cannot be resolved in the context of a motion to dismiss or for summary determination. Instead, a fact-finding hearing is necessary to clarify the matter. Thus, the standard for summary determination is not met and the matter should be remanded for a hearing on the questions surrounding the different dates indicated for the issuance of an account adjustment notice for the year in issue. If indeed such a notice was issued on that date, it may indicate that petitioners did place the Division on notice of a potential refund claim for that tax year.

We will retain jurisdiction over this matter based upon the exception already timely filed by petitioners. After the issuance of a supplemental determination, petitioners will be allowed to add to their existing exception and briefs, so long as they do so within 30 days of the issuance of the supplemental determination or request an extension of time within the 30-day period. The Division will be given an opportunity to respond to any additional material submitted by petitioners. If the Division wishes to except to any portion of the supplemental determination, the Division will be required to submit a timely exception to the supplemental determination.

Accordingly, it is ORDERED that the matter is remanded to the Administrative Law Judge for further proceedings consistent herewith related to petitioners' protest of the notice of

disallowance dated March 1, 2021.

DATED: Albany, New York
July 10, 2025

/s/ Jonathan S. Kaiman
Jonathan S. Kaiman
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner