STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| **FRANCIS GREENBURGER AND ISABELLE AUTONES** | : | DETERMINATION DTA NO. 825103 |
| for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2006. | : | |

Petitioners, Francis Greenburger and Isabelle Autones, 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 2006.

On September 13, 2013 and September 18, 2013, respectively, petitioner, appearing by John K. Haslach, CPA, and the Division of Taxation, appearing by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs to be submitted by February 10, 2014, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

## *ISSUE*

Whether the Division of Taxation properly denied petitioners' claim for credit or refund of personal income tax for the year 2006 on the basis that the claim was filed after the expiration of the applicable statute of limitations.

## *FINDINGS OF FACT*

The Division of Taxation (Division) submitted seven proposed findings of fact pursuant to § 307(1) of the State Administrative Procedure Act, which have been incorporated into the facts below, except proposed finding 3, which is a conclusion of law.

1. On October 15, 2007, petitioners filed a New York State resident income tax return, form IT-201, for the year 2006. The return itself was signed and dated October 15, 2007 and the metered postmark on the envelope containing the return was October 15, 2007.

2. Petitioners filed a New York State amended resident income tax return, form IT-201-X, on October 14, 2010, requesting a refund for the year 2006 in the sum of $365,279.00. The metered postmark on the envelope containing the amended 2006 return was October 14, 2010. The return was signed and dated October 13, 2010.

3. The Division conducted a search of its records for the year 2006 and certified that no Application for Automatic Six-Month Extension of Time to File for Individuals, form IT-370, for the year 2006 was filed on or prior to April 15, 2007 on behalf of petitioners. Although the certification did not properly spell petitioner Francis Greenburger's name ("Greenberg"), it did correctly note his social security number and both the proper name and social security number for Isabelle Autones.

4. Independently, the Division's Personal Income Tax Desk Audit Unit reviewed the filing history of petitioners, including the year 2006. It also determined that petitioners' 2006 resident income tax return was filed, signed and dated October 15, 2007. The same Unit determined that petitioners' 2006 amended resident income tax return was filed on October 14, 2010 and signed and dated on October 13, 2010.

5. Mr. Philip Horgan, a Tax Technician III in the Desk Audit Unit, performed a search and review of the Division's records and files and determined that the Division did not receive a timely filed form IT-370, Application for Automatic Six-Month Extension of Time to File for Individuals, for the year 2006 on behalf of petitioners. Additionally, Mr. Horgan determined that petitioners did not file an amended 2006 New York State personal income tax return requesting a refund of $365,279.00 prior to the amended return filed on October 14, 2010.

6. On May 6, 2011, the Division issued to petitioners a Notice of Disallowance of the entire refund claim, $365,279.00, made in the amended 2006 personal income tax return filed on October 14, 2010. The reason for the disallowance was stated as follows:

> The New York State Tax Law allows a refund only if the claim for refund is made within the period provided by Sec.687(a) of the Tax Law. Under Sec.687(a), a claim for refund must be filed within the latter [sic] of three years from the date of filing the return or two years from the payment of the tax; where the claim is made in the three year period, only tax paid within three years prior to the filing of the return maybe [sic] refunded.
>
> We have no extension on file for you for tax year 2006.

7. Petitioner Francis Greenburger was and is the sole shareholder of Time Equities, Inc. (Equities). Since at least 1985, the chief financial officers for Equities have filed federal and state personal income tax returns for petitioners each year. It was customary to request the maximum extension of time for petitioners' New York return and those filed in the other jurisdictions and to issue and send a check for payment of the estimated taxes due. This extension methodology was utilized because of the nature of petitioners' income, much of which was derived from various real estate investments for which necessary reporting information was not made available by the April 15th filing deadline for returns.

8. Generally, since at least 1985, petitioners directed that their applications for automatic six-month extension of time to file for individuals and the requisite payments be sent to the Division by first class mail on or before April 15th. It was not the custom to send the application and payment by certified or registered mail. In affidavits, the chief financial officers, past and present, Louis Polonkay and John Haslach, respectively, attested to the "unblemished" filing history of Equities using this protocol.

9. Although the general ledger of Equities indicated that an extension payment was budgeted for New York as of April 7, 2007, petitioners' Citigold Account, from which the extension payments to several other states and the Internal Revenue Service were made, did not reflect payment made to New York State or include a copy of a canceled check for the $500,000.00 allegedly mailed with the application. In fact, upon petitioners' later review of Equities' records and petitioners' own banking records, it was discovered that the $500,000.00 check payable to New York State had never been cashed and a replacement check was issued.

## *CONCLUSIONS OF LAW*

A. A properly issued notice of deficiency is presumed to be correct and the taxpayer has the burden of demonstrating the incorrectness of such an assessment (***Matter of Leogrande v. Tax Appeals Tribunal***, 187 AD2d 768, 589 NYS2d 383 [1992], ***lv denied*** 81 NY2d 704, 595 NYS2d 398 [1993]; ***Matter of O'Reilly***, Tax Appeals Tribunal, May 17, 2004). Tax Law § 689(e) provides that in any matter brought before the Division of Tax Appeals under Article 22 of the Tax Law, the burden of proof is upon the petitioner. Accordingly, it is necessary to ascertain

whether petitioners have sustained their burden of proof in showing that they properly filed the IT-370 with the required payment by April 17, 2007,[1] resulting in a timely claim for refund.

B. Tax Law § 687(a) explains the limitations on claims for credit or refund. It provides as follows:

> 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 . . . .

In order to determine if petitioners timely filed for a refund in this matter, the statute mandates a determination of the date the return for 2006 was filed, the date the tax was paid, and, if the claim was filed within the three-year period, whether the refund requested exceeds 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.

C. There is no dispute that petitioners' original 2006 income tax return was filed on October 15, 2007 and that petitioners' payment of estimated taxes throughout the year 2006 were deemed to have been paid on April 15, 2007. (Tax Law § 687[i].) There is also no dispute that the refund claim, contained in petitioners' amended 2006 income tax return, was filed on October 14, 2010, within three years of the filing of the original 2006 return. Therefore, the claim for refund

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[1]Since April 15, 2007 was a Sunday, and April 16, 2007 a holiday recognized by the Internal Revenue Service, the due date for federal income tax returns and New York State income tax returns, including the application for extension, was April 17, 2007. (***See*** New York State Department of Taxation and Finance Notice, N-07-4.)

in the amended return was timely, since it was filed within three years after the return was filed. (Tax Law § 678[a].)

However, where the refund claim is made within three years from the filing of the return plus the period of any extension of time for filing the return, Tax Law § 687(a) limits the amount of any refund to the amount of tax paid within the three-year period plus the period of any extension of time for filing the return immediately preceding the filing of the refund claim. Since petitioners' payment of estimated taxes throughout 2006, deemed to have occurred on April 15, 2007 (Tax Law § 687[i]), occurred more than three years before the filing of their claim for refund, Tax Law § 687(a) bars any refund to petitioners, unless they filed a form IT-370 and made full payment of properly estimated tax balances due, which would have operated to extend the three year look back period by the length of the extension granted. (***Matter of Brenhouse***, Tax Appeals Tribunal, September 4, 2008.)

If petitioners had properly filed the IT-370 for the year 2006, the three-year period immediately preceding the filing of the claim for refund would have been extended back an additional six months and the estimated taxes paid in 2006 and deemed paid on April 15, 2007 could have been considered. Thus, as previously stated, the issue to be decided is whether petitioners timely filed a form IT-370 and paid the estimated taxes due.

D. The law and regulations pertaining to extensions are straightforward. Tax Law § 657(a) provides, in part, that, "[t]he commissioner may grant a reasonable extension of time . . . for filing any return, statement, or other document required pursuant to this article, on such terms and conditions as it may require . . . ."

The regulation at 20 NYCRR 152.13 provides that, "[a]ll applications for extensions of time must be delivered, mailed, or transmitted to the address or location as directed in the

appropriate forms and instructions." Additionally, former section 157.2 of the regulations provides, in part, as follows:

> (a) The department will grant an automatic six-month extension of time to file a New York State income tax return beyond the date prescribed for filing the return upon the proper application by the individual, partnership, or fiduciary required to file the return. The application must be filed on or before the date prescribed for filing the return.
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> (b) The department will set forth in the appropriate forms and instructions the different methods, along with the terms and conditions for each, for individuals, partnerships, and fiduciaries to make a proper application for the automatic extension of time to file a New York State income tax return (20 NYCRR former 157.2).

The instructions for tax year 2006 for an application for automatic six-month extension of time to file, in turn, provide that a taxpayer may request a six-month extension of time to file a return by filing Form IT-370 with the Division.

Petitioners have not demonstrated that they filed the form IT-370 for 2006 and made a payment therewith. Although the affidavits of Louis Polonkay and John Haslach, who both served as chief financial officer at Time Equities, Inc., (Mr. Haslach for the year in issue), attest to an office procedure that included preparing an IT-370 and remitting estimated taxes with said form to the Division on or before the due date for petitioners' New York personal income tax return for 2006, they offer no proof that the form IT-370 or the check issued were actually mailed to the Division. Notably, both gentlemen indicated in their respective affidavits that the forms and checks were sent by first class, "regular," mail, and that it was not the practice to use certified or registered mail.

Tax Law § 691(a)(1) provides as follows:

> If any return . . . required to be filed . . . within a prescribed period or on or before a prescribed date . . . is, after such period or such date, delivered by United States mail . . . , the date of the United States postmark stamped on the envelope shall be

> deemed to be the date of delivery . . . . If any document or payment is sent by United States registered mail, such registration shall be prima facie evidence that such document or payment was delivered to the tax commission, bureau, office, officer or person to which or to whom addressed.

Here, there is no evidence that an original copy of the 2006 form IT-370 and the payment were ever received by the Division. Absent proof from petitioners of certified or registered mailing of the form and payment, the affidavits proffered by petitioners are insufficient to establish that the IT-370 and payment were received by the Division (***see Matter of Schumacher***, Tax Appeals Tribunal, February 9, 1995; ***Matter of Savadjian***, Tax Appeals Tribunal, December 28, 1990).

In discussing the importance of the mailing language in Tax Law § 691(a)(1), the Appellate Division wrote:

> Based upon the wording of the statute as a whole, we are of the view that the Legislature intended that if a taxpayer uses ordinary mail to file a document, he does so at his own risk. If ordinary mail does not result in actual delivery, the taxpayer cannot resort to extrinsic means to prove delivery and timely filing. (***Matter of Dattilo v. Urbach***, 222 AD2d28, 645 NYS2d 352, 353-354 [1996].)

E. Petitioners argue that ***Matter of Mutual Life Insurance Company of New York v. New York State Tax Commn*** (142 AD2d 41, 534 NYS2d 565 [1988]) is supportive of their position. In that case, the petitioner was a corporation that filed semimonthly withholding tax returns with payment by first class mail, enjoying much the same unblemished filing history as petitioner herein, until a return and payment went missing. The Division informed Mutual that it had failed to remit tax for a certain period, which Mutual claimed had been mailed. Mutual issued a replacement payment but incurred penalty and interest on the late payment. At hearing, petitioner presented detailed evidence of its mailing practice and check preparation. The Appellate Division held that where there was evidence that a letter with a check had been

properly mailed, there was a presumption that is was delivered to its addressed destination. Notably, the Division failed to produce any evidence that it never received the check. Indeed, the court stated that the Division's burden was "light" and that it only needed to show that it had "conducted at least a cursory review of its files for the check."

Thus, the critical factor driving the court's decision in the ***Mutual Life*** case was the Division's failure to produce any evidence with respect to at least a minimal attempt to search its files. This simply was not the case here as evidenced by the official certification that a search of all papers and documents in the custody of the Commissioner of Taxation and Finance did not locate a form IT-370 filed on behalf of petitioners and concluding that no such form had been filed on or prior to April 15, 2007.[2] In addition, Philip Horgan, the tax technician in Desk Audit who conducted an independent review of the file and filing history of petitioners, found that after a thorough search of the Division's files and records, the Division had not received a timely form IT-370, Application for Automatic Six-Month Extension of Time to File for Individuals for 2006. In fact, Mr. Horgan also determined that the Division's records contained no record of any application for extension of time to file for 2006 at any time.

Based on the crucial factual difference here, i.e., that the Division thoroughly searched and reviewed its records and files twice, petitioners' reliance on ***Mutual Life*** is misplaced.

F. Petitioners have failed to carry their burden of proving that the Division's denial of their refund application was erroneous and refuting the Division's conclusion that the claim was

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[2]The fact that petitioner Francis Greenburger's name is incorrect on the certification is deemed inconsequential. (***Cf. Matter of Combemale***, Tax Appeals Tribunal, March 31, 1994.) The certificate correctly noted his social security number and both the name and social security number of his spouse. Further, the substance of the certificate's conclusions is buttressed by the independent search conducted by the Desk Audit Unit and described by Mr. Horgan in his affidavit.

made after the applicable statute of limitations for credit or refund had expired. (Tax Law § 689[e].)

G. The petition of Francis Greenberger and Isabelle Autones is denied and the Notice of Disallowance, dated May 6, 2011, is sustained.

DATED: Albany, New York
July 31, 2014

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE