STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
INFUSIONDEV CORPORATION	:	DETERMINATION DTA NO. 825737
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Period April 1, 2008 through December 31, 2008.	:	

Petitioner, Infusiondev Corporation, 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 period April 1, 2008 through December 31, 2008.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel), brought a motion dated January 13, 2014 seeking an order of dismissal, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Marcum LLP (David M. Donnelly, CPA), filed a response to the Division's motion on February 12, 2014, and it is this date that commences the 90-day period for issuance of this determination. Based upon the motion papers, the affirmation and documents submitted therewith, petitioner's response thereto, and all pleadings and documents submitted in connection with this matter, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner's challenge to the disallowance of a claim for refund of personal income tax paid for the period April 1, 2008 through December 31, 2008 was properly denied by the Division of Taxation as not filed within the applicable period of limitations.

FINDINGS OF FACT

1. On or about April 21, 2009, three amended quarterly withholding tax returns (Form NYS-45-X), pertaining to petitioner, Infusiondev Corporation, and covering (in quarterly increments) the period spanning April 1, 2008 through December 31, 2008, were filed with the Division of Taxation (Division). These amended returns were filed on petitioner's behalf by CTS (Ceridian Tax Services), the payroll company engaged by petitioner, and sought a refund in the aggregate amount of $34,628.18, based upon the alleged overpayment of withholding tax on behalf of petitioner's employees.[1]

2. By a letter dated June 3, 2009, the Division notified petitioner that it had reviewed the foregoing withholding tax refund request, and advised as follows:

> An employer can receive a refund for an overpayment of withholding tax only if an employer has paid more to New York State than was actually deducted and withheld from an employee. An overpayment does not exist if the amount of tax withheld exceeds the employee's personal income tax liability **and** the excess has not been repaid to the employee. In this case, the employee must file a personal income tax return to receive a refund.
>
> **Based on the information above, the refund is denied.** We have enclosed Form CMS-1, *Request for Conciliation Conference*. To protest the action referenced above, you must request a conference within two years from the date of this notice (emphasis and italics as in original).

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[1] The specific refund amounts sought (and denied by the Division) were $2,526.28, $2,101.90 and $30,000.00. The only amount shown as remaining at issue is the latter $30,000.00 amount, pertaining to an alleged overwithholding concerning two specific employees. The record does not reveal any reasons (e.g., settlement, abandonment, etc.) why the other two amounts were not challenged herein (***see*** Finding of Fact 4).

3. Petitioner's payroll company (CTS) submitted additional information subsequent to the June 3, 2009 denial letter. In response, the Division issued to petitioner a letter dated October 23, 2009, again denying the refund request in language identical to that set forth in its June 3, 2009 letter, including the specific advice that a request for a conference must be filed within two years from the date of the notice, and again enclosing Form CMS-1, Request for Conciliation Conference.

4. Petitioner filed a Request for Conciliation Conference (Request) with the Division's Bureau of Conciliation and Mediation Services (BCMS). The Request is dated as signed on March 21, 2013, specifies October 23, 2009 as the "Date of notice of disallowance or refund denial" and specifies the "Amount of refund requested" as $30,000.00. The envelope in which the Request was mailed bears a machine metered (Pitney Bowes) postage stamp dated March 21, 2013, does not bear a United State Postal Service (USPS) postmark, and is stamped as received by BCMS on May 9, 2013. The Request was accompanied by a letter from petitioner's director of finance, also dated March 21, 2013, in explanation of the underlying substantive basis upon which petitioner claims entitlement to the refund.

5. On May 24, 2013, BCMS issued to petitioner a Conciliation Order Dismissing Request (Order). This Order, denominated CMS No. 257556, stated:

> The Tax Law requires that a request be filed within two years from the mailing date of the statutory notice. Since the notice was issued on October 23, 2009, but the request was not mailed until May 9, 2013, or in excess of two years, the request is late filed.
>
> The request filed for a Conciliation Conference is denied.

6. Petitioner challenged the foregoing denial of its Request by filing a petition with the Division of Tax Appeals. The petition is dated as signed on June 25, 2013. The envelope in

which the petition was mailed bears a USPS postmark dated June 26, 2013, and the envelope and the petition are stamped as received by the Division of Tax Appeals on June 28, 2013.

7. In its answer to the petition, the Division denied making any error in denying the refund claim. The answer further stated that the petition was untimely because it was filed more than 90 days from the date the refund claim was denied, and that the burden to show the refund denial at issue was erroneous rested with petitioner. Finally, the answer requested that the petition be denied and the refund denial be sustained.

8. The affirmation filed with the subject motion sets forth the facts and evidence in support of the Division's claim that petitioner's May 9, 2013 Request challenging the refund denial was untimely since it was not filed within two years after petitioner received notice of such denial in October of 2009. In addition, the Division states by affirmation that since the protest was filed more than 90 days from the date the refund denial was issued, it was untimely filed and the Division of Tax Appeals lacks jurisdiction to review the denial.

9. In response to the subject motion, petitioner states that it received the initial notice of denial of its refund claim on June 3, 2009 and, after submitting additional information, thereafter received the second notice of denial, dated October 23, 2009, in October 2009. Petitioner further states that the amended returns requesting a refund were timely filed and that the refund should therefore be granted.

CONCLUSIONS OF LAW

A. The Division brings a motion to dismiss the petition under section 3000.9(a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9(b). In this case, the documents reveal there are two questions presented. The first question is whether a timely petition was filed with the Division of Tax

Appeals challenging the correctness of the Order dismissing petitioner's Request for a BCMS conciliation conference. The second question is whether, assuming a timely petition was filed, the Order (CMS No. 257556) correctly dismissed petitioner's Request as untimely.

B. 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" (20 NYCRR 3000.9[b][1]). Section 3000.9(c) of the Rules 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, 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. Vil. of Patchogue Fire Dept.***, 146 AD2d 572 [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 [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***). As detailed hereafter, there are no material or triable issues of fact presented and the Division is entitled to summary determination in its favor.

C. Addressed first is the Division's claim that the Division of Tax Appeals is without jurisdiction to address the correctness of the May 24, 2013 Order dismissing petitioner's Request because a petition was not filed within 90 days after petitioner received the notice of refund denial dated October 23, 2009. On this issue, there is a strict 90-day statutory time limit for filing a petition for a hearing with the Division of Tax Appeals following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (***Matter of Voelker***, Tax Appeals Tribunal, August 31, 2006). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 689(b), the Order dismissing petitioner's Request and thus sustaining the Division's underlying refund denial would be binding upon petitioner unless a timely petition was filed with the Division of Tax Appeals.[2]

D. The documents in the record, as submitted by the Division in support of its motion, disclose that the Order is dated May 24, 2013 and, in turn, the petition challenging the Order is dated as signed by petitioner on June 25, 2013, was mailed via the USPS on June 26, 2013 and was received by the Division of Tax Appeals on June 28, 2013 (***see*** Findings of Fact 5 and 6). The petition was thus filed well within the foregoing strict 90-day period of limitations, is unquestionably timely, and there exists jurisdiction in this forum to address the correctness of the Order dismissing petitioner's Request as untimely.

E. Consideration of the foregoing jurisdictional issue of the timeliness of the petition arises here only because of the language set forth in the Division's answer, and in the affirmation accompanying the Division's motion, specifically (though incorrectly) claiming that the petition

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[2] This 90-day post-conciliation order period of limitations for filing a petition challenging such an *order* is to be distinguished from the two-year post *refund denial* period of limitations within which either a request for a conciliation conference or a petition for a hearing must be filed (***see*** Conclusion of Law E).

was untimely because it was filed more than 90 days after petitioner's receipt of the notice of refund denial. In fact, a denial or disallowance of a claim for refund may be challenged by the filing of *either* a petition with the Division of Tax Appeals or a Request for Conciliation Conference with BCMS within two years after the issuance of the notice of refund denial or disallowance (Tax Law § 689[c], § 170[3-a][a]). Here, petitioner chose to challenge the Division's denial of its refund claim by filing a Request for Conciliation Conference as opposed to its other (initial) option of filing a petition with the Division of Tax Appeals. This choice resulted in the issuance of the Order (CMS No. 257556) dismissing the Request as untimely. Petitioner, in turn, was then entitled to challenge the correctness of this Order, provided it did so by filing a petition with the Division of Tax Appeals within 90 days after issuance of the Order (Tax Law § 170[3-a][e]). As detailed earlier, petitioner filed its petition well within the 90-day period. Therefore, to the extent the subject motion seeks an order dismissing the petition as untimely, per 20 NYCRR 3000.9(a), it is denied.

F. Given the foregoing conclusion that the petition in this matter was timely filed, the Division of Tax Appeals has jurisdiction over the petition and, accordingly, a motion for summary determination under section 3000.9(b) of the Rules is the proper vehicle to consider the timeliness of petitioner's Request challenging the denial of its refund claim. This determination shall address the instant motion as such. In turn, careful review of the record as a whole demonstrates that there are no material facts in dispute concerning the filing of petitioner's Request challenging the Division's denial of its claim for refund. On this issue the record bears out that such Request was not timely filed. Therefore, to the extent the Division's motion seeks summary determination sustaining the Order dismissing the Request as untimely, the same will be granted as set forth hereinafter.

G. 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, amended withholding tax returns seeking a refund for the year 2008 based upon a claim of overpayments made for 2008 were timely filed on April 21, 2009 (***see*** Finding of Fact 1). In turn, however, by a letter dated June 3, 2009, the Division notified petitioner that its refund claim was denied. Additional information was supplied by petitioner and, by an essentially identical letter dated October 23, 2009, the Division again notified petitioner that its claim for refund was denied. Each of these denial notices advised that in order to challenge the refund denial, a request for a conciliation conference must be filed within two years of the date of the denial, and each of the notices referenced and included a copy of the specific form used to request such a conference (Form CMS-1--Request for Conciliation Conference) (***see*** Findings of Fact 2 and 3). Petitioner specifically acknowledged receiving the first denial notice on June 3, 2009, and specifically acknowledged receiving the second denial notice, dated October 23, 2009, in October of 2009 (***see*** Finding of Fact 9).

H. As set forth earlier, a refund denial or disallowance may be challenged by filing either a Request or a petition within two years after issuance of the notice of denial or disallowance (Tax Law § 689[c], § 170[3a][a]; ***see*** Conclusion of Law E). Here, petitioner opted to file a Request. Petitioner's Request challenging the refund denial was signed as dated on March 21, 2013, and the envelope in which it was mailed bore a machine metered (Pitney Bowes) postage stamp also dated March 21, 2013. However, the envelope did not bear any USPS dated postmark, and the Request is date stamped as received by BCMS on May 9, 2013. Under these circumstances,

where there is no USPS postmarked mailing date, the sender-affixed dates (signature dates and Pitney Bowes dates) are disregarded as insufficient to establish the actual date of mailing, and the Request is deemed filed on the date it is received by BCMS (***see Matter of Almanzer***, Tax Appeals Tribunal, June 7, 2001; ***Matter of Harron's Electrical Serv.***, Tax Appeals Tribunal, February 19, 1988; 20 NYCRR 3000.22[b]). There is no allegation by petitioner that either a Request or a petition challenging the refund denial was filed at any time prior to the foregoing May 9, 2013 Request, nor does the record reveal evidence of any such filing. Accordingly, as measured from either of the dates on which petitioner admitted its actual receipt of the Division's notice of disallowance of its refund claim, the Request was not filed within the period of limitations specified by Tax Law § 689(c) and the same was properly dismissed by BCMS as not timely filed.[3]

I. The Division of Taxation's motion for summary determination is granted, the petition of Infusiondev Corporation is hereby denied and the Conciliation Order Dismissing Request dated May 24, 2013 is sustained.

DATED: Albany, New York
May 1, 2014

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

[3] The Division did not submit proof of the dates of mailing of the notice of refund denial and thus the starting point for measuring the two-year period within which a protest challenging such denial would have to be filed commences with the date of actual receipt of such notice (***see Matter of Hyatt Equities LLC***, Tax Appeals Tribunal, May 22, 2008; ***Matter of Riehm v. Tax Appeals Tribunal***, 179 AD2d 970 [1992], ***lv denied*** 79 NY2d 759 [1992]. Petitioner admitted receiving the refund denial notice dated June 3, 2009 on that date, and further admitted receiving the refund denial notice dated October 23, 2009 "in October 2009." Even viewed in the light most favorable to petitioner, such that its admitted receipt of the October 23, 2009 refund denial occurred on the latest possible date in October (i.e., October 31, 2009), petitioner's Request challenging the notice of denial was not filed until May 9, 2013, or more than three and one-half years later, and was thus clearly untimely.