

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ACCIDENTAL HUSBAND INTERMEDIARY, INC.	:	DETERMINATION DTA NO. 827186
For Refund under Article 9-A of the Tax Law for the period ended December 31, 2007.	:	

Petitioner, Accidental Husband Intermediary, Inc., filed a petition for a refund under article 9-A of the Tax Law for the period ended December 31, 2007.

On February 27, 2017, petitioner, appearing by Greenberg Traurig, LLP (Glenn Newman, Esq., of counsel), and on March 16, 2017, the Division of Taxation, appearing by Amanda Hiller, Esq. (Robert Tompkins, Esq., and Diana Vance, Esq., of counsel), waived a hearing and submitted the matter for determination pursuant to 20 NYCRR 3000.12 based on documents and briefs to be submitted by September 15, 2017, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

ISSUES

- I. Whether petitioner timely filed a refund claim with the Division of Taxation.
- II. If not, whether the Division of Taxation should use its discretionary power to grant the refund claim pursuant to Tax Law § 1097 (d).

FINDINGS OF FACT

Petitioner and the Division of Taxation (Division) have entered into a joint stipulation of facts. These facts have been included in the facts set forth below.

1. Petitioner, Accidental Husband Intermediary, Inc., produced a film in New York City entitled *The Accidental Husband* (film) for which production concluded in 2007. On November 3, 2006, petitioner applied for an Empire State film production credit (credit) pursuant to Tax Law §§ 24 and 210 (36) for costs incurred in the production of the film.

2. Petitioner thereafter received a Certificate of Tax Credit (certificate), dated October 15, 2008, indicating that petitioner's application for the credit in connection with the production of the film had been approved as of that date.

3. The certificate indicated that the amount of the credit was \$1,203,501.00 and that the "completion year" for the credit was "December 31, 2007." The certificate also indicated that the credit was allowed for the taxable year in which the film was completed.

4. Pursuant to Tax Law § 24 (a) (2), the credit must be claimed over a two-year period beginning in the first taxable year in which the credit may be claimed and in the next succeeding taxable year, with one-half of the amount of the credit allowed being claimed in each year.

5. Tax Law § 1087 (a), as pertinent in this matter, provides that a claim for a credit, such as the credit at issue herein, must be filed by an article 9-A taxpayer within three years from the time the taxpayer's New York State business corporation franchise tax return (NYS tax return) was filed.

6. Petitioner was an article 9-A taxpayer in 2007 and 2008, and thereafter.

7. Petitioner was required to claim one-half of its \$1,203,501.00 credit on its NYS tax return for 2007, and the other half of the credit on its NYS tax return for 2008.

8. Petitioner filed its original NYS tax return for 2007 on September 15, 2008, before it received its certificate. The amount of tax due and paid with the return was \$100.00.

9. On its original NYS tax return for 2007, petitioner did not claim one-half of its \$1,203,501.00 credit.

10. Petitioner engaged Russell Saffer of Saffer & Flint Accountancy Corporation (SFAC) to prepare its NYS tax returns for 2007 and 2008, and thereafter.

11. SFAC prepared and timely filed petitioner's NYS tax return for 2008. Mr. Saffer signed this NYS tax return on September 14, 2009.

12. Petitioner's NYS tax return for 2008 claimed a credit in the amount of \$601,750.00 and included a copy of the certificate.

13. Petitioner thereafter received a refund in the amount of \$609,950.00 reflecting the credit in the amount of \$601,750.00 for 2008.

14. Petitioner submitted a copy of an amended NYS tax return for 2007 to the Division by certified mail in June 2012.

15. The Division has no record of receiving petitioner's amended 2007 NYS tax return prior to June 18, 2012.

16. Through this amended NYS tax return for 2007, petitioner claimed a refund of the credit for the period ended December 31, 2007.

17. By letter dated August 14, 2012, the Division denied petitioner's claim for refund of the credit for the period ended December 31, 2007. The Division denied the claim because it

concluded that the three-year period provided for in Tax Law § 1087 (a) to file this claim expired prior to the filing of the claim.

18. Petitioner filed amended NYS tax returns for 2009 and 2010, in August 2012.

Through these amended NYS tax returns, petitioner claimed a refund of the credit for the period ended December 31, 2007.

19. By letter dated November 27, 2012, the Division denied petitioner's claim for a refund of the credit for periods ended December 31, 2009 and December 31, 2010. The Division denied these claims for refund because it concluded that the credits claimed were not for the periods ended December 31, 2009 and December 31, 2010.

20. Petitioner filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services. By order dated June 5, 2015, the conciliation conferee sustained the refund claim denial letter. Thereafter, petitioner filed a timely petition with the Division of Tax Appeals.

21. Chapter 60 of the Laws of 2004 created the Empire State Film Production Credit to promote film and television production in New York State. In October 2009, a Report on the Empire State Film Production Tax Credit (2009 Report) was issued jointly by the Governor's Office for Motion Picture & TV Development and the Division.

On page 13 of the 2009 Report, project 165 is listed, showing a credit in the amount of \$1,203,501.00 as approved. An email from Craig Alfred, Records Access Officer of the Empire State Development Corporation, dated November 17, 2016, received in response to a Freedom of Information Law (FOIL) request, dated October 21, 2016, confirms that the feature film

completed in 2007, and referenced as project 165 in the 2009 Report, is the feature film *Accidental Husband* and the applicant for project 165 is petitioner.¹

22. In response to petitioner's claim that its amended return was filed prior to June 18, 2012, the Division conducted a search of its files to determine whether any amended return was previously filed by petitioner. By certification of the Deputy Tax Commissioner of the Division, dated May 5, 2017, no prior return was found.

23. In order to establish that its amended NYS tax return was filed on or about January 22, 2009, petitioner submitted the affidavit of Dennis Brown, its Secretary/Vice-President. This affidavit set forth Mr. Brown's responsibility for compliance with petitioner's tax filings. Mr. Brown affirms that, when he received the amended form CT-3 from petitioner's accountant, he signed the form as Secretary and then instructed his receptionist to mail it to the Division. Mr. Brown affirms that he confirmed with his receptionist that, in fact, she did mail the amended NYS tax return as he instructed. Additionally, petitioner submitted a cover letter from the accounting firm, dated January 22, 2009, that was attached to the amended 2007 NYS tax return.

CONCLUSIONS OF LAW

A. Tax Law § 1087 (a) requires that a "claim for credit or refund of an overpayment of tax under article nine or nine-A shall be filed by the taxpayer within (i) three years from the time the return was filed, [or] (ii) two years from the time the tax was paid." Furthermore, Tax Law § 1087 (e) provides that:

"failure to file claim within prescribed period. No credit or refund shall be allowed or made, except as provided in subsection (f) of this section or subsection

¹It is noted that the email from Mr. Alfred to petitioner's representative refers to project 16 which is deemed to be a typographical error. The full sentence correctly refers to project 165 and the information stated within this email clearly refers to project 165 and not 16.

(d) of section one thousand ninety, after the expiration of the applicable period of limitation specified in this article, unless a claim for credit or refund is filed by the taxpayer within such period. Any later credit shall be void and any later refund erroneous. No period of limitations specified in any other law shall apply to the recovery by a taxpayer of moneys paid in respect of taxes under article nine, nine-a, nine-b or nine-c.”

There is no dispute that petitioner’s original 2007 NYS tax return was timely filed, under an extension, on September 15, 2008. Therefore, pursuant to Tax Law § 1087 (a), the deadline for filing a refund claim was September 15, 2011. Petitioner alleges that it filed an amended 2007 NYS tax return in January of 2009. The Division has no record of this filing.

B. The first issue to address is whether petitioner has provided adequate proof that the amended return was mailed within the statute of limitations. To prove mailing, petitioner has submitted the affidavit of Dennis Brown, petitioner’s Secretary/Vice President, who states that the amended return was received by him from petitioner’s tax preparer on January 22, 2009. Mr. Brown states that he signed the return and it was mailed on the same day. Clearly, such assertions fall short of proving the return was filed on the claimed date. The Tax Appeals Tribunal (Tribunal) has consistently held that “proof of ordinary mailing is insufficient, as a matter of law, to prove timely filing” (*Matter of Sipam Corp.*, Tax Appeals Tribunal, March 10, 1988 [proof of ordinary mailing of a petition did not prove timely filing]), especially in light of the fact that the Division certified, after a review of its records, that it has no record of an amended 2007 NYS tax return filed by petitioner prior to June 18, 2012. Therefore, petitioner’s amended 2007 NYS tax return was not timely filed.

C. In the alternative, petitioner states that, even if the amended return is deemed untimely filed, its 2008 NYS tax return should be considered an informal refund claim for the 2007 tax year. In the *Matter of Tsoumas* (Tax Appeals Tribunal, June 15, 2017), the Tribunal stated that:

“The informal claim doctrine provides that, in order to be recognized as such, an informal claim (i.e., one not conforming with regulatory requirements or that contains formal defects), must put the taxing authority on notice, within the relevant period of limitations, that the taxpayer is making a refund claim, requesting a conciliation conference or filing a petition (citations omitted).

An informal claim or protest must have a written component that includes the specific years or periods involved and the basis for the claim (*Hollie v Commr.*, 73 TC 1198, 1213 [1980]; *Matter of Glover Bottled Gas Corp.*, Tax Appeals Tribunal, September 27, 1990). The sufficiency of the written component must be considered in the context of the surrounding circumstances (*American Radiator & Sanitary Corp. v U.S.*, 162 Ct. Cl. 106, 114 [1963]). ‘The determination of whether a taxpayer has satisfied the requirements for an informal claim is made on a case-by-case basis and is based on the totality of the facts (citation omitted)’ (*Donahue v U.S.*, 33 Fed. Cl. 608 [1995]). The ultimate question is whether the taxing authority knew or should have known that a refund claim was being made or a request for conciliation conference or petition was being filed (*see Krape v Commr.*, TC Memo 2007-125).”

In order for a claim to be deemed an informal refund claim, such claim is required to be timely and it must put the Division on notice of the claim.

Petitioner argues that it made an informal claim by filing its 2008 NYS Tax Return, along with the certificate that awarded it the film credit, well before the statute of limitations expired for the 2007 year. Moreover, petitioner asserts that the 2008 return set forth the amount and basis for the claim. Although petitioner’s filing of its 2008 NYS tax return was within the statute of limitations for the 2007 tax year, the return cannot be construed as putting the Division on notice of a refund claim for the tax year 2007.

Petitioner relies on *Matter of Greenburger* (Tax Appeals Tribunal, September 8, 1994) for the proposition that no special forms are required for taxpayers making an informal refund claim. In *Greenburger*, the taxpayer wrote “Paid under Protest” on the front of four checks used to pay real estate transfer taxes (transfer tax) on the transfers of certain real property. In finding that this was an informal refund claim, the Tax Appeals Tribunal noted that, at the time of these

transactions, the Division had not created a specific form or any guidance for a taxpayer to seek a refund of the transfer tax. Additionally, the Tribunal noted that the transfer tax is a transactional tax and, as such, the claimed refund was easy to identify; both in amount and tax period. Moreover, the Tribunal emphasized that the transfer tax, unlike income tax or corporation business franchise tax, was not based on any Federal tax that could provide guidance. Therefore, the Tribunal found that the notation on the front of the checks, coupled with the ease of identifying the amount of tax and tax year at the heart of the protest, was enough to put the Division on notice of an informal refund claim.

In the case herein, the 2008 NYS tax return did not contain any notations or language that could be construed as claiming a refund for the tax year 2007. Nowhere on the return is the tax year 2007 referenced. The certificate attached to the 2008 NYS tax return merely set forth that petitioner was entitled to a film credit and noted that the completion year of the film was December 31, 2007. These facts are clearly distinguishable from the facts in *Greenburger*.

Petitioner also argues that *Matter of Rand* (Tax Appeals Tribunal, May 10, 1990) is on point. Petitioner states that, in *Rand*, the petitioner never used the word refund nor specifically requested the return of money paid with the return, but rather, filed tax returns with attachments that described the taxpayer's reasons for claiming nonresident status. In *Matter of Rand*, the attached riders involved the specific year for which the returns were filed. The returns became the subject of an audit that addressed the issue of residency for all the years. The language contained in the rider included a statement that the petitioner was not subject to the taxing jurisdiction of New York State. These facts are easily distinguished from the facts herein. At no point did petitioner make any notation that could be construed that it was claiming a refund for

the tax year 2007. Therefore, petitioner has not established that it made an informal refund claim for the year 2007.

D. Lastly, petitioner argues that the Division should use its discretion, pursuant to Tax Law § 1097 (d), to grant petitioner's refund claim using its special refund authority. The Division's use of its special refund authority is appropriate in the following instances:

“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 or of article nine, nine-a, nine-b or nine-c, 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” (Tax Law § 1097 [d]).

In this case, there is no question of fact or law in issue. Therefore, in order for petitioner to qualify for discretionary treatment pursuant to the special refund authority provisions, it needs to prove that moneys were either illegally or erroneously collected or paid under a mistake of fact. As the Division points out, petitioner paid \$100.00 when it filed its 2007 NYS tax return in accordance with Tax Law § 210 (36). With respect to the film credit, petitioner was due a refundable credit, not an overpayment of moneys that were paid in error. Accordingly, there are no factors presented herein that establish petitioner's entitlement to receive discretionary treatment by the Division pursuant to the special refund authority.

E. The petition of Accidental Husband Intermediary, Inc., is denied and the Division of Taxation's denial of the refund claim dated November 27, 2012 is sustained.

DATED: Albany, New York
March 15, 2018

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE