STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ABRAHAM AND RENEE FRUCHTHANDLER	:	DETERMINATION DTA NO. 827600
for Redetermination of Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 2012.	:	

Petitioners, Abraham and Renee Fruchthandler, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2012.

A hearing was held before Herbert M. Friedman, Jr., Supervising Administrative Law Judge, in New York, New York, on January 9, 2018, with all briefs to be submitted by April 20, 2018, which date began the six-month period for the issuance of this determination. Petitioners appeared by Roberts & Holland LLP (Ellen S. Brody, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel).

ISSUE

Whether petitioners can demonstrate that they filed their 2009 personal income tax return in a timely manner to ultimately allow for a carry forward credit to their 2012 personal income tax return.

FINDINGS OF FACT[1]

1. Petitioners, Abraham and Renee Fruchthandler, filed joint federal and New York State personal income tax returns for the years 2006 through 2012.

2. From 2009 through 2012, petitioner Abraham Fruchthandler was a partner in the following entities: (1) FBE Limited LLC; (2) ICA Partners L.P.; (3) Industry City Associates; (4) 19-20 Industry City Associates, LLC; (5) 1-10 Industry Associates LLC; and (6) 212 Wolcott Street Partners, LLC.

3. From 2009 through 2012, petitioner Renee Fruchthandler was a partner in FBE Limited LLC.

4. From 2009 through 2012, the December 28, 1995 Abraham Fruchthandler Trust, a grantor trust for which petitioner Abraham Fruchthandler was the grantor, was a partner in FBE Limited LLC.

5. Through the partnership interests described in findings of fact 2 through 4, petitioners were eligible for Qualified Empire Zone Enterprise (QEZE) credits for eligible real property taxes on their personal income tax returns pursuant to Tax Law § 15 for the years 2009 through 2012.

6. Petitioners electronically filed an application for automatic six-month extension of time to file for individuals for New York State for the year 2009 on April 9, 2010. Thus, the deadline for filing their 2009 return was October 15, 2010.

7. The Division did not receive petitioners' 2009 personal income tax return prior to April

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[1] The parties placed a stipulation of facts into the record, the majority of which has been incorporated into this determination.

23, 2014.

8. On June 24, 2015, the Division of Taxation (Division) issued notice of deficiency number L-042866199 to petitioners arising from their personal income tax return for the year 2012 (notice of deficiency). The notice of deficiency assessed tax in the amount of $43,182.00, penalty of $5,829.57, and interest.

9. The tax amount reflected in the notice of deficiency resulted from a disallowance of the claimed overpayment by petitioners of $223,032.00 from tax year 2011. Petitioners' 2011 overpayment related to an overpayment of $270,250.00 reported on their 2010 return. Petitioners' 2010 overpayment related to an overpayment of $281,517.00 reported on their 2009 return. Petitioners' 2009 overpayment related to an overpayment of $159,787.00 reported on their 2008 return.

10. On March 6, 2013, the Division's non-filing unit, Audit Group 15, issued correspondence to petitioners informing them that the Division had no record of a New York State personal income tax return on file for the year 2009.

11. On January 14, 2014, the Division issued a statement of proposed audit changes for the year 2012 (petitioners' most recently filed return) informing petitioners that the Division had no record of their personal income tax return for 2009. Therefore, because petitioners could not carry forward overpayments from 2009, ultimately additional tax was due for 2012.

12. On April 23, 2014, the Division received petitioners' New York State personal income tax return for the year 2009. The return was signed by petitioners and their accountant, Steven Tabak, and dated October 15, 2010. The copy placed into evidence was accompanied by two cover letters: one dated March 24, 2014 and sent to the Division by regular mail, and one dated

April 14, 2014 and sent to the Division by certified mail.

13. Petitioners' 2009 return reported tax owed of $19,928.00, claimed QEZE credits of $141,658.00, and total estimated tax payments of $159,787.00 (based on claimed overpayment from the 2008 return), for a total overpayment of $281,517.00, which petitioners elected to apply to their 2010 personal income tax return.

14. On November 12, 2014, the Division received petitioners' amended resident income tax return for the year 2009. The 2009 amended return was accompanied by cover letters dated November 6, 2014 (by regular mail) and November 7, 2014 (by certified mail). The 2009 amended return reported tax owed of $19,928.00, QEZE credits of $243,673.00, and total estimated tax payments of $159,787.00, for an overpayment of $383,532.00. Petitioners elected to apply $281,517.00 of the overpayment to their 2010 personal income tax return and sought a refund of $102,015.00. The amended return was signed by petitioners and Mr. Tabak, and dated October 11, 2012.

15. On May 20, 2015, the Division issued to petitioners a notice of disallowance that denied their claim for credit or refund on their 2009 amended return. The basis for the denial was that the amended return was untimely. The notice of disallowance is not the subject of the instant petition.

16. Mr. Tabak prepared petitioners' returns for several years, including 2009. Once prepared, the returns were signed and dated by Mr. Tabak and hand-delivered to petitioners' office for their signatures and mailing. Once delivered, the returns were no longer in the possession of Mr. Tabak. Mr. Tabak explained that this procedure was followed for the 2009 return in October 2010.

17. Petitioners' returns were received at their office by Andrew Zachariades, their companies' controller. Mr. Zachariades explained that he was personally involved in the preparation for mailing of petitioners' federal and state income tax returns each year. He added that it was the practice to have the federal and state returns signed at the same time. Mr. Zachariades stated that there were thousands of pages of tax returns on behalf of petitioners and their entities each filing season.

18. Petitioners' 2009 federal income tax return was signed on October 15, 2010. The Internal Revenue Service received that return on October 18, 2010.

19. Mr. Zachariades explained that once the returns were prepared and ready to be mailed, they were placed in a box or envelope to be transferred out of the office. He added that it was the responsibility of the office secretaries to prepare the certified mailing or Federal Express receipts and, ultimately, mail the returns. His direct involvement with the mailing of the returns ended once the returns were given to the secretaries for packaging and mailing. This preparation often occurred in a separate conference room. In addition, any certified mail receipts were maintained by the secretaries.

20. In 2010, petitioners had a particular secretary that had problems performing her responsibilities, including mailing and tracking items. She was terminated from her position in 2011, in part, due to her failure to complete her mailing tasks.

21. Mr. Zachariades testified that petitioners' tax returns were filed along with a cover letter as often as possible. Those cover letters for years other than 2009 that were placed into the record specifically reference the particular year or years of the returns submitted with them. In addition, petitioners' returns were often sent by certified mail, return receipt requested, or Federal

Express. At times, however, petitioners' tax returns were sent by regular mail.

22. Mr. Zachariades testified that some, but not all, amended returns sent from his office were accompanied by a cover letter.

23. Mr. Zachariades stated that if a return was not filed with a cover letter, his office would keep a copy of the first and signature pages of the return to evidence preparation of the return.

24. Petitioners did not have a certified or registered mail receipt, or any other type of receipt evidencing mailing of their 2009 New York State personal income tax return prior to April 2014.

25. The Division entered into evidence a certification, dated December 28, 2017, stating that a search of the Department of Taxation and Finance's files was made on that date and that there was no record of the filing of a 2009 personal income tax return for petitioners prior to April 23, 2014.

26. Petitioners timely filed their 2011 New York State personal income tax return on October 15, 2012. Mr. Zachariades testified that petitioners' 2009 amended personal income tax return was prepared at the same time as petitioners' 2011 return, "and since everything was done, we decided to put everything in the same envelope." He also testified that he "would have been the person to mail that return." That statement conflicted with Mr. Zachariades' other testimony that his secretaries were the ones physically taking the returns and putting them in boxes, "doing the Federal Express set-ups or the certified return receipt set-ups."

27. As proof of the filing of their 2009 amended return, petitioners placed into evidence a certified mail receipt bearing certified mail number "7007 2680 0003 1733 8144" and a cover

letter, dated October 15, 2012, from Mr. Zachariades bearing the same certified mail number as was on the receipt. The cover letter referenced petitioners' filing of returns for the year 2011. Neither the cover letter or receipt, however, had any reference of a return for 2009.

28. Mr. Zachariades stated that instead of preparing a new cover letter for the filing of petitioners' 2009 amended return, he would have simply kept a copy of the signature page so he knew that it was mailed.

29. In 2010, the Division issued a letter to petitioners stating that it did not have a copy of their 2006 New York State personal income tax return. In response, petitioners provided a copy of a cover letter, dated November 30, 2007 that referenced petitioners' filing of their 2006 return. The letter was sent by certified mail.

30. In 2011, in response to an inquiry by the Division regarding the filing petitioners' 2007 and 2008 personal income tax returns, petitioners were able to produce evidence of certified mailing of tax returns for those years. This evidence included a cover letter specifically referencing those two filing years and bore a certified mail number that matched an accompanying certified mail receipt.

31. During the Division's 2011 inquiry regarding petitioners' 2007 and 2008 returns, Mr. Tabak was never told that the Division did not have a copy of petitioners' 2009 return.

32. In 2015, the Division informed Mr. Tabak that it did not have a copy of petitioners' 2010 personal income tax return. In response, petitioners were able to produce a certified mail receipt from Mr. Tabak's office evidencing the timely filing of their 2010 return.

33. Petitioners submitted 37 proposed findings of fact. In accordance with State Administrative Procedure Act (SAPA) § 307 (1), petitioners' proposed findings of fact have been

accepted, except that proposed findings of fact 8, 15, 18, 19 and 27 have been modified to more accurately reflect the record.

34. The Division submitted 21 proposed findings of fact. In accordance with SAPA § 307 (1), the Division's proposed findings of fact have been accepted.

CONCLUSIONS OF LAW

A. This matter concerns the issuance of a notice of deficiency to petitioners for their 2012 personal income tax return. Initially, it must be noted that in proceedings for review of a properly issued notice of deficiency, the burden of proof is on the taxpayer to demonstrate that the deficiency is erroneous (Tax Law § 689 [e]). The deficiency at issue arose from the disallowance of a credit for overpayment on petitioners' 2012 return that originated from an overpayment credit from petitioners' 2009 personal income tax return. The disallowance was based on petitioners' late filing of their 2009 return, which petitioners dispute. Hence, the crux of this matter concerns whether petitioners can demonstrate that they timely filed their 2009 New York State personal income tax return in order to allow for their claimed credit.

B. The relevant limitation periods on making an application for a credit or refund are found within Tax Law § 687, which provides:

> "(a) General. --Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer (i) within three years from the time the return was filed [or] (ii) two years from the time the tax was paid...whichever of such periods expires the later, 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 . . . Except as otherwise provided in this section, if no claim is

> filed, the amount of a credit or refund shall not exceed the amount which would be allowable if a claim had been filed on the date the credit or refund is allowed.
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> (e) 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 (d) of section six hundred 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 this article.
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> (i) Prepaid income tax.--For purposes of this section, any tax paid by the taxpayer before the last day prescribed for its payment, any income tax withheld from the taxpayer during any calendar year, and any amount paid by the taxpayer as estimated income tax for a taxable year shall be deemed to have been paid by him on the fifteenth day of the fourth month following the close of his taxable year with respect to which such amount constitutes a credit or payment."

C. Petitioners' 2009 return was due on or before October 15, 2010. The Division placed into evidence a certificate of non-filing, however, stating that petitioners' 2009 personal income tax return had not been filed prior to April 23, 2014. Pursuant to Tax Law § 691 (d), the Division's certificate is prima facie evidence of non-filing prior to that date. Thus, it is incumbent upon petitioners to rebut such evidence and demonstrate clearly and convincingly that they timely filed their return in order to have entitlement to the overpayment that ultimately would have carried forward to their 2012 return.

D. In response, petitioners present several arguments. First, they offer the testimony of Mr. Tabak, their accountant, to establish the timely creation of the 2009 return, and that of Mr. Zachariades to prove its signing and mailing in October 2010. A review of their testimony, however, demonstrates that neither had first-hand knowledge of the mode and actual mailing of the 2009 return at that time. Mr. Tabak attested to his creation of the return, but acknowledged

that he turned it over to Mr. Zachariades prior to filing. Meanwhile, Mr. Zachariades explained that, consistent with his usual practice, he left the signed return with others on his staff to prepare for mailing and eventually mail. Indeed, Mr. Zachariades stated that on occasion, petitioners' returns had been filed by ordinary mail and he did not rule out that it occurred for the original 2009 return. Most importantly, petitioners failed to present evidence of certified or registered mail to prove delivery of the return to the Division as contemplated by Tax Law § 691 (a) (1). Hence, the record is unclear as to whether or not petitioners' 2009 return was originally sent by certified or ordinary mail, or even mailed at all. The mere speculative assertions of petitioners' witnesses fall short of proving that the return was filed on the date petitioners claim or even the method of mailing. Given those circumstances, 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). "Where a taxpayer uses ordinary mail, the taxpayer bears the risk that a postmark may not be timely fixed by the postal service or that the document may not be delivered at all" (***Matter of Sipam***). In sum, the record does not clearly demonstrate petitioners' filing of their 2009 return in a timely manner, especially in light of the fact that the Division certified, after a review of its records, that it has no record of a 2009 New York State personal income tax return filed by petitioners prior to April 23, 2014.

E. Petitioners also argue that the Division had a history of failing to find returns that were actually filed. In support of this position, they point out that their 2006, 2007 and 2008 returns were initially missing but eventually shown to have been filed through presentation of a certified mail receipt and matching cover letter. Petitioners further maintain that there was a

pattern of misplaced returns by the Division specifically involving QEZE credits. The 2009 return, according to petitioners, was just one in this pattern.

This argument, however, is without merit. It ignores the basic tenet that a taxpayer, and not the Division, bears the burden of proof on the issue of the filing of a return (***see Matter of Emerald International Holdings, Ltd.***, Tax Appeals Tribunal, April 5, 2018). Petitioners' stance relates to the issue of whether the Division misplaced certain documents and has no bearing on the issue of whether petitioners actually filed their 2009 return (***see Matter of Levin***, Tax Appeals Tribunal, April 16, 1998). Ultimately, as the Division correctly notes, petitioners could have avoided any risk emanating from mishandling of their 2009 return by the Division (and, in fact, did with their 2006, 2007 and 2008 returns) by using certified or registered mail, and maintaining and presenting proof thereof (***see*** Tax Law § 691). The failure to do so proved to be determinative in this case (***see Matter of Klocek***, November 24, 2010).

F. Petitioners further point out that the Internal Revenue Service timely received their 2009 federal return, which was prepared, signed, and, as they assert, filed at the same time as their New York State return. As a result, petitioners maintain that their 2009 New York State return must have also been timely filed. Such an argument, when faced with the Division's certificate of non-filing, however, has previously been rejected by the Tribunal (***see Matter of Reeves***, Tax Appeals Tribunal, August 22, 1991). Although the two returns appear to have been signed on the same day, petitioners have not proven that they were also mailed on the same day.

G. Finally, petitioners argue that, in any event, their 2009 amended personal income tax return was signed and filed in October 2012 with their 2011 return in an envelope sent by certified mail. As with petitioners' original 2009 return, if an amended return has not been

received by the Division, petitioners must come forward with sufficient proof of mailing, i.e., by certified or registered mail (***see Matter of Schumacher***, Tax Appeals Tribunal, February 9, 1995; ***see also Matter of Savadjian***, Tax Appeals Tribunal, December 28, 1990). Tax Law § 691 (a) provides that ". . . [i]f 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." Petitioners presented a certified mail receipt dated October 15, 2012, without any indication of its contents, and bearing certified mail number "7007 2680 0003 1733 8144." They also presented a cover letter of the same date from Mr. Zachariades to the State Processing Center bearing the same certified mail number. This letter solely references the filing of petitioners' 2011 personal income tax return and makes no mention of a return for 2009. They further offered the testimony of Mr. Zachariades, who testified that as the 2009 amended return was prepared at the same time as the 2011 return, his office would have just placed the former in the box with the latter, without a separate cover letter.

Petitioners, likewise, do not meet their burden on this point. Again, when faced with the Division's certificate of non-filing, the lack of a reference to the 2009 amended return on either the certified mail receipt or cover letter weakens petitioners' case significantly. This absence contradicts petitioners' demonstrated practice of specifically identifying the particular contents and years of returns submitted with a cover letter. Here, what petitioners have established is that they mailed their 2011 personal income tax return on October 15, 2012. They have not convincingly established that the 2009 amended return was mailed with it. Mr. Zachariades offered conflicting testimony regarding mailing of the amended return. While he stated that he

was the one who would have mailed the return, he conversely acknowledged that he only watched the process to a certain point, which ended prior to mailing. His speculative testimony on this point, while no doubt sincere, lacked the sufficient detail or certainty to allow a determination that petitioners met their burden of proving that the amended return was filed in 2012 (***see Matter of Reeves***).

H. As petitioners have failed to clearly and convincingly demonstrate that they filed either their original or amended 2009 return prior to April 23, 2014, they are not entitled to their claimed credit or refund for that year pursuant to Tax Law § 687 (a). Consequently, the carry forward of an overpayment from 2009 was properly disallowed by the Division.

I. The petition of Abraham and Renee Fruchthandler is denied and the Division of Taxation's notice of deficiency dated June 24, 2015 is sustained.

DATED: Albany, New York
October 11, 2018

/s/ Herbert M. Friedman, Jr.
SUPERVISING ADMINISTRATIVE LAW JUDGE