STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALI AND NORIN MOHYUDDIN	:	DETERMINATION DTA NO. 827940
For Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 2011.	:	

Petitioners, Ali and Norin Mohyuddin, 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 year 2011.

On February 10, 2019 and February 11, 2019, respectively, petitioners, appearing by Sanjay Grover, CPA, and the Division of Taxation, appearing by Amanda Hiller, Esq. (Stephanie M. Lane, Esq., of counsel), waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by May 31, 2019, which date commenced the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation's disallowance of petitioners' claim for credit or refund of personal income tax for the year 2011, upon the basis that the claim was filed after the expiration of the period of limitations, was proper and should be sustained.

II. Whether, if so, petitioners have nonetheless established that their claimed refund

should be granted pursuant to the special refund authority set forth in Tax Law § 697 (d).

FINDINGS OF FACT[1]

1. On April 16, 2012, petitioners, Ali and Norin Mohyuddin, electronically filed a New York State resident income tax return (form IT-201) for the year 2011. This return reported total New York tax due in the amount of $295,937.00. After reducing this amount by New York State tax withheld ($14,590.00), and estimated tax payments ($25,000.00), the amount of tax owed was $256,347.00. There is no dispute that petitioners paid the full amount of tax owed with the filing of their return.

2. Petitioners filed a New York State amended resident income tax return for the year 2011 (form IT-201-X), requesting a refund for that year in the amount of $109,570.00. The postmark on the envelope in which petitioners' amended return for 2011 was filed is illegible. The return is signed by petitioners. It is also signed by petitioner's representative, and that signature is dated May 19, 2015. The envelope in which the amended return was filed is date stamped as received by the Division of Taxation (Division) on May 26, 2015.

3. Petitioners' refund claim was based on the treatment of certain proceeds resulting from a May 9, 2011 settlement of litigation relating to the sale of an S corporation in which petitioner Ali Mohyuddin held an interest. Petitioners initially reported the settlement amount of $3,800,000.00 as capital gain income for 2011, allegedly derived from an 18% ownership interest petitioner Ali Mohyuddin held in Sina Drug Corporation. Following the settlement, the accountant for the corporation issued amended schedules K-1 for 2011, and for other, prior years. For 2011, the amended schedule K-1 reported petitioner Ali Mohyuddin's share of proceeds as

[1] Pursuant to State Administrative Procedure Act § 307 (1), the Division of Taxation submitted seven proposed findings of fact. Those proposed facts are supported by the record, and have been included herein.

ordinary business income in the amount of $140,728.00. Petitioners disagreed with this characterization of the settlement proceeds and commenced an action challenging the same. By a decision and order dated November 13, 2014, petitioners' assertion that this characterization of the settlement proceeds was incorrect was rejected (***see Sina Drug Corp. v Mohyuddin***, 122 AD3d 444 [1st Dept 2014]). Accordingly, petitioners filed an amended 2011 return. This amended return reflects the changed characterization of the settlement receipts, and results in the calculation of a reduction to petitioners' reported tax liability for 2011, from $295,937.00 (as originally reported), to $186,367.00, thus leaving an overpayment and a claimed refund due for 2011 in the amount of $109,570.00.

4. On October 14, 2015, the Division issued to petitioners a notice of disallowance, denying the claimed refund for the year 2011 on the basis that the same had not been timely filed.

5. Petitioners have challenged the Division's notice of disallowance upon the basis that their amended return for 2011 (form IT-201-X) had been filed within three years after the due date for the filing of their return for the year 2011 (form IT-201). In support, petitioners submitted a copy of an amended return for 2011. This copy, as submitted, bears the typewritten date "04-10-2012." It is identical to the amended return for 2011, as described above (***see*** findings of fact 2 and 3), but for the absence thereon of petitioners' signatures, the signature of petitioners' representative with the accompanying handwritten date May 19, 2015, and the Division's date stamp indicating receipt on May 26, 2015.

6. Petitioners also submitted a copy of an application for automatic six-month extension of time to file for individuals (form IT-370). The copy of the form is not signed. Petitioners' representative submitted a statement, made by one Rajesh Tayal, an employee of the firm S. Grover, CPA PLLC, as follows:

> " I certified [sic] that the Extension of Ali Mohyuddin and Norin Mohyuddin for the Year 2011 was mailed out on the evening of 04.10.2012 via regular mail and was dropped at the Local Hicksville Post Office located at 185 W John Street, Hicksville, NY 11801."[2]

7. In support of its disallowance, the Division conducted a search of its records for the year 2011, and certified that petitioners had not filed a New York State amended resident income tax return for the year 2011, claiming a refund in the amount of $109,570.00, at any time prior to that which was filed by petitioners on May 26, 2015 (***see*** finding of fact 2).

8. In further support of its disallowance of petitioners' refund claim, the Division conducted an additional search of its records for the year 2011, and certified that petitioners had not filed an application for automatic six-month extension of time to file for individuals (form IT-370), for the year 2011, on or before April 17, 2012.

9. In addition, the Division obtained through its Office of Disclosure and Government Exchange, copies of petitioners' U.S. Individual Income Tax Return (form 1040), and petitioners' Amended U.S. Individual Income Tax Return (form 1040X) for the year 2011, seeking a refund upon the same basis as the refund sought herein. As part of the information provided by the IRS, the Division also obtained an IRS transcript of petitioners' IRS tax filings for 2011, together with correspondence between petitioners and the IRS for that year. This information shows that petitioners timely filed their federal return for 2011 on April 15, 2012, with no extension to file, and subsequently filed their amended federal return on May 27, 2015. This federal amended return was, like the amended New York State return for 2011, dated as

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[2] The statement is not sworn to by Mr. Tayal, and therefore does not constitute an affidavit. In addition, there is no claim or evidence to indicate that Mr. Tayal is an attorney admitted to practice in New York State, or a physician, osteopath or dentist as described in CPLR 2106. Consequently, the facts set forth in the statement have little evidentiary value as only attorneys, physicians, osteopaths or dentists, authorized by law to practice in New York, who are not parties to the proceeding, or individuals physically located outside the United States, are authorized to submit affirmations (***see*** CPLR 2106).

signed by petitioners' representative on May 19, 2015. Associated correspondence reveals that the IRS disallowed petitioners' claim for refund August 3, 2015, as untimely, and petitioners' appeal of that disallowance was subsequently upheld on August 1, 2016.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 689 (e), petitioners bear the burden of establishing, by clear and convincing evidence, that the Division's disallowance of their claimed refund is erroneous (***see Matter of Suburban Restoration Co. v Tax Appeals Trib***, 299 AD2d 751 [3d Dept 2002]). Herein, the question presented is whether petitioners have established that the Division improperly disallowed their claimed refund on the basis that it was barred as untimely filed pursuant to Tax Law § 687. Assuming the refund was properly disallowed as untimely, petitioners nonetheless seek the same under the special refund authority set forth at Tax Law § 697 (d).

B. 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, 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 . . . . "

C. Petitioners electronically filed their 2011 personal income tax return on April 16, 2012 (***see*** finding of fact 1), or one day before the April 17, 2012 latest statutorily prescribed due date for filing such return, without regard to any extension of such filing due date as may be obtained.

As such, petitioners' return was deemed to have been filed, and payment was deemed to have been made, on April 17, 2012 (***see*** Tax Law § 687 [h], [i]).[3]

D. Under the foregoing, in order to be entitled to a refund for 2011, petitioners were required to have filed their claim therefor within three years of the date on which their 2011 return was due to have been filed, i.e., by April 17, 2015, and the amount of any such refund would be limited to the portion of the tax paid within such three year period, plus any extension of time for the filing of the return (***see*** Tax Law § 687 [a]).

E. Petitioners claimed their refund by filing an amended return for the year 2011, dated as signed on May 19, 2015, and date stamped as received by the Division on May 26, 2015 (***see*** finding of fact 2). As such, petitioners amended 2011 return was not filed within three years from the April 17, 2012 latest date for the filing of such return, absent any extensions of such filing due date. Likewise, no portion of petitioners' tax payments for 2011 were made within the three years immediately preceding the $109,570.00 refund claim set forth on their amended return for 2011. Consequently, the Division properly disallowed petitioners' claim for refund as untimely (***see*** Tax Law § 687 [a], [e], [i]; ***see also Matter of Oliver Petrovich***, Tax Appeals Tribunal, January 20, 2000).

F. Petitioners assert they filed their amended return on April 10, 2015, that their refund claim was thus filed within three years after the April 16, 2012 filing of their 2011 return, and hence was timely filed. Petitioners also maintain that, on April 10, 2012, they filed an application for a six-month extension of the time to file their 2011 return, that the due date for filing their 2011 return was thereby extended to October 15, 2012, such that their time within

[3] To the extent payment of petitioners' liability for 2011 was made by amounts withheld from wages and by estimated tax payments made by petitioners, the same are deemed to have been paid on the fifteenth day of the fourth month following the close of the taxable year, i.e., April 15, 2012 (***see*** Tax Law § 687 [i]).

which to file a refund claim was consequently extended until October 15, 2015. Petitioners maintain that the refund claimed via their amended return was therefore timely, whether filed on April 10, 2015, as claimed, or on May 26, 2015, as indicated by the date stamp affixed on the face of the return by the Division.

G. Petitioners' assertions of timeliness are rejected. As to petitioners' first argument, there is no objectively verifiable basis in the record to support the claim that petitioners' amended return for 2011, on which the refund at issue was claimed, was filed on April 10, 2015, so as to have been filed within three years after the April 16, 2012 filing of petitioners' 2011 return. In contrast, the Division's certified search of its files and records found that no 2011 amended return was filed with, or received by the Division, by or on behalf of petitioners, prior to May 26, 2015. That amended return was, as noted, dated and signed by petitioners' representative on May 19, 2015, and was date-stamped as received by the Division on May 26, 2015. Petitioners' claim of having filed an earlier amended return, i.e., on April 10, 2015, is in fact belied by the evidence in the record. Thus, petitioners have not met the burden of proving that their claim for refund was made within three years after the filing of their 2011 tax return.

Likewise, and as to petitioners' second argument, there is no objectively verifiable evidence in the record upon which to conclude that an application for extension of the due date for petitioners' 2011 return was filed, or to support petitioners' claim that the "official time" within which to file an amended return and claim a refund for 2011 was, as a consequence, extended until October 15, 2015. On this score, the Division's certified search of its files and records confirmed that no application for extension of the time to file a return for 2011 (form IT-370) was filed with or received by the Division, by or on behalf of petitioners. First, the statement concerning the purported mailing of such an extension request on April 10, 2012 has

been accorded no weight (***see*** finding of fact 6, n. 2). Further, and assuming such statement could be accorded any evidentiary value or weight, the statement clearly indicates that the extension request was filed by "regular" mail (***see*** finding of fact 6). It is well established that the risk of untimely delivery of a time sensitive document, or of non-delivery of any document, as well as the consequences of such risks, rest with the sender. There is no evidence or claim that the amended return in question, or the filing date extension request, were submitted by the use of a method of mailing that allowed for the confirmation of both the fact and date of such mailing, from which petitioner would be entitled to a presumption that the items mailed were delivered in due course thereafter. In ***Matter of Sipam*** (Tax Appeals Tribunal, March 10, 1988), the Tax Appeals Tribunal (Tribunal) addressed the issue of proof of mailing when filing tax documents. In ***Sipam***, petitioner used ordinary (first class) mail, rather than certified or registered mail, to file its petition with the Division of Tax Appeals, and the petition was not received within the statutorily mandated time period. The Tribunal held that the "[u]se of registered mail is prima facie evidence that the document was delivered. 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*" (emphasis added) (***Matter of Sipam***; ***Matter of Harron's Elec. Serv.***, Tax Appeals Tribunal, February 19, 1988; ***see also Deutsch v Commissioner of Internal Revenue***, 599 F2d 44 [2d Cir 1979]; ***Miller v United States***, 784 F2d 728 [6th Cir 1986]). In short, the use of registered or certified mail allows a taxpayer to avoid the risks of mishandling, late delivery, or nondelivery of time-sensitive items (***see Matter of Sipam***).[4] Here, the record includes no evidence to establish that the amended return in question was delivered to

[4] Registered or certified mailing allows an expedient method to establish both physical delivery of the item allegedly mailed into the custody of the USPS and, via return receipt cards or the use of USPS form 3811-A, subsequent delivery information (or confirmation) with respect to the item.

the Division prior to May 26, 2015, or that any extension request was in fact mailed or delivered to the Division at any time. Unfortunately for petitioners, their allegations of such mailings, alone, are insufficient to establish the same. In sum, petitioners have not established the filing of their refund claim at any point in time prior to May 26, 2015, and it is this date from which the timeliness of the claim must be evaluated. In turn, the Division correctly determined that such claim was untimely, and properly disallowed the same (***see*** finding of fact 4).

H. Finally, the special refund authority, set forth at Tax Law § 697 (d), provides as follows:

> "Where no questions of law or fact 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."

I. The standard for application of the foregoing provision has been set forth by the Tribunal as follows:

> "A mistake of fact has been defined as an understanding of the facts in a manner different than they actually are (citations omitted). A mistake of law, on the other hand, has been defined as an acquaintance with the existence or nonexistence of facts, but ignorance of the legal consequences following from the facts." (***see Matter of Wallace***, Tax Appeals Tribunal, October 11, 2001).

J. In this case, petitioners have not demonstrated that there was no question of law involved, or that moneys were erroneously or illegally collected, or were paid under a mistake of fact (***see Matter of Mostachetti***, Tax Appeals Tribunal, February 13, 1997). Petitioners' initial manner of reporting the income in question (as capital gain income rather than as ordinary business income), presented a question of law regarding the proper manner of reporting such

income, thereby leaving the special refund authority of Tax Lax § 697 (d) inapplicable. In turn, that legal question was resolved on November 13, 2014, as a result of litigation (***see*** finding of fact 3). While the date of such resolution occurred prior to the expiration of the period of limitations for filing a claim for refund, petitioners simply failed to make their claim within such period. Under the circumstances presented here, the Division properly disallowed petitioners' claim for refund as untimely.

L. The petition of Ali and Norin Mohyuddin is hereby denied, and the Division's October 14, 2015 disallowance of petitioner's claim for refund is sustained.

DATED: Albany, New York
November 21, 2019

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE