STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KYAR P. WINPE	:	DETERMINATION DTA NO. 829407
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2014.	:	

Petitioner, Kyar P. Winpe, 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 2014.

A formal hearing was held by videoconference via CISCO webex before Donna M. Gardiner, Administrative Law Judge, on June 11, 2021. Petitioner appeared by Jhonatan Mondragon, EA. The Division of Taxation appeared by its representative, Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel). Petitioner's reply brief was due on October 1, 2021.

On August 9, 2021, petitioner brought a motion seeking an order for official notice to be taken of certain Internal Revenue Service changes and corrections. The Division of Taxation filed its reply to the motion on September 8, 2021. This determination shall address both the petition and the motion.

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for refund for the tax year 2014 on the basis that the claim was filed after the expiration of the applicable statute of limitation pursuant to Tax Law § 687.

FINDINGS OF FACT

1. Petitioner, Kyar P. Winpe, filed a 2014 amended New York resident income tax return, form IT-201-X, requesting a refund in the amount of $986.00.

2. Petitioner's amended tax return was dated April 10, 2018. However, the envelope containing the amended tax return mailed to the Division of Taxation (Division) indicates a United States Postal Service (USPS) mailing label that reflects a mail date of April 18, 2018, from Brooklyn, New York.

3. The Division issued an account adjustment notice (notice) to petitioner dated May 24, 2018. This notice denied the claimed refund because the Division determined such refund claim was late filed. On the notice, the Division indicated that petitioner's original 2014 New York resident income tax return, form IT-201, was filed on April 15, 2015, and that the amended tax return was filed on April 18, 2018. The Division stated that the Tax Law requires a claim to be filed within three years from the date that the original return was filed. Since petitioner's amended return was filed more than three years after the original return, the Division denied the claim as untimely filed.

4. Petitioner filed a petition with the Division of Tax Appeals on May 15, 2019 in protest of the notice.[1]

5. In preparation for the hearing by videoconference, the parties were instructed to submit all documents that they planned on introducing into evidence by May 26, 2021.

6. At the hearing, petitioner's representative explained that he was unable to comply with the directive to mail the documents in support of petitioner's case by the May 26, 2021 deadline.

[1] Although, on its face, it appears that the petition was not timely filed, the Division did not introduce any mailing records to establish when it mailed the notice at issue. Therefore, there is jurisdiction to entertain the petition.

He requested additional time to do so. Moreover, he argued that the amended return could not have been mailed on April 18, 2018, as claimed by the Division, because he remembered depositing it in a mailbox located near where he lived. He said his normal practice was to allow up to two days before a tax deadline to mail returns because, in his experience, it took two days for returns to be delivered by mail. Although petitioner's representative did not testify under oath, he requested the opportunity to submit an affidavit and other documents post hearing. Petitioner presented no witnesses at the hearing.

7. Petitioner's representative was given until June 25, 2021 to submit documents in support of petitioner's case. The Division was given until July 9, 2021, to respond to petitioner's documents and to submit an affidavit, if necessary. Petitioner failed to submit any documents by the deadline and no request for an extension of time was made. Therefore, the record was closed and only the submission of briefs remained.

8. Thereafter, on July 14, 2021, petitioner submitted his documents. The submission included a two-page letter brief.

9. The letter brief addressed the issue of the mailing of the amended tax return. Specifically, petitioner's representative conceded that the amended return might have been late filed, but he argued that he was sick on April 18, 2018, and that he could not have mailed the amended tax return from Brooklyn as indicated by the USPS mailing label on the envelope that contained the amended return.

10. On August 9, 2021, petitioner filed a motion dated August 7, 2021, for an order requesting an extension of time to file for leave to take official notice of Internal Revenue Service (IRS) changes and corrections. Petitioner submitted a three-page memorandum in

support of his motion. Additionally, petitioner noted that he was not requesting an extension of time within which to file his reply brief to his petition which was due on October 1, 2021.

11. The Division submitted both its reply to the motion and its brief in opposition to the petition on September 8, 2021. Petitioner did not submit a reply brief in support of his petition by the October 1, 2021 deadline.

CONCLUSIONS OF LAW

A. Tax Law § 687 (a) provides, in pertinent part, 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 later . . . .."

Petitioner's representative argues that, although it appears that he filed the amended return late, he could not have mailed it on April 18, 2018, because he was both overwhelmed and ill on such date and was not in Brooklyn, New York, that day. In essence, petitioner seeks an equitable tolling of the statute of limitations set forth in Tax Law § 687 (a) based upon illness. In ***United States v Brockamp***, 519 US 347 (1997), the taxpayer therein argued that senility caused the delay in filing the claim and that the statutory time limitation should be extended because of the existence of a mental disability. The United States Supreme Court rejected the taxpayer's contentions, noting that there was neither an explicit nor implied equitable tolling exception in Internal Revenue Code § 6511. The Court stated in part as follows:

> "To read an 'equitable tolling' provision into these provisions, one would have to assume an implied exception for tolling virtually every time a number appears. To do so would work a kind of linguistic havoc. Moreover, such an interpretation would require tolling, not only procedural limitations, but also substantive limitations on the amount of recovery—a kind of tolling for which we have found no direct precedent. Section 6511's detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate to us that Congress did not intend the courts to read other unmentioned, open-ended, 'equitable' exceptions

> into the statute that it wrote. There are no counterindications. Tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities" (***United States v Brockamp***, at 352).

The Tax Appeals Tribunal (Tribunal), in ***Matter of Levine*** (Tax Appeals Tribunal, August 7, 2008), noted that:

> "While decisions of the Federal courts interpreting the Internal Revenue Code are not binding precedent in interpreting the provisions of the Tax Law, following such interpretations has long been favored by the courts of New York where, as here, the New York statute is patterned on the Federal one. Thus, the Court of Appeals stated in ***Matter of Marx v Bragalini***, 6 NY2d 322 [1959], at 333, 'It has long been the policy of our courts to adopt, whenever reasonable and practical, the Federal construction of substantively similar tax provisions . . . . The doctrine is in furtherance of the legislative policy of maintaining uniformity in the administration of the two tax laws.'"

Although sympathetic to the fact that petitioner's representative had personal circumstances affecting his ability to perform his duties, his failure to meet a statutory deadline cannot be excused (***see Matter of Zhu***, Tax Appeals Tribunal, October 21, 2021). Given that petitioner has failed to introduce any evidence regarding the mailing of the amended return, it is determined that the amended return was not timely filed in accordance with Tax Law § 687 (a). As such, there is no jurisdiction to consider the merits of the refund claim.

B. Although it has been determined that the amended tax return was not timely filed, in an effort to create a complete record, the issue of the late submission of documents is addressed.

As set forth in the findings of fact, the parties were instructed to submit all documents to me that they intended to introduce into evidence at the hearing, with a copy to their adversary, by May 26, 2021. Petitioner did not submit any documents by the May 26, 2021 deadline. At the hearing, he requested, and was granted, additional time to do so. He was given until June 25, 2021 to make his submission. He failed to submit any documents by June 25, 2021.

As noted by the Division, the Tribunal has established a firm policy of not accepting the submission of evidence after the record is closed. In ***Matter of Saddlemire*** (Tax Appeals Tribunal, June 14, 2001), the Tribunal stated that:

> "We have held that in order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record [citations omitted]."

The documents, mailed on July 14, 2021, were submitted after the record in this matter was closed. Therefore, they are not accepted and were not considered in rendering this determination.

C. After the conclusion of the formal hearing, petitioner filed a motion on August 9, 2021. Specifically, the motion seeks leave for official notice to be taken of IRS changes and corrections. Petitioner alleges that he filed amended tax returns with the IRS that were accepted and claims that official notice can be taken of an IRS account transcript.

The State Administrative Procedure Act (SAPA) provides that official notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency (SAPA § 306 [4]). Judicial notice is defined as "knowledge which a judge will officially take of a fact, although no evidence to prove that fact has been introduced" (Richardson, Evidence § 8 [Prince 10th ed]). Judicial notice may be taken of all facts which are common knowledge.

The contents of an IRS account transcript are not common knowledge nor a fact of which official notice may be taken. Although petitioner seems to indicate that the Division may have knowledge regarding certain federal filing information, the Division of Tax Appeals certainly does not have access to any information retained by the IRS. Moreover, petitioner failed to allege that amended tax returns were filed with the IRS for the tax year 2014 or to make any

argument as to how a timely filing with the IRS affects the statute of limitations for filing a claim for refund with New York State. Accordingly, petitioner's motion seeking official notice be taken of an IRS account transcript is denied.

D. The petition of Kyar P. Winpe is denied and the account adjustment notice, dated May 24, 2018, is sustained.

DATED: Albany, New York
December 02, 2021

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE