

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
	:	
of	:	
	:	
XUE SHAN WANG AND TZE YAM PUN	:	DETERMINATION
	:	DTA NO. 829594
	:	
For Redetermination of a Deficiency or Refund under	:	
Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Year 2018.	:	

Petitioners, Xue Shan Wang and Tze Yam Pun, filed a petition for redetermination of a deficiency or refund under article 22 of the Tax Law and the New York City Administrative Code for the year 2018.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Maria Matos, Esq., of counsel), brought a motion, dated January 27, 2021, seeking an order dismissing the petition or, in the alternative, granting summary determination in the above-referenced matter, pursuant to sections 3000.5, and 3000.9 (a) (i) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners, appearing pro se, responded to the motion by letter dated February 9, 2021. The 90-day period for issuance of this order began on February 26, 2021. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, James P. Connolly, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners are entitled to additional interest with regard to their personal income tax refund for 2018.

FINDINGS OF FACT

1. Petitioners, Xue Shan Wang and Tze Yam Pun, filed a joint New York State resident income tax return, form IT-201, on February 26, 2019, for year 2018, claiming their son as a dependent, and requesting a refund of \$3,195.00. The return showed total New York State and New York City tax due of \$485.00 and \$373.00, respectively, and New York State and New York City tax withheld of \$1,471.00 and \$991.00, respectively. The return sought the following New York State and New York City refundable credits:

<u>Name of the Credit</u>	<u>Amount of the Credit</u>
New York City enhanced real property tax credit	\$500.00
Empire State child credit	\$330.00
New York State earned income credit	\$497.00
New York City earned income credit	\$88.00

2. By letter dated April 25, 2019, the Division of Taxation (Division) notified petitioners that it could not approve the tax refund they requested in their return because it could not verify petitioners' claim for an enhanced New York City real property tax credit. The letter requested that petitioners supply additional documentation.

3. Petitioners apparently responded to the Division's letter, but the response in not included in the Division's motion papers. By letter dated July 17, 2019, the Division notified petitioners that it was denying the refund claimed on their 2018 return because their enhanced New York City real property tax credit was computed incorrectly. The letter instructed petitioners to submit an amended resident income tax return for 2018.

4. On August 1, 2019, petitioners filed an amended resident income tax return, form IT-201-X, for 2018 (amended return), requesting a refund of \$2,902.00. The amended return

reduced petitioners' claimed New York City enhanced real property tax credit to \$207.00, but otherwise claimed the same refundable credits, tax due, and tax withheld as petitioners' original 2018 return.

5. The Division sent petitioners an account adjustment notice dated August 23, 2019, based on their original return, informing them that the return for 2018 was adjusted and that their claims for Empire State child credit (ESCC) and New York State and New York City earned income credit (EIC) were denied. The Division requested that petitioners submit documentation in support of those requested credits. Pursuant to the notice, the Division issued petitioners a refund in the amount of \$1,801.08, which included an overpayment of tax in the amount of \$1,780.00. That refund reflected New York State and New York City withholding of \$2,462.00, tax due of \$828.00, refundable credits of \$146.00, and interest in the amount of \$21.08. The Division informed petitioners that the interest was computed on the amount of their overpayment of tax from the effective date of the refund.

6. The Division sent a second account adjustment notice, this one dated August 27, 2019, which granted petitioners an additional refund of \$207.00, based on the Division's granting of the adjusted amount of the real property tax credit sought by petitioners' amended return. The notice advised petitioners that their claims for ESCC and New York State and New York City EIC were denied.

7. The petition in this matter, dated September 26, 2019, and received by the Division of Tax Appeals on October 4, 2019, challenges the Division's partial denial of petitioners' refund claim as reflected in the account adjustment notice dated August 27, 2019, which is attached to the petition. The petition seeks a refund in the amount of \$915.00, which is the amount of New York State and New York City EIC and ESCC claimed by petitioners on their original and

amended 2018 returns.

8. After the filing in the petition in this matter, the Division issued to petitioners a third account adjustment notice, dated November 15, 2019, adjusting the amended return for 2018 and allowing petitioners an additional refund in the amount of \$915.00 for the EIC and ESCC credits they claimed on their original and amended returns. The notice does not explain the Division's decision to grant petitioners these credits, stating only that "[w]e adjusted the return described above based on our computations or information we received."

9. On this motion, the Division claims that, because petitioners have been granted the full amount of the refund sought by their amended return, no justiciable issue is present, and therefore this motion should be granted, and the petition dismissed. Alternatively, the Division claims that, even if there is a justiciable issue, it should be granted summary determination because, as a matter of law, petitioners are not entitled to the only additional item that petitioners seek here, interest on the \$915.00 refund the Division belatedly granted petitioners based on the EIC and ESCC that petitioners sought on their original and amended returns. In response to the Division's motion, petitioners continue to seek interest on the \$915.00 the Division granted them on the New York State and New York City EIC and ESCC. In addition, petitioners ask that the Division reimburse them for the \$500.00 fee they paid their accountant for the latter's assistance in helping them obtain a full refund in this matter.

CONCLUSIONS OF LAW

A. As discussed, the petition in this matter seeks a refund in the amount of \$915.00 based on the EIC and ESCC claimed by petitioners on their original and amended returns. Pursuant to its account adjustment notice dated November 15, 2019, the Division granted petitioners those credits in full.

B. The Division now makes a motion to dismiss, and, in the alternative a motion for summary determination in this matter. Its argument that the petition should be dismissed on the ground that there is no justiciable issue is rejected. While the Division has belatedly granted petitioners the full amount of the refund they sought on their amended joint return, petitioners, in response to the Division's motion, now seek interest on the \$915.00 payment they received pursuant to the November 15, 2019 notice of account adjustment. While their petition in this matter does not specifically refer to interest, the petition nevertheless encompasses interest because "tax" for purposes of article 22 of the Tax Law includes "interest" (*see* Tax Law § 684 [f]). The issue whether petitioners are entitled to interest on their \$915.00 refund is a justiciable controversy (*see* Tax Law §§ 2000; 2006 [4]; *Matter of Michael A. Goldstein A No. 1 Trust*, Tax Appeals Tribunal, June 29, 2011, *confirmed Michael A. Goldstein No. 1 Trust v Tax Appeals Trib. of the State of N.Y.*, 101 AD3d 1496 [3d Dept 2012], *lv denied* 21 NY3d 860 [2013] [Tribunal rejects petitioners' argument that they were entitled to interest on their refund arising from federal changes back to the filing date of the original returns for the years at issue]). Accordingly, this matter will be treated as a motion for summary determination and not a motion to dismiss.

C. Section 3000.9 (c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal 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, Inc. 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 (*see Gerard v Inglese*, 11 AD2d 381, 382 [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*).

D. As a general matter, and subject to exceptions, the Division is to pay interest on refunds of personal income tax “from the date of the overpayment to the due date of an amount against which a credit is taken” (*see* Tax Law § 688 [a] [1]). The refund petitioners sought in their petition related to the ESCC and New York State and New York City EIC they claimed on their amended joint return. The ESCC is governed by subsection (c-1) of Tax Law § 606.

Paragraph (2) of subsection (c-1) provides that:

“If the amount of the credit allowed under this subsection for any taxable year shall exceed the taxpayer's tax for such year, the excess shall be treated as an overpayment of tax to be credited or refunded in accordance with the provisions of [Tax Law § 686], *provided, however, that no interest shall be paid thereon* [emphasis added]”

Similarly, the New York State EIC sought by petitioners is governed by Tax Law § 606 (d), paragraph (2) of which provides:

“In the case of a resident taxpayer, the credit under this subsection shall be allowed against the taxes imposed by this article for the taxable year reduced by the credits permitted by this article. If the credit exceeds the tax as so reduced, the taxpayer may receive, and the comptroller, subject to a certificate of the commissioner, shall pay as an overpayment, *without interest*, the amount of such

excess [emphasis added]” (*accord* Tax Law § 1310 [f] [2] [New York City’s EIC]).

Thus, the Tax Law clearly provides that the Division is not to pay interest on refunds arising from claims of the ESCC or the New York State or New York City EIC, and no material question of fact exists with respect to that issue.

E. Petitioners’ request for \$500.00 to reimburse them for the fee charged by their accountant for his assistance in seeking the refund eventually granted by the Division also does not raise any material question of fact. Tax Law § 3030 allows the Division of Tax Appeals to award “reasonable administrative costs” to a “prevailing party” in a Division of Tax Appeals proceeding. One of the requirements that must be met for a party to qualify as a prevailing party is that the party must have submitted to the Division of Tax Appeals “within thirty days of final judgment in the action,” a proper “application for fees and other expenses, . . . which shows that the party is a prevailing party and is eligible to receive an award under this section” (Tax Law § 3030 [c] [5]). The request for reimbursement made by petitioners on this motion is not in proper form and is premature because no “final determination” had been issued in this matter at that time petitioners filed their response to the Division’s motion. Thus, petitioners’ request for reimbursement of the fee they paid their accountant raises no material questions of fact and is denied as a matter of law.

F. The motion of the Division of Taxation for summary determination is granted, and the petition is denied, except as noted in conclusion of law A.

DATED: Albany, New York
April 29, 2021

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE