

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition  
of  
**CHRISTINA CURRY**

DETERMINATION  
DTA NO. 830789

for Redetermination of Deficiencies or for Refunds of New York  
State Personal Income Taxes under Article 22 of the Tax Law  
for the Years 2015 and 2016.

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Petitioner, Christina Curry, filed a petition for redetermination of deficiencies or for refunds of New York State personal income taxes under article 22 of the Tax Law for the years 2015 and 2016.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Amanda Alteri), brought a motion on June 6, 2023, seeking summary determination in the above-captioned matter pursuant to section 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). Petitioner, appearing by Jerry Merola, Esq., did not file a response by July 6, 2023, which date commenced the 90-day period for issuance of this determination.

Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Kevin R. Law, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation's denial of petitioner's claims for refund of personal income tax for the years 2015 and 2016, upon the basis that the claims were filed after the expiration of the period of limitations, was proper and should be sustained.

***FINDINGS OF FACT***

1. On November 11, 2020, petitioner, Christina Curry, filed a 2015 New York State personal income tax return on which she reported \$140,214.00 of New York adjusted gross income and New York State tax of \$7,599.00. After claiming tax withheld from wages of \$13,192.00, petitioner claimed a refund of \$5,593.00.

2. On April 11, 2017, petitioner filed an application for an automatic six-month extension of time to file her 2016 New York State personal income tax return (2016 return). Based on this application, petitioner's 2016 return was due on or before October 16, 2017.

3. On November 11, 2020, petitioner filed her 2016 return on which she reported \$124,796.00 of New York adjusted gross income and New York State tax of \$5,409.00. After claiming tax withheld from wages of \$8,642.00, petitioner claimed a refund of \$3,233.00.

4. On November 30, 2020, the Division of Taxation (Division) issued an account adjustment notice denying petitioner's claim for refund for the 2015 tax year.

5. On December 2, 2020, the Division issued an account adjustment notice denying petitioner's claim for refund for the 2016 tax year.

6. Both the November 30, 2020, and the December 2, 2020, account adjustment notices denied petitioner's respective claims for refund on the basis that they were untimely filed.

7. In her petition, petitioner alleges that the Division erroneously failed to toll the statute of limitations for filing her claims for refund because of the COVID-19 pandemic and that Executive Order 202.8 issued by then-Governor Andrew Cuomo should extend to late-filed refund claims.

8. In conjunction with the filing its motion for summary determination, the Division searched its records and found no record of petitioner having filed her 2015 and 2016 returns

prior to November 11, 2020, nor did it find a record of petitioner having filed an extension to file her 2015 return.

### **CONCLUSIONS OF LAW**

A. A motion for summary determination “shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented” (20 NYCRR 3000.9 [b] [1]). Section 3000.9 (c) of the Rules 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 Village of Patchogue Fire Dept.*, 146 AD2d 572, 573 [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 (*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*).

Petitioner did not respond to the Division’s motion. Accordingly, she is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v Baiden*, 36

NY2d 539 [1975]; *John William Costello Assocs. v Standard Metals Corp.*, 99 AD2d 227 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts alleged in the Division's motion papers. Therefore, those facts are deemed admitted (*Kuehne & Nagel v Baiden*, at 544; *Whelan v GTE Sylvania*).

B. Tax Law § 687 (a) provides that a claim for refund of an overpayment of personal income tax must be filed by the taxpayer within three years from the time the return was filed or within two years from the time the tax was paid, whichever period expires the latest. In this case, because petitioner's claims for refund were filed on the same date as her returns, they fell within the three-year period pursuant to Tax Law § 687 (a). Nonetheless, Tax Law § 687 (a) limits the amount of the refund to the amount of taxes paid within the three years immediately preceding the filing of the refund claim plus the period for any extension of time for filing the return. The amounts that petitioner sought as overpayments were based on excess withholding which is deemed to have been paid on April 15 of the following year, i.e., the due date for the filing of the return (*see* Tax Law § 687 [i]). Because petitioner did not have an extension of time to file her 2015 return, her refund is limited to tax paid within three years preceding November 11, 2020, i.e., November 11, 2017. Petitioner's overpayment for 2015 was deemed to have been paid on April 15, 2016. Therefore, her claim for this year is untimely.

C. With respect to the 2016 tax year, petitioner also filed this return on November 11, 2020. Because she had a six-month extension of time to file her 2016 return, her refund is limited to any payments that were made three years and six months prior to November 11, 2020, or May 11, 2017. As with 2015, her overpayment of tax is the result of tax withheld from wages which was deemed to have been paid on April 15, 2017 (*see* Tax Law § 687 [i]). Thus, her claim for this year is also untimely.

D. Although petitioner did not respond to the Division's motion, the petition filed in this matter alleges that the Division erroneously failed to toll the statute of limitations for filing her claims because of the COVID-19 pandemic asserting that Executive Order 202.8 issued by then-Governor Andrew Cuomo should extend to late-filed refund claims. This argument is rejected. Executive Order 202.8, dated March 20, 2020, provided, in part, as follows:

“In accordance with the directive of the Chief Judge of the State to limit operations to essential matters during the pendency of the COVID-19 health crises, any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule or regulation, or part thereof, is hereby tolled from the date of this Executive Order until April 19, 2020.”

The language of the Executive Order that states “[i]n accordance with the directive of the Chief Judge of the State to limit operations to essential matters” indicates that such provisions do not apply to filing of refund claims seeking overpayments of tax. Furthermore, as pointed out by the Division in its motion papers, then-Governor Cuomo also issued Executive Order 202.12, allowing the Division to extend certain filing dates. In accordance with this executive order, the Division extended the April 15, 2020, due date to July 15, 2020, for New York State personal income tax and corporation tax returns originally due on April 15, 2020, and for all related tax payments, including estimated tax payments, that were due on April 15, 2020 (*see* NY State Dept of Taxation & Fin Notice N-20-2 [March 2020]). This notice specifically applies to personal income tax returns and corporation tax returns that were originally due on April 15, 2020, and does not apply to refund requests for prior years. Based upon the foregoing, petitioner's refund applications were properly denied.

E. The petition of Christina Curry is denied, and the November 30, 2020, and December 2, 2020, account adjustment notices, are sustained.

DATED: Albany, New York  
September 28, 2023

/s/ Kevin R. Law  
ADMINISTRATIVE LAW JUDGE