

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ISAAC FISBOIN AND KEREN REZNIK	:	DETERMINATION DTA NO. 850350
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 2016.	:	

Petitioners, Isaac Fisboin and Keren Reznik, 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 year 2016.

A formal hearing by videoconference was held before Barbara J. Russo, Administrative Law Judge, on September 19, 2024, at 10:30 a.m., with the final brief to be submitted by January 9, 2025, which date began the six-month period for the issuance of this determination.

Petitioners appeared pro se by Isaac Fisboin. The Division of Taxation appeared by Amanda Hiller, Esq. (M. Mark O'Higgins, Esq., of counsel, at the hearing and Daniel Olika, Esq., of counsel, on the brief).

ISSUE

Whether petitioners have met their burden of proving that they are entitled to a refund of personal income tax for the year 2016.

FINDINGS OF FACT

1. The Division of Taxation (Division) performed a review of its records regarding petitioners' personal income tax filings for the tax year 2016 and determined that petitioners, Isaac Fisboin and Keren Reznik, did not file a personal income tax return for that year with New York State.

2. The Division issued correspondence to petitioners, dated November 20, 2020, stating that its records indicated that petitioners earned income taxable to New York in 2016 and they may be required to file a New York State income tax return for that year (form AU-222). Form AU-222 further states that the Division had no record that petitioners filed a New York income tax return for 2016.

3. Petitioners subsequently filed a joint New York State nonresident and part-year resident income tax return, form IT-203, for tax year 2016 (2016 return). On their 2016 return, petitioners reported New York State tax in the amount of \$5,229.00, total payments of \$9,133.00, consisting of New York State and New York City tax withheld in the amount of \$5,896.00 and \$3,237.00, respectively, and claimed a refund in the amount of \$3,904.00.

4. The Division issued an account adjustment notice, dated March 9, 2021, denying petitioners' claim for refund in the amount of \$3,904.00, on the basis that the refund claim was not timely filed. The account adjustment notice indicated that petitioners' refund claim for 2016 was filed on December 30, 2020.

5. The Division issued a notice of disallowance, dated November 3, 2021, to petitioners, denying their claim for refund for tax year 2016 in the amount of \$3,904.00.

6. Petitioners filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) protesting the notice of disallowance. By order,

dated November 4, 2022 (CMS No. 000334128), the conciliation conferee sustained the statutory notice.

7. On December 1, 2022, petitioners filed a timely petition with the Division of Tax Appeals protesting the BCMS order.

8. The Division introduced an affidavit of Oscar Boomer, Taxpayer Service Specialist 2, sworn to on August 29, 2024, into the record. According to the affidavit, petitioners' 2016 return was filed on December 2, 2020.¹

9. The Division introduced into the record certifications from the Office of Budget and Management Analysis, Disclosure and Government Exchange, which states that it conducted a search of the Division's records on June 12, 2024 and certifies that no personal income tax returns or extensions were filed by petitioners for tax year 2016 prior to December 2, 2020.

10. During the hearing, petitioners offered the testimony of Mr. Fisboin. He testified that petitioners' tax preparer, Alan Dubrow, prepared their 2016 return on September 7, 2017. Mr. Fisboin further testified that the Division notified him by letter in late 2020 that petitioners had not filed their 2016 return. He testified that he contacted the Division in response to the letter and, subsequently, provided the Division with the 2016 return. According to Mr. Fisboin, the 2016 return was originally "mailed in 2017," but he did not testify as to a specific date when the 2016 return was filed. He stated that historically he filed his federal and state returns in a timely manner. During cross-examination, Mr. Fisboin testified that he "usually aim[s] to submit [their state tax returns] by the April deadline, unless there's a need for an extension." He testified that he did not believe they requested an extension for the filing of their 2016 return.

¹ Although the affidavit cites to attachment 2 thereto as being a copy of the 2016 return, attachment 2 to the affidavit is a copy of the petition and not the 2016 return. The record is unclear why Mr. Boomer's affidavit states that the 2016 return was filed on December 2, 2020, when the account adjustment notice indicated that petitioners' refund claim for 2016 was filed on December 30, 2020.

11. Petitioners also offered the testimony of Alan Dubrow. Mr. Dubrow was petitioners' tax preparer for 2016. Mr. Dubrow testified that petitioners provided him with documents to prepare their federal and state income tax returns for 2016 in a timely manner and he prepared the returns. Mr. Dubrow electronically filed petitioners' 2016 federal income tax return and it was accepted by the Internal Revenue Service on September 19, 2017. Mr. Dubrow testified that he prepared petitioners' New York State 2016 return on September 7, 2017. He further testified that he attempted to electronically file petitioners' New York State 2016 return, but it was rejected and petitioners were required to file manually by mailing their return. The record is unclear as to when Mr. Dubrow attempted to electronically file petitioners' 2016 return for New York State. Mr. Dubrow testified that if an electronic return is rejected, it is his office's procedure to immediately call the client, prepare and sign the return and mail it to the client for the client to sign, and he includes a stamped envelope for the client to mail the return. According to Mr. Dubrow, when he calls clients to let them know a return is coming, he instructs them to call him if they do not receive it. When questioned on cross-examination whether he knew whether petitioners signed and mailed the return, he responded, "I can only assume, yes. I would not have been at his house when he received it and sent it." Mr. Dubrow did not state what date he mailed the return to petitioners for their signature.

12. Pursuant to State Administrative Procedure Act (SAPA) § 307 (1) and 20 NYCRR 3000.15 (d) (6), the Division submitted nine proposed findings of fact. The Division's proposed findings of fact 1, 3 and 6 through 9 are supported by the record, and have been consolidated, condensed, combined, renumbered and substantially incorporated herein. The Division's proposed findings of fact 2 and 5 have been modified to more accurately reflect the record. The Division's proposed finding of fact 4 has been rejected as calling for a legal conclusion.

CONCLUSIONS OF LAW

A. It is initially noted that petitioners bear the burden of proof to establish, by clear and convincing evidence, that the Division's disallowance of the claimed refund is erroneous (*see* Tax Law § 689 [e]; *Matter of Suburban Restoration Co. v Tax Appeals Trib.*, 299 AD2d 751, 752 [3d Dept 2002]). The Division disallowed the refund petitioners claimed in their 2016 return on the basis that it was untimely filed. Petitioners bear the burden to prove that such refund request was timely filed.

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, petitioners' claim for refund was filed with their 2016 return. Tax Law § 687 (a) further 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 amount that petitioners sought as an overpayment was based on excess withholding, which is deemed to have been paid on April 15 of the following year, i.e. April 15, 2017 (*see* Tax Law § 687 [i]). Petitioners did not have an extension for the filing of their 2016 return. Therefore, to be entitled to a refund of the excess withholding, petitioners must prove that their 2016 return with their claim for refund was filed by April 15, 2020. Petitioners have failed to meet this burden.

C. The certification from the Office of Budget and Management Analysis, Disclosure and Government Exchange (certification), certified that a search of the Division's records showed that no 2016 return or extension to file a 2016 return was filed by petitioners prior to December 2, 2020. While there is an inconsistency between the account adjustment notice, which

indicated that petitioners' refund claim for 2016 was filed on December 30, 2020, and Mr. Boomer's affidavit and the certification, which indicate that petitioners' refund claim for 2016 was filed on December 2, 2020, such inconsistency is inconsequential, as either date falls after April 15, 2020. Although petitioners argue that they timely filed their 2016 return and refund claim, they have failed to establish, by clear and convincing evidence, that their 2016 return and refund claim were filed by April 15, 2020. While petitioners presented testimony from Mr. Fisboin and Mr. Dubrow that their 2016 return was prepared on September 7, 2017, noticeably absent from that testimony is a specific date in 2017 when Mr. Dubrow purportedly mailed the 2016 return to petitioners to sign and file manually, and the date that petitioners allegedly mailed the 2016 return. Furthermore, while Mr. Dubrow testified that he originally attempted to file the 2016 return electronically, there is no evidence in the record showing a date when the 2016 return was electronically filed and Mr. Dubrow admitted that the electronic return was rejected and that petitioners were required to file their 2016 return manually by mail. Mr. Dubrow's assumption that petitioners signed and mailed the 2016 return after he sent it to them for their signature is mere speculation and is insufficient to meet petitioners' burden of proof.

D. The petition of Isaac Fisboin and Keren Reznik is denied and the notice of disallowance, dated November 3, 2021, is sustained.

DATED: Albany, New York
June 26, 2025

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE