STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **LOUISE MENSCH** for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 2018.	: : : : : :	DETERMINATION DTA NO. 850771

Petitioner, Louise Mensch, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2018.

On January 28, 2026, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Kathleen D. Chase, Esq., of counsel), brought a motion seeking summary determination in its favor in the above-referenced matter pursuant to Tax Law § 2006 and sections 3000.5 and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Harter Secrest & Emery LLP (Laura A. Higgins, Esq., of counsel), failed to file a response to the motion by the February 27, 2026 return date, which date commenced the 90-day period for the 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.

ISSUES

I. Whether petitioner timely filed responding papers in opposition to the Division of Taxation's motion for summary determination.

II. Whether the Division of Taxation properly limited petitioner's estimated tax payment based upon the methodology prescribed in 20 NYCRR 151.10 (f).

III. Whether the notice of deficiency is barred by the statute of limitations.

FINDINGS OF FACT

1. Petitioner, Louise Mensch, along with her husband Peter Mensch, filed a form IT-201, New York State resident income tax return, for the year 2017 with a filing status of married filing jointly, claiming an overpayment of personal income tax of $255,480.00 (2017 return).[1] The 2017 return directed that the overpayment be applied to estimated tax for the year 2018.

2. On October 15, 2019, Mr. Mensch filed his 2018 form IT-201,with a filing status of married filing separately, claiming an estimated payment of $255,480.00, representing the entire overpayment that petitioner and he requested be carried over from the 2017 tax year and applied as an estimated tax payment for 2018.

3. On November 7, 2019, the Division issued Mr. Mensch an account adjustment notice notifying him that, of the $148,149.00 overpayment he requested be carried over as an estimated tax payment to 2019, only $20,408.93 would be carried over to his 2019 estimated tax account. This notice stated that "[the Division] adjusted the estimated tax claimed on [his] return to reflect the payments and/or credit in [his] tax account."

[1] The affidavit of Monique Place, a Taxpayer Services Specialist 2 in the Division of Taxation's (Division's) Personal Income Tax Bureau, states that the 2017 return was filed on January 28, 2020. Based upon the filing dates of petitioner and Mr. Mensch's 2018 personal income tax returns, this date is an obvious typographical error.

4. On April 16, 2021, the Division issued Mr. Mensch a notice of disallowance formally disallowing the $127,740.07 overpayment amount. This notice of disallowance refers to the November 7, 2019 account adjustment notice for an explanation.

5. On January 28, 2020, petitioner filed a 2018 form IT-201, with a filing status of married filing separately. Petitioner reported total New York State and New York City tax of $43,191.00 and claimed a refund of $141,774.00 after claiming withholdings, credits and estimated payments. As relevant herein, petitioner claimed $127,740.00 as an estimated tax payment representing one-half (50%) of the overpayment that petitioner and Mr. Mensch requested be carried over from the 2017 tax year to estimated tax for 2018.

6. By an account adjustment notice, dated February 21, 2020, the Division issued the refund as claimed by petitioner except applied $2,967.07 of the claimed overpayment to an outstanding sales tax assessment owed to the Division by petitioner.

7. Mr. Mensch filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) protesting the April 16, 2021, notice of disallowance issued to him. Following a conciliation conference, Mr. Mensch executed a consent, on April 7, 2022, agreeing to a refund of $106,427.00.

8. Subsequently, on July 15, 2022, the Division issued a statement of proposed audit change to petitioner proposing tax of $106,427.07, plus interest. The statement of proposed audit change explains that the estimated tax reported on petitioner's 2018 return had been adjusted to reflect the payments and/or credit in petitioner's tax account, specifically, $21,312.86.

9. On November 23, 2022, the Division issued notice of deficiency, notice number L-056560113 (the notice), asserting additional tax due, consistent with the July 15, 2022 statement of proposed audit change, of $106,427.00, plus interest.

10. Petitioner requested a conciliation conference with BCMS, which was conducted on November 7, 2023. By conciliation order, dated December 15, 2023 (order), BCMS denied petitioner's request and sustained the notice.

11. On January 8, 2024, petitioner timely filed a petition in protest of the order. In her petition, petitioner alleges that the notice is barred by the statute of limitations pursuant to Tax Law § 683 (c) (5).

12. After issue had been joined, the Division filed the instant motion. Included with the Division's motion papers is the affirmation of Kathleen D. Chase, Esq., and the affidavit of Monique Place, a Taxpayer Services Specialist 2 in the Personal Income Tax Bureau of the Division, sworn to on January 28, 2026, with attached exhibits including the respective returns.

13. In her affidavit, Ms. Place sets forth the New York State personal income filing history of petitioner and Mr. Mensch for the years 2017 and 2018 and explained the Division's method of allocation of the Mensch's 2017 personal income tax overpayment that was carried forward as a 2018 estimated tax payment. Ms. Place avers that, the notice issued to petitioner and the consent executed by Mr. Mensch at BCMS, were determined based on application of the methodology prescribed by 20 NYCRR 151.10 (f) such that each spouse's share of the 2017 personal income tax overpayment carryforward as an estimated tax payment to 2018 were allocated pro rata between petitioner and Mr. Mensch.

14. The Division's motion is dated January 28, 2026, and was mailed via certified mail bearing certified mail number 9589 0710 5270 2946 9944 33. The envelope containing the Division's motion papers bears a postage machine-metered stamp with a date of January 28, 2026, and was date-stamped received on February 2, 2026 by the Division of Tax Appeals.

15. Petitioner's responding papers are dated March 4, 2026, and mailed to the Division of Tax Appeals by United States Postal Service (USPS) first-class mail. The envelope containing same bears a postage machine-metered stamp with a date of March 4, 2026, and was date-stamped received on March 9, 2026 by the Division of Tax Appeals.

16. On March 6, 2026, the Division filed an objection to the timeliness of petitioner's papers in opposition to the Division's motion for summary determination. Included therewith is the affidavit of Joseph Kastler, an Office Assistant 2 in the Division's Office of Counsel. Mr. Kastler averred that, on January 28, 2026, he prepared for certified mailing of the Division's motion for summary determination in this matter. Mr. Kastler states that he prepared envelopes addressed to the Division of Tax Appeals and to petitioner's representative and affixed to the envelopes certified mail article numbers along with a mail log identifying the certified mail items by addressee and article number. The certified mail log lists the tracking number for both pieces of mail. Said tracking number for the article mailed to the Division of Tax Appeals matches the tracking number on the envelope that was received. The certified mail log attached to Mr. Kastler's affidavit does not contain a USPS postmark.

17. Mr. Kastler further averred that he used the USPS mail tracking service to obtain a delivery receipt for the copy served on petitioner. Attached to his affidavit is a printout from the USPS website with tracking information for the item mailed to petitioner's representative. The USPS delivery receipt indicates the same arrived at the USPS Regional Facility in Springfield, Massachusetts, on January 30, 2026, and was delivered to the post office in Rochester, New York on February 2, 2026, and held there "at customer's request."

18. In response, petitioner concedes that the Division filed the motion on January 28, 2026, but contends that Civil Practice Law and Rules (CPLR) 2103 (b) applies to extend the time

within which to serve her response. In the alternative, petitioner contends that the late filing should be excused.

CONCLUSIONS OF LAW

A. Prior to addressing the merits of the Division's motion, it must be determined whether petitioner filed a timely response to said motion. Pursuant to the Rules, a response to a motion must be served within 30 days of service of the motion (***see*** 20 NYCRR 3000.5 [b]). In this case, the Division's motion is dated January 28, 2026, and the envelope within which the motion to the Division of Tax Appeals was mailed bears a metered postage date of January 28, 2026, the envelope does not bear a United States Postal Service postmark, nor does the certified mail receipt record contain a USPS Postmark. It was received by the Division of Tax Appeals on February 2, 2026. Likewise, petitioner's copy was delivered to the post office in Rochester, New York on February 2, 2026, and held there "at customer's request." Petitioner concedes that the Division's motion was filed on January 28, 2026. Accordingly, petitioner had 30 days from such date to file her response (***see*** 20 NYCRR 3000.5 [b]). Thirty days from January 28, 2026 was February 27, 2026. Petitioner's papers in opposition were filed on March 4, 2026 Contrary to petitioner's line of argumentation, CPLR 2103 (b), which provides an additional five days to a prescribed period if service of a paper is made by mail in a pending action, is inapplicable in proceedings before an administrative agency, such as the Division of Tax Appeals, because the same is not an "action" (***see Matter of Fiedelman v New York State Dept. of Health***, 58 NY2d 80, 82 [1983]; ***Matter of Esther Parking Corp.***, Tax Appeals Tribunal, December 18, 1997; ***Matter of Designer Realty Corp.***, Tax Appeals Tribunal, November 12, 1992). Because her response was filed on March 4, 2026, it is late and has not been considered in rendering the instant determination. Finally, petitioner's request to waive the late filing of her responsive

papers is denied. Holding otherwise would subvert the established time filing deadlines set forth in the Rules.

B. Turning to the merits, a motion for summary determination is properly 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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party" (20 NYCRR 3000.9 [b] [1]).

C. 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 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 (***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 v City***

of New York, 49 NY2d at 562). After reviewing the Division's motion papers, it is clear that summary determination in its favor is warranted.

D. This matter centers around two spouses' competing claims to an overpayment of personal income tax in one year that they requested be carried over to estimated tax in the succeeding year. Petitioner's husband claimed the entire amount, while petitioner claimed one-half. In this case, the Division limited petitioner's husband's carryover to his pro rata share and similarly limited her carryover amount to her pro rata share of said overpayment. Petitioner asserts she is entitled to one-half. This action is entirely consistent with the Division's regulations at 20 NYCRR 151.10 (f), which provide, in part, as follows:

> "If a spouse makes a demand that any overpayment made by him or her be applied only on account of his or her separate liability, then:
>
> (1) amounts attributable to withholding from wages of such spouse will be applied only against the separate liability of such spouse;
>
> (2) amounts attributable to separate payments of estimated income tax by such spouse will be applied only against the separate New York State personal income tax liability of such spouse; and
>
> (3) amounts attributable to joint payments of estimated income tax and amounts attributable to any other payment will be applied against the separate New York State personal income tax liability of each spouse in such proportion as is agreed upon by both spouses; provided, however, that in the absence of any such agreement, such amounts will be applied against the separate New York State personal income tax liability of each spouse in the same proportion which the separate New York State personal income tax liability of each spouse bears to the total New York State personal income tax liability of both spouses. In the absence of an agreement between spouses, the amounts of joint estimated income tax payments and other payments will be apportioned based upon the following formula:
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> (separate New York State personal income tax liability of spouse/total New York State personal income tax liability of both spouses) × amount of estimated income tax payments."

Here, there is no evidence of any agreement in the record that petitioner and her husband agreed how the overpayment should be applied to estimated tax accounts. Barring such, the Division properly limited each spouse's share in accordance with the formula contained in the quoted regulation.

E. In her petition, petitioner asserts that the notice of deficiency is barred by the statute of limitations for assessment claiming that because she had been issued a refund after she filed her return, Tax Law § 683 (c) (5), which provides a two-year statute of limitations for the recovery of erroneous refunds, applies. Petitioner's argument is simply without merit because no erroneous refund was issued.

The term erroneous refund is defined, in part, as follows:

> "a refund which is issued as a result of an error made by an employee of the Department of Taxation and Finance, including an error made in an audit of a New York State income tax return. However, a refund in the amount requested by a taxpayer on a New York State income tax return, including a refund of such amount issued after verification of such return for a mathematical error by an employee of the department, is not an erroneous refund" (20 NYCRR 107.7 [a]).

Instead, the three-year statute of limitations contained in Tax Law § 683 (a) applies. In this case, petitioner's 2018 return was filed on January 28, 2020, and the notice was issued on November 23, 2022, well within the three-year statute of limitations for assessment.

F. The Division of Taxation's motion for summary determination is granted, the petition of Louise Mensch is denied and the notice of deficiency, dated November 23, 2022, is sustained.

DATED: Albany, New York
May 28, 2026

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE