STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| **PAUL AND JUDITH POLLAK** | : | DETERMINATION<br>DTA NO. 851068 |
| 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. | :<br>: | |

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Petitioners, Paul and Judith Pollak, 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 the year 2016.

A formal hearing by videoconference was held before Jennifer L. Baldwin, Administrative Law Judge, on November 18, 2025, with all briefs to be submitted by February 26, 2026, which date began the six-month period for the issuance of this determination. Petitioners appeared by H. Friedman & Associates, CPA (Herschel Friedman, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Daniel Olika, Esq., of counsel).

## *ISSUES*

I. Whether petitioners have established that the Division of Taxation improperly denied their claim for refund of brownfield redevelopment tax credit and special additional mortgage recording tax credit for tax year 2016 on the basis that it was not timely filed.

II. Whether petitioners are entitled to relief under Tax Law § 3004-a.

## *FINDINGS OF FACT*

The Division of Taxation (Division) submitted nine proposed findings of fact pursuant to State Administrative Procedure Act (SAPA) § 307 (1) and section 3000.15 (d) (6) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). The Division's proposed findings of fact 1, 3, 4, 6 and 7 are supported by the record and have been substantially incorporated herein. Proposed findings of fact 2, 5, 8 and 9 have been modified to more accurately reflect the record.

1. On April 6, 2017, petitioners, Paul and Judith Pollak, electronically filed form IT-370, application for automatic six-month extension of time to file for individuals, for tax year 2016.

2. On November 4, 2018, petitioners electronically filed form IT-201, New York State resident income tax return, for tax year 2016 (original return). On the original return, petitioners computed an overpayment of $37,351.00 and requested that such amount be applied to their estimated tax for tax year 2017, which the Division allowed.

3. On March 7, 2024, petitioners filed form IT-201-X, New York State amended resident income tax return, for tax year 2016 (amended return). On the amended return, petitioners requested a refund of $1,720,148.00, comprised of a special additional mortgage recording tax credit of $25,000.00 and a brownfield redevelopment tax credit of $1,695,148.00.

4. Petitioners included form IT-256, claim for special additional mortgage recording tax credit, with their amended return. On form IT-256, petitioners computed a credit of $25,000.00 based on 50% of the special additional mortgage recording tax paid on a mortgage for a property located in Brooklyn, New York.

5. Petitioners also included form IT-611.1, claim for brownfield redevelopment tax credit, with their amended return. Form IT-611.1 identified the site for which the brownfield

redevelopment tax credit was claimed as "FORMER ARKANSAS COMPANY, INC SITE," located in Brooklyn, New York, with a site number of "C224172" and a date the certificate of completion was issued of "12232014" (brownfield site). On form IT-611.1, petitioners computed a brownfield redevelopment tax credit of $1,695,148.00, comprised of a site preparation credit component of $21,069.00 and a tangible property credit component of $1,674,079.00. Petitioners also included a copy of the certificate of completion issued by the Division of Environmental Remediation of the New York State Department of Environmental Conservation on December 23, 2014. The certificate of completion identified the certificate holders as 74 Wallabout LLC, Northland LLC and Starwood LLC and listed the site owner as 74 Wallabout LLC and the address of the site as 74 Wallabout Street, Brooklyn, New York.

6. The Division conducted a desk audit review of petitioners' returns in response to the filing of petitioners' amended return. The Division determined that petitioners filed their amended return more than three years after they filed their original return, which was outside the statute of limitations for claiming a credit or refund pursuant to Tax Law § 687 (a), and denied their refund claim.

7. On July 17, 2024, the Division issued a notice of disallowance to petitioners that denied in full petitioners' refund claim and provided, in relevant part:

"**We denied your Brownfield Redevelopment Tax Credit.**

We found you are not entitled to the Brownfield Redevelopment Tax Credit you claimed as a result of your indirect interest in 74 Wallabout LLC.

**Brownfield Redevelopment Tax Credit:**

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| **Amount requested:** | $1,695,148 |
| **Amount denied:** | $1,695,148 |

**We denied your Special Additional Mortgage Recording Tax Credit.**

> We found you are not entitled to the Special Additional Mortgage Recording Tax Credit you claimed as a result of your indirect interest in 74 Wallabout LLC.
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> **Special Additional Mortgage Recording Tax Credit:**
> **Amount requested:** $25,000
> **Amount denied:** $25,000
>
> **We denied your claim for the credits in full as the statute of limitations to amend your return and collect the credits for refund expired three years after the date your original return was filed, November 4, 2018.**"

8. On July 25, 2024, the Division issued an account adjustment notice to petitioners that explained that their claims for the brownfield redevelopment tax credit and the special additional mortgage recording tax credit were denied and that the overpayment claimed on their original return, $37,351.00, was applied to tax year 2017 as estimated tax.

9. On the same date, July 25, 2024, petitioners filed a timely petition with the Division of Tax Appeals in protest of the notice of disallowance.

10. On December 20, 2024, petitioners filed a motion for summary determination wherein they asserted that they made an informal refund claim for tax year 2016 and, alternatively, that the statute of limitations for claiming a refund was tolled due to the Division's alleged violation of Tax Law § 3004-a. By order, dated June 12, 2025, the undersigned administrative law judge denied petitioners' motion on the basis that there remain questions of fact requiring a hearing.

11. Terri Ballard testified on behalf of the Division at the hearing. Ms. Ballard currently works in the Division's Guidance Division but previously worked in the Corporate Desk Audit Bureau on flow-through credits and partnerships. She reviewed petitioners' filing history for tax year 2016.

Ms. Ballard testified that the Division first learned of petitioners' claim for refund of special additional mortgage recording tax credit and brownfield redevelopment tax credit when petitioners filed their amended return in March 2024 and, at that time, she denied them in full as being filed outside the three-year statute of limitations for claiming a refund.

12. Ms. Ballard also completed the audit of the refund claims filed by the partners of 74 Wallabout LLC for tax year 2016.[1] The case was transferred to her in July 2022 after the original auditor, Erica Ackroyd (formerly Cardella), left the Audit Division. She testified that, in December 2022, after she finished the adjustments made to the partners' claims, Juda Neuman, the partners' representative, requested the adjustments for petitioners. Ms. Ballard explained that she did not have a case for petitioners. She further testified that had petitioners filed their claims at that time, in December 2022, they would have been denied as untimely.

13. Ms. Ballard stated that claims for brownfield redevelopment tax credit must be examined every year because the ownership interests in a site could change.

14. Ms. Ackroyd testified at the hearing pursuant to a subpoena issued at petitioners' request by the undersigned administrative law judge. At the time of the hearing, Ms. Ackroyd was a Human Resources Specialist 1 with the Division. Prior to that, Ms. Ackroyd worked in the Audit Division as a Tax Technician 1 and started the audit of the partners of 74 Wallabout LLC in May 2020. On June 26, 2020, she requested a copy of the "organizational chart that includes all the related entities['] names, identification numbers and percentages of ownership."

15. On August 19, 2020, Ms. Ackroyd was provided with an organizational chart in response to her request. The chart indicated that the brownfield site (74 Wallabout Street) was co-owned by 74 Wallabout Holdings LLC (50%), Northland LLC (36%) and Starwood LLC (14%) as tenants-in-common. The chart also indicated that 74 Wallabout LLC held a 100%

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[1] 74 Wallabout LLC filed a partnership return for tax purposes (***see*** finding of fact 16) and, therefore, its members will be referred to herein as partners. At the hearing, petitioners put into evidence an authorization from the partners to disclose, discuss and provide their federal, state and local tax information. For privacy purposes, the partners will not be named herein.

ownership interest in 74 Wallabout Holdings LLC and Mr. Pollak held a 100% ownership interest in Northland LLC.

16. The August 2020 responsive materials also included form IT-204, partnership return, filed by 74 Wallabout LLC for tax year 2016 (partnership return). Included with the partnership return was form IT-204-IP, New York partner's schedule K-1, for Northland LLC. The form IT-204-IP indicates that Northland LLC was a partner of 74 Wallabout LLC for some portion of tax year 2016 based on its beginning (36%) and ending (blank) shares of profit, loss and capital. Ms. Akroyd stated that the organizational chart provided in August 2020 did not indicate that Northland LLC was ever a partner of 74 Wallabout LLC. Also included with the partnership return was a claim for brownfield redevelopment tax credit (form IT-611.1) for 74 Wallabout LLC. Attached to the claim form was a schedule indicating that 74 Wallabout LLC was claiming 50% of the total site preparation costs related to the brownfield site.

17. Ms. Ackroyd testified that:

> "Unless a credit form is filed, we don't know what a person is actually entitled to. The information provided shows that there's other entities and other people involved, but until that claim is made, we can't guess and assume what it is based on operating agreements and other things going on within their entities and businesses.
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> We don't know exactly how much a person is entitled to just based off of an organizational chart or other letters listing people's names."

Ms. Akroyd further testified that, during her review of the claims filed by the partners of 74 Wallabout LLC, she was never alerted that petitioners should also be included in that review.

18. On August 26, 2020, Ms. Ackroyd sent an email to Mr. Neuman agreeing to put the audit of the claim filed by one of the partners of 74 Wallabout LLC on hold while "we wait for the prior years to settle." The email requested an updated claim form and a detailed list of the invoices that make up the costs claimed. On February 24, 2021, Ms. Ackroyd requested invoices

from the same partner: "Please provide copies of all the invoices that make up the Site Preparation credit component of $170,296 ($85,148 50% TIC as reported on IT-611.1) for 74 Wallabout LLC."

19. Mr. Neuman also testified at the hearing. Mr. Neuman is a certified public accountant who helped prepare the initial tax returns, credit claims and schedules for the brownfield site for tax year 2016. Mr. Neuman explained that the brownfield site was owned as a tenancy-in-common. Per the tenancy-in-common agreement, dated July 18, 2013, 74 Wallabout LLC, Northland LLC and Starwood LLC intended to acquire the brownfield site as tenants in common and divide profits and losses of the tenancy for federal income tax purposes as follows:

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| 74 Wallabout LLC | 50.00% |
| Northland LLC | 37.50% |
| Starwood LLC | 12.50% |

20. Regarding the ownership of Starwood LLC, Mr. Neuman testified that, based on an affidavit of its owner, Starwood LLC transferred its 14% interest in the brownfield site to Mr. Pollak, effective January 1, 2016. At the time Mr. Neuman provided the organizational chart to the Division, in August 2020, he was unaware that a transfer had occurred.

21. Mr. Neuman testified that the Division disallowed a "relatively small" portion of the claims for refund of brownfield redevelopment tax credit of the partners of 74 Wallabout LLC. On December 8, 2022, the Division issued notices of disallowance to those partners. On December 15, 2022, Mr. Neuman emailed Ms. Ballard requesting that Ms. Ballard provide "the 2016 adjustment calculation" for petitioners. As noted, Ms. Ballard responded that she did not have a case for petitioners, only the partners of 74 Wallabout LLC. Mr. Neuman testified that he prepared and filed petitioners' amended return claiming the brownfield redevelopment tax credit

in March 2024 using the same information that was used for the partners of 74 Wallabout LLC. He explained that he did not file the amended return in 2020 because he "was not directly representing [them] at the time."

## *CONCLUSIONS OF LAW*

A. Tax Law § 687 (a) provides, in relevant part, that a claim for a credit or 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, there is no dispute that petitioners filed their original return on November 4, 2018, and their amended return claiming a refund of tax credits on March 7, 2024, more than three years after their original return was filed. Therefore, the Division properly denied petitioners' refund claim as untimely.

Petitioners argue that the Division possessed sufficient information to identify petitioners' overpayment for tax year 2016 before the three-year statute of limitations to claim a refund expired and, as a result, the Division had a mandatory duty to notify petitioners of the overpayment pursuant to Tax Law § 3004-a. Petitioners claim that because the Division did not notify them, "the statute of limitations was tolled as a matter of law."[2]

B. Tax Law § 3004-a provides that:

> "Disclosure of overpayment to taxpayer. (a) The department shall disclose to a taxpayer all instances of overpayment of tax by such taxpayer discovered by the department during the course of an audit, assessment, collection or enforcement proceeding.

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[2] Petitioners also argued, as part of their motion for summary determination, that they made an informal refund claim for tax year 2016. This argument appears to be abandoned in their briefs. Nevertheless, petitioners have failed to establish any of the elements of an informal refund claim (***see Matter of Accidental Husband Intermediary***, Tax Appeals Tribunal, April 11, 2019). In particular, petitioners failed to show that the Division had notice that *they* were asserting a right to a refund as they rely entirely on information provided during the audits of other taxpayers.

> (b) The time within which a taxpayer may apply for a refund or claim a credit for an overpayment of tax disclosed pursuant to this section shall be one hundred twenty days from the date that notice of disclosure is given to such taxpayer by the department. Failure to apply for a refund or credit within the one hundred twenty days shall result in the loss of the right to apply for a refund or credit. Provided, that this subdivision shall not reduce the time within which a taxpayer may claim a credit or refund of an overpayment of tax pursuant to any other provision of this chapter or any other applicable law.
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> (c) Nothing in this section shall be construed as requiring or permitting the giving of notice or the payment of a refund or granting of a credit with respect to a period which, at the time such overpayment is discovered by the department, is not open for assessment or refund by virtue of any period of limitations provided for in any tax."

Initially, petitioners claim that the Division discovered petitioners' overpayment during the audits of the partners of 74 Wallabout LLC and argue that Tax Law § 3004-a requires the Division to disclose overpayments to taxpayers discovered during audits of *other* taxpayers. Petitioners provide no support for such a notion. As explained below, the statute assures that taxpayers' rights are protected where, in the course of examining a taxpayer's activities during a taxable period, the Division uncovers an overpayment by that taxpayer for that period. Petitioners' interpretation, therefore, is rejected as it would extend the protections provided by Tax Law § 3004-a beyond its scope.

C. Notwithstanding, petitioners have not shown that the Division discovered an "overpayment of tax" during an audit that falls within the meaning of Tax Law § 3004-a (***see Matter of Globe Wholesale Tobacco Distributors, Inc.***, Tax Appeals Tribunal, November 7, 2019). The record in this matter shows that the Division received an organizational chart and a schedule of costs related to the brownfield site on August 19, 2020. These documents, according to petitioners, are all the Division needed to discover petitioners' overpayment of tax. Petitioners' argument is without merit.

Petitioners admit that the organizational chart is not accurate. The organizational chart reflects that Starwood LLC held a 14% interest in the brownfield site whereas Starwood LLC no longer held any interest as of January 1, 2016. The organizational chart also does not reflect that Northland LLC was a partner of 74 Wallabout LLC for any portion of 2016. Moreover, the organizational chart, partnership return and tenancy-in-common agreement show that Northland LLC's interest in the brownfield site changed from 2013 to 2016. As such, petitioners' interest in the brownfield site in tax year 2016 cannot be determined from the organizational chart alone. Had the Division, in fact, relied on the organizational chart it would have disclosed an alleged overpayment to a taxpayer that no longer had any interest in the brownfield site and would have disclosed the wrong amount to petitioners.

The schedule of costs indicates that 74 Wallabout LLC claimed 50% of the total site preparation costs related to the brownfield site for tax year 2016. According to petitioners, this fact indicates that petitioners (through Northland LLC) were entitled to claim the other 50% of the costs related to the brownfield site. The schedule, however, does nothing more than provide minimal information related to 74 Wallabout LLC's credit claim. The record shows that during the audits of the partners of 74 Wallabout LLC the Division requested all the invoices that made up the costs on that schedule to determine their entitlement to the credit. A schedule, without more, does not establish entitlement to a credit.

Further, petitioners confuse entitlement to a credit with an overpayment of tax. An overpayment of tax can only be determined after credits are applied to tax due, which can only be determined after an audit of petitioners themselves. Petitioners did not claim the credits at issue on their original return. The Division did not audit petitioners' returns until after petitioners filed their amended return claiming the credits and at which time the statute of limitations for petitioners to claim a refund had expired. Therefore, the Division did not possess information to determine whether petitioners had overpaid their tax on August 19, 2020, or at any point prior to the expiration of the statute of limitations.[3]

D. Petitioners also argue, in their briefs, that petitioners should be entitled to an "adverse inference" that certain withheld documents, requested from the Division under the Freedom of Information Law (FOIL), establish discovery under Tax Law § 3004-a. The record indicates that Mr. Neuman requested and was denied certain documents because they had "references to taxpayers' information for whom we do not have a [power of attorney] on file, and this information is specifically exempted by FOIL and if released would constitute an unwarranted invasion of privacy." Petitioners suggest that the withheld documents relate to the Division's alleged discovery of their overpayment as Mr. Neuman did not have a power of attorney for them. Nonetheless, petitioners do not claim nor is there any indication in the record that petitioners themselves, or their representative, made a FOIL request for such documents. Accordingly, I decline to speculate or to make the requested adverse inference.

E. The petition of Paul and Judith Pollak is denied and the notice of disallowance, dated July 17, 2024, is sustained.

DATED: Albany, New York
August 20, 2026

/s/ Jennifer L. Baldwin
ADMINISTRATIVE LAW JUDGE

[3] At best, the Division discovered petitioners' entitlement to the credits claimed herein at the same time it determined the amount of credits allowed to the partners of 74 Wallabout LLC. Based on the information in the record, this was sometime in late 2022. The statute of limitations for petitioners to claim a refund expired on November 4, 2021. Pursuant to Tax Law § 3004-a (c), the Division is not required to notify taxpayers of overpayments discovered after the limitations period expired.