STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TAMMY ROBINSON	:	ORDER DTA NO. 828208
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2014, 2015 and 2016.	:	

Petitioner, Tammy Robinson, filed a petition for revision of a determination or for refund of personal income tax under article 22 of the Tax Law for the years 2014, 2015 and 2016.

On October 4, 2018, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Stephanie M. Lane, Esq., of counsel), filed a motion seeking dismissal of the petition pursuant to Tax Law § 2006 (5), 20 NYCRR 3000.5 and 20 NYCRR 3000.9 (a) (1) (ii), or summary determination pursuant to Tax Law § 2006 (6), 20 NYCRR 3000.5 and 20 NYCRR 3000.9 (b) (1), upon the grounds that the Division of Tax Appeals does not have jurisdiction of the subject matter of the petition, that there are no material issues of fact, and that the petition does not state a cause upon which relief may be granted. Accompanying the motion was the affirmation of Stephanie M. Lane, Esq., dated October 4, 2018, and annexed exhibits supporting the motion. Petitioner, appearing pro se, submitted documents in response to the motion on October 4, 18, 24 and 30, 2018. Pursuant to Tax Law § 3000.5 (b), and the 90-day period for issuance of this order commenced on November 5, 2018. After due consideration of the Lane affirmation and annexed exhibits, petitioner's responding documents, and all pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following order.

ISSUE

Whether the petition in this matter is properly subject to resolution by summary determination or by dismissal.

FINDINGS OF FACT

1. Petitioner, Tammy Robinson, filed three New York State resident income tax returns (Form IT-201) on April 29, 2017, pertaining, respectively, to the years 2014, 2015 and 2016. Review of each of these returns by the Division of Taxation (Division) resulted in certain actions, as described hereinafter.

2014

2. For 2014, petitioner reported federal adjusted gross income of $22,032.00, reduced such amount by her claim of the standard deduction ($10,950.00), and by her claim of one dependent exemption ($1,000.00), thereby resulting in New York taxable income of $10,082.00, with tax due thereon in the amount of $403.00. This tax amount was reduced by petitioner's claimed household credit ($60.00) to arrive at a total New York tax liability of $343.00. Petitioner claimed an empire state child credit ($330.00), a New York State earned income credit ($730.00), a college tuition credit ($200.00), and reported tax withheld ($648.00), resulting in reported payments and credits totaling $1,908.00. Petitioner's reported tax liability ($343.00) compared to her reported total payments and credits ($1,908.00), resulted in her claim for a refund in the amount of $1,565.00.

3. The Division performed an audit of petitioner's return for the year 2014, and as a result issued to petitioner an Account Adjustment Notice - Personal Income Tax (account adjustment notice) dated May 24, 2017 for the year 2014. Review of this notice reveals that the Division

disallowed petitioner's claimed dependent exemption ($1,000.00), thereby increasing her New York taxable income to $11,082.00, with tax due thereon in the amount of $443.00. In addition, the Division reduced petitioner's claimed household credit from $60.00 to $50.00, resulting in a total New York tax liability of $393.00. The Division also disallowed petitioner's claimed empire state child credit ($330.00) and New York State earned income credit ($730.00), resulting in (reduced) total payments of $848.00. Petitioner's adjusted (increased) tax liability per the Division ($393.00) compared to her adjusted (reduced) total payments ($848.00), resulted in a reduced overpayment of $455.00. The Division's foregoing adjustments reduced petitioner's claimed refund of $1,565.00 to an allowable refund of $455.00, thus constituting a refund disallowance in the amount of $1,110.00.

4. The May 24, 2017 account adjustment notice specified that the dependent exemption and empire state child credit claimed by petitioner were disallowed by the Division on the bases that the information concerning the child or dependent claimed by petitioner was incomplete and/or that such child or dependent was claimed by another taxpayer. In the case of the claimed earned income credit, the Division's account adjustment notice specified that petitioner's earned income exceeded the maximum amount allowed.[1]

5. Petitioner's $455.00 reduced refund amount, as calculated above, was withheld and applied on May 16, 2017 as a payment against another outstanding New York State tax liability

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[1] The Division's adjustment reducing petitioner's claimed household credit amount from $60.00 to $50.00, described in the account adjustment notice as "based on available information," appears to stem (mathematically) from the taxable income increase resulting from the Division's disallowance of the claimed dependent exemption. Similarly, the disallowance of petitioner's claimed New York State earned income credit appears to be (at least mathematically) a consequence of the income increase resulting from the elimination of the claimed dependent exemption.

owed by petitioner. Specifically, pursuant to Tax Law § 686 (a), the Division applied petitioner's otherwise allowable $455.00 refund for 2014 as an offset against petitioner's outstanding Tax Law article 22 personal income tax liability for the year 2010, per assessment ID L-041227261, under warrant ID E-028078512 - W016 - 7.

2015

6. For 2015, petitioner reported federal adjusted gross income of $22,783.00, reduced such amount by her claim of the standard deduction ($7,900.00), and did not claim a dependent exemption, thereby resulting in (New York) taxable income of $14,883.00, with tax due thereon in the amount of $659.00. This tax amount was reduced by petitioner's claimed household credit ($40.00) to arrive at a total New York tax liability of $619.00. Petitioner reported her total payments as tax withheld ($827.00). Petitioner's reported tax liability ($619.00) compared to her reported total payments ($827.00), resulted in her claim for a refund in the amount of $208.00.

7. The Division performed an audit of petitioner's return for the year 2015, and as a result issued to petitioner an account adjustment notice dated May 10, 2017 for the year 2015. Review of this notice reveals that the Division made no changes to petitioner's 2015 return, including the $208.00 refund claimed due to overpayment. However, petitioner's $208.00 refund amount was withheld and applied on May 2, 2017 as a payment against another outstanding New York State tax liability owed by petitioner. Specifically, pursuant to Tax Law § 686 (a), the Division applied petitioner's otherwise allowable $208.00 refund for 2015 as an offset against petitioner's outstanding Tax Law article 22 personal income tax liability for the year 2010, per assessment ID L-041227261, under warrant ID E-028078512 - W016 - 7.

8. Petitioner had outstanding tax liabilities subject to collection based upon assessments for which warrants had been issued for the years 2008 (assessment ID L - 037858863 [warrant ID: E - 028078512 - W008 - 1]), 2010 and 2011 (assessment ID L - 041227261 and assessment ID L - 043098705 [Warrant ID E - 028078512 - W016 - 7]), and 2012 (assessment ID L - 039784954 [Warrant E - 028078512 - W012 - 9]). The liabilities under these warrants were satisfied on March 16, 2015 (2008), July 20, 2017 (2010 and 2011), and December 30, 2016 (2012), respectively.

2016

9. For 2016, petitioner reported federal adjusted gross income of $55,249.00, reduced such amount by her claim of the standard deduction ($11,150.00), and claimed one dependent exemption ($1,000.00), thereby resulting in New York taxable income of $43,099.00, with total New York tax due thereon in the amount of $2,271.00. Petitioner claimed an empire state child credit ($330.00), a family tax relief credit ($350.00), and tax withheld ($2,306.00.), for total payments and credits of $2,986.00. Petitioner's reported tax liability ($2,271.00), compared to her reported total payments ($2,986.00), resulted in her claim for a refund in the amount of $715.00.

10. On July 5, 2016, the Division issued to petitioner the full $715.00 refund claimed on her return for the year 2016.

11. On May 23, 2017, the Division of Tax Appeals received from petitioner a petition, which included several attachments. Petitioner also submitted a variety of documents, on October 4, 18, 24 and 30, 2018, in response to the subject motion. Taken together, these documents appear to concern a dispute between petitioner, her former employer, and the New

York State Department of Labor, including wage issues and unemployment insurance benefits. Though the documents submitted are not complete, it appears that the dispute resulted in an October 22, 2014 indictment, returned in Schenectady County, New York (indictment no. B - 814 - 9), charging petitioner with grand larceny in the third degree (Penal Law § 155.35 [1]) and falsifying business records in the first degree (Penal Law § 175.35). On August 28, 2015, petitioner was convicted upon her plea of guilty to grand larceny in the third degree with a waiver of her right to appeal, in satisfaction of the indictment, and was sentenced. Petitioner appealed that conviction and judgment (notwithstanding her waiver), and by memorandum and order decided and entered November 16, 2017, that appeal was denied and the conviction and judgment was affirmed (***People v Robinson***, 2017 NY Slip Op 08050 [Appeal No. 107934], NY App. Div. 3D Dept, November 16, 2017).[2]

12. On August 23, 2017, the Division filed its answer in opposition to the petition and in support of its audit activities and its account adjustment notices. Paragraphs 2 through 5, and 17, of the answer affirmatively state:

a) that by her filed return for the year 2014 petitioner claimed a refund in the amount of $1,565.00, and that the Division audited such return.

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[2] Petitioner also attempted to commence an action, denominated a "Notice of Motion", on May 2, 2018, in the Court of Claims, apparently premised upon a claim of "unjust wrongful conviction, to recover damages for personal injury of tort activity imposed upon petitioner." On August 15, 2018, the court issued an Order to Show Cause, sua sponte, based upon petitioner's apparent failure to have effected proper service of her claim (Claim No. 131393, Mot No. M -92697, Hard, J.). On September 17, 2018, New York Assistant Attorney General Paul F. Cagino, Esq., filed with the court an Affirmation in Compliance With Order to Show Cause, seeking dismissal based upon petitioner's failure to have effected service of any claim or notice of intent to file a claim. The disposition of this matter by the Court of Claims is unknown.

b) that the Division issued an account adjustment notice whereby, as a result of its audit, a portion ($455.00) of petitioner's claimed refund ($1,565.00) was granted, leaving the balance thereof ($1,100.00) disallowed.

c) that no (formal) notice of disallowance has been issued and six months have not expired since the refund claim was made by petitioner upon the April 29, 2017 filing of her return, as required by Tax Law § 689 (c) (3) (A), and therefore the appeal of the Division's denial of such refund is premature.[3]

13. The Division brings the subject motion seeking dismissal of the petition on the basis that the petition, as filed, did not list or include by attachment any valid statutory notices giving rise to the right to a hearing, such that petitioner has failed to validly commence a proceeding in the Division of Tax Appeals. Specifically, the Division maintains that the account adjustment notices are not statutory notices that afford a person a right to a hearing before the Division of Tax Appeals, and that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition, per 20 NYCRR 3000.9 (a) (1) (ii).[4] The Division further, and alternatively, seeks summary determination in its favor pursuant to 20 NYCRR 3000.5 and 20 NYCRR 3000.9 (b)

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[3] The described disallowance of a part of petitioner's claimed refund was premised upon the Division's disallowance, on audit, of petitioner's claim of one dependent exemption, and the mathematical recalculations that followed therefrom. In turn, this dependent exemption disallowance was made upon the Division's asserted bases that information concerning the child or dependent claimed by petitioner was incomplete, or that such child or dependent had been claimed by another taxpayer, (***see*** findings of fact 3 and 4 n. 1).

[4] It appears the Division may be arguing that petitioner's failure to have physically appended a copy of any notice giving rise to the right to a hearing (phrased as "the petition does not contain a valid statutory notice"), must itself result in dismissal as a matter of law. If this is the case, 20 NYCRR 3000.3 (8), addressing the "Form of Petition," requires, solely for the purpose of establishing the timeliness of a petition, that a copy of the statutory notice being protested be attached to the petition. Any such argument is obviated here, since copies of the three account adjustment notices have been furnished as part of the subject motion. Hence, the question presented is whether such notices may be viewed as statutory notices which give a person the right to a hearing in the Division of Tax Appeals (***see*** Tax Law § 2008 [1]; 20 NYCRR 3000.1 [k]).

(1), upon the basis that there are no material issues of fact, and that the petition does not state a cause upon which relief may be granted by the Division of Tax Appeals.

14. As described above, petitioner has responded with multiple submissions, none of which specifically addresses the Division's motion in a manner by which petitioner's position with respect thereto can be clearly discerned. Petitioner's submissions focus mainly upon matters relating to, and arising from, disputes with her former employer which appear to have resulted in liabilities owed to the Department of Labor.

15. The record on this motion includes no argument, evidence or other information indicating or establishing that the liabilities resulting from personal income tax assessments against petitioner for the years 2010 and 2011, against which petitioner's refunds for two of the years in issue here (2014 and 2015) were applied, were not fixed and final personal income tax liabilities validly subject to collection, including payment by offset pursuant to Tax Law § 686 (a).

CONCLUSIONS OF LAW

A. The Division has moved for dismissal of the petition pursuant to Tax Law § 2006 (5) and 20 NYCRR 3000.5 and 3000.9 (a) (1) (ii), upon the basis that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition, and for summary determination pursuant to Tax Law § 2006 (6) 20 NYCRR 3000.5 and 3000.9 (b) (1), upon the grounds of there are no material issue of fact, and that the pleadings fail to state a cause upon which relief may be granted.

B. In this matter, the Division maintains that the account adjustment notices, dated May 24, 2017 pertaining to the year 2014, and May 10, 2017 pertaining to the year 2015, are not

statutory notices affording the right to a hearing before the Division of Tax Appeals. In addition, the Division notes that petitioner's refunds, as reduced upon audit for 2014 and as claimed for 2015, were not denied but instead were properly applied as offsets toward satisfaction of petitioner's outstanding personal income tax liabilities for earlier years, per Tax Law § 686 (a). Further, the Division points out that petitioner's refund, as claimed for 2016, was in fact paid to petitioner in full. Finally, the Division asserted, in its August 23, 2018 answer to the petition, that since no formal notice of disallowance had been issued and that six months had not expired from the April 29, 2017 date of petitioner's refund claim made upon the filing of her 2014 tax return, her refund claim for such year was premature, per Tax Law § 689 (c) (3) (A).

C. Regarding the Division's motion to dismiss the petition, the Tax Appeals Tribunal's Rules of Practice and Procedure (rules), at 20 NYCRR 3000.9, provide, in pertinent part, as follows:

> "**(a) Motion to dismiss. (1) Grounds.** A party may move to dismiss a petition on the grounds that:
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> (ii) the division of tax appeals lacks jurisdiction of the subject matter of the petition;
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> * * *
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> (vi) the pleading fails to state a cause for relief;" (emphasis as in original).

D. The Tribunal's rules also provide for a motion for summary determination. Such a motion "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 of Practice and Procedure of the Tax Appeals Tribunal (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 [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 (***Gerard v Inglese***, 11 AD2d 381 [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***).

E. Tax Law § 2006 (4) requires the Tax Appeals Tribunal:

> "[t]o provide a hearing as a matter of right, to any petitioner upon such petitioner's request, pursuant to such rules, regulations, forms and instructions as the tribunal may prescribe, *unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter*." (Emphasis added.)

F. Tax Law § 2008 (1), in turn, provides:

> "All proceedings in the division of tax appeals shall be commenced by the filing of a petition with the division of tax appeals protesting *any written notice* of the division of taxation which has advised the petitioner of a tax deficiency, a notice of determination of tax due, *a denial of a refund or credit application* . . ., or any

> other notice which gives a person the right to a hearing in the division of tax appeals under this chapter or other law." (Emphasis added.)

G. The Tribunal's rules, at 20 NYCRR 3000.1, define the term "statutory notice" as follows:

> "**(k) Statutory notice.** The term 'statutory notice' means a *any written notice of the commissioner of taxation and finance which advises a person* of *a* tax deficiency, determination of tax due, assessment, or *denial of a refund*, credit or reimbursement application, or of cancellation, revocation, suspension or denial of an application for a license, permit or registration, or of any other notice which gives the person a right to a hearing in the division of tax appeals" (Emphasis as in original; italics added).

H. The Division of Tax Appeals is an adjudicatory body of limited jurisdiction whose powers are confined to those expressly conferred in its authorizing statute (***Matter of Scharff***, Tax Appeals Tribunal, October 4, 1990, ***revd on other grounds sub nom Matter of New York State Dept. of Taxation & Fin. v Tax Appeals Trib.***, 151 Misc 2d 326 [1991]). In the absence of legislative action, this forum cannot extend its authority to disputes that have not been specifically delegated to it (***Matter of Hooper,*** Tax Appeals Tribunal, July 1, 2010).

2014

I. The Division contends that there is no jurisdiction in this forum to address the petition for the year 2014 because no statutory notice of disallowance was issued for such year. The Division maintains that an account adjustment notice is not a "statutory notice" giving rise to the right to a hearing. This argument is rejected as the statement of account adjustment issued to petitioner for 2014 as a result of the Division's audit of that year clearly denied a portion of her 2014 claim for refund. As set forth in findings of fact 3 and 4, the Division disallowed $1,110.00 of petitioner's claimed $1,565.00 refund, upon its audit disallowance of petitioner's claim of one child or dependent exemption. The premise for this disallowance was that the claimed child or

dependent did not qualify because the information supplied by petitioner (presumably upon audit) was incomplete, or that the child or dependent claimed by petitioner on her return was also claimed by another taxpayer. The partial refund disallowance, resulting from the Division's foregoing factual conclusions, is properly subject to challenge in this forum by petitioner, notwithstanding that petitioner was notified of the same via an account adjustment notice. In this factual context, an account adjustment notice clearly constitutes a "written notice of the [Division]" advising petitioner of "a denial of a refund or credit application," and as such constitutes a "statutory notice" under 20 NYCRR 3000.1 (k), carrying with it the right to a hearing (***see*** Tax Law §§ 2006 (4), 2008 (1); ***Meyers v Tax Appeals Trib.***, 201 AD2d 185 [3d Dept 1994] ***lv denied*** 84 NY2d 810 [1994]). In fact, the Tribunal has consistently ruled on petitions challenging reductions or disallowances of taxpayers' claimed refunds, as set forth on account adjustment notices, rather than rejecting such notices as not constituting statutory notices giving rise to the right to a hearing that are, therefore, beyond the ambit of its jurisdiction to provide a hearing as a matter of right (***id., see e.g. Matter of Balbo***, Tax Appeals Tribunal, August 18, 2016; ***Matter of Solis-Cohen***, Tax Appeals Tribunal, March 13, 2016; ***Matter of Goode***, Tax Appeals Tribunal, October 17, 2013).[5]

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[5] In addition, even assuming that the account adjustment notice for 2014, though issued upon the factual audit-based premise described above, is not a "statutory document" that gives rise to the right to a hearing, such right now exists by operation of law based upon the Division's failure to have issued a formal notice of disallowance within six months from the date the claim for refund was filed (***see*** Tax Law § 689 [c] [3] [A]). Here, the Division unquestionably disallowed a portion of petitioner's claimed refund, upon the basis of its disallowance of her claim of one child or dependent exemption on such return, and more than six months have elapsed since petitioner claimed her refund for 2014. The Division's motion papers do not include any supporting documents establishing that a formal notice of disallowance was ever issued to petitioner for the year 2014 (***see*** finding of fact 12 [c]). Given that six months have passed since the date on which petitioner filed her 2014 return claiming the disputed refund, it follows that such claim has been "deemed denied," and petitioner has the right to file a petition challenging such deemed denial (***id***). In the context of this case, the petition is no longer premature, as claimed in the Division's answer. In light of the Division's motion, the petition may properly be treated, nunc pro tunc, as a challenge to the Division's deemed refund denial.

J. Accordingly, for the year 2014, the Division's motion for dismissal for lack of subject matter jurisdiction is denied, as is its motion for summary judgment, and petitioner's protest of the account adjustment notice for the year 2014 may proceed to hearing. However, in so proceeding, the scope of petitioner's challenge will be limited solely to the factual issue of whether she can establish her entitlement to one child or dependent exemption, as claimed on her return for the year 2014 (i.e., that the claimed child or dependent met the requisite qualifications for such status and, if so, was not claimed by another taxpayer).

<u>2015</u>

K. For the year 2015, the $208.00 overpayment amount calculated on petitioner's return and claimed by petitioner as a refund was not disallowed by the Division. Rather, such overpayment was not issued to petitioner as a refund, but was applied by the Division as an offset in payment against a preexisting outstanding personal income tax liability owed by petitioner for a prior year (***see*** finding of fact 7). The Division's authority to apply overpayments against outstanding liabilities is found in Tax Law § 686 (a), which provides, in relevant part, as follows:

> "General.- The commissioner of taxation and finance, within the applicable period of limitations, may credit an overpayment of income tax and interest on such overpayment against any liability in respect of any tax imposed by this chapter . . . on the person who made the overpayment, against any liability in respect of any tax imposed pursuant to the authority of this chapter or any other law on such person if such tax is administered by the commissioner of taxation and finance . . . ."

L. As noted, there is no evidence to show that the outstanding liability against which petitioner's overpayment for the year 2015 was applied was not a fixed and final liability that was subject to collection (***see*** finding of fact 15). In fact, petitioner has presented no discernible challenge to any of the liabilities listed by assessment ID and associated with the warrants as

described (***see*** findings of fact 7 and 8). It is well established that the jurisdiction of the Division of Tax Appeals does not extend to collection activities (***Matter of Club Marakesh v Div. of Tax Appeals***, Sup Ct., Albany Co., Nov 7, 1990, Keniry J.; ***Matter of Driscoll,*** Tax Appeals Tribunal, April 11, 1991; ***Matter of Barrier Oil***, Tax Appeals Tribunal, July 29, 1999). Thus, for the year 2015, the petition presents a collection challenge that is beyond the subject matter jurisdictional authority granted to the Division of Tax Appeals. Accordingly, the Division of Taxation's motion for dismissal based on lack of jurisdiction of the subject matter of the petition, per Tax Law § 2006 (5) (ii) and 20 NYCRR 3000.9 (a) (1) (ii), shall be granted.

2016

M. For the year 2016, the account adjustment notice clearly shows that the Division did not disallow any portion of the $715.00 overpayment as calculated and claimed as a refund by petitioner on her return. Rather, the Division's documents establish that the claimed refund was in fact paid to petitioner on July 5, 2017. Accordingly, there is no justiciable controversy presented for the year 2016, and the Division's motion to dismiss the petition as it pertains to such year is properly granted under 20 NYCRR 3000.9 (a) (1) (vi) for failure to state a cause for relief.

N. The Division of Taxation's motion for dismissal and for summary determination for the year 2014 is denied, as set forth in conclusion of law J; the Division's motion for dismissal for the year 2015 is granted, as set forth in conclusion of law L; the Division's motion for

dismissal for the year 2016 is granted, as set forth in conclusion of law M; and this matter will proceed in due course to a hearing, limited however, solely to the issue set forth in conclusion of law J.

DATED: Albany, New York
January 31, 2019

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE