

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition  
of  
**RALPH A. ROSSI II**

ORDER  
DTA NO. 829260

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 2013.

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Petitioner, Ralph A. Rossi II, 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 2013.

On February 7, 2020, the Division of Taxation, by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel), filed a motion seeking an order granting summary determination pursuant to Tax Law § 2006 (6) and 20 NYCRR 3000.9 (b). Accompanying the motion was the affirmation of Michele W. Milavec, Esq., with annexed exhibits, and the affidavit of Diane Andriani, with annexed exhibits. Petitioner, appearing pro se, did not respond to the motion. Accordingly, the 90-day period for issuance of this order began on March 9, 2020,<sup>1</sup> the due date for petitioner’s response. After due consideration of the documents submitted, Winifred M. Maloney, Administrative Law Judge, renders the following order.

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<sup>1</sup> Since March 8, 2020 fell on a Sunday, petitioner had until Monday, March 9, 2020, to file a response to the Division’s motion (*see* General Construction Law § 20).

***ISSUE***

Whether the Division of Taxation properly denied petitioner's claim for credit or refund of personal income tax return for the year 2013 on the basis that the claim was filed after the expiration of the applicable statute of limitations for credit or refund.

***FINDINGS OF FACT***

1. On or about April 15, 2014, petitioner, Ralph A. Rossi II, filed a New York State application for automatic six-month extension of time to file for individuals (form IT -370) for the year 2013, and remitted \$500.00 with his request for an extension. On this form IT-370, petitioner indicated that he was subject to New York State personal income tax.

2. Petitioner's filing of form IT-370 extended the due date for filing his New York State resident income tax return for tax year 2013 to on or before October 15, 2014.

3. On February 1, 2019, petitioner filed a New York State resident income tax return (form IT-201) for the year 2013 with the Division of Taxation (Division). On his 2013 tax return, petitioner reported total New York State tax due in the amount \$9,444.00, total payments made in the amount of \$10,448.00,<sup>2</sup> and requested a refund/overpayment in the amount of \$1,004.00. Petitioner's signature and the handwritten date of "2/1/19" appear on page 4 of this return. Petitioner's tax return was mailed to the Division by United States Postal Service (USPS) Certified Mail on February 1, 2019.

4. The Division's OPTS-Liability Correspondence Section-Income issued a form DTF-160, "Account Adjustment Notice – Personal Income Tax" for the year 2013 (notice of account adjustment), dated February 27, 2019, to petitioner disallowing the claimed refund/overpayment

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<sup>2</sup> The total payments made consisted of New York State taxes withheld from petitioner's wages in the amount of \$9,948.00 plus \$500.00 paid with the extension of time to file.

in the amount of \$1,004.00 in full. The “Explanation” section of the notice of account adjustment contained, in pertinent part, the following paragraph:

“We denied your claim for the refund or credit because it was filed too late. The tax law allows a refund or credit if the taxpayer makes the claim within three tax years from the time the return was required to be filed or within two years from the time the tax was paid, whichever is later.”

5. Petitioner filed a petition with the Division of Tax Appeals by hand delivery on March 22, 2019. In his petition, petitioner petitions for an “[a]pplication of prepayment made in good faith for 2013 to tax liability for 2014,” challenges the notice of account adjustment issued for the year 2013, and “seeks either return of the \$500 taken without notice or due process, or application of same to Petitioner’s 2014 tax liability.”

6. In support of its motion for summary determination, the Division submitted: (i) the affirmation, dated February 7, 2020, of Michele W. Milavec, Esq., an attorney employed in the Office of Counsel of the Division; (ii) the affidavit, dated February 6, 2020, of Diane Andriani, Taxpayer Services Specialist III in the Division’s Individual Liability Resolution Center (ILRC); (iii) a copy of petitioner’s New York State application for automatic six-month extension of time to file for individuals for the year 2013, and a copy of the accompanying check remitting \$500.00; (iv) a copy of petitioner’s New York State resident income tax for the year 2013, and a copy of the envelope in which it was mailed; (v) a copy of the notice of account adjustment for the year 2013; (vi) a copy of the petition; and (vii) a copy of the Division’s answer, dated June 12, 2019.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 687 (a) provides, in relevant part, as follows:

“Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within (i) three years from the time the return was filed, (ii) two years from the time the tax was paid . . . whichever of such periods expires the

latest, or if no return was filed, within two years from the time the tax was paid. If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return . . . . Except as otherwise provided in this section, if no claim is filed, the amount of a credit or refund shall not exceed the amount which would be allowable if a claim had been filed on the date the credit or refund is allowed.”

B. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

“Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party’s favor” (20 NYCRR 3000.9 [b] [1]; *see also* Tax Law § 2006 [6]).

In reviewing a motion for summary determination, an administrative law judge is initially guided by the following regulation:

“The motion shall be granted if, upon all 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. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact” (20 NYCRR 3000.9 [b] [1]; *see also* Tax Law § 2006 [6]).

C. The standard with regard to a motion for summary determination has been set forth numerous times. A motion for summary determination made before the Division of Tax Appeals is “subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR” (20 NYCRR 3000.9 [c]; *see also Matter of Service Mdse. Co.*, Tax Appeals Tribunal, January 14, 1999). Summary determination is a “drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]; *see Daliendo v Johnson*, 147 AD2d 312, 317 [2d Dept 1989]). Because it is the “procedural

equivalent of a trial” (*Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989], undermining the notion of a “day in court,” summary determination must be used sparingly (*Wanger v Zeh*, 45 Misc 2d 93, 94 [1965], *affd* 26 AD2d 729 [3d Dept 1966]). It is not for the court “to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist” (*Daliendo v Johnson*). If material facts are in dispute, if the existence of a triable issue of fact is arguable, or if contrary inferences may be reasonably drawn 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]).

D. In support of its motion for summary determination, the Division submitted the affidavit of Diane Andriani, a Division employee. Ms. Andriani provides various statements and conclusions based upon her “personal knowledge of the facts in this matter and based upon a review of the Division’s official records.” Although Ms. Andriani, in her affidavit, claimed to “have reviewed information in the Division’s systems including correspondence, case contacts, filing history and other documents” for petitioner and his 2013 personal income tax return, only three documents were provided with this affidavit to support Ms. Andriani’s assertions. One of those documents is a copy of petitioner’s 2013 personal income tax return bearing a handwritten date of “2/1/19” and postmark date of February 1, 2019, which such date contradicts Ms. Andriani’s assertion that petitioner filed his 2013 personal income tax return on January 28, 2019. The existence of the contradictory dates raises an issue of material fact and a matter of credibility, neither of which can be resolved on a motion for summary

determination (*see Daliendo v Johnson*). As such, the Division's motion for summary determination must be denied.

E. The motion for summary determination filed by the Division of Taxation is denied, and a hearing will be scheduled in due course.

DATED: Albany, New York  
June 4, 2020

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE