

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
	:	
of	:	
	:	
MARY E. RUBIN AND	:	
SAMUEL A. LIEBER (DECEASED)	:	ORDER
	:	DTA NO. 850877
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax and	:	
Metropolitan Commuter Transportation Mobility Tax	:	
under Articles 22 and 23 of the Tax Law for the Year	:	
2018.	:	

Petitioners, Mary E. Rubin and Samuel A. Lieber (deceased), filed a petition for redetermination of a deficiency or for refund of New York State personal income tax and metropolitan commuter transportation mobility tax under articles 22 and 23 of the Tax Law for the year 2018.

On July 8, 2025, petitioners, appearing by Proskauer Rose LLP (Abraham Gutwein, Esq., of counsel), filed a motion seeking summary determination in the above-captioned matter. The Division of Taxation, appearing by Amanda Hiller, Esq. (Colleen McMahon, Esq., of counsel), submitted its response on August 5, 2025. Petitioners were granted time to reply until August 14, 2025, which date began the 90-day period for the issuance of this order.

Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Anita K. Luckina, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners have established that no material and triable issue of fact exists such that summary determination may be granted in their favor.

FINDINGS OF FACT

1. On April 11, 2019, petitioners, Mary E. Rubin and Samuel A. Lieber (deceased), filed with the Division of Taxation (Division) a form IT-370, application for automatic six-month extension of time to file for individuals, for tax year 2018 (form IT-370).

2. On October 15, 2019, petitioners filed a form IT-201, New York State resident income tax return, for tax year 2018 (2018 return). The return proffered by the Division as petitioners' 2018 return appears to be dated August 1, 2022, and, accordingly, it is questionable whether it is the return that petitioners filed on October 15, 2019 (*see* finding of fact 13). That 2018 return indicates as follows. Petitioners reported New York State and metropolitan commuter transportation mobility (MCTM) taxes due of \$6,371,871.00 and sales or use tax due of \$250.00, for total taxes due of \$6,372,121.00, and total 2018 estimated tax payments and amounts paid with form IT-370 (total payments) of \$6,942,897.00. On line 77, "**Amount Overpaid** (*see instructions*)," petitioners reported an overpayment of \$570,776.00, and on line 79, "Amount of line 77 that you want applied to your 2019 estimated tax (*see instructions*)," petitioners indicated the amount of \$570,776.00.

3. On December 1, 2022, petitioners filed form IT-201-X, New York State amended resident income tax return, for tax year 2018 (2018 amended return). On the 2018 amended return, petitioners reported New York State and MCTM taxes due of \$6,371,871.00 and sales or use tax due of \$250.00, for total taxes due of \$6,372,121.00, total payments of \$6,942,897.00, and requested a refund of \$395,651.00. On line 78, "**Overpayment**, if any, as shown on original return or previously adjusted by NY State (*see instr.*)," petitioners reported the amount of

\$175,125.00.¹ On Line 78a, “Amount from original **Form IT-201, line 79** (*see instructions*),” petitioners reported the amount of \$570,776.00.

4. On March 17, 2023, the Division issued an account adjustment notice (notice) to petitioners disallowing the claimed refund of \$395,651.00 for tax year 2018 as untimely and allowing an overpayment of \$175,125.00 from the 2018 return as an estimated tax payment for tax year 2019.

5. On May 6, 2024, the Division issued a notice of disallowance to petitioners disallowing the requested refund of \$395,651.00 for the reasons set forth in the notice.

6. On May 9, 2024, petitioners timely filed a petition with the Division of Tax Appeals protesting the notice of disallowance.

7. On July 17, 2024, the Division filed an answer to the petition.

8. On March 12, 2025, petitioners, with permission, submitted an amended petition wherein petitioners included additional legal arguments.

9. On May 13, 2025, the Division filed an answer to the amended petition.

10. On July 8, 2025, petitioners filed a motion for summary determination and supporting documents, including an unsworn, unnotarized statement of Abraham Gutwein, Esq., dated July 8, 2025 (statement). Petitioners’ statement includes 17 paragraphs and asserts the following facts:

“1. The taxpayers received a valid extension of time of six months from April 15, 2019, to October 15, 2019, within which to file their 2018 New York State resident income tax return. See DTF Answer in Response to Revised Petition, paragraph 19.

¹ The instructions for line 78, in relevant part, request the overpayment, if any, “[f]rom your original Form IT-201, Line 77... [i]f the overpayment claimed on your original return was previously adjusted by the Tax Department, enter the adjusted overpayment on this line” (New York State Department of Taxation and Finance instructions for form IT-201-X, amended resident income tax return [2018], available at https://www.tax.ny.gov/pdf/2018/inc/it201xi_2018.pdf). Line 77 of petitioners’ original 2018 return reported an overpayment of \$570,776.00 (*see* finding of fact 2).

2. The taxpayers timely filed their 2018 New York State resident income tax return on October 15, 2019. See DTF Answer in Response to Revised Petition paragraphs 19 and 22.

3. The taxpayers paid \$3,150,000 in tax for 2018 on April 15, 2019. See DTF Account Adjustment Notice dated March 17, 2023 (attached to taxpayers' petition).

4. The taxpayers filed an amended 2018 New York State resident income tax return seeking a refund of \$395,651 no later than December 5, 2022. See DTF Answer in Response to Revised petition paragraph 21."

The remainder of the statement—paragraphs 5 through 17—are statements of law, arguments applying those statements of law to petitioners' facts or requests for relief.² The only attachments included with the motion are select copies of then-Governor Cuomo's 2020 executive orders in support of petitioners' position that their time to request a refund of income tax for tax year 2018 was extended by those executive orders.

11. On August 5, 2025, the Division, by the affirmation of Colleen McMahon, Esq., submitted its response to petitioners' motion, particularly asserting that it was procedurally defective.³

12. The Division's response also included an affidavit of Christine A. Genito, a Taxpayer Services Administrator 1 in the Division's Individual Liability Resolution Center, sworn to on August 5, 2025 (Genito affidavit), and attachments. Ms. Genito attests that her "responsibilities include managing a unit of approximately 50 resolvers who handle protests of personal income tax returns . . . and [she] assist[s] with resolution and advocate[s] on behalf of the Division when necessary." Ms. Genito further attests that "[i]n performance of these

² Petitioners requested the opportunity to present oral arguments with respect to the issues raised in their motion. As a matter of course, applications for oral arguments on a motion are not granted by the administrative law judge (*see* 20 NYCRR 3000.5 [c]).

³ The Division's response included a copy of the Division's proposed August 6, 2025, amended answer to petitioners' March 12, 2025, amended petition (*see* finding of fact 15).

responsibilities, [she has] reviewed the information in the Division's systems including correspondence, case contacts, filing history, and other documents for [petitioners] and their New York State Personal Income Tax Returns, Extensions, and Amended Returns for tax year 2018." Ms. Genito further states that her "affidavit is based upon [her] personal knowledge of the facts in this matter" and her "review of the Division's official records which are kept in the ordinary course of business."

13. Paragraph 5 of the Genito affidavit avers:

"On October 15, 2019, the petitioners filed a New York State Resident Personal Income Tax Return, IT-201, for tax year 2018 requesting a refund of \$175,125. A copy of petitioner's [sic] 2018 New York State Resident Personal Income Tax Return is attached hereto as **Attachment 3**. A certificate of filing from the Division's Disclosure office [sic] is attached as **Attachment 2**, evidencing the October 15, 2019 filing date for the Return."

14. Paragraph 6 of the Genito affidavit avers:

"Petitioners filed an Amended New York State Resident Income Tax Return, Form IT-201-X (the 'Amended Return') for tax year 2018 on December 1, 2022 requesting a refund [of] \$395,651 on line 78 of the return. A copy of the Amended Return is attached as **Attachment 4**. A certificate of filing from the Division's Disclosure office [sic] is attached as **Attachment 5**, evidencing the filing date for the Amended Return."

15. On August 6, 2025, the Division, with permission, filed an amended answer to petitioners' March 12, 2025, amended petition.

16. On August 14, 2025, petitioners, with permission, filed a reply to the Division's response. Petitioners' reply addressed the procedural issues raised by the Division and referenced the Division's response in support of the facts in their motion, further adding that "[p]etitioners [sic] petition was filed on May 9, 2024 (received May 10, 2024)." Petitioners' reply also expounded on their legal arguments. No additional documents were provided.

CONCLUSIONS OF LAW

A. As noted, petitioners bring a motion for summary determination under section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. A motion for summary determination “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” and the moving party is entitled to a favorable determination as a matter of law (20 NYCRR 3000.9 [b] [1]).

B. A motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to Civil Practice Law and Rules 3212 (*see* 20 NYCRR 3000.9 [c]). “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]). It is well established that, as the procedural equivalent of a trial, summary judgment is a drastic remedy that should be denied if there is any doubt as to the existence of a triable issue or where a material fact is arguable (*see 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]).

C. Tax Law § 687 (a) generally provides, in relevant part, that a claim for credit or refund of an overpayment of tax under article 22 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 (*see also* Tax Law § 806 [a] [incorporating and applying the procedural provisions of article 22 to the MCTM tax]).

In this case, petitioners had a six-month extension of time to file their 2018 return, until October 15, 2019. Petitioners filed their original 2018 return on October 15, 2019, requesting that their overpayment of 2018 tax be credited towards their 2019 estimated tax. Thereafter, on December 1, 2022, petitioners filed the 2018 amended return claiming a refund of tax for tax year 2018. Consequently, the Division denied petitioners 2018 amended return refund claim as untimely. Petitioners, however, posit that the time within which they could claim a refund of tax for tax year 2018 was extended by then-Governor Cuomo's 2020 executive orders.

Notwithstanding, there is a material issue of fact regarding the amount that petitioners originally reported as an overpayment of tax and requested as a refund or credit on their 2018 return.

D. Tax Law § 686 (e), in relevant part, provides:

“If any overpayment of income tax is so claimed as a credit against estimated tax for the succeeding taxable year, such amount shall be considered as a payment of the income tax for the succeeding taxable year, and no claim for credit or refund of such overpayment shall be allowed for the taxable year for which the overpayment arises, except upon request to the commissioner on or before the last day prescribed for the filing of the return for the succeeding taxable year, determined with regard to any extension of time granted. If good cause is shown for reversing the credit, the commissioner may, in his or her discretion, credit the overpayment against a liability or refund the overpayment without interest.”

The 2018 return proffered by the Division, and uncontroverted by petitioners, indicates that petitioners reported an overpayment of tax of \$570,776.00 and requested that overpayment be applied to their 2019 estimated tax (*see* finding of fact 2). However, the Division avers that petitioners' 2018 return requested a refund of \$175,125.00 (*see* finding of fact 13). Petitioners' 2018 amended return, as proffered by the Division and uncontroverted by petitioners, further

confuses the matter. The 2018 amended return appears to confirm that petitioners' 2018 return requested that a \$570,776.00 overpayment of tax be applied to their 2019 estimated tax while also reporting an overpayment of tax for tax year 2018 of \$175,125.00 (*see* finding of fact 3). Accordingly, the amount of tax that petitioners originally reported as an overpayment and requested as a refund or credit for tax year 2018 cannot be determined.

Thus, petitioners have not made a prima facie showing of entitlement to judgment as a matter of law.

E. The motion of Mary E. Rubin and Samuel A Lieber (deceased) for summary determination is denied, and a hearing will be scheduled in due course.

DATED: Albany, New York
November 6, 2025

/s/ Anita K. Luckina
ADMINISTRATIVE LAW JUDGE