

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PAUL AND JUDITH POLLAK	:	ORDER
	:	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.	:	

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.

Petitioners, by their representative, H. Friedman & Associates, CPA (Herschel Friedman, CPA), brought a motion on December 20, 2024, seeking summary determination in the above-referenced matter pursuant to section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. The Division of Taxation, by its representative, Amanda Hiller, Esq. (Daniel Olika, Esq., of counsel), requested and was granted an extension of time to respond to petitioners' motion, and timely responded by February 18, 2025. Petitioners requested and were granted permission to file a reply, and timely did so by March 20, 2025, which date commenced 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, Jennifer L. Baldwin, Administrative Law Judge, renders the following order.

ISSUE

Whether issues of fact mandating a hearing are present such that petitioners' motion for summary determination should be denied.

FINDINGS OF FACT

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 of Taxation (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." 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 (the qualified site).

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 and, in turn, 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:

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.

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. Accompanying petitioners’ motion is the affidavit of Herschel Friedman, dated December 20, 2024, with attached exhibits. Mr. Friedman avers that he was retained by petitioners “to assist in their 2016 income tax refund claim and the protest of the denial thereof,” that he “is familiar with the facts, issues, and relevant considerations surrounding this matter,” that he “thoroughly investigated all underlying facts, transactions, and related documents” and that he “conducted interviews with the parties involved.” Mr. Friedman further avers that the Division “had opened audits for the project’s 2014 and 2015 tax years, which remained ongoing through the time of the 2016 tax filings of the project and later as well.” Because of these unresolved audits, according to Mr. Friedman:

“the preparation and filing of [petitioners’] 2016 amended return claiming the refund was delayed for cause. The 2014 and 2015 audit results impact the 2016 credit numbers, as disallowed site preparation costs claimed in earlier years may be claimed as tangible property component costs in future years. They also must be claimed only in the year placed in service, which was 2016.”

11. The exhibits to Mr. Friedman’s affidavit include, among others, documents indicating that, on July 27, 2020, the Division made an offer in settlement of the brownfield redevelopment tax credit for the qualified site for the 2014 tax year. The documents identify the

four individual owners of the qualified site (co-owners), including petitioner Paul Pollak through Northland LLC, their ownership percentages and the additional credit allowed per the settlement offer. Other documents indicate that the Division audited two of the co-owners' claims for brownfield redevelopment tax credits related to the qualified site for tax year 2016.

12. Also included in petitioners' motion papers is the affidavit of Mozes Guttman, CPA, dated December 18, 2024. Mr. Guttman is "a CPA representing [petitioners] for their personal tax filings, including the 2016 tax year in question" and "was responsible for preparing and filing [petitioners'] original 2016 individual tax returns." Mr. Guttman avers that he filed petitioners' original return on November 4, 2018 without claiming the brownfield redevelopment tax credit for the following reason:

"The reason for not including these credits was the ongoing audits of the Brownfield project for the years 2014 and 2015, which had a direct impact on the 2016 credit calculations. The numbers for the 2016 Brownfield credits were not finalized, and I determined it was prudent to wait until the audit was resolved to accurately reflect those credits in an amended return."

13. Also included in petitioners' motion papers is the affidavit of Juda Neuman, CPA, dated December 18, 2024, with attached exhibits. According to Mr. Neuman, he "was actively involved in the accounting and audit management of the Brownfield Redevelopment Project, Site # C224172 . . . in which Paul Pollak was a co-owner." Mr. Neuman avers that he "recall[s] specific communications and documents that confirm the Division's awareness of Paul Pollak's entitlement to the Brownfield credits" and that, based on such, "it is evident that the Division was well aware that Paul Pollak was represented among the other co-owners. At the very least, the Division was aware before October 15, 2020 that Paul Pollak was due a tax refund for 2016."

14. The exhibits attached to Mr. Neuman's affidavit include, among others, a letter, dated November 13, 2017, to petitioners, which indicates that the Division audited petitioners'

claim for a brownfield redevelopment tax credit for tax year 2014. The letter indicates that the Division disallowed some of the site preparation costs claimed by petitioners. It also indicates that certain disallowed costs “may be allowed as tangible property the year the property is placed in service on a qualified site.” Also included in the exhibits are copies of four separate requests for conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (BCMS), dated October 23, 2019, filed by petitioners and the other co-owners of the qualified site related to the disallowance of site preparation costs in tax year 2014. Attached to petitioners’ request is the November 13, 2017 letter. All four requests indicate that conferences are being requested for the 2014 tax year.

15. The exhibits attached to Mr. Neuman’s affidavit also include an organizational chart for the qualified site that indicates that Mr. Pollak is the sole member of Northland LLC, which owned a 36% interest as tenant-in-common in the qualified site. The chart indicates that 74 Wallabout LLC (through 74 Wallabout Holdings LLC) and Starwood LLC owned the other 50% and 14% tenant-in-common interests, respectively. There is no date on the organizational chart.

16. Also included in petitioners’ motion papers is the affidavit of Judy Weiss, dated December 19, 2024. Ms. Weiss “was a co-owner of the [qualified site] through [her] ownership of Starwood LLC.” Ms. Weiss avers that “[e]ffective January 1, 2016, [she] transferred her entire 14% ownership interest in [the qualified site], held through Starwood LLC, to Paul Pollak” and that, as a result, “[a]ll interests, including the rights to Brownfield tax credits, were transferred to Paul Pollak.”

17. In opposition to petitioners’ motion, the Division submitted the affirmation of Daniel Olika, Esq., dated February 14, 2025, and the affidavit of Terri Ballard, a Tax Technician 1 in

the Division's Transaction Desk Audit Bureau, sworn to on February 12, 2025, with attached exhibits. Mr. Olika avers that:

“[t]his matter is clearly not appropriate for summary determination because there are material issues of fact related to the [p]etitioners' claim that [they] made an informal claim for a refund for the 2016 tax year before November 4, 2021 and that the Division failed to notify the [p]etitioners despite being aware of the [p]etitioners' entitlement to a refund before that date.”

Ms. Ballard, in her affidavit, recounts the desk audit review of petitioners' returns for tax year 2016 as set forth above.

18. In reply to the Division's response to their motion, petitioners argue that “the Division discovered overpayments during an audit within an open statutory period and subsequently failed to notify [p]etitioners in violation of its obligation under Tax Law § 3004-a” and that “[p]etitioners have satisfied the standard for an informal refund claim, the Division has been provided with ample and timely information to enable investigation of the overpayment.” Therefore, according to petitioners, “no material issue of fact exists and [p]etitioners are entitled to judgment as a matter of law.”

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 (Rules). 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” (20 NYCRR 3000.9 [b] [1]).

B. 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 Civil Practice Law and Rules (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]).

C. Tax Law § 687 (a) provides, in relevant part, that a claim for a 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. In this case, petitioners filed their original return on November 4, 2018 and their amended return claiming a refund of tax credits on March 7, 2024. Consequently, the Division denied petitioners’ refund claim as untimely.

Petitioners argue that they made a valid informal refund claim for tax year 2016 and, alternatively, that the statute of limitations is tolled due to the Division’s alleged violation of Tax Law § 3004-a.

D. As set forth by the Tax Appeals Tribunal in *Matter of Accidental Husband Intermediary* (Tax Appeals Tribunal, April 11, 2019), an informal refund claim has three elements: (i) it must provide the taxing authority with notice that the taxpayer is asserting a right to a refund; (ii) it must describe the legal and factual basis for the requested refund; and (iii) it

must have a written component (*see New England Elec. Sys. v United States*, 32 Fed Cl 636, 641 [1995], citing *American Radiator & Std. Sanitary Corp. v United States*, 162 Ct Cl 106, 113-114 [1963]). “[C]ourts have held that under certain circumstances, it is sufficient that the taxpayer submit a so called ‘informal claim’ within the statutory period, and then, outside of the limitation period, submit a formal claim” (*Donahue v United States*, 33 Fed Cl 600, 608 [1995]). “The determination of whether a taxpayer has satisfied the requirements for an informal claim is made on a case-by-case basis and is based on the totality of the facts” (*id.* [citations omitted]). “The ultimate question is one of notice: whether the taxing authority knew or should have known that a refund claim was being made” (*Matter of Accidental Husband Intermediary*, citing *Krape v Commr.*, TC Memo 2007-125 [2007]).

E. 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.

(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.

(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.”

F. Both the informal refund claim doctrine and Tax Law § 3004-a focus on notice, here, that is, whether the Division was put on notice of petitioners’ refund claim prior to the filing of

their amended return and whether petitioners were put on notice that an overpayment, if any, existed for tax year 2016. Issues of fact exist in both regards.

In his affidavit, Mr. Friedman alleges that the Division “had opened audits for the project’s 2014 and 2015 tax years, which remained ongoing through the time of the 2016 tax filings of the project and later as well.” However, petitioners’ motion papers do not include any documentation detailing an audit of petitioners or the other co-owners for tax year 2015 or its effect on any other year. Also, based on petitioners’ motion papers, petitioners and the other co-owners filed requests for conciliation conferences for tax year 2014, which conflicts with Mr. Friedman’s statement in his affidavit that the audit of tax year 2014 “remained ongoing.” There are also issues of fact surrounding the outcome of tax year 2014, considering the Division’s disallowance of the site preparation costs, petitioners’ protest thereof, and the Division’s settlement offer, and how other co-owners made seemingly timely claims for brownfield redevelopment tax credits for tax year 2016.

In addition, it is unclear how the Division’s disallowance of the site preparation costs in tax year 2014, which, according to the Division, “may be allowed as tangible property the year the property is placed in service on a qualified site,” put the Division on notice that petitioners were asserting a right to a refund for tax year 2016. There is nothing in petitioners’ motion papers to indicate that the Division knew when the property was placed in service. This unresolved issue is further complicated by the fact that petitioners clearly disagreed with the Division’s disallowance since they filed a request for a conciliation conference in protest thereof, which indicates that petitioners believed that the disallowed costs were properly taken in tax year 2014.

Likewise, there are questions of fact surrounding the Division's statement in its November 13, 2017 letter that certain disallowed site preparation costs in tax year 2014 "may be allowed as tangible property the year the property is placed in service on a qualified site." Without more, it cannot be determined whether the Division's statement put petitioners on notice that an overpayment may exist for another year. Petitioners filed their original return for tax year 2016 on November 4, 2018, nearly a year after the Division sent the letter to petitioners and nearly a year before petitioners filed a request for conciliation conference in protest of the letter. There is no explanation in petitioners' motion papers why, at the time they filed their original return, petitioners could not make a timely claim for a brownfield redevelopment tax credit for the disallowed costs.

In sum, petitioners have not made a prima facie showing of entitlement to summary determination in their favor as there remain questions of fact warranting a full hearing.

G. Paul and Judith Pollak's motion for summary determination is denied, and a hearing will be scheduled in due course.

DATED: Albany, New York
June 12, 2025

/s/ Jennifer L Baldwin
ADMINISTRATIVE LAW JUDGE