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RESIDENT IS NOT SUBJECT TO USE TAX ON YACHT BRIEFLY DOCKED IN THE STATE

By Michael J. Hilkin

In *Matter of Michael Pellino*, DTA No. 825869 (N.Y.S. Div. of Tax App., Oct. 1, 2015), a New York State Administrative Law Judge concluded that two short stopovers at a New York marina did not constitute a "use" sufficient to subject a New York resident to compensating use tax on a yacht that he purchased and otherwise moored and stored outside of the New York State.

Facts. In 2005 Mr. Pellino, a New York resident, purchased and took delivery of a yacht in Virginia, and paid Virginia sales tax on the purchase. Thereafter, Mr. Pellino transported his yacht to Connecticut to be moored during the summer and stored during the winter, and in January 2008 paid Connecticut use tax in connection with such use. Mr. Pellino permanently moored and stored his yacht in Connecticut, except for a single period during 2008 and 2009, when it was moored in North Carolina so that service work could be performed.

In connection with transporting his yacht to and from North Carolina for the service work, Mr. Pellino made two "temporary stopover[s]" at a marina in Port Jefferson, New York. In 2008, Mr. Pellino stopped in Port Jefferson to pick up a crew member who was joining him on his trip to North Carolina. Mr. Pellino had dinner and stayed overnight with the crew member in Port Jefferson "as a courtesy" to the crew member, and then continued on the trip. On his return trip in 2009, Mr. Pellino made another temporary stopover in Port Jefferson for three nights. During his return trip, Mr. Pellino also made stops in Virginia and New Jersey. These two stopovers in Port Jefferson were the only times Mr. Pellino docked his yacht in New York during the decade that he owned the yacht.

After becoming aware of Mr. Pellino's two stopovers in Port Jefferson during a state-wide review of marinas and yacht clubs, the Department assessed Mr. Pellino compensating use tax.

The Law. New York imposes a compensating use tax on taxable property or services not subject to State and local sales tax. Tax Law § 1110. The Tax Law defines a "use" as "[t]he exercise of any right or power over tangible personal property . . . by the purchaser thereof, and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time . . . ." Tax Law § 1101(b)(7).

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The Decision. Concluding that the "temporary physical presence" of Mr. Pellino's yacht "in New York while en route to another state . . . was not sufficient to trigger the compensating use tax," the ALJ canceled the Department's assessment.

The ALJ stated that the Department "essentially argues that the mere fact that [a] vessel was physically present in New York at all" is sufficient to demonstrate a taxable use subject to compensating use tax. The ALJ, however, found that while the statutory definition of the term "use" in the Tax Law was broad, the term is not "all encompassing," and that a use in New York "may be so de minimis that the [compensating use] tax is not triggered."

In concluding that the definition of "use" did not reach Mr. Pellino's two stops in Port Jefferson made over two calendar years, the ALJ cited two decisions by the former New York State Tax Commission holding that temporarily mooring a vessel in New York while en route to a location outside of the State, or bringing a vessel into New York for emergency repairs, did not constitute uses subject to compensating use tax. *See Matter of Sunshine Developers*, TSB-H-86(84) S (N.Y.S. Tax Comm'n, Dec. 13, 1985), *confirmed*, *Sunshine Developers v. Tax Comm'n*, 132 A.D.2d 752 (N.Y. App. Div. 1987); *Matter of Jamco Investments*, TSB-H-86(19)S (N.Y.S. Tax Comm'n, Jan. 17, 1986).

The ALJ further determined that Department regulations interpreting the term "use" for purposes of the compensating use tax require "something more than a mere stopover during the passage of a vessel through New York on a transient basis." In Mr. Pellino's case, the ALJ found that he neither intended to nor actually "kept," "stored," or "retained" his yacht in New York as such terms may be reasonably understood and applied in the context of Mr. Pellino's yacht's "ephemeral period of presence in New York." *See* 20 NYCRR § 526.9(a) (defining "use" to include "the receiving, storage or any keeping or retention for any length of time" of tangible personal property).

Additional Insights

New York State generally does not provide an exception from compensating use tax for property purchased by a New York resident and first used outside of the State. Tax Law § 1111. The lack of such an exception, along with the Tax Law's broad definition of "use," means that New York residents risk being subject to compensating use tax on taxable property purchased for use out of State when the Department can establish that such property was present at some point in the State. In this case, the Department discovered that Mr. Pellino docked his yacht in New York after it conducted a statewide review of marinas and yacht clubs in 2010, demonstrating how aggressive the Department has been in identifying potential use tax liabilities on high-value items such as yachts.

Department regulations interpreting the term "use" for purposes of the compensating use tax require "something more than a mere stopover during the passage of a vessel through New York on a transient basis."

With respect to vessels such as yachts, however, a recent change in the Tax Law provides a more relaxed standard for determining when use tax is due. Effective June 1, 2015, a vessel purchased by a New York resident outside of the State may not be subject to use tax until the earliest of the following dates: (1) the date that the vessel is required to be registered with the New York State Department of Motor Vehicles ("DMV"); (2) the date that the vessel is actually registered with the DMV; or (3) the date when the purchaser of the vessel uses the vessel in New York for more than 90 consecutive days. L. 2015, ch. 59, part SS (amending Tax Law § 1118).

According to the ALJ in this case, the Department essentially argued that *any* presence of taxable property in New York is sufficient to subject such property to use tax — a position that the ALJ ultimately found to be unjustified. Thus, New York residents subject to a future use tax audit related to property that was present in New York for so short a time that it could be classified as "*de minimis*" may consider whether the principles underlying this non-precedential decision can be used to defend against such an assessment.

NEW YORK'S HIGHEST COURT REFUSES TO DISMISS *QUI TAM* TAX ACTION AGAINST SPRINT NEXTEL

The New York State Court of Appeals has rejected Sprint Nextel's motion to dismiss a *qui tam* action brought by the New York State Attorney General under the New York State False Claims Act. *People of the State of New York, et al. v. Sprint Nextel Corp, et al.*, No. 127 (N.Y., Oct. 20, 2015). The Court of Appeals held that the New York State AG's complaint sufficiently set forth a cause of

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action under the False Claims Act, which was expanded in 2010 to cover "claims, records or statements made under the tax law," noting that in response to the motion to dismiss, the court is required to accept all facts alleged in the complaint as true, and to accord the plaintiff – here, the AG – the benefit of every possible favorable inference. The complaint alleged that Sprint knowingly violated the Tax Law, engaged in fraudulent and illegal acts, and submitted false documents. Sprint was seeking to dismiss the complaint for failure to state a cause of action under CPLR 3211. The Court's decision now allows the case to proceed and the AG to pursue discovery.

STATE RELEASES DRAFT ARTICLE 9-A REGULATIONS ON APPORTIONMENT OF DIGITAL PRODUCTS AND OTHER SERVICES

By Irwin M. Slomka

On October 15, 2015, two sets of comprehensive draft Article 9-A corporate franchise tax regulations were released by the New York State Department of Taxation and Finance relating to the State corporate tax reform legislation that went into effect for tax years beginning on or after January 1, 2015. The first draft is a complete revision of an existing regulation (20 NYCRR § 4-4.6) for sourcing receipts from services and other business receipts that are not otherwise enumerated in the Tax Law. The second draft is an entirely new section of the regulations (20 NYCRR § 4-4.9) that would apply to the sourcing of receipts from sales of digital products. *Corporate tax reform draft regulations: Business Apportionment Factor*, N.Y.S. Dep't of Taxation and Fin.

Unenumerated Business Receipts. Under the corporate tax reform legislation, corporations are now required to source unenumerated business receipts – that is, receipts not otherwise specifically addressed in the Tax Law – based on a hierarchy, the first level of which looks to where "the benefit is received" by the customer. The law requires that taxpayers exercise due diligence before rejecting a sourcing method and moving to the next level in the hierarchy. Among the areas addressed by the draft regulations are the following:

- Setting forth the general principles for sourcing unenumerated receipts, including the due diligence standard that taxpayers would have to apply in moving from one hierarchy level to another;
- The rules for determining where the "benefit" of a taxpayer's services are received by its customer, including when a taxpayer may use a "reasonable approximation" to determine where the benefit is received, and how the approximation should be determined;
- The application of the other three hierarchy methods for sourcing other business receipts (delivery destination, use of the preceding year apportionment, and use of current year apportionment information for all other services and business receipts); and
- The sourcing of receipts from services provided to a consumer through an "intermediary," where the intermediary passes the service on to the consumer.

Sales of Digital Products. Another significant aspect of the corporate tax reform legislation is the introduction of detailed sourcing rules for receipts from sales of digital products. Such receipts are generally sourced to the locations of the customer's "primary use" of the product, but the new law also provides a hierarchy of sourcing methods and a due diligence requirement in moving from one hierarchy method to another. Among the issues covered by the draft regulations regarding digital products are:

- As with the draft regulations for other business receipts, setting forth the general principles for sourcing receipts from sales of digital products, including the due diligence standard in moving from one hierarchy level to another;
- The rules for determining the customer's "primary use" location — that is, where the customer "derives the value" of the digital product purchased — including when and how a taxpayer may use a reasonable approximation;
- The application of the other three hierarchy methods for sourcing receipts from sales of digital products (where the digital product is received, use of the preceding year apportionment, and use of current year apportionment information for all other digital products); and
- The sourcing of receipts from digital products provided through an intermediary to a consumer, with several examples (for instance, where a corporation develops an Internet-based information database and contracts with a retailer "intermediary" that in turn markets and sells access to that database).

As was the case with the Department's prior release of draft nexus regulations, it has not yet formally proposed

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these draft regulations under the State Administrative Procedure Act. The Department is inviting comments by January 16, 2016.

NO AGGREGATION OF UNRELATED TRANSFERS UNDER REAL PROPERTY TRANSFER TAX

By Irwin M. Slomka

A recent decision of a New York City Administrative Law Judge concerning the New York City real property transfer tax addresses two interesting questions: one substantive, involving transfers of economic interests; the other procedural, regarding who is the proper party to claim a refund. The decision holds that a transfer of a non-controlling economic interest in real property may be not be aggregated with earlier transfers where the later transfer is shown to be unrelated to those earlier transfers. It also holds that the individual who filed the claim for refund of the tax, and who filed the petition challenging the denial of that refund claim, was the real party in interest entitled to challenge the refund denial. *Matter of Jonis Realty/E. 29th Street, LLC*, TAT (H) 09-9R (RP) (N.Y.C. Tax App. Trib., Admin. Law Judge Div., Sept. 9, 2015).

Facts. Two brothers (Steven and Nathan Halegua) each held 46.5% interests in Jonis Realty/E. 29th Street LLC (“Jonis”), a limited liability company that indirectly owned a 96% interest in real property located on 29th Street in Manhattan (“the Property”). Nathan planned to develop the Property into a multi-story condominium, but needed additional funding and construction expertise. In August 2005, Jonis sold a 30% economic interest in the Property (in the form of a membership interest of an intermediate LLC) to the Grantee in exchange for consideration. Several months later, Jonis transferred another 18% economic interest in the Property to the same Grantee. After the second transfer, Jonis and the Grantee each held a 48% beneficial interest in the Property (while the remaining 4% continued to be held by an unrelated party). There were no plans for further transfers, and it was expected that the development project would proceed under this structure.

Shortly thereafter, Steven, the other brother and LLC member, became uncomfortable with the development plans and the potential funding requirements, and sought to exit the project. Since Nathan did not have sufficient funds to purchase Steven’s beneficial interest, a third transfer was made in 2006, effectuated as a transfer by Jonis to the Grantee of a 22% interest in the intermediate LLC. As a result of that conveyance, and following the distribution by Jonis to Steven of nearly $10 million of the sales proceeds, Steven was no longer a member of Jonis. After the third transfer, the Property was beneficially owned 70% by the Grantee, 26% by Jonis, and 4% by the unrelated third party. All three transfers occurred within a three-year period.

Under the real property transfer tax (“RPTT”), a transfer of a 50% or more controlling interest in real property is subject to tax. Related transfers of less than a controlling interest are aggregated in determining whether a controlling interest has been transferred. The RPTT regulations provide that transfers made within a three-year period are presumed related and aggregated, unless it can be shown that they are unrelated. 19 RCNY 23-02.

Following the third transfer, Jonis filed a Real Property Transfer Tax Return and reported tax due based on the aggregation of the three transfers, totaling $511,000 in tax (plus interest). Jonis paid the RPTT out of the proceeds paid to Steven following his exit from Jonis.

In September 2007, Jonis filed a claim for refund on the grounds that the third transfer was unrelated to the first two transfers should not have been aggregated with those transfers, and that therefore there was no taxable transfer of a controlling interest. The refund claim was signed by Steven as a member of Jonis, even though he was no longer a member, and unaccompanied by a power of attorney. It requested that the refund be paid directly to Steven. In May 2008, the Department denied the refund claim solely on the basis that transfers of economic interests made within a three-year period “must be aggregated.”

Procedural History. The case has a long history due to questions regarding whether Steven was the proper party and whether the petition was valid. In 2009, after a Petition had been filed, accompanied by a power of attorney signed by Steven (although no longer a member of Jonis), the Department filed a motion for summary judgment, claiming that since Steven was no longer a member of Jonis, he had no authority to file the Petition or to claim a refund. The Department’s motion was granted in a determination dated July 21, 2010. Following the filing of an exception with the City Tribunal – this time accompanied by a power of attorney signed by Nathan, who was still a member of Jonis – the case was remanded to the ALJ Division to, among other things, determine whether Steven was the true party in interest.

The Decision. A hearing was finally held on both the procedural and substantive tax issues in December 2014, six years after the disallowance was protested. The ALJ concluded that based on the testimony and evidence, Steven, rather than Jonis, actually

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paid the tax – analogizing the manner of payment to an employer withholding of income tax from an employee's wages – and that Steven was the proper party to pursue the refund claim. The fact that the refund claim was not accompanied by a duly authorized power of attorney – as required under the RPTT regulations – or that the Petition seeking a refund was brought under the wrong name of the proper party, did not preclude a conclusion that the claim for refund and Petition were proper and that Steven (although not the Grantor) was the proper party.

[The Department's position] would result in an irrebuttable presumption of aggregation any time economic interests in an entity are transferred within a three-year period, which was not supported by the Department's own regulations.

As for the substantive issue of whether the third transfer should be aggregated with the first two transfers, the ALJ noted that the RPTT regulations provide a *rebuttable* presumption that transfers made within a three-year period are "related" and must be aggregated. The ALJ found that the taxpayer had proved conclusively that the first two transfers – which gave the Grantee a 48% interest in the entity — were wholly unrelated to the third transfer, which was made only because of Steven's subsequent desire to exit the project. The Department took the position that all three transfers were "related" because they all involved transfers of interests in the same legal entity. The ALJ rejected this argument, concluding that it would result in an irrebuttable presumption of aggregation any time economic interests in an entity are transferred within a three-year period, which was not supported by the Department's own regulations.

The ALJ concluded that the third transfer was unplanned and unrelated to the two earlier transfers, that there was no transfer of a controlling interest in the Property, and that Steven was entitled to a refund of the RPTT.

Additional Insights

The considerable procedural hurdles in this case – a claim for refund made by a former member of the Grantor, a power of attorney not signed by a current member of the Grantor, and questions about who paid the tax – account for the unusually lengthy delay (including two previous orders by the City Tribunal) before the case finally proceeded on the merits. On the procedural issue, it should be noted that the tax law permits a refund to be claimed by either the Grantor or Grantee "or other person who has actually paid the tax." Admin. Code § 11-2108.a.

As for the substantive issue, it is difficult to justify the Department's position – that somehow the regulatory presumption of aggregation becomes irrebuttable where there are transfers of interests in the same legal entity within a three-year period – and the ALJ's decision on the merits is not surprising. It does not appear that the Department claimed that the third transfer had been part of a plan, or even that it was reasonably contemplated at the outset, so as to justify a claim that it was related to the earlier transfers.

TRIBUNAL DENIES SUNGARD'S MOTION TO RE-ARGUE SALES TAX CASE

By Irwin M. Slomka

This past March, in *Matter of SunGard Securities Finance LLC*, DTA No. 824336 (N.Y.S. Tax App. Trib., Mar. 16, 2015), the Tax Appeals Tribunal held that certain data analysis services performed by SunGard for members of the financial services industry constituted the furnishing of taxable information services for sales tax purposes (discussed in the April 2015 issue of *New York Tax Insights*). On June 1, 2015, SunGard filed a motion to re-argue and for reconsideration. The Tribunal has now issued an Order denying SunGard's motion. *Matter of SunGard Securities Finance LLC*, Order and Opinion, DTA No. 824336 (N.Y.S. Tax App. Trib., Sept. 25, 2015).

In support of its motion, SunGard first claimed that the transcript of the oral argument before the Tribunal contained "extensive material inaccuracies that cannot be otherwise adequately corrected." While the Tribunal acknowledged that there were inaccuracies in the transcript, it pointed out that there was no evidence that SunGard had attempted to correct the transcript prior to receiving the adverse decision from the Tribunal in March 2015. Most significantly, the Tribunal found that even if there were mistakes in the transcript of the oral argument, those errors would not preclude the courts, on appeal, from conducting a meaningful review of the case, which would include SunGard's brief filed with the Tribunal.

Next, SunGard contended that the Tribunal incorrectly based its decision upon inconsistencies between documents in evidence and SunGard's affidavits

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in evidence, asserting that there were no such inconsistencies. The Tribunal noted that a motion to re-argue "must be founded upon an allegation that this Tribunal has 'overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law.'" The Tribunal pointed out that it had found certain information in the affidavits to be at odds with the documentary evidence regarding the nature of the information that SunGard was providing, and that SunGard had failed to adequately resolve those discrepancies.

In the end, the Tribunal saw no reason to permit re-argument to, as it explained, "impermissibly 'permit the unsuccessful party to argue once again the very questions previously decided.'"

COSTS DENIED DESPITE SUCCESSFUL CHALLENGE TO ASSESSMENT

By Hollis L. Hyans

A New York State Administrative Law Judge has held that an individual taxpayer is not entitled to an award of litigation expenses incurred in the course of his successful challenge to an assessment of personal income tax, since he did not qualify to be treated as the "prevailing party" under Tax Law § 3030. *Matter of Bentley Blum*, DTA No. 825455 (N.Y.S. Div. of Tax App., Oct.1, 2015). In the original decision, the same ALJ had held that a "flat sum settlement" with the Internal Revenue Service of federal income tax liabilities did not constitute a change that was required to be reported to New York State under Tax Law § 659, and therefore Mr. Blum's failure to report the federal change did not extend the New York State statute of limitations.

Background. The taxpayer, Bentley Blum, was a promoter of oil and gas partnerships that were examined by the IRS. His federal personal income tax returns were also audited by the IRS, and an Examination Report for the years 1994 through 1997 had been issued proposing adjustments to Mr. Blum's income. Mr. Blum challenged the assessments, and eventually entered into "a flat sum settlement of $510,000" for the 1996 year, which resolved 1994 through 1996 proposed federal adjustments.

Mr. Blum had timely filed his State and City personal income tax return for 1996, the only year at issue in the State proceeding. Despite the fact that the standard three-year statute of limitations would have expired on April 15, 2000, the Department issued a Notice of Deficiency for State and City personal income taxes for 1996 on May 22, 2012, relying on a claim that Mr. Blum's federal taxable income had been increased in an amount that resulted in the $510,000 in federal tax paid to the IRS in settlement. The Department took the position that because Mr. Blum had failed to report the federal settlement to New York State, the assessment was timely under the extended statute of limitations period of Tax Law § 683(c)(3), which applies when taxpayers fail to report final federal changes.

ALJ Decision on the Merits. The ALJ held that a "flat sum settlement" is not included in the list of federal changes required to be reported to the State under Tax Law § 659, and that the settlement did not constitute a change in Mr. Blum's taxable income. Accordingly, the Department was bound by the standard three-year statute of limitations, and could not rely on the extended statute of limitations period of Tax Law § 683(c)(3) applicable when taxpayers fail to report their federal changes. Since the Notice of Deficiency was issued after the standard three-year limitations period, the notice was canceled. The Department did not file an exception to the ALJ's decision.

[A] successful litigant is not a "prevailing party" under the statute if the Department establishes that its position was "substantially justified."

Request for Litigation Expenses. After his initial victory, Mr. Blum moved for an award of litigation expenses, including legal fees, under Tax Law § 3030, which provides that a "prevailing party" is entitled to reasonable administrative costs, including reasonable fees paid in connection with an administrative proceeding. A "prevailing party" is defined as a party who has substantially prevailed, submits an application within 30 days, and had net worth not exceeding $2 million. However, a successful litigant is not a "prevailing party" under the statute if the Department establishes that its position was "substantially justified."

The ALJ, relying on *Matter of Grillo*, DTA. No 823237 (N.Y.S. Tax App. Trib., Aug. 23, 2012), held that, in order to prove substantial justification, the Department must show that its position was justified to a degree that would satisfy a "reasonable person." The ALJ found that the Department satisfied this test, and that

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it "reasonably" believed that an assessment "based on unreported federal audit changes could be made at any time." He found that the Department's audit conclusion that there was additional income was "simply a logical extrapolation" of the federal changes, that there was no contrary controlling precedent, and that there was no failure to follow published guidelines. Therefore, the award of costs was denied.

Additional Insights

Under the standards applied by the Tribunal, it is generally very difficult to obtain an award of costs, and a taxpayer who succeeds on the merits must recognize that there are not many circumstances in which an ALJ is going to find that the Department's position failed to meet the "reasonable person" standard – at least it is hoped that the Department will seldom take such an extreme position. However, it will be interesting to see what happens should the issue again arise of whether a federal flat sum settlement amounts to a federal change that must be reported to the State, and whether those circumstances might lead an ALJ to reach a different conclusion on the reasonableness of the Department's position with respect to a taxpayer who meets the net worth condition. Because ALJ decisions are not precedential as to other taxpayers, and the Department chose not to appeal the ALJ merits decision to the Tribunal, there is no binding authority in New York on the issue.

In a somewhat analogous situation, the California Court of Appeals recently upheld an award of over $2.5 million in "reasonable litigation costs" against the State Board of Equalization, finding that the Board's litigation position was not substantially justified and had been rejected in prior litigation on the same issue, and rejecting the Board's argument that, as a government entity, it is entitled to make a repeated challenge to a decision with which it does not agree. *Lucent Technologies, Inc. v. State Bd. of Equalization*, No. B257808 (Cal. Ct. App., 2d App. Dist., Oct. 8, 2015).

INSIGHTS IN BRIEF

Limitation of NYC NOLs Upheld Under Same Source Year Rule

A New York City Administrative Law Judge has held that a corporation's net operating loss deduction under the general corporation tax is limited to NOLs having the same source year as deducted for federal income tax purposes for the same tax year. *Matter of Plasmanet, Inc.*, TAT (H) 12-17 (GC) (N.Y.C. Tax App. Trib., Admin. Law Judge Div., Sept. 29, 2015). The fact that federal NOL amounts from multiple years must also be aggregated for GCT purposes does not eliminate the application of the same source year limitation. The ALJ did abate substantial understatement of tax penalties because the taxpayer made adequate disclosure on its GCT returns.

Taxpayer Petitions Filed More Than 90 Days After Submitting Request to Discontinue Conciliation Held to Be Untimely

A taxpayer that chooses to discontinue a New York State conciliation proceeding, but seeks to pursue a challenge of the Department's tax assessment or refund denial, must file its Petition with the Division of Tax Appeals within 90 days from the time it files its request for discontinuance, and not from receipt of a letter acknowledging the request. *Matter of Douglaston Grimaldi, Inc., et al.*, DTA Nos. 826988 and 826989 (N.Y.S. Div. of Tax App., Sept. 24, 2015). A New York State Administrative Law Judge dismissed as untimely Petitions filed by the taxpayers after the 90-day period from its discontinuance request had expired, noting that nothing in the Tax Law allows a taxpayer to wait for the Conciliation Bureau to issue an acknowledgement letter before the 90-day period for filing a Petition begins to run.

Tribunal Reverses ALJ and Finds Request for Conciliation Conference Was Timely Filed

The New York State Tax Appeals Tribunal has held that a request for a conciliation conference was timely, since it was filed within two years from the date that a second refund request was deemed disallowed by operation of Tax Law § 689(c)(3). *Matter of Janet Yoell-Mirel*, DTA No. 825058 (N.Y.S. Tax App. Trib., Sept. 21, 2015). The refund claim, filed in 2011, sought a partial refund of taxes paid on a 2003 New York State personal income tax return filed in 2004, based on a claimed credit for tax that Ms. Yoell-Mirel paid to New Jersey in 2008 and the fact that she did not know she owed at the time of filing her original New York return. The ALJ had held that no timely request for a conciliation conference had been filed in response to the denial of an initial claim for refund, but the Tribunal focused on the fact that there had been a second claim for refund filed, which had not been actually denied, so that the request within two years of the deemed denial date was timely. While noting that Ms. Yoell-Mirel has "other procedural hurdles to address" with regard to whether or not she filed a timely claim for refund, the Tribunal held that she was nonetheless entitled to a conciliation conference at which those issues could be addressed.

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Waiver of Penalties Denied

A New York State Administrative Law Judge has denied a request for abatement of penalties imposed in connection with underpayment of personal income tax, rejecting the taxpayers' claims that they reasonably relied on the advice of their accountant. *Matter of Surinder and Aruna Pal*, DTA No. 825976 (N.Y.S. Div. of Tax App., Oct. 1, 2015). The ALJ found that the Pals, both physicians, had been suspicious of the advice they received, since it resulted in an abrupt increase in the amount of their refunds, and even tried to do their own research, but nevertheless continued to rely on that advice and never consulted another tax professional or the Department. Therefore, their continued reliance on such professional advice was found not to constitute reasonable cause under the circumstances for setting aside the imposition of penalties.

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