DISTRICT COURT OF GUAM

MICHAEL E. and CARRIE L. WENDT, Plaintiffs, vs. DIRECTOR OF DEPARTMENT OF REVENUE AND TAXATION, Defendant.	Civil Case No. 08-00020 **ORDER RE: MOTION FOR SUMMARY JUDGMENT**

This matter came before the court on a Motion for Summary Judgment filed by the Defendant, Director of Department of Revenue and Taxation ("the Director") through the Office of the Attorney General of Guam. *See* Docket No. 20. The Plaintiffs Michael E. and Carrie L. Wendt ("the Plaintiffs") opposed the motion. *See* Docket No. 27. A hearing on the motion was held on September 28, 2010. After reviewing the record and relevant statutes and authority, the court hereby **GRANTS** the Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises from the Plaintiffs' petition seeking a redetermination of their income tax deficiency for 2001, as set forth in the September 5, 2008 Notice of Deficiency from the Guam Department of Revenue and Taxation ("DRT"). *See* Docket No. 1, Exh. A (Notice of Deficiency). The Plaintiffs claim that they "filed a timely joint 2001 U.S. Individual Income Tax Return Form 1040 during 2002." Docket No. 1, p. 2 (Petition). Their filings do not specify the

///

precise date that they filed their 2001 tax return, and their pleadings do not include a stamp-filed copy of this filed return.

The Plaintiffs' home was damaged by Typhoon Pongsona in December 2002, and they applied for a loan from the Federal Emergency Management Agency. *See* Docket No. 1, Affidavits of Michael and Carrie Wendt. Their application (apparently through the Small Business Administration ("SBA")) was withdrawn by the SBA on February 27, 2003 because the SBA could not obtain documentation of their income from the DRT. *See* Docket No. 1, Exh. C (letter from SBA). The Plaintiffs claim that they visited the DRT office[1] after receiving the letter from SBA but were told that DRT could not find a copy of their 2001 tax return. *See* Docket No. 1, Affidavits of Michael and Carrie Wendt. They state that during this visit to the DRT office, a DRT employee told them to file a facsimile return using Form 1040X and to indicate that "it was not an actual return." *See* Docket No. 1, Affidavits of Michael and Carrie Wendt. The Plaintiffs further state that they prepared the Form 1040X as instructed, signed it on August 30, 2005, and mailed it the next day.[2] *See* Docket No. 1, Affidavits of Michael and Carrie Wendt. They aver that when they mailed the Form 1040X, they "did not intend to be filing a tax return, but instead was following [DRT's] instructions to provide [DRT] with information for the sole purpose of supplanting information [DRT] had lost that FEMA needed for [their] application for financial assistance." *See* Docket No. 1, Affidavits of Michael and Carrie Wendt. They further assert that the Form 1040X "effected no changes to the timely-filed Form 1040." *See* Docket No. 1, Affidavits of Michael and Carrie Wendt.

DRT challenges the Plaintiffs' assertion that they timely filed their 2001 tax return. *See* Docket No. 21 (Memorandum). According to DRT records, the Plaintiffs requested an

---

[1] The Plaintiffs' Affidavits do not give the specific date of their visit to the DRT.

[2] The record contains no explanation why it apparently took 2½ years for the Plaintiffs to follow up with DRT about their 2001 tax return after they received notice from the SBA. The only information in the record as to the timeline is that: in February 2003, SBA withdrew their loan application; at some unknown date thereafter they received information from the DRT employee; and then in August 2005 they filed their Form 1040X.

automatic extension on April 15, 2002. *See* Docket No. 23, Exh. 9 (Application for Automatic Extension of Time). The Plaintiffs then filed a second extension on September 24, 2002, requesting until December 31, 2002 to file their tax return. *See* Docket No. 23, Exh. 1 (Extension form). The extensions were granted and the Plaintiffs were required to file their 2001 tax return by December 31, 2002. However, DRT records do not show that the Plaintiffs filed their tax return by mail between September 24, 2002 and December 31, 2002. According to DRT, it is under the business duty to maintain a Certified Mail log, which lists both the certified and registered mail received by DRT, and indicates the name and description of both the document and the sender. *See* Docket No. 22 (Declaration of Mary Ann Palomo). This Certified Mail log does not have any indication of any certified or registered mail received by DRT from the Plaintiffs during the time period from September 24, 2002 until December 31, 2002. *See* Docket No. 22 (Declaration of Mary Ann Palomo).

On August 25, 2008, DRT issued a Notice of Examination and Appointment, indicating that the Plaintiffs' tax returns would be would be audited. *See* Docket No. 1, Exh. E (DRT Notice). On September 5, 2008, DRT issued a Notice of Deficiency of $4,361.00 for 2001. *See* Docket No. 1, Exh. A (Notice of Deficiency). In addition, DRT indicated that it would disallow the miscellaneous deductions of $14,300.00 from the Plaintiffs' Schedule A because there was no substantiation supporting the deductions. DRT also disallowed the Plaintiffs from applying an overpayment of $20,452.00 for tax year 2000 as a credit on their 2001 tax return, as the request for the credit was not timely made and this amount had been refunded to the Plaintiffs on November 11, 2007. *See* Docket No. 1, Exh. A (Notice of Deficiency); *see also* Docket No. 23, Exh. 5 (2000 tax refund check signed by the Plaintiffs).

On November 26, 2008, the Plaintiffs filed their Petition in this court, seeking a redetermination of their tax deficiency. *See* Docket No. 1. They allege that the Notice of Deficiency was issued after the statute of limitations for assessment of the tax period had expired, and that they had documentary support for the miscellaneous deductions. *See* Docket No. 1, Exh. A (Notice of Deficiency). They ask that the Notice of Deficiency be deemed invalid

///

and denied; alternatively if the Notice of Deficiency is deemed timely, then they request the opportunity to defend their miscellaneous deductions. *See* Docket No. 1 (Petition). The Director, through the Office of Attorney General, filed its Answer on December 22, 2008. *See* Docket No. 3 (Answer).

The Director filed the instant Motion for Summary Judgment on June 17, 2009. *See* Docket No. 20 (Motion for Summary Judgment). The Plaintiffs opposed the motion. *See* Docket No. 27. Although the matter was set for a hearing, the parties requested, and the court granted, several continuances to allow the parties the opportunity to settle the matter. The settlement did not materialize and the matter was argued on September 28, 2010.

II. DISCUSSION

The Director contends that summary judgment is proper, and that there is no issue of material fact that: 1) the Notice of Deficiency was issued within the three-year statute of limitations; and 2) the Plaintiffs failed to provide substantiation for the miscellaneous deductions in the audit. *See* Docket No. 21 (Memorandum). The Director also contends that the Plaintiffs have waived the issue of applying the credit from their 2000 tax return to their 2001 tax return, because they failed to argue this issue in their Petition. *See* Docket No. 21 (Memorandum).

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A "material" fact is "one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). Thus, a fact's "materiality" is "determined by the substantive law governing the claim or defense." *Id.* The nonmovant cannot rest on conclusory allegations, but must set forth specific facts showing a genuine issue for trial. *See Leer v. Murphy*, 844 F.2d 628, 631 (9th Cir. 1988). Moreover, to defeat a motion for summary judgment, the nonmovant must come forward with evidence sufficient to establish the existence of any disputed element essential to that party's case, and for which that party would bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A. Statute of limitations

Under 26 U.S.C. § 6501,[3] taxes must be assessed within three years after a tax return is filed.[4] The Plaintiffs contend that their 2001 tax return "was filed by the extended deadline of December 31, 2002" and therefore, the September 5, 2008 Notice of Deficiency is invalid because it was filed after the statute of limitations had expired. Docket No. 27. They further argue that their filing of the 1040X for "records-replacement purposes" does not extend the three-year statute of limitations. *See* Docket No. 1 (Affidavit of Michael Wendt).

The Director contends summary judgment is proper because there is no dispute that the Notice of Deficiency was issued within the limitations period. The Director argues that "the

---

[3] Federal income tax laws apply to Guam pursuant to 48 U.S.C. § 1421i, which states in relevant part:

> (a) Applicability of Federal laws; separate tax
> The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam: Provided, That notwithstanding any other provision of law, the Legislature of Guam may levy a separate tax on all taxpayers in an amount not to exceed 10 per centum of their annual income tax obligation to the Government of Guam.
> . . .
>
> (c) Enforcement of tax
> The administration and enforcement of the Guam Territorial income tax shall be performed by or under the supervision of the Governor.
> . . .
> (d)(2)The Governor or his delegate shall have the same administrative and enforcement powers and remedies with regard to the Guam Territorial income tax as the Secretary of the Treasury . . . .

[4] 26 U.S.C. § 6501(a) states in relevant part:

> Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. For purposes of this chapter, the term "return" means the return required to be filed by the taxpayer (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit).

Form 1040X filed on September 8, 2005 constitutes the tax return that starts the running of the statute of limitations." Docket No. 21, p. 5 (Memorandum).

"The bar of the statute of limitations on assessment is an affirmative defense, and the party raising it must specifically plead it and carry the burden of proving its applicability." *Adler v. Comm'r*, 85 T.C. 535, 540 (1985). The three year limitation period runs from the date the original return is filed. *See Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934). Thus, for the Plaintiffs to succeed, they must demonstrate that the Notice of Deficiency was mailed more than three years after they filed their 2001 tax return. *See* 26 U.S.C. § 6501(a) (stating that "the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed . . . .") (emphasis added.).

1. Whether the Plaintiffs filed a tax return for 2001

The Plaintiffs assert that they timely filed their 2001 tax return by December 31, 2002. However, according to DRT, it does not have a copy of the Plaintiffs' 2001 tax return. The Plaintiffs' Petition did not include a copy of a stamp-filed tax return. Rather, in notarized and sworn affidavits, they state that they "filed a timely joint 2001 U.S. Individual Income Tax Return, Form 1040, with the Guam Department of Revenue and Taxation." *See* Docket No. 1 (Affidavits of Michael and Carrie Wendt). They further claim that when they sought to obtain a copy of this tax return, they "were informed that [DRT] did not have a copy of the 2001 tax return." *See* Docket No. 1 (Affidavits of Michael and Carrie Wendt).

"Th[e] Court is not bound to accept a taxpayer's self-serving, unverified, and undocumented testimony." *Mendes v. Commissioner*, 121 T.C. 308, 320 (U.S.Tax Ct. 2003) (citing *Shea v. Commissioner*, 112 T.C. 183, 189 (U.S. Tax Ct. 1999)). The Plaintiffs' Affidavits, although sworn and notarized, were not made under penalty of perjury. Nothing else in the record supports their statements of a timely filing. As noted, the limitation period begins when the original return is filed. *See Zellerbach Paper Co.*, 293 U.S. 172.

Accordingly, the court is not persuaded by the Plaintiffs' self-serving affidavits and representations that their 2001 tax return was timely filed.

///

2. Whether the Form 1040X is the Plaintiffs' tax return for 2001

DRT, relying on the Plaintiffs' Form 1040X, contends this document should be interpreted as the Plaintiffs' tax return for 2001, and that the three-year period began when the Form 1040X was filed on September 8, 2005. DRT cites no authority for construing the Plaintiffs' Form 1040X as their tax return for 2001, such as to trigger the start of the statute of limitations.

There are normally four requirements for a filing to qualify as a valid tax return: (1) it must contain sufficient data to permit tax liability to be calculated; (2) it must purport to be a return; (3) it must represent honest and reasonable attempt to satisfy requirements of tax law; and (4) it must be executed by taxpayer under penalty of perjury. *See In re Wright*, 244 B.R. 451 (N.D. Cal. Bankr. 2000); *see also Watson v. Commissioner*, T.C. Memo. 2007-146 (U.S. Tax. Ct. 2007).

The first requirement is satisfied, because the Form 1040X contains sufficient data to determine tax liability. *See* Docket No. 1, Exh. D (Form 1040X). The fourth requirement is met, because the document was signed under penalty of perjury. *See* Docket No. 1, Exh. D (Form 1040X). However, the Form 1040X does not meet the second or third requirements to be treated as a valid tax return. It does not purport to be a return for the purposes of filing, and it does not represent the Plaintiffs' honest and reasonable attempt to satisfy requirements of tax law.

The Form 1040X states, in relevant part: "This 1040X is not a change to our tax return, but a computer-generated copy for your record." Docket No. 1, Exh. D (Form 1040X). The Plaintiffs also state that they had submitted the "Form 1040X for 2001 clearly indicating that the form was not intended to be an actual filing and instead was intended to provide [DRT] with missing 2001 information necessary for [Plaintiffs'] FEMA application income verification." Docket No. 1, p. 3 (Petition). The document itself indicates that it is simply a copy of a tax return that had already been filed, in order to obtain federal assistance and to create a record with DRT.

"To be a return for statute of limitations purposes, the document 'must honestly and reasonably be intended as such' by the taxpayer." *Allnut v. Commissioner*, T.C. Memo. 2002-

311, 2002 WL 31875119 (U.S. Tax Ct. 2002). Furthermore, "[i]t has long been held that in order for the period of limitations on assessment and collection prescribed by section 6501 and its predecessors to run against the United States, a taxpayer must meticulously comply with all conditions for application of the statute." *Friedmann v. Commissioner*, T.C. Memo 2001-207, 2001 WL 883222 *7 (U.S. Tax Ct. 2001). The record reveals that the Plaintiffs did not intend the Form 1040X to be a tax return to be filed. They did not submit this document for purposes of filing, but rather to obtain federal funding and to create a record for DRT to "supplant" the missing tax return for 2001. Nothing in the record shows that the Plaintiffs have "meticulously" complied with the law so as to trigger the running of the statute of limitations. Accordingly, the court finds that the Form 1040X cannot be construed as the Plaintiffs' tax return for 2001. The court further concludes that September 8, 2005, when the Form 1040X was submitted, cannot be interpreted as the starting date for statute of limitations purposes.

3. Assuming that the Form 1040X is interpreted as the tax return

Furthermore, even assuming *arguendo* that September 8, 2005 triggers the three-year limitations period, the Plaintiffs' statute of limitations argument would nevertheless fail. The Plaintiffs argue that because they mailed the Form1040X on August 31, 2005, the statute of limitations would begin on the postmark date and the Notice of Deficiency is beyond the statute of limitations. In making this argument, the Plaintiffs are attempting to invoke the so-called "mailbox rule" exception of the Internal Revenue Code, found at 26 U.S.C. § 7502(a).

Under the "mail box rule" exception, a filing occurs when a document is mailed. Thus, the postmark date governs as the date of filing. However, "§ 7502 applies only when the document is postmarked on or before the *due date* for that return." *Becker v. Dep't of Treasury*, 823 F.Supp. 231, 233 (S.D.N.Y. 1993). The court in *Mills v. United States*, 805 F.Supp. 448 (E.D. Tex. 1992), reached the same conclusion, and found that taxpayers who had filed their return late were "therefore not entitled to take advantage of the 'mailbox rule' exception contained in 26 U.S.C. § 7502(a)(2)(A)(i) (1992) that filing occurs when the return is mailed." *Id.* at 450. The court in *Mills* concluded that the tax return was filed when it was received. *Id.*

///

The Fifth Circuit has held that the language of § 7502 is "clear, explicit, and strictly limited." *Drake v. Commissioner*, 554 F.2d 736, 738 (5th Cir. 1977). Here, the Plaintiffs' 2001 tax return was due before December 31, 2002. It is undisputed that the Form 1040X was signed on August 30, 2005 and according to the Plaintiffs, it was mailed the next day. The Form 1040X was postmarked after the due date and therefore, the Plaintiffs cannot avail themselves of the "mailbox rule" exception of § 7502. Therefore, the Form 1040X is deemed to be filed when it was received by DRT on September 8, 2005. The court finds that the Notice of Deficiency was not issued after the expiration of the statute of limitations.

Summary judgment should be granted when "there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c). Here, there is no genuine issue that the Notice of Deficiency was not barred by the statute of limitations. Therefore, DRT is entitled to summary judgment as a matter of law on this issue.

B. Miscellanous deductions

In their Petition, the Plaintiffs had alternatively requested, if they did not succeed on the statute of limitation argument, that they be allowed to defend their miscellaneous deductions in the Schedule A attached to their Form 1040X. *See* Docket No. 1 (Petition). The Director argues that summary judgment is proper as to the Plaintiffs' claim regarding the denial of their miscellaneous deductions, because they failed to substantiate the deductions and because the Notice of Deficiency is presumed to be correct. *See* Docket No. 21 (Memorandum).

The court must begin with the proposition that the Director's determination of a tax deficiency "has the support of a presumption of correctness, and the [taxpayer] has the burden of proving it to be wrong." *Welch v. Helvering*, 290 U.S. 111, 115 (1933); *see also* Rules of Practice and Procedure of the U.S. TAx Court 142(a). The federal circuit courts are in agreement. *See, e.g., Walt Disney Inc. v. Commissioner*, 4 F.3d 735, 742 (9th Cir. 1993) ("The Commissioner's deficiency determination is presumed to be correct, and Disney has the burden of proving error."); *Halle v. Commissioner*, 175 F.2d 500, 502 (2d Cir. 1949) ("The Commissioner's determination bears a presumption of correctness."); *Demkowicz v. Commissioner*, 551 F.2d 929, 931 (3d Cir. 1977) (recognizing "the settled principles that the

Commissioner's deficiency determination is entitled to a presumption of correctness and that the burden is on the taxpayer to prove the incorrectness of that determination."); *United States v. Strebler*, 313 F.2d 402, 403-04 (8th Cir. 1963) (stating that the determination of tax liability "is presumptively correct; and 'the burden is on the taxpayer to overcome this presumption' by countervailing proof.") (quotation marks and citation omitted); *Kearns v. Commissioner*, 979 F.2d 1176, 1178 (6th Cir. 1992) (" The Commissioner's determination of a tax deficiency is generally presumptively correct and the taxpayer has the burden of proving that the determination is erroneous or arbitrary."); *Portillo v. Commissioner*, 932 F.2d 1128, 1133 (5th Cir. 1991) (recognizing "the well settled principle that the government's deficiency assessment is generally afforded a presumption of correctness.").

Here, the Director argues that the miscellaneous deductions were disallowed because the Plaintiffs never provided documentation to substantiate the $14,300 they claimed in deductions. According to DRT records, it conducted an audit of the Plaintiffs' Form 1040X and schedules, and requested that the Plaintiffs substantiate the employee business expenses in the Schedule A. *See* Docket No. 23, Exh. 7 (Notice of Deficiency, audit report and exam work papers). DRT records show that despite repeated requests from DRT personnel, the Plaintiffs did not submit any documentation to DRT to substantiate the deductions. Rather, the Plaintiffs insisted that the statute of limitations had run, and stated that they were working with the Governor's Office on the matter. *See id.* The Plaintiffs failed to provide any documentation to DRT during the audit process to substantiate their entitlement to the deductions.

A taxpayer has the burden of demonstrating entitlement to a deduction. *Smith v. Commissioner*, 800 F.2d 930, 933 (9th Cir. 1986), and the decision to disallow a deduction has a presumption of correctness. *Kalgaard v. Commissioner*, 764 F.2d 1322, 1323 (9th Cir. 1985). The Ninth Circuit has held: "It is the taxpayer's burden to substantiate claimed deductions." *Maciel v. Commissioner*, 489 F.3d 1018, 1028 (9th Cir. 2007); *Keogh v. Commissioner*, 713 F.2d 496, 501 (9th Cir. 1983) (recognizing that the taxpayer has the "ultimate burden" as to claims for deductions). *See also Portillo*, 932 F.2d at 1134 ("The taxpayer clearly bears the burden of proof in substantiating claimed deductions.").

///

The Plaintiffs did not submit any documentation to DRT, and thus, have not met their burden to substantiate their claim to the miscellaneous deductions. Furthermore, they have not presented any evidence to overcome the presumption that the Notice of Deficiency was correct. Summary judgment is proper on this issue.

C. Credit for overpayment in 2001

Finally, the Director argues that summary judgment should be granted as to the Plaintiffs' election to apply an overpayment from their 2000 tax return ("the 2000 overpayment) to their tax liability for 2001. Docket No. 21 (Memorandum). In short, the Director contends that the Plaintiffs cannot apply the 2000 overpayment to their tax liability for 2001.

The Director first argues that the Plaintiffs have waived this issue by failing to raise it in their Petition. The Director cites Local Tax Rule LTR 2, which states in relevant part:

> The petition in a deficiency or liability action shall contain:
>
> (d) Clear and concise assignments of each and every error which the petitioner alleges to have been committed by the Director in the determination of the deficiency or liability. The assignments of error shall include issues in respect of which the burden of proof is on the Director. Any issue not raised in the assignment of errors shall be deemed to be conceded.

Guam Local Tax Rule LRT 2(d). The Plaintiffs' Petition did not include any reference to the 2000 overpayment; they argued only the statute of limitations issue, and alternatively, their miscellaneous deductions. *See* Docket No. 1 (Petition).

This court recognizes its obligation to liberally construe a pro se litigant's pleadings. *Washington v Garrett*, 10 F.3d 1421, 1432 (9th Cir. 1993). "The Supreme Court has instructed the federal courts to liberally construe the "inartful pleading" of pro se litigants." *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987) (quoting *Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (per curiam)). "The policy allowing liberal reading of pro se pleadings is particularly appropriate in tax cases." *Christensen v. Commissioner*, 786 F.2d 1382, 1385 (9th Cir. 1986).

However, the Plaintiffs' status as pro se litigants does not excuse them from complying with federal law, rules of civil procedure or local rules of court. *Perkins v. United States*, 314 F.Supp.2d 664, 570 (E.D.Tex. 2004). *See also Carter v. Commissioner*, 784 F.2d 1006, 1008

(9th Cir. 1986) ("Although pro se, he is expected to abide by the rules of the court in which he litigates."); *LoSacco v. City of Middletown*, 71 F.3d 88, 92 (2d Cir. 1995) ("Although pro se litigants should be afforded latitude, they generally are required to inform themselves regarding procedural rules and to comply with them.") (quotation marks and citation omitted); *Lefebvre v. Commissioner*, 830 F.2d 417, 419 (1st Cir. 1987) ("While pro se pleadings are viewed less stringently, a petitioner who elects to proceed pro se must comply with the applicable procedural and substantive rules of law.").

Here, even construing the Petition liberally, it is undisputed that it does not include, as an assignment of error, DRT's refusal to apply the 2000 overpayment to their tax liability for 2001. *See* Docket No. 1 (Petition). Although required to liberally construe the Petition, this court is not required to advocate for the Plaintiffs and make this argument for them. *See Bias v. Moynihan*, 508 F.3d 1212, 1219 (9th Cir. 2007) (rejecting pro se litigant's argument that "the district court should have searched the entire record to discover whether there was any evidence that supports her claims," and finding that "[a] district court does not have a duty to search for evidence that would create a factual dispute."). Nothing in the Petition refers to the 2000 overpayment; thus, pursuant to LTR 2(d), this issue has been waived, and summary judgment is proper.

In addition, the court recognizes that, in any case, the Plaintiffs could not apply the 2000 overpayment to their 2001 tax liability because they were refunded this overpayment. DRT provides a copy of the 2000 tax refund check, in the amount of $23,264.18, which was signed by the Plaintiffs and deposited.[5] Docket No. 23, Exh. 5 (2000 tax refund check signed by the Plaintiffs). There does not appear to be any issue that the Plaintiffs received this refund, and thus, they cannot seek to apply it to their 2001 tax return.

III. CONCLUSION

For the foregoing reasons, the court finds that there is no genuine issue of material fact that: 1) the Notice of Deficiency was not filed after the expiration of the statute of limitations; 2)

[5] On the basis of the Plaintiffs' signatures and the bank notations on the back of the check, it seems that they indeed cashed it and deposited the amount in a Schwab or Bank of America account. *See* Docket No. 23, Exh. 5 (2000 tax refund check signed by the Plaintiffs).

///

the Notice of Deficiency was correct; and 3) the Plaintiffs cannot seek to have the overpayment in their 2000 tax return applied to their 2001 tax liability.

Accordingly, the Director's Motion for Summary Judgment is hereby **GRANTED.**

SO ORDERED.

/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Oct 28, 2010