

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ANNE M. CAMUTO	:	DECISION
for Revision of a Determination or for Refund	:	DTA No. 810979
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioner Anne M. Camuto, 1001 Fifth Avenue, New York, New York 10028, filed an exception to the order of the Administrative Law Judge issued on December 24, 1992 granting a motion by the Division of Taxation to dismiss petitioner's petition on the grounds that the Division of Tax Appeals lacks jurisdiction over the subject matter of the petition. Petitioner appeared by Stuart S. Schachter, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter brief in opposition. Petitioner's request for oral argument was denied. Any reply brief from petitioner was due on March 11, 1993, which date began the six-month time period for the issuance of this decision. No reply brief was submitted.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioners Koenig and Jones concur.

ISSUE

Whether petitioner made a timely application for refund of gains tax pursuant to Tax Law § 1445(1).

FINDINGS OF FACT

We find the following facts.

On July 9, 1992, the Division of Tax Appeals received a petition for a refund of real property gains tax. In the petition, two errors were alleged: (1) that the Tentative Assessment and Return erroneously allowed only \$85,000.00 as the purchase price of the real property sold instead of \$400,000.00, as stated by petitioner in her claim for refund; and (2) that petitioner's claim for refund was erroneously denied on the ground that it was late.

In her petition, petitioner alleges that title to property was transferred from her former husband, Vincent Camuto, who was sole owner, to petitioner on December 23, 1976 as part of a divorce property settlement. It is also alleged that the transfer was a bona fide purchase by petitioner in an arm's-length taxable transaction and that petitioner's consideration for the property was the release of all of her claims upon the property and estate of her former husband.

Petitioner submits that her cost of the property was \$400,000.00 as stated in the divorce settlement agreement and allowed by the Internal Revenue Service after an audit of her 1988 return. In the process of her 1988 Internal Revenue Service audit, which was conducted in 1990, petitioner discovered proof of the divorce settlement agreement valuation of the property and her attorney informed her of her right to appeal. It is averred that the claim for a refund was filed soon after the Internal Revenue Service confirmed her \$400,000.00 cost in its report of October 2, 1990.

In her petition, petitioner also argues that she was not informed of her right to appeal the adjustment by either the Division of Taxation (hereinafter the "Division") or her attorney. Petitioner contends that the failure to be properly advised of her appeal rights and the finding of new evidence is reasonable cause to excuse the delay in filing, and the refund claim should be considered on its merits.

In support of its motion to dismiss, the Division alleges that on June 29, 1988 it issued a Tentative Assessment and Return to petitioner for real property transfer gains tax due on the transfer by petitioner of certain real property identified as Beach Road, Village of Southampton, New York. On or about June 30, 1988, petitioner transferred the real property which was the

subject of the Tentative Assessment and Return. On or about the same date, petitioner executed the Tentative Assessment and Return and paid \$189,140.00 as the real property transfer gains tax due on the transfer.

On December 26, 1990, petitioner filed a Claim for Refund dated December 18, 1990. In that claim, petitioner requested a refund of \$31,500.00 of the real property transfer gains tax she paid, based on her claim that the original purchase price of the property she transferred was understated and, as a result, she had overpaid the tax. In her claim for refund, petitioner indicated that the later of the date of the transfer or the date tax was paid was June 30, 1988. On January 23, 1991, the Division denied the claim for refund and, in an order dated April 24, 1992, the Bureau of Conciliation and Mediation Services denied petitioner's request for refund.

On the basis of the foregoing, the Division argues that in accordance with Tax Law § 1445(1) the claim for refund was untimely and the Division has no authority to waive the statute of limitations.

In opposition to the motion to dismiss, petitioner reiterates her position that she was not informed of her right to appeal the Tentative Assessment and Return by either the Division or her attorney. Petitioner submits that she was under the impression that the Tentative Assessment and Return was a "final negotiated settlement". Petitioner's counsel asserts that, in the process of the 1988 audit, petitioner discovered new evidence of the cost of her property and petitioner's attorney informed her of her right to appeal the gains tax assessment. Further, petitioner's claim for refund was prepared and filed after her cost for the property was confirmed in the Internal Revenue Service audit report of October 2, 1990.

On the basis of the foregoing, petitioner's counsel asserts that petitioner acted in good faith, and the failure to be properly advised of her appeal rights and the later finding of new evidence should, in fairness, excuse the delay in filing the refund claim. Petitioner's counsel also contends that additional grounds for granting the refund are a special refund authority and equitable recoupment.

In addition to the facts averred by the parties, the available documents show that the Tentative Assessment and Return, which petitioner signed on June 30, 1988, contained an Affidavit of Transferor which stated as follows:

"I swear (or affirm) under penalty of perjury that this return and all accompanying statements and schedules has been examined by me and is, to the best of my knowledge and belief, a true and complete return, made in good faith, pursuant to Article 31-B of the New York State Tax Law. This form is not a waiver of any right I may have to claim a refund of any gains tax paid or to otherwise challenge the tentative assessment as computed by the Department of Taxation and Finance."

OPINION

The Administrative Law Judge determined that petitioner's claim for refund was clearly untimely since it was filed with the Division on December 26, 1990, more than two years after June 30, 1988, the date petitioner asserts is the later of the date of transfer or the date of payment of the tax (Tax Law § 1445[1][a]).

The Administrative Law Judge rejected as without merit petitioner's assertion that there was reasonable cause for the late filing of the refund application because neither the Division nor her attorney informed her of her right to challenge the Tentative Assessment and Return. The Administrative Law Judge pointed out that the affidavit of transfer expressly advised petitioner that the execution of the form did not waive any right petitioner may have to claim a refund of gains tax or otherwise challenge the tentative assessment. "This statement should have at least put petitioner on notice that such rights may have existed. Petitioner's failure to explore these options with her attorney cannot toll the statute of limitations" (Order, pp. 4-5).

The Administrative Law Judge rejected petitioner's assertion that the delay in filing the refund claim should be excused because it was not until 1990 that she discovered the 1976 letter in connection with her divorce settlement which set forth the value of the property. The Administrative Law Judge pointed out that:

"[a]ssuming that the evidence referred to by petitioner constitutes 'newly-discovered evidence' [cite omitted] petitioner has not presented any authority to support the proposition that newly-discovered evidence tolls the statute of limitations (see, Siegel, NY Prac § 50 et seq; see also, CPLR 5015[a][2] [which permits relief from a judgment or order on the basis of newly-discovered evidence])" (Order, p. 5).

The Administrative Law Judge rejected as without merit petitioner's assertion that the refund may be granted under a special refund authority without regard to any period of limitations. The Administrative Law Judge pointed out that Article 31-B of the Tax Law (the gains tax) does not contain a provision similar to section 697(d) in Article 22, the Personal Income Tax. "Accordingly, petitioner's reliance on a special refund authority is misplaced" (Order, p. 6).

Finally, the Administrative Law Judge determined that the doctrine of equitable recoupment was not applicable:

"[u]nder the doctrine of equitable recoupment, a taxpayer is permitted, under some circumstances, to recoup a claim for taxes barred by the statute of limitations against a claim for taxes for the same period (see, Matter of Kadish, Tax Appeals Tribunal, November 15, 1990; see also, Black's Law Dictionary 484 [5th ed 1979]). Here, there is no outstanding claim for taxes upon which petitioner can recoup. Accordingly, the doctrine of equitable recoupment is inapplicable" (Order, p. 6).

On exception, petitioner raises the same arguments that she raised in response to the Division's motion.

The Division, on exception, fully supports the order of the Administrative Law Judge.

It is conceded by petitioner that the application for refund was filed beyond the two-year period of limitations set forth in Tax Law § 1445(1)(a). It is also a fact that the Division, in its answer to petitioner's petition, raised the statute of limitations as a reason for denying the refund application. Petitioner, in urging us to reverse the order of the Administrative Law Judge, raises the same arguments on exception as it did at hearing. In our view, the Administrative Law Judge in his order dealt fully and correctly with each of these assertions. Accordingly, we dismiss the petition on the ground that the application for refund was untimely, since it was filed beyond the period of limitations.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Anne M. Camuto is denied;
2. The order of the Administrative Law Judge is affirmed; and

3. The petition of Anne M. Camuto is denied.

DATED: Troy, New York
July 29, 1993

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner

/s/Maria T. Jones

Maria T. Jones
Commissioner