STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BARRY YAMPOL	:	DECISION DTA No. 813261
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1981, 1982 and 1983.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on June 27, 1996 with respect to the petition of Barry Yampol, 19667 Turnberry Way, North Miami Beach, Florida 33180-2508. Petitioner appeared by McDermott, Will & Emery (Arthur R. Rosen, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kenneth J. Schultz, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition and the Division of Taxation filed a reply. Oral argument, at the Division of Taxation's request, was heard on March 6, 1997 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Jenkins concurs but for the reasons set forth in a separate decision.

ISSUES

I. Whether reports of Federal changes filed by petitioner conceded the accuracy of the Federal changes so that the filings constituted self-assessments of tax which authorized the Division of Taxation to issue a Notice and Demand to petitioner for the tax so assessed.

II. Whether petitioner failed to comply with the requirements of Tax Law § 659, thus, authorizing the Division of Taxation to issue a Notice of Additional Tax Due to petitioner pursuant to Tax Law § 681(e), and, if so, whether the Notice and Demand issued to petitioner should be deemed a Notice of Additional Tax Due.

III. Whether petitioner's payment of income tax pursuant to an order of State Supreme Court constituted a timely assessment under Tax Law § 682(a), placing the burden of proof on petitioner to show that Federal changes to his taxable income were incorrect.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "3" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Petitioner timely filed New York personal income tax returns for 1981, 1982 and 1983, the years at issue.

The Internal Revenue Service ("IRS") audited petitioner's Federal income tax returns for the years at issue determining that petitioner owed additional Federal income taxes for each of the years. On February 19, 1991, the IRS issued its final determination to petitioner concerning additional taxes due,[1] and in or about April of 1991, petitioner paid to the IRS the amounts asserted as due.

On or about May 3, 1991, petitioner timely filed separate Forms IT-115, Report of Federal Changes, with respect to the Federal changes resulting from the IRS audit for each of the years at issue.

For the year 1981, petitioner reported the following summary of Federal changes in Part I of the IT-115:

Federal adjustments	
Contributions	$1,025,534.00
Schedule E (Partnership deduction)	339.00
Schedule C	394.00
Net Federal adjustments-increase	$1,026,267.00
Plus: Previously reported Federal taxable income	4,811,933.00
Corrected Federal taxable income	$5,838,200.00
Corrected Federal tax	$3,996,419.00
Less: Federal tax shown on return	3,610,206.00
Increase in Federal tax	$ 386,213.00
Plus: Interest	677,755.00
Total Federal amount assessed	$1,063,968.00

[1]The IRS issued a separate Statement of Tax Due on Federal Tax Return for each of the three years at issue.

In Part II of the Form IT-115 for 1981, petitioner calculated the "amount you owe" of $134,405.00 as a result of the above Federal changes as follows:

New York net income previously reported	$6,768,420.00
Net federal adjustment-increase	1,026,267.00
Corrected New York net income	$7,794,687.00
Maximum tax	$1,085,350.00
Recalculation of minimum income tax	(8,579.00)
Net tax	$1,076,771.00
Less: Tax previously reported	942,366.00
Amount you owe	$ 134,405.00

For the year 1982, petitioner reported the following summary of Federal changes in Part I of the IT-II5:

Federal adjustments	
Contributions	$ 945.297.00
Net Federal Adjustments-increase	945,297.00
Plus: Previously reported Federal taxable income	299,755.00
Corrected Federal taxable income	$1,245,052.00
Corrected Federal tax	$ 483,781.00
Less: Federal tax shown on return	265,368.00
Increase in Federal tax	$ 218,413.00
Plus: Interest	313,884.00
Total Federal amount assessed	$ 532,297.00

In Part II of the Form IT-115 for 1982, petitioner calculated the "amount you owe" of $107,542.00 as a result of the above Federal changes as follows:

New York net income previously reported	$1,987,471.00
Net Federal adjustment-increase	945,297.00
Corrected New York net income	$2,932,768.00
Maximum tax	$ 408,175.00
Recalculation of minimum income tax	(23,827.00)
Net tax	$ 384,348.00
Less: Tax previously reported	276,806.00
Amount you owe	$ 107,542.00

For the year 1983, petitioner reported the following summary of Federal changes in Part I of the IT-115:

Federal adjustments	
Contributions	$ 592,203.00
Net Federal adjustments-increase	$ 592,203.00
Plus: Previously reported Federal taxable income	859,390.00
Corrected Federal taxable income	$1,451,593.00
Corrected Federal tax	$ 817,285.00
Less: Federal tax shown on return	698,845.00
Increase in Federal tax	$ 118,440.00
Plus: Interest	123,928.00

Total Federal amount assessed	$ 242,368.00

In Part II of the Form IT-115 for 1983, petitioner initially calculated the "amount you owe" of $77,934.00, which was recalculated and corrected apparently by the Division of Taxation ("Division") to $80,114.00 on such form as follows:

New York net income previously reported	$ 417,606.00
Net Federal adjustment-increase	592,203.00
Corrected New York net income	$1,009,809.00
Maximum tax	$ 139,933.00
Recalculation of minimum income tax	(4,974.00)
Net tax	$ 134,959.00
Less: Tax previously reported	54,845.00
Amount you owe	$ 80,114.00

We modify the last paragraph of finding of fact "3" to read as follows:

> A review of petitioner's Forms IT-115 for each year in issue establishes that petitioner reported increases to his Federal taxable income, resulting from IRS adjustments to petitioner's reported contributions, of $1,025,534.00, $945,297.00 and $592,203.00 for the years 1981, 1982 and 1983, respectively. For 1981, there were also two very minor Federal adjustments apparently not at issue.[2]

On each of the three Forms IT-115, petitioner drew a line through type-printed language on the form that stated:

> "In accordance with Section 659 of the New York State Tax Law, I concede the accuracy of the above federal change or correction. (If you do not so concede, see instructions.)"

The instructions for the Forms IT-115 filed by petitioner provided, in relevant part, as follows:

> "Your signature - You must sign and date this report even if you do not concede the accuracy of the federal change or correction. If you do not so concede, draw a line through the concession statement above the signature line, sign and date this report and attach a statement of the reasons you disagree with the federal change or correction."

Petitioner signed each of the Forms IT-115 and wrote on each form above his signature: "See attached statement". The statement attached to each form was labelled a rider and provided as follows:

> "Taxpayer does not agree to the federal change. He intends to file a claim for refund with the Internal Revenue Service and pursue the matter, if necessary, in Federal Court."

---

[2] We modified finding of fact "3" to more precisely reflect the record.

Approximately a year and one-half after petitioner filed his report of Federal changes on the requisite forms, the Division on November 16, 1992 issued a Notice and Demand (a copy is attached to the petition, which was marked into the record as Exhibit "1", as an Exhibit "B" to the petition) to petitioner requesting payment of the additional New York State personal income tax attributable to the Federal changes for each of the years at issue. The Notice and Demand explained that "An amount is due for the Tax Type indicated above" (i.e., "personal income"). A second page to the Notice and Demand is captioned "Consolidated Statement of Tax Liabilities" and includes "the liability(ies) referred to in the enclosed Notice and Demand for Payment of Tax Due." This consolidated Statement of Tax Liabilities shows a "tax amount assessed" of $322,061.00 plus interest which corresponds to the additional New York personal income tax related to the Federal changes reported by petitioner. The Notice and Demand noted that:

> "If we do not receive full payment of the total amount due or your disagreement by 11/26/92: We will take legal action to compel payment of the balance due."

It should be noted that at no time subsequent to the filing of the Forms IT-115 has the Division issued a Notice of Deficiency concerning such forms and the related Federal changes.

By a letter dated December 1, 1992, Richard Savetsky, petitioner's accountant, responded to the Notice and Demand by noting that "we disagree with the amount due", and he enclosed drafts of the amended U.S. individual income tax returns for each of the years at issue, which would be eventually filed, as noted below, to show that petitioner intended to seek refunds of the additional taxes paid to the IRS as a result of the Federal changes.

On March 30, 1993, petitioner filed a Form 1040X, Amended U.S. Individual Income Tax Return for each of the years at issue. Such forms claimed a refund of the respective amounts paid to the IRS on or about April of 1991, as above. Petitioner articulated two basic grounds in support of his refund claims: (1) the Federal assessments were not timely because petitioner had revoked his "Form 872 consent to extend the time to assess tax", and (2) the IRS incorrectly disallowed petitioner's charitable deductions which, according to petitioner, properly

reflected the fair market value of his gifts to charity. The IRS denied petitioner's refund claims approximately six months later, by a letter dated July 12, 1993 (Exhibit "19"), which provided, in relevant part, as follows:

> "We have disallowed the claim[s] because our records indicate that the tax assessments for the above years were made on a timely basis. You have not presented new or previously unconsidered information. You had six months from the date the tax was assessed to file a claim. We are unable to consider the claims since they were filed outside the required period.
>
> If you want to sue to recover tax, penalties, or other amounts, you may file a lawsuit with the United States District Court having jurisdiction or the United States Claims Court. These courts are independent bodies and have no connection with the Internal Revenue Service.
>
> The law permits you to do this within two years from the mailing date of this letter."

It is observed that petitioner never filed amended New York State personal income tax returns for the years at issue. Neither did he ever report the denial of his refund claims by the IRS to the Division.

Coincidentally, about a month after the denial by the IRS of petitioner's refund claims, the Division's Tax Compliance Division sent a collection letter dated September 1, 1993, which was almost a year after it issued its Notice and Demand described above, to petitioner showing a balance due of $800,751.64 and providing, in relevant part, as follows:

> "The balance of your account, with accrued statutory charges, is shown above. Unless this balance is paid within ten days from the date of this notice, a tax warrant may be filed against you. The warrant will affect your credit rating, serve as a lien against your personal and real property, and allow us to enforce collection through our agents and courts in your area."

In response to the collection letter dated September 1, 1993, petitioner brought a CPLR Article 78 proceeding in Supreme Court, Albany County to prevent the Division from issuing any warrant for the years at issue. Justice Joseph Harris, as a condition for his signing petitioner's order to show cause and temporary restraining order with a return date of September 24, 1993 (Exhibit "9"), which commenced the Article 78 proceeding, required petitioner to establish an escrow account in a commercial bank in the City of Albany in the amount of $801,410.02 "subject to further order of this court". Approximately six months later, on March

31, 1994, the proceeding was dismissed by Justice John G. Connor on the grounds that petitioner had failed to exhaust his administrative remedies. Pursuant to the subsequent judgment of Justice Connor dated in May 1994 (the day is not readable on the photocopy in the record designated Exhibit "13"), petitioner was ordered to pay to the Division the $801,410.02 which had been placed in escrow, and the Division was prohibited from issuing any warrant against petitioner for the years at issue if any further balance alleged to be owed by petitioner was paid to the Division. On June 9, 1994, the amount of $851,405.91 was paid to the Division, which represented payment in full of New York personal income tax totalling $322,061.00, consisting of $134,405.00 for 1981, $107,542.00 for 1982 and $80,114.00 for 1983, plus interest.

Petitioner's payment of the total amount of $851,405.91 was transmitted to the Division by his representative's letter dated June 9, 1994 which noted that "[t]his payment is being made under protest." In his petition, petitioner alleged that the Division deemed this transmittal letter a request for refund of the $851,405.91 payment. However, the Division in its answer denied such allegation. It is observed that petitioner transmitted photocopies of Claims for Credit or Refund of Personal Income Tax, forms IT-113X, by a letter dated June 24, 1994, and the originals of such claims by a transmittal letter dated August 15, 1994. In any event, the Division issued a Notice of Disallowance dated August 31, 1994, which denied in full petitioner's request for refund of such payment. The Notice of Disallowance provided, in relevant part, as follows:

> "Since you did not attach a Statement to your Forms IT-115 when filed, stating why you did not agree with the Federal adjustments, we have properly issued a Notice and Demand in assessing the New York State tax due.
>
> Furthermore, since you did not report to New York State the final Federal determination pertaining to your Federal Amended Returns, Forms 1040X, within 90 days from the date the Internal Revenue Service denied your claim for refund, there is no Statute of Limitations.
>
> Therefore, [the assessment] has been sustained."

On July 11, 1995, petitioner and his wife filed a complaint in the United States District Court for the Southern District of Florida (Petitioner's Exhibit "A") against the United States of

America seeking a refund of the additional Federal income taxes for the years at issue which petitioner had paid to the IRS in or about April of 1991, as noted above. As noted above, the IRS had denied petitioner's claims for refund of such taxes by its letter dated July 12, 1993.

The parties entered into a stipulation dated August 7, 1995 (Exhibit "17"), of which relevant portions have been incorporated herein.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that no tax had been self-assessed by petitioner by virtue of his report of Federal changes and, consequently, that the Division was without authority to proceed against petitioner for collection of tax by issuance of a Notice and Demand.

The Administrative Law Judge concluded that petitioner complied with Tax Law § 659 on the basis of three factual findings: (1) petitioner drew a line through the concession statement on each Form IT-115; (2) petitioner attached a rider to each report of Federal changes stating that he did not agree with the Federal change and intended to file refund claims with the IRS; and (3) the Forms IT-115, as completed by petitioner, disclosed the basis for petitioner's disagreement with the Federal change, namely the disallowance by the IRS of certain charitable deductions.

Since the reports of Federal changes (Forms IT-115) filed by petitioner complied with the requirements of Tax Law § 659, the Administrative Law Judge concluded that neither the "deemed to be assessed" provision of Tax Law § 682(a) or the provision for issuing a Notice of Additional Tax Due under Tax Law § 681(e)(1) was available to the Division. Rather, he determined, the only avenue open to the Division was to issue a Notice of Deficiency within two years of the time the reports of Federal changes were filed in accordance with Tax Law § 683(c)(3). Since the two-year period of limitation passed and a Notice of Deficiency was not issued, the Administrative Law Judge determined that the Division is now barred from seeking to collect the tax from petitioner.

ARGUMENTS ON EXCEPTION

The Division reiterates the arguments made to the Administrative Law Judge.[3] First, the Division argues that petitioner did not comply with Tax Law § 659 because he failed to "state wherein [the federal determination] is erroneous" (Tax Law § 659). The Division contends that petitioner's failure to state the basis for his disagreement with the Federal changes constitutes a concession that the Federal changes were correct, thus triggering the deemed assessed provision of Tax Law § 682(a). Since petitioner did not then pay the tax assessments, the Division maintains that it properly issued a Notice and Demand for payment of the outstanding assessments pursuant to Tax Law § 692(b).

The Division takes exception to the Administrative Law Judge's factual conclusion that the Forms IT-115 disclose the basis for the Federal changes. The Division notes that the Forms IT-115 filed by petitioner refer to "contributions" and not charitable deductions. On this basis, the Division argues that the Administrative Law Judge must have referred to documents not submitted with the IT-115s in order to conclude that the Federal changes were disallowances of charitable deductions.

If it is found that petitioner did not concede the correctness of the Federal changes, the Division contends that petitioner failed to comply with each requirement of Tax Law § 659 because he did not include a statement detailing the basis for his disagreement with the Federal changes. The Division argues that under these circumstances it was proper to issue a Notice of Additional Tax Due under Tax Law § 681(e)(1). Although the issued notice was captioned a "Notice and Demand," the Division argues that it should be treated as though it were a Notice of Additional Tax Due. The Division argues that the caption is irrelevant since petitioner was fully apprised that the Division was asserting a deficiency of tax resulting from the Federal changes and responded as though the Notice and Demand was a Notice of Additional Tax Due.

---

[3] In the proceeding below, the Division argued that petitioner's refund claim was properly denied because petitioner did not file amended State returns within 90 days of filing amended Federal returns (Tax Law § 659). The Division did not raise this issue in its brief on exception. Therefore, we deem the argument to be abandoned.

In response, petitioner states that the Administrative Law Judge correctly found that petitioner fully complied with the requirements of Tax Law § 659. Petitioner asserts that the Forms IT-115 disclose that petitioner disagreed with the disallowance of the deductions for contributions, and he argues that the nature of the contributions disallowed by the IRS is irrelevant to the issue of whether petitioner self-assessed the tax. Petitioner agrees with the Administrative Law Judge that the Division was required to issue a Notice of Deficiency before any action could be taken for collection of the tax. Petitioner asserts that Tax Law § 681(e)(1) is irrelevant because he complied with section 659. He also maintains that deeming the Notice and Demand to be a Notice of Additional Tax Due would be unfair, especially in this case where the Division's position is premised on petitioner's purported failure to exactly comply with the letter of the law.

OPINION

We affirm the determination of the Administrative Law Judge.

The first issue raised on exception is whether the Division had the statutory authority to issue a Notice and Demand to petitioner for collection of tax deficiencies resulting from the Federal changes. Tax Law § 692(b) provides for the issuance of a Notice and Demand. As pertinent, it states: "[t]he [Division] shall as soon as practicable give notice to each person liable for any amount of tax, addition to tax, penalty or interest, which has been assessed but remains unpaid, stating the amount and demanding payment thereof" (emphasis added).

We begin our analysis by reviewing the statutory provisions relied on by the Administrative Law Judge.

There are three relevant provisions in Article 22 which provide for the issuance of an assessment of income tax. Tax Law § 681(a) states that the Division may issue a Notice of Deficiency to a taxpayer if, upon examination of a taxpayer's return, the Division determines that there is a deficiency of income tax. The Notice of Deficiency will become an assessment of the amount of tax specified in the Notice, with interest and any additions to tax as stated, unless the taxpayer files a petition with the Division of Tax Appeals within 90 days from the mailing

of the Notice (Tax Law § 681[b]). Pursuant to Tax Law § 681(c), "[n]o assessment of a deficiency in tax and no levy or proceeding in court for its collection shall be made . . . until a notice of deficiency has been mailed to the taxpayer, nor until the expiration of the time for filing a petition contesting such notice . . . ."

Tax Law § 659 provides in relevant part:

> "[i]f the amount of a taxpayer's federal taxable income . . . is changed or corrected by the United States internal revenue service . . . or if a taxpayer's claim for credit or refund of federal income tax is disallowed in whole or in part, the taxpayer . . . shall report such change or correction in federal taxable income . . . or such disallowance of the claim for credit or refund within ninety days after the final determination of such change, correction, renegotiation or disallowance, or as otherwise required by the [commissioner], and shall concede the accuracy of such determination or state wherein it is erroneous . . . . Any taxpayer filing an amended federal income tax return . . . shall also file within ninety days thereafter an amended return under this article, and shall give such information as the [commissioner] may require" (emphasis added).

If a report of Federal changes filed pursuant to Tax Law § 659 "concedes the accuracy of a federal change or correction, any deficiency in tax . . . resulting therefrom shall be deemed to be assessed on the date of filing such report . . . and such assessment shall be timely notwithstanding section six hundred eighty-three" (Tax Law § 682[a], emphasis added).

Tax Law § 681(e)(1) provides that if a taxpayer fails to comply with section 659 of the Tax Law then instead of issuing a Notice of Deficiency the Division "may assess a deficiency based upon such federal change, correction or disallowance by mailing to the taxpayer a notice of additional tax due." The deficiencies, interest and additions to tax or penalties stated in a Notice of Additional Tax Due are deemed assessed on the date the notice is mailed

> "unless within thirty days after the mailing of such notice a report of the federal change, correction or disallowance or an amended return, where such return was required by section six hundred fifty-nine, is filed accompanied by a statement showing wherein such federal determination and such notice of additional tax due are erroneous" (Tax Law § 681[e][1]).

If the taxpayer complies with Tax Law § 659, then the Division may issue an assessment of tax at any time within two years after the date on which the report of Federal changes is filed (Tax Law § 683[c][3]).

With respect to Tax Law § 659, there is only one circumstance in which a deficiency in tax may be "deemed to be assessed" under the authority of Tax Law § 682(a) and that is where the taxpayer "concedes the accuracy of a federal change or correction." Petitioner did not concede the accuracy of the Federal changes. On each Form IT-115 filed, petitioner drew a line through the concession statement and attached a separate statement stating: "Taxpayer does not agree to the federal change." We agree with the Administrative Law Judge that these unequivocal expressions of disagreement with the Federal changes cannot be converted into concessions to those changes. Inasmuch as petitioner did not concede the accuracy of the Federal changes, the deficiencies in tax resulting from the changes cannot "be deemed to be assessed on the date of filing of such report" (Tax Law § 682[a]). It follows that since the tax was not self-assessed with the filing of the reports, the Division did not have authority to issue a Notice and Demand under Tax Law § 692(b).

In addition, we agree with the Administrative Law Judge that the procedure for collection of tax set forth in Tax Law § 681(e)(1) was not available to the Division because petitioner complied with each requirement of Tax Law § 659. The Division argues that petitioner failed to comply with the statute because he failed "to state wherein [the Federal determination] is erroneous" (Tax Law § 659). We reject this contention.

The Administrative Law Judge concluded that the term "contributions" as used on the IT-115s meant charitable contributions and, therefore, that the Federal changes disagreed with consisted of disallowances of charitable deductions. We think this was a reasonable inference based on the statements made in the IT-115s. But even if the nature of the contributions was not clearly stated in the reports, the reports adequately apprised the Division of the basis for petitioner's claim that the Federal changes were erroneous. "Wherein" means "in what particular or respect" (Merriam Webster's Collegiate Dictionary 1346 [10th ed 1993]). As completed, the IT-115s state in what respect petitioner believed the Federal changes were erroneous: amounts deducted for contributions were disallowed by the IRS resulting in an increase to petitioner's Federal taxable income.

We reject the Division's contention that the Administrative Law Judge inappropriately looked to ***Matter of Di Lorenzo***, (State Tax Commn., December 29, 1982) for guidance in this matter.[4] In ***Di Lorenzo***, the petitioners consented to an IRS audit determination but failed to file the requisite Form IT-115 within 90 days of the consent. Consequently, the Audit Division issued a Notice of Additional Tax Due to the petitioners. The petitioners then filed a Form IT-115 with a cover letter. The petitioners did not cross out the concession statement on the IT-115. They asserted in the cover letter that they did not concede the accuracy of the Federal change and they asked for an additional 90 days to review the Federal proceeding and to file a statement showing where the Federal determination was erroneous. In response, the Audit Division withdrew its Notice of Additional Tax Due and issued a Notice of Deficiency. The issue before the State Tax Commission was whether the petitioners could challenge the correctness of the final Federal determination. The parties stipulated that if the petitioners were entitled to challenge the Federal determination then the matter would be remanded for a State audit. In resolving this issue, the State Tax Commission held that the "filing of the form IT-115 and letter constitutes substantial compliance with Tax Law § 681(e)(1)." Like section 659, Tax Law § 681(e)(1) requires the taxpayer to file a report of Federal changes "accompanied by a statement showing wherein such federal determination and such notice of additional tax due are erroneous" within 30 days of the issuance of a Notice of Additional Tax Due (emphasis added). Thus, our conclusion that petitioner substantially complied with the requirements of Tax Law § 659 is consistent with the finding of the State Tax Commission in ***Di Lorenzo***.

The purpose of the statutory requirement that the taxpayer state the basis for his or her disagreement with the Federal determination "is to afford the Division of Taxation notice of the reasons for the disagreement so that it may look into the merits of the federal changes" (Division's brief in support, p. 14). The Division was afforded such an opportunity here. As stated by the Administrative Law Judge:

---

[4]We note that as decisions of a body of coordinate jurisdiction, the State Tax Commission decisions are not binding precedent for us, but are entitled to respectful consideration (***Matter of The Racal Corp. & Decca Elecs.***, Tax Appeals Tribunal, May 13, 1993).

> "[i]f the Division believed that it needed more information and that the report did not adequately disclose 'wherein' the Federal changes were erroneous, it had a ready remedy. Tax Law § 683(c)(3) allows the Division to issue an assessment against a taxpayer, who complies with Tax Law § 659 and does not concede the Federal changes, 'at any time within two years after such report . . . was filed'" (Determination, conclusion of law "E").

Because we agree with the Administrative Law Judge that petitioner complied with the requirements of Tax Law § 659, it is not necessary for us to address the Division's contention that the Notice and Demand issued to petitioner should be deemed a Notice of Additional Tax Due under Tax Law § 681(e)(1).

We will next address the second issue raised on exception: whether the Division properly denied petitioner's claim for refund of tax which was paid pursuant to the order of the State Supreme Court. The Administrative Law Judge found that the monies collected constituted an "overpayment" of tax under Tax Law § 686(g). Since petitioner timely filed a claim for refund of the overpayment, the Administrative Law Judge concluded that he is entitled to the refund of his payment of $851,405.91 plus interest.

As relevant, Tax Law § 682(a) provides as follows:

> "[a]ny amount paid as tax or in respect of a tax, other than amounts withheld at the source or paid as estimated income tax, shall be deemed to be assessed upon the date of receipt of payment, notwithstanding any other provisions."

It is the Division's position that under this provision the tax was assessed in June 1994 when the tax was paid. According to the Division, the Division's failure to issue a Notice of Deficiency was rendered academic once the tax was paid because, at that point, petitioner's claim was converted to a challenge to a denial of a refund claim. The Division maintains that this placed the burden on petitioner to establish substantive grounds for granting his refund claim.

Petitioner asserts that the Division's position is in conflict with Tax Law § 686(g). Even if petitioner's payment is found to constitute an assessment of tax, petitioner maintains that the assessment was barred by the statute of limitations found at Tax Law § 683(c)(3).

We affirm the determination of the Administrative Law Judge.

Tax Law § 686(g) states:

> "Assessment and collection after limitation period.--If any amount of income tax is assessed or collected after the expiration of the period of limitations properly applicable thereto, such amount shall be considered an overpayment."

Petitioner filed the Forms IT-115 on May 3, 1991. We have held that petitioner complied with Tax Law § 659; therefore, the period of limitation for issuing an assessment based upon the filing of the Forms IT-115 was two years (Tax Law § 683[a][3]). Since the period for assessment of tax expired on or about May 3, 1993, petitioner's payment of the tax in June 1994 must be considered an overpayment under Tax Law § 686(g). Petitioner timely filed a claim for refund of the overpayment (Tax Law § 687[a]); therefore, he is entitled to a refund.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Barry Yampol is granted; and
4. The refund claim for $851,405.91 plus interest due and owing is granted.

DATED: Troy, New York
August 28, 198

_____
Donald C. DeWitt
President

_____
Joseph W. Pinto, Jr.
Commissioner

Commissioner Jenkins concurring:

I concur in the result reached by the majority in this matter but for the reasons set forth below.

Tax Law § 659 provides, inter alia, that where a taxpayer's taxable income has been changed or corrected by the IRS, he/she shall report such changes in Federal taxable income,

and "shall concede the accuracy of such determination or state wherein it is erroneous . . ." ("Statement of Error"). I disagree with the majority that petitioner's "unequivocal expression of disagreement" with the Federal changes is sufficient to meet the requirements of this provision. Saying "I don't owe the tax" does not explain why.

Under section 659, a taxpayer can either concede the accuracy of the Federal changes or not. But if he does not concede them, in order to comply with Tax Law § 659, the taxpayer must set forth a brief statement of why he disagrees, i.e., "wherein it is erroneous." This statement need be nothing more than "I feel the IRS was incorrect because . . . ." This case demonstrates why it can be important for a disagreeing taxpayer to comply with the language of section 659 by setting forth a statement of error. As part of this statutory scheme, the taxpayer's statement of error, or lack thereof, triggers the Division's appropriate response.

In this case, the taxpayer failed to comply with Tax Law § 659 because he failed to set forth a statement of error. Where there is a failure to comply with section 659, the Division "may assess a deficiency" arising from Federal changes by mailing a "notice of additional tax due" (Tax Law § 681[e][1]) or a Notice of Deficiency (Tax Law § 681[a]). In this case, the Division did neither. Instead, it issued a Notice and Demand to petitioner (Tax Law § 692[b]), and argues that we should treat it as if it is a Notice of Additional Tax Due.

I agree with the Division that petitioner has failed to comply with Tax Law § 659. However, I also agree with petitioner that the Division did not have authority under the statute to proceed upon a Notice and Demand. I view the Division's failure as dispositive and fatal to its argument. That being the case, while I disagree with the reasoning by the majority, I concur in the result.

DATED: Troy, New York
August 28, 1997

Carroll R. Jenkins

Commissioner