

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ELLEN LINKER-MARTIN	:	DECISION
	:	DTA NO. 815158
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 1986 through 1993.	:	

Petitioner Ellen Linker-Martin, 163 Roundhill Road, Roslyn Heights, New York 11577-1536, filed an exception to the determination of the Administrative Law Judge issued on January 12, 1998. Petitioner appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner filed a letter in support of her exception. The Division of Taxation did not file a brief in opposition. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly denied petitioner's claims for refund of New York State personal income taxes for tax years 1986 through 1993.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On May 28, 1996¹, Ellen Linker Martin (“petitioner”)² filed a petition with the Division of Tax Appeals requesting review of all notices and assessments issued to her from 1986 to 1993. The petition was signed by Mrs. Martin on May 27, 1996 and was received by the Division of Tax Appeals on May 30, 1996, as evidenced by a date stamp.

Mrs. Martin indicates that she has worked in New Jersey since 1979, and that, in April 1996, she received notification that she owed New Jersey state income taxes from 1987 through the current tax year. She claims to have overpaid New York State income taxes in the same years, and seeks refunds from New York State for the years 1986 through 1993. Attached to the petition is a Consolidated Statement of Tax Liabilities dated January 18, 1996. Such statement indicates that a 1991 income tax liability arising from income tax assessment L007548206-4 in the amount of \$3,109.00, plus penalty and interest (totaling \$4,502.03) is subject to collection action. In addition, the statement provides information pertaining to liabilities which were under review at that time: Assessment Nos. L-00805461-9 and L-010521274-2. The former is an assessment for tax year 1990 asserting additional tax due in the amount of \$506.18 plus interest. The latter pertains to tax year 1992, and asserts additional tax due in the amount of \$1,880.30 plus interest.

Petitioner filed her 1986 New York State Income Tax return in a timely manner, on or before April 15, 1987. In connection with tax year 1986, four notices were issued to petitioner: two notice and demands and two notices of deficiency. The information pertaining to such

¹Although the Division of Taxation’s answer indicates that the petition was filed on April 30, 1996, the postal stamp on the mailing envelope is dated May 28, 1996, and the petition indicates receipt by the Division of Tax Appeals on May 30, 1996.

²Although petitioner filed a joint tax return with her husband, Alan B. Martin, any reference to petitioner herein is solely to Ellen Linker Martin.

notices was provided by the affidavit of Robert J. Miller, a Tax Technician III in the Central Office Audit Bureau-Income Tax-Audit Group 3 of the New York State Department of Taxation and Finance. Mr. Miller reviewed petitioner's file and the Division of Taxation's Case Resource and Tracking System ("CARTS"), the computer system used for storing information and generating assessments sent to taxpayers. The details of such notices are set forth below:

a. Notice and Demand L001592177, dated March 26, 1990, was issued to petitioner for a penalty in the amount of \$57.58, for her failure to pre-pay 80% of her New York State income tax for the tax year 1986. Petitioner paid this assessment in full on April 2, 1990.

b. Notice and Demand L001592178, dated March 26, 1990, was issued to petitioner for a penalty in the amount of \$21.74, for her failure to pre-pay 80% of her New York City income tax for the tax year 1986. Petitioner paid this assessment in full on April 2, 1990.

c. Notice of Deficiency L000334081 (converted from Assessment No. A890300431), dated April 5, 1990, was issued to petitioner asserting additional income tax due in the amount of \$1,768.29, plus penalty and interest. The assessment was issued due to petitioner's failure to calculate New York State minimum income tax for tax year 1986. The assessment was paid in full in the following increments: on both April 10, 1991 and on May 13, 1991, \$1,000.00 was paid; on June 3, 1991, \$530.43 was paid.

d. Notice of Deficiency L000373287 (converted from Assessment No. A8903030431) dated April 5, 1990, was issued to petitioner asserting additional income tax due in the amount of \$ 736.79 plus penalty and interest. The assessment was issued due to petitioner's failure to calculate New York City minimum income tax for tax year 1986. The assessment was paid in

full in two payments: on January 19, 1993, petitioner paid \$736.79, and on July 13, 1994, \$598.50 was paid.

The Division of Taxation (“Division”) maintains that since the petition was filed on May 28, 1996 (see Footnote 1), petitioner’s claim for refund of amounts paid in a, b and c above, (represented by the filing of her petition), is untimely, since it is beyond the statute of limitations set forth in Tax Law § 687.

Petitioner filed her 1987 New York State Resident Income Tax Return on or about August 15, 1988,³ and subsequently file an amended return for that year dated October 1, 1994. The Division’s date stamp indicates receipt of the amended return on October 5, 1994. The amended return purportedly seeks a refund of taxes due to petitioner’s entitlement to a New York State resident tax credit for 1987. The record does not reflect any response by the Division to petitioner’s amended return prior to the filing of the subject petition.

With regard to the 1987 refund claim, the Division takes the position that the petition (deemed as a claim for refund) was untimely as it was filed beyond the statute of limitations of Tax Law § 687(a).

Petitioner filed her 1988 New York State Resident Income Tax Return on or about August 15, 1989, as is evidenced by the Division’s in-date stamp. There is no documentation in the record which would indicate that a claim for refund for 1988 was filed prior to the subject petition.

³The Answer of the Division states that petitioner’s 1987 return was filed on or before April 15, 1988. However, the 1987 return which was introduced into the record bears a Division date stamp of August 15, 1988.

The Division maintains that the petition (deemed as a claim for refund) was filed beyond the statute of limitations of Tax Law § 687(a).

The information pertinent to tax year 1989 was provided by the affidavit of Thomas Donnelly, a Tax Processing Manager II who has been using the CARTS system since its inception in 1990. Petitioner filed her 1989 New York State Resident Income Tax Return in an untimely manner on or about August 15, 1990. Petitioner was assessed for her late-filed, part-paid return by Notice and Demand L002169250 (converted from R901116215) dated November 27, 1990. Preceding the issuance of the Notice and Demand dated November 27, 1990, was the Division's issuance of a Statement of Income Tax Adjustment, R9011162135, dated November 11, 1990. The Statement of Income Tax Adjustment indicates that petitioner's return for 1989 was recomputed because petitioner and her husband incorrectly calculated their taxable income, a balance remained due, petitioner had attempted to claim New Jersey tax withheld as New York State withholding tax, and the Division had imposed penalties for late filing and late payment, as well as interest.

At an undetermined date prior to April 1991, the Division adjusted assessment L002169250 by allowing petitioner a resident tax credit for taxes paid to New Jersey for tax year 1989. The reduced assessment was paid in full by petitioner on April 30, 1991.⁴

Subsequently, petitioner filed an amended return (Form IT-201-X) for 1989, purportedly claiming a credit for New Jersey taxes paid for the same tax year. The amended return is signed

⁴It is noted that the evidence is at odds with the pleadings with regard to when petitioner completed her payment of the 1989 assessment. However, the evidence as established by the affidavit is accepted, and modified only to the extent that the affidavit stated payment was made on April 31, 1991.

by petitioner and dated October 31, 1993. It is date-stamped as having been received by the Division on November 3, 1993.

Petitioner filed a 1990 New York State Resident Income Tax Return (Form IT-201) on or about August 14, 1991. In connection with tax year 1990, three notices were issued. Neal Moore, a Tax Technician III in the Division's Central Office Audit Bureau-Income Tax Audit Group 2, reviewed petitioner's tax file and CARTS information relevant to tax year 1990. Mr. Moore's affidavit provided information pertinent to 1990. The notices issued to petitioner for that tax year were the following:

a. A Notice and Demand, L005209944, dated January 24, 1992, was issued to petitioner due to numerous errors made by petitioner on her 1990 income tax return: petitioner and her husband erroneously took personal exemptions for themselves on their 1990 return; they erroneously overstated the allowable exemption amount by \$5,150.00; and they overstated the allowable withholding tax to apply to their New York return. The assessment was paid in full by payment of \$440.01 made on April 2, 1992.

Petitioner filed an amended 1990 return on or about October 15, 1993, claiming she is entitled to a New York State resident tax credit for taxes paid to New Jersey for the same year.

The Notice of Claim (described in c. below), issued over two years after Notice and Demand L005209944, states that such Notice and Demand was being canceled because the exemption discrepancy was being included in the Notice of Claim. However, as of the date of Mr. Moore's affidavit, April 10, 1997, the cancellation of the Notice and Demand had not been effectuated. Thus, the Division has agreed to refund petitioner's payment in the amount of \$440.01, provided the Martins have no other outstanding assessments.

b. Notice of Deficiency L008054461, dated November 29, 1993, was issued for tax due in the amount of \$275.38, plus penalty and interest. The Notice of Deficiency was issued because discrepancies existed between petitioner's 1990 Federal income tax return and her 1990 New York return. A Statement of Proposed Audit Changes for L008054461 dated October 18, 1993 indicates that petitioner's 1990 New York State itemized deductions did not match her 1990 Federal itemized deductions.

c. A Notice of Claim dated April 29, 1994 was issued to petitioner, wherein a greater deficiency was assessed than originally assessed in Notice of Deficiency L008054461. Neal Moore's affidavit sets forth the following explanation for the greater deficiency in the Notice of Claim:

The amount of \$2,919.00 as taxes paid in a prior year was disallowed as a New York subtraction modification to income, but was allowed as an itemized deduction; a resident tax credit was disallowed; a correction in New York income that resulted from the income being incorrectly carried over from the original return to the amended return; Alan Martin's City of New York Non-resident Earnings Tax was recomputed to \$103.91; the adjustments originally in assessment L005209944 for an incorrect exemption amount and an incorrect New York State withholding amount, which were included in the Notice of Claim recomputation, but were not mentioned in the text of the Notice of Claim; and the Notice of Claim also eliminated the \$305.40 of City of New York Non-resident Earnings Tax computed by Ellen Martin, but this was not mentioned in the Notice of Claim.

According to Mr. Moore's review of petitioner's 1990 tax file, petitioner requested a conference with the Bureau of Conciliation and Mediation Services ("BCMS"), regarding Notice of Deficiency L008054461 and the Notice of Claim. The conciliation conferee issued Conciliation Order #135330 dated May 12, 1995, wherein the conferee canceled the penalty on assessment L008054461 (though the tax was sustained since it was based on amounts reported to

the Internal Revenue Service), and recalculated the Notice of Claim. The original amount of tax due on assessment L008054461 of \$275.38 was adjusted to include the tax due on the Notice of Claim as recalculated by BCMS. The Notice of Claim was reduced to \$230.80, resulting in part from the allowance of a resident tax credit in the amount of \$1,881.00 for taxes paid to the State of New Jersey which had been disallowed by the Notice of Claim. Petitioner was allowed a personal income tax refund for tax year 1995 in the amount of \$1,272.86, \$730.24 of which was applied to assessment L008054461 and the Notice of Claim, resulting in their payment in full.

Petitioner filed a New York State Nonresident and Part-Year Resident Income Tax Return (Form IT-203) for tax year 1991, dated August 9, 1992, on or about August 15, 1992 (as indicated by the Division's in-date stamp). Attached to the return is Form IT-370, Application for Automatic Extension of Time to File for Individuals, for tax year 1991 which is dated April 12, 1992.⁵

The Division issued to petitioner Notice of Deficiency L007548206-4 dated February 3, 1994, asserting additional tax due in the amount of \$3,109.00, plus penalty and interest. Petitioner requested a conciliation conference which resulted in an order denying petitioner's request as untimely.⁶ A petition was filed with the Division of Tax Appeals and a Determination as to Notice of Deficiency L007548206-4 was issued on May 16, 1996, which granted the

⁵The Division's Answer states that the return for 1991 was filed late. However, the documents indicate this return was timely filed on extension, and is treated as such in this determination.

⁶Certain facts pertaining to tax year 1991 were extracted from the Determination issued in the *Matter of Ellen Linker Martin* (Division of Tax Appeals, May 16, 1996), which was made a part of the record, including information pertaining to petitioner's request for a conciliation conference. A Conciliation Order (CMS No. 151938) dated February 23, 1996, referencing Notice Number L007548206 in the name of Alan B. Martin was introduced as a part of the record. Since Mr. Martin is not a party to this proceeding, such Order was not considered relevant information.

Division's Motion for Summary Judgment and dismissed petitioner's petition to review the merits of the notice. No exception was taken to such Determination. As of August 28, 1996, the date of the Division's Answer, Notice of Deficiency L007548206 had not been paid in full.

Petitioner filed a 1992 New York State Nonresident and Part-Year Resident Tax Return dated April 11, 1993, on or about April 15, 1993. Notice No. L010521274, dated October 3, 1995 was issued assessing additional tax due in the amount of \$1,880.30 plus interest. In lieu of a conciliation conference scheduled to address Notice No. L010521274, petitioner opted to have the matter decided by correspondence. A Conciliation Order dated January 24, 1997 (CMS No. 150363) was issued to petitioner sustaining the statutory notice.

Petitioner filed a 1993 New York State Personal Income Tax Return, Form IT-201, in a timely manner on or before April 15, 1994. Petitioner was issued a Notice and Demand for the 1993 tax year, Assessment #R940924713, which was converted to L009480298 dated September 9, 1994, due to a math error on the return. Petitioner was issued an assessment in the amount of \$24.09 due to the incorrect calculation of New York State tax due. Petitioner paid the 1993 Notice and Demand on or about September 16, 1994.

The Division issued Notice of Deficiency L011942212 dated June 21, 1996, assessing additional tax due. In lieu of a conciliation conference scheduled with BCMS on November 22, 1996, petitioner opted to have the matter decided by correspondence. A Conciliation Order (CMS No. 156085) dated January 24, 1997 was issued, resulting in a recomputation of the statutory notice to tax due in the amount of \$584.09. The penalty was waived, but interest was imposed.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that where the Division determines there is an income tax deficiency, it must mail a Notice of Deficiency to the taxpayer at his or her last known address by certified or registered mail (Tax Law § 681[a]). If such notice is properly mailed, it shall constitute a final assessment unless the taxpayer files a petition protesting the notice within 90 days of the Division's mailing the notice (*citing*, Tax Law § 681[b]; *Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). The taxpayer has the option of protesting the notice by requesting a conciliation conference in lieu of filing a petition for hearing (Tax Law § 689[b]) if the 90-day period to petition for hearing has not elapsed (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[c]).

Next, the Administrative Law Judge noted that Tax Law former § 687(a), effective for the years in issue, provided, in pertinent part, with respect to refunds:

General.--Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within two years from the time the tax was paid

Tax Law § 689(e) addresses the burden of proof:

In any case before the tax commission under this article, the burden of proof shall be upon the petitioner except for the following issues, as to which the burden of proof shall be upon the tax commission:

* * *

(3) whether the petitioner is liable for any increase in a deficiency where such increase is asserted initially after a notice of deficiency was mailed and a petition under this section filed, unless such increase in deficiency is the result of a change or correction required to be reported under section six hundred fifty-nine, and of

which change or correction the tax commission had no notice at the time it mailed the notice of deficiency

The petition in this matter, filed on May 28, 1996, was treated by the Administrative Law Judge as a claim for refund for the years specified by petitioner. The Administrative Law Judge pointed out that in order for the merits of a refund claim to be addressed, the claim must be properly and timely filed. The Administrative Law Judge concluded that, pursuant to the statute of limitations imposed by Tax Law § 687(a), the claim for refund was not timely as to the following notices:

1986

a. Notice and Demand L001592177 - The claim for refund was untimely after April 2, 1992.

b. Notice and Demand L001592178 - The claim for refund was untimely after April 2, 1992.

c. Notice of Deficiency L000334081 - The claim for refund was untimely after June 13, 1993.

1989

Notice and Demand L002169250 - The claim for refund was untimely after August 15, 1993.

1990

Notice and Demand L005209944 - The claim for refund was untimely after August 14, 1994. However, a Notice of Claim dated April 29, 1994 canceled this notice and demand and the Division has agreed to refund (or credit petitioner with payment, if there are outstanding tax obligations) \$440.01.

Notice of Deficiency L000373287, issued for tax year 1986 and dated April 5, 1990, assessed petitioner additional tax due for failure to calculate New York City minimum income tax for 1986. Petitioner paid the assessment in two installments, one on January 19, 1993 and the

second on July 13, 1994. Since the petition was filed within two years of the July 1994 payment, the Administrative Law Judge concluded the petition was a timely claim for refund as to that portion of the assessment (Tax Law § 687[a]). However, since petitioner offered no evidence in support of her case, the Administrative Law Judge denied petitioner's claim for refund for 1986.

With respect to tax year 1987, petitioner filed an amended return dated October 1, 1994. Since the amended return, also referred to as a claim for refund, was filed more than three years after petitioner's original return was filed on August 15, 1988, the Administrative Law Judge concluded it was untimely (Tax Law § 687[a]) and the merits of the refund claim could not be addressed.

On or about October 31, 1993, an amended return was also filed by petitioner with respect to tax year 1989 claiming a refund for taxes paid to New Jersey for the same year. The Administrative Law Judge concluded this claim for refund was untimely since it was filed after August 15, 1993 (Tax Law § 687[a]).⁷

For tax year 1988, petitioner filed her New York State return on or about August 15, 1989. The Administrative Law Judge noted that any claim for refund for that tax year would not be timely after August 15, 1992. Since petitioner's claim for refund for 1988 is deemed filed on May 28, 1996, the date of the petition, the Administrative Law Judge concluded the refund claim must be denied as untimely (Tax Law § 687[a]). Further, the Administrative Law Judge noted, petitioner did not specify the basis for any refund for 1988 and submitted no documentation to support her refund claim (Tax Law § 689[e]).

⁷It is noted that when the Division adjusted assessment L002169250, the Division allowed petitioner a resident tax credit for tax year 1989. Thus, petitioner was already granted the remedy sought by the filing of her amended return.

Petitioner filed an amended tax return for 1990 on or about October 15, 1993. This amended return was timely filed and requested a refund based on petitioner's entitlement to a New York State Resident Tax Credit. The Administrative Law Judge noted that although the Division originally disallowed the credit, because petitioner failed to produce her New Jersey return, the credit was allowed as a reduction in the Notice of Claim dated April 29, 1994 and is described in correspondence from the Division to petitioner dated March 28, 1995. Thus, petitioner's claim under the amended return has been satisfied.

Notice of Deficiency L008054461 and a Notice of Claim dated April 29, 1994, both issued with regard to tax year 1990, were reviewed by BCMS and are the subject of Conciliation Order No. 135330 dated May 12, 1995. The conferee sustained the tax imposed on Notice No. L008054461, but canceled the penalty. The Notice of Claim was recalculated resulting from the allowance of the resident tax credit for taxes in the amount of \$1,881.00 paid to the State of New Jersey. Petitioner's personal income tax refund for 1995, to the extent of \$730.24, was applied to the 1990 Notice of Deficiency and the Notice of Claim, as adjusted. The date of the actual payment of the \$730.24 balance is not clear from the record. However, the Administrative Law Judge found that petitioner's 1995 return was filed on or before April 15, 1996. To the extent the 1995 refund was available on April 15, 1996, the Administrative Law Judge deemed it applied as of that date and concluded the petition here is timely to challenge the \$730.24 payment. With respect to the Notice of Deficiency, since petitioner failed to introduce any evidence to prove that the Division has assessed her erroneously, the Administrative Law Judge concluded that petitioner surrendered to the statutory presumption of correctness (*Matter of Tivolacci v. State Tax Commn.*, 77 AD2d 759, 431 NYS2d 174).

As to the Notice of Claim, the Division bears the burden of proof pursuant to Tax Law § 689(e)(3). The Administrative Law Judge concluded that the Division met its burden by providing adequate explanation for the basis of the Notice of Claim and subsequent adjustments, and petitioner offered no evidence to show why the reduced assessment of \$230.80 should not stand. Thus, the Administrative Law Judge concluded, application of a portion of petitioner's 1995 refund to satisfy the assessments discussed above was proper.

Turning to 1991, the Administrative Law Judge noted that Notice of Deficiency No. L007548206-4 was the subject of the dispute resolved by the determination issued in *Matter of Ellen Linker Martin* (*supra*). The Administrative Law Judge concluded that the earlier determination is *res judicata* as to this 1991 Notice of Deficiency and the merits of the claim pertaining to 1991 would not be addressed.

Focusing next on Notice No. L010521274, issued with regard to the 1992 tax year, the Administrative Law Judge concluded the petition to challenge the notice was untimely filed. The notice, dated October 3, 1995, became a final assessment unless challenged by the filing of a petition within 90 days, or by January 1, 1996 (January 2, 1996 due to the holiday) (Tax Law § 681[b]). The petition was not filed until May 28, 1996. The fact that a conciliation conference was requested in a timely manner, the Administrative Law Judge stated, does not change the fact that the petition was not timely. The conciliation conference resulted in an order sustaining the notice. If petitioner chose to have the order reviewed, she would have had to petition the Division of Tax Appeals by April 24, 1997. The petition in this case was filed prior to the issuance of the BCMS order and, therefore, the Administrative Law Judge concluded, does not act to challenge the order.

The notices issued in connection with 1993 include Notice and Demand No. L009480298 and Notice of Deficiency No. L011942212. The Administrative Law Judge concluded the petition was timely filed as to the Notice and Demand, but that petitioner failed to introduce any evidence to prove that the Division erroneously assessed petitioner. Accordingly, the Administrative Law Judge sustained the notice (Tax Law § 689[e]).

As to the Notice of Deficiency, the Administrative Law Judge noted that it was issued after the date the petition in this case was filed with the Division of Tax Appeals. Therefore, the Administrative Law Judge concluded that the Notice of Deficiency was not properly before this forum.

ARGUMENTS ON EXCEPTION

Petitioner, on exception, continues to claim entitlement to refunds for some or all of the years in issue.

OPINION

As noted above, Tax Law § 687(a) provides time limitations for filing a claim for refund. Section 687(f) provides that if a timely petition is filed with respect to a Notice of Deficiency, a determination of overpayment may be made without a separate claim for refund having been filed. Tax Law § 689(c) essentially provides that a taxpayer may file a petition with the Division of Tax Appeals for the amounts asserted in a claim for refund if the taxpayer has filed a timely claim for refund with the Division of Taxation and has not previously filed a timely petition for the same taxable year. With certain exceptions, the Administrative Law Judge concluded that the petition was not timely as a claim for refund for any of the years at issue. Except as noted below, we agree with her conclusion.

For 1986, the Administrative Law Judge concluded that the petition constituted a justiciable claim for refund because it was filed within two years of payment of an amount due on an assessment. We disagree. Compliance with the provisions of Tax Law § 687 is a prerequisite for our review of petitioner's claim pursuant to Tax Law § 689. In this case, petitioner neither filed a refund claim with the Division nor filed a timely petition to protest the Notice of Deficiency issued in 1990. However, in our analysis we obtain the same result as the Administrative Law Judge, who denied this portion of petitioner's claim for lack of evidence in support thereof.

Regarding petitioner's amended return for 1990, the Administrative Law Judge concluded that the Division had already agreed to refund or credit petitioner with the amount of refund claimed. We agree with this conclusion. The Administrative Law Judge concluded that the petition was also timely as a refund application for the amount paid by petitioner pursuant to Notice and Demand L-009480298 concerning the 1993 tax liability. Petitioner, however, did not file a refund claim with the Division. However, in our analysis we obtain the same result as the Administrative Law Judge, who denied this portion of petitioner's claim since no evidence was submitted in support thereof.

On exception, petitioner has provided no basis on which to modify the determination of the Administrative Law Judge. Therefore, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ellen Linker-Martin is denied;
2. The determination of the Administrative Law Judge, as modified, is affirmed; and

3. The petition of Ellen Linker-Martin is granted to the extent described in conclusion of law "D" (tax year 1990) of the determination of the Administrative Law Judge, whereby petitioner shall receive a refund or credit in the amount of \$440.01, but is in all other respects denied.

DATED: Troy, New York
September 3, 1998

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner