STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JEAN LEECY	:	DECISION DTA NO. 815174
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1981 and 1982.	:	

Petitioner Jean Leecy, 4937 Spring Lake Road, Wolcott, New York 14590, filed an exception to the determination of the Administrative Law Judge issued on December 4, 1997. Petitioner appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr. , Esq., of counsel).

Petitioner filed a brief in support of her exception and a reply brief. The Division of Taxation filed a letter in lieu of 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 claim for refund as untimely.

FINDINGS OF FACT

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

On May 21, 1984, the Division of Taxation ("Division") issued to petitioner, Jean Leecy, a Notice of Deficiency which asserted a penalty pursuant to Tax Law § 685(g) in the amount of $6,696.61. This penalty was equal to the amount of unpaid withholding taxes the Division determined to be due from Prestige Remodeling and Home Repair Service, Inc. for the years 1981 and 1982.

On May 5, 1985, the Division filed a warrant against Chris G. Burrell, individually and as officer of Prestige Remodeling and Home Repair Service, Inc., in the office of the Monroe County Clerk. This warrant indicated an assessment against Burrell of $6,696.58 in penalty for the years 1981 and 1982. Like the assessment against petitioner, the assessment against Burrell was made pursuant to Tax Law § 685(g) and was equal to the amount of unpaid withholding taxes determined to be due from Prestige Remodeling and Home Repair Service, Inc. for the years 1981 and 1982.

The Burrell warrant indicates that it was "wholly satisfied" as of April 2, 1986.

Petitioner filed a petition with the Division of Tax Appeals in protest of the May 21, 1984 Notice of Deficiency. Following a hearing on December 1, 1987 before an administrative law judge, a determination was issued on February 19, 1988 which held that petitioner was a person required to collect, truthfully account for and pay over withholding taxes on behalf of Prestige Remodeling and Home Repair Service, Inc. and that petitioner had willfully failed to collect and pay over such taxes. The determination therefore denied the petition and sustained the May 21, 1984 Notice of Deficiency. Petitioner did not file an exception to the February 19, 1988 determination.

On September 29, 1989, the Division filed a warrant against petitioner in the office of the Wayne County Clerk with respect to the assessment arising from the May 21, 1984 Notice of Deficiency. The warrant indicated unpaid penalty in the amount of $6,696.58, plus interest of $733.87, for a total amount due of $7,430.45.

Petitioner's 1989 New York State income tax return, filed jointly with her husband, claimed a refund of $480.00. The Division applied this refund to petitioner's withholding tax penalty assessment.

Petitioner caused checks dated December 10, 1991 and February 26, 1992 in the respective amounts of $7,430.45 and $1,331.15 to be remitted to the Division in full payment of the subject assessment, plus accrued interest.

Petitioner was in contact with the Division on several occasions from the time of the filing of the warrant against her in 1989 through the time the warrant was finally satisfied in 1992. Petitioner was never told that the Burrell warrant was satisfied. Petitioner became aware that the Burrell warrant was satisfied in 1994.

By an Application for Credit or Refund dated November 16, 1994, petitioner claimed a refund of $7,430.45 in respect of the subject assessment. In her application petitioner noted the satisfaction of the warrant filed against Burrell on April 2, 1986, and contended that the Division had subsequently collected the same tax from her. Petitioner contended that since the tax was paid twice, she is entitled to a refund.

By letter dated April 12, 1995 the Division denied petitioner's refund claim.

It is noted that, in 1982, petitioner and Burrell entered into an agreement which provided, among other things, that Burrell and Prestige Remodeling and Home Repair Service, Inc.

"release" petitioner from "any and all claims or obligations for all Federal and State taxes owed by Prestige Remodeling and Home Repair Service, Inc."

In her second petition, dated July 8, 1996, petitioner contended that the Division's denial of her refund claim was improper and also claimed a refund of her 1989 State income tax refund of $480.00 which was applied by the Division to her withholding tax penalty assessment.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that petitioner's Application for Credit or Refund, dated November 16, 1994, was one for refund of an overpayment of tax. Since that claim was filed more than two years from the time petitioner finally satisfied the warrant filed against her, the Administrative Law Judge concluded that her claim was filed beyond the time limitations set forth in Tax Law § 687(a) and her petition was barred pursuant to Tax Law §§ 687(a) and 689(c)(1).

The Administrative Law Judge also concluded that, even if petitioner's refund claim had been timely filed, the petition in this matter would nonetheless be barred pursuant to Tax Law § 689(c)(2). Petitioner had previously filed a timely petition with the Division of Tax Appeals under Tax Law § 689(b) for the same taxable years as her refund claim. That petition resulted in a final determination against petitioner on February 19, 1988.

Based on the foregoing, the Administrative Law Judge concluded that the Division of Tax Appeals was without jurisdiction to consider the merits of petitioner's claim. The Administrative Law Judge noted in a footnote, however, that the Division's collection of penalty from petitioner after it had already collected it from another responsible person appeared to have been improper

based on the decision of this Tribunal in ***Matter of Phillips*** (Tax Appeals Tribunal, May 11, 1995).

ARGUMENTS ON EXCEPTION

In support of her exception, petitioner argues that it was an error on the part of the Division to collect the same debt separately from her and from Chris Burrell. Petitioner demands a refund of the amount paid by her in satisfaction of the warrant and the amount of tax refund withheld from her pursuant to Tax Law § 697(d).

In opposition to the exception, the Division argues that the Administrative Law Judge correctly determined that petitioner's claim was based on an overpayment of tax and that her claim was barred by the statute of limitations pursuant to Tax Law § 687(a). Additionally, the Division argues that the documents submitted with petitioner's brief on exception should be excluded from the record.

OPINION

As an initial matter, we have not considered the documentary evidence submitted by petitioner with her brief on exception and have excluded the same from the record herein. As we stated in ***Matter of Schoonover*** (Tax Appeals Tribunal, August 15, 1991):

> [i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons we must follow our policy of not allowing the submission of evidence after the closing of the record.

In his determination, the Administrative Law Judge considered petitioner's claim for refund to be based on an overpayment of tax which was filed beyond the time limitations set forth in Tax Law § 687(a). Further, the Administrative Law Judge concluded that the petition in this matter was also barred by Tax Law § 689(c)(2) because petitioner had previously filed a petition contesting her status as a person required to collect, truthfully account for and pay over withholding taxes on behalf of Prestige Remodeling and Home Repair Service, Inc. for the same taxable years as her refund claim. That petition resulted in a final determination against petitioner on February 19, 1988.

In her brief on exception, however, petitioner presents for the first time the argument that she is entitled to relief pursuant to Tax Law § 697(d). That section provides the following:

> [w]here no questions of fact or law are involved and it appears from the records of the tax commission that any ***moneys have been erroneously or illegally collected from any taxpayer*** or other person, or paid by such taxpayer or other person under a mistake of facts, pursuant to the provisions of this article, the tax commission at any time, ***without regard to any period of limitations***, shall have the power, upon making a record of its reasons therefor in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certificate to the comptroller (emphasis added).

The exercise of the special refund authority by the Commissioner of Taxation and Finance is discretionary, not mandatory (***Matter of Fiduciary Trust Co. v. State Tax Commn.,*** 120 AD2d 848, 502 NYS2d 119). In ***Matter of Wallace*** (Tax Appeals Tribunal, October 5, 1989), we concluded that the Division of Tax Appeals and the Tax Appeals Tribunal have jurisdiction to review the Division's actions under Tax Law § 697(d). As we noted in ***Wallace***, the first condition for recovery under Tax Law § 697(d) is that there must be no unresolved questions of

fact or law concerning the refund claim. Secondly, the money must have been illegally or erroneously collected from the taxpayer or paid under a mistake of fact. While there are no rules and regulations which prescribe the procedure to apply for relief under section 697(d), nor any other instructions as to how taxpayers are to make application under section 697(d), the Division must be effectively put on notice by the taxpayer that consideration of her claim pursuant to Tax Law § 697(d) is requested. No such notice was provided to the Division in this case and the refund denial issued by the Division gives no indication that Tax Law § 697(d) was considered relevant to this claim. Thus, there is no action by the Commissioner of Taxation and Finance pursuant to section 697(d) for us to review.

As a result, we affirm the determination of the Administrative Law Judge for the reasons set forth therein. This decision, however, does not preclude petitioner from filing a refund application with the Division pursuant to Tax Law § 697(d) should she choose to do so.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jean Leecy is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Jean Leecy is dismissed.

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