

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
HAROLD AND SHIRLEY PETERFREUND	:	DECISION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 816956
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 1982.	:	

Petitioners Harold and Shirley Peterfreund, 271-223 Grand Central Parkway, Floral Park, New York 11005, filed an exception to the determination of the Administrative Law Judge issued on January 25, 2001. Petitioners appeared by Ronald Kassoover, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioners filed a brief in support of their exception and the Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Petitioners' request for oral argument was denied.

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

ISSUE

Whether the Division of Taxation properly asserted additional New York State personal income taxes based upon certain Federal audit changes which were not reported by petitioners so that their refund claim was properly denied.

FINDINGS OF FACT

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

The Division of Taxation (“Division”) issued a Notice of Additional Tax Due dated April 16, 1993 to petitioners for 1982, which asserted additional New York State personal income tax due of \$5,326.00 plus interest of \$6,961.33. No penalty was asserted due. This additional tax due was based upon an increase of \$39,157.00 to petitioners’ previously reported New York income of \$45,936.00. The notice included the following explanation:

Since you did not reply to our previous letter(s), the following adjustment(s) has been made.

Under authorization of section 6103(d) of the Internal Revenue Code, we received notification of Federal audit changes. The following deficiency is based on failure to report those changes.

Section 659 of the New York State Tax Law requires taxpayers to report Federal changes to New York State within 90 days after final Federal determination. This provision of the Tax Law is outlined in the instructions for preparation of New York State income tax forms.

Section 683(c) of the New York State Tax Law provides for assessment at any time when a taxpayer fails to comply with section 659.

The Federal audit changes show an adjustment was made to your distributive share of partnership income/loss from the following partnership(s): JACLYN REALTY.

The adjustment(s) results in a correction of the limitation percentage.

Interest is due for late payment or underpayment at the applicable rate. Interest is mandatory under the New York State Tax Law.

Petitioners filed a resident New York income tax return for 1982, the year at issue, which was conceded by petitioners' representative, Ronald Kassover, a certified public accountant who prepared petitioners' income tax returns for 1982.

As noted above, a partnership loss of \$39,157.00 from Jaclyn Realty claimed by petitioners on their 1982 income tax return was disallowed by the Internal Revenue Service ("IRS"). Petitioners do not contest the disallowance of this loss, but instead complain that they were only "silent partners." Furthermore, they claim that they were the only partners who were assessed additional tax by New York State on the basis of this disallowance.

The Federal income tax adjustment of petitioners' income for 1982, based upon the disallowance of the partnership loss claimed from Jaclyn Realty, was asserted on July 30, 1990. Petitioners never reported this Federal adjustment to the Division. Rather, the IRS, pursuant to Internal Revenue Code § 6103(d), notified the Division of this Federal audit change on a date not specifically established in the record but some time after July 30, 1990 and before April 16, 1993, the date of the Notice of Additional Tax Due. In July of 1996, the Division successfully levied upon a bank account of Mrs. Peterfreund to satisfy the additional tax due for 1982 of \$5,326.00, plus interest of \$10,303.48 and penalty of \$958.68, for a total amount of \$16,588.16. Shortly thereafter, petitioners filed a claim for refund of the \$16,588.16. The specific date of this refund claim is unknown since the photocopy introduced into evidence shows that petitioners did not date their signatures. According to written comments of a tax technician who served as the Division's advocate at a conciliation conference, petitioners' refund claim was denied and their case closed on December 11, 1996. However, the record does not include a written denial, such as a notice of disallowance, by the Division of petitioners' refund claim.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge considered the statutory authority which allowed the Division to issue the assessment under review. The assessment was premised on the failure of petitioners to notify the Division within 90 days of a final determination by the IRS of a change in petitioners' Federal taxable income as required by Tax Law § 659. The Administrative Law Judge found that the Division of Tax Appeals had jurisdiction to consider the merits of petitioners' refund claim.

The Administrative Law Judge noted that petitioners bear the burden of proving by clear and convincing evidence that the Division's assertion of tax due for 1982 was in error and, therefore, their refund claim should be allowed. The Administrative Law Judge found that petitioners failed to meet their burden. He rejected their arguments that they were not residents of New York State in 1982 and that the IRS altered its position in 1983 concerning the disallowance of partnership losses claimed by Jaclyn Realty as unsupported by the evidence. Further, the Administrative Law Judge found no basis in the record to support petitioners' argument of discriminatory enforcement because the Division allegedly did not proceed against the general partners of Jaclyn Realty. The Administrative Law Judge also noted that the poor health of one of the petitioners at the time the bank account was levied upon by the Division provided no basis on which to grant petitioners' refund claim.

The Administrative Law Judge also reviewed petitioners' case in light of Tax Law § 3008(a), which provides for the abatement of interest accruing on a tax deficiency which resulted from unreasonable error or delay by an employee of the Department of Taxation and Finance. Initially, the Administrative Law Judge noted that the interest at issue in this

proceeding accrued prior to the effective date of Tax Law § 3008(a). The Administrative Law Judge found no support in the record on which to conclude that the interest which accrued on the underlying deficiency resulted from an unreasonable error or delay of a Tax Department employee. Rather, the interest collected by the Division accrued as a result of petitioners' failure to timely report the Federal adjustment and remit additional tax due to the State based upon such adjustment.

The Administrative Law Judge did, however, find that when the Division levied upon Mrs. Peterfreund's bank account, penalty in the amount of \$958.68 was also collected. Since no penalty was assessed by the notice of additional tax due, the Administrative Law Judge concluded that petitioners were entitled to a refund of this amount.

ARGUMENTS ON EXCEPTION

On exception, petitioners argue that they were not residents of New York State in 1982 and had incorrectly filed a resident tax return for that year. Since the Division changed the amount of income tax owed by petitioners for that year, the Division should also change their filing status to nonresidents and adjust their tax liability accordingly. Additionally, since the IRS reversed its original assessment of liability for Federal income tax against petitioners for 1983, petitioners maintain that their 1982 tax liability should be adjusted as well. Finally, petitioners assert that it is unfair to assess them more than 10 years after the tax year has ended.

The Division argues that petitioners have offered no evidence to support their allegations of nonresident status for 1982. Petitioners have failed to meet their burden to prove by clear and convincing evidence that the denial of refund by the Division was in error. As a result, the Division requests that the determination of the Administrative Law Judge be affirmed.

OPINION

Although the Administrative Law Judge did not directly address the statute of limitations issue raised by petitioners, we note that pursuant to Tax Law § 683(c), if a taxpayer fails to comply with Tax Law § 659, additional tax may be assessed at any time. There is no dispute here that petitioners failed to meet the requirements of that section; i.e., to report to the Division changes to Federal taxable income within 90 days of the final determination of such changes. Thus, petitioners' claim that the assessment is barred by the statute of limitations is rejected. With the exception of the statute of limitations issue, petitioners have presented the same arguments on exception that were considered and rejected by the Administrative Law Judge. Petitioners have offered no evidence below, and no argument on exception, that demonstrates that the Administrative Law Judge's determination is incorrect. Therefore, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Harold and Shirley Peterfreund is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Harold and Shirley Peterfreund is granted to the extent indicated in conclusion of law "F" of the Administrative Law Judge's determination, but in all other respects is denied; and

4. Petitioners' claim for refund is granted consistent with paragraph "3" above, but in all other respects is denied.

DATED: Troy, New York
September 13, 2001

/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