

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ANNA WASSERMAN	:	DECISION
	:	DTA NO. 817454
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income Taxes	:	
under Article 22 of the Tax Law and the Administrative	:	
Code of the City of New York for the Year 1991.	:	

Petitioner Anna Wasserman, 2300 Olinville Avenue, Apt. 8F, Bronx, New York 10467, filed an exception to the determination of the Administrative Law Judge issued on July 20, 2000. Petitioner appeared by her son, Ralph Wasserman. The Division of Taxation appeared by Barbara G. Billet, Esq. (Herbert M. Friedman, Jr., and Michelle Helm, Esqs., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation did not file a brief in opposition. Oral argument, at petitioner's request, was heard on December 14, 2000 in New York, New York.

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

ISSUE

Whether, pursuant to Tax Law § 687(a), the Division of Taxation properly denied petitioner's claim for refund.

FINDINGS OF FACT

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

For the tax year 1991, petitioner made four estimated payments of tax totaling \$6,000.00. By check dated April 13, 1991, she paid the sum of \$2,000.00; by check dated June 15, 1991, she paid \$1,800.00; by check dated September 16, 1991, the sum of \$1,200.00 was paid; and \$1,000.00 was paid by check dated January 13, 1992.

Diane Parsons, Tax Technician I for the Audit Division of the Division of Taxation (“Division”), reviewed and searched the Division’s files regarding this petitioner. Her review indicated that petitioner claimed an overpayment of estimated taxes in the amount of \$5,647.00 for the 1990 tax year. On her 1990 return, petitioner requested that this overpayment be applied to her 1991 tax year liability. Petitioner’s 1990 New York State return was filed on or after April 7, 1995.

Ms. Parsons reviewed the Division’s files concerning petitioner’s 1990 return and found that all of her estimated payments for the tax year 1990 were made on or before April 13, 1991, which was more than three years before her 1990 return was filed on or after April 7, 1995. Accordingly, petitioner’s claim for a credit for the 1990 tax year was disallowed as untimely pursuant to Tax Law § 687.

Petitioner received an extension of the deadline for filing her 1991 return until August 15, 1992. However, the 1991 return was not filed until on or after April 8, 1996. On her 1991 return, petitioner claimed a refund of \$9,155.00. The amount of the refund claimed consisted of

the \$6,000.00 in estimated payments plus the \$5,647.00 credit from her 1990 return, minus the amount of tax due for the year 1991 (\$2,492.00).

On December 2, 1996, the Division denied petitioner's claim for refund for the 1991 tax year. The letter explained, in pertinent part, as follows: "The Tax Law provides for the granting of a refund or credit if the request is filed within three (3) years from the time the return was required to be filed or within two (2) years from the time the tax was paid, whichever is later."

On September 17, 1999, the Division's Bureau of Conciliation and Mediation Services issued a Conciliation Order (CMS No. 172278) denying petitioner's request for a refund for the 1991 tax year. Petitioner thereupon filed a petition with the Division of Tax Appeals seeking an administrative review of the Conciliation Order.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that Tax Law § 687(a) provides that a claim for credit or refund of an overpayment of personal income tax must be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever is later. Finding that petitioner's claim was timely filed within three years of her return, the Administrative Law Judge stated that pursuant to Tax Law § 687(a), the amount of allowable refund cannot exceed the portion of tax paid within the three-year period immediately preceding the filing of the refund claim plus the period of any extension of time for filing the return.

The Administrative Law Judge found that while petitioner filed her claim for refund of tax as part of her 1991 income tax return, that return was not filed until April 8, 1996. Since petitioner did not pay any portion of the amount she claimed as a refund during the three-year

period immediately preceding the filing of the refund claim, the Administrative Law Judge concluded that the Division properly denied petitioner's refund claim pursuant to Tax Law § 687(a).

The Administrative Law Judge concluded that since petitioner admitted that there are no issues of fact in dispute, the Division's motion for summary determination must be granted. The Administrative Law Judge rejected petitioner's argument that the Division's interpretation of Tax Law § 687(a) in this case was unfair and would result in a gross miscarriage of justice.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that as a matter of fairness and justice, petitioner should not have her overpayment of tax confiscated. Petitioner argues that she is being literally cheated out of her overpayment on the basis of "obscure legal technicalities" (Petitioner's brief in support).

The Division, in opposition, argues that the Administrative Law Judge's determination was correct.

OPINION

Tax Law § 687(a) provides as follows:

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 If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return

As the Administrative Law Judge noted, section 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides, in part, that a motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

That section further provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR § 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595).

Generally, to defeat a motion for summary judgment, the opponent must produce evidence in admissible form sufficient to raise an issue of fact requiring a trial (CPLR 3212[b]).

Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (*Alvord & Swift v. Muller Constr. Co.*, 46 NY2d 276, 413 NYS2d 309).

In her response to the motion of the Division for summary determination, petitioner admitted that there are no issues of fact in dispute in this matter. Her contention that the Division’s interpretation of Tax Law § 687 and its application to this case is unfair and a gross miscarriage of justice is not sufficient to defeat the Division’s motion. Petitioner has not articulated any legal basis to support her position nor has she provided any evidence sufficient to raise an issue of fact requesting a trial. Although we are sympathetic to petitioner's

circumstances in this case, any relief for the seemingly harsh result produced by application of the statute of limitations set forth in Tax Law § 687 would require legislative action.

We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and we see no reason to modify them in any respect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Anna Wasserman is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Anna Wasserman is denied.

DATED: Troy, New York
May 10, 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