

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petitions	:	
of	:	
<b>LEONARD AND LUCILLE MERKOWITZ</b>	:	DECISION
for Redetermination of Deficiencies or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1975, 1977, 1978, 1979, 1980, 1981, 1982, 1991 and 1992.	:	DTA NOS. 819012 AND 819928

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Petitioners Leonard and Lucille Merkowitz, 192-04 L 71 Crescent, Fresh Meadows, New York 11365, filed an exception to the determination of the Administrative Law Judge issued on February 16, 2006. Petitioners appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michelle M. Helm, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter in lieu of a formal 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.

***ISSUES***

I. Whether the Division of Taxation's notices of additional tax due issued for 1975, 1977, 1978, 1979, 1980 and 1981 should be sustained.

II. Whether the Division of Taxation's denial of refunds for the years 1982, 1991 and 1992 should be sustained.

***FINDINGS OF FACT***

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

This matter involves two separate and distinct petitions. The first, DTA No. 819012, involves the years 1980 and 1981. The Division issued to petitioner Leonard Merkowitz two notices of additional tax due, dated May 4, 2000. The first, assessment number L-017674359-4, set forth additional tax due for the year 1980 in the sum of \$489.00 plus interest, which was due to unreported Federal changes for the same period. The second notice, assessment number L-017674360-4, set forth additional tax due for the year 1981 in the sum of \$577.00 plus interest, which also was asserted for unreported Federal changes.

A conciliation order, dated February 1, 2002, sustained the statutory notice for the year 1980 and canceled the notice for 1981. A footnote on the order stated that the 1981 overpayment in the amount of \$11,060.00 plus applicable interest was available as an offset against outstanding assessments for the years 1977, 1978 and 1979.

Petitioners filed a petition, dated April 29, 2002, with the Division of Tax Appeals in response to the conciliation order. In the petition, other than noting that the conciliation order incorrectly included Lucille Merkowitz when she was not listed on the notice of additional tax due for 1980, petitioners did not contest the tax determined to be due for 1980. Although the Notice of Additional Tax Due for 1981 was canceled, petitioners claimed that they were not apprised of the calculations that led to that cancellation and questioned the accuracy of the calculations. In addition, petitioners contended that 1982 should have been included in any

revision for 1981 since the Federal information included information on 1982 as well, although petitioners conceded the tax year 1982 was not “docketed” by the Internal Revenue Service.

Petitioners entered into a stipulation of settlement with the Internal Revenue Service for the years 1980 and 1981 on July 21, 1993 which resulted in adjustments to petitioners’ income for those years. These changes were never reported to the State of New York.

The second petition filed by petitioners, dated March 15, 2004 and assigned DTA No. 819928, concerned petitioners’ New York State and New York City personal income taxes for the years 1975, 1977, 1978, 1979, 1982, 1991 and 1992.

The Division issued notices of additional tax due to petitioners for the years 1975, 1977, 1978 and 1979 for additional tax that was due because petitioners did not report changes to their Federal returns for each of these years as required by Tax Law § 659. The notices issued are set forth on the following table:

Year	Date	Notice Number	NYS Tax Due	NYC Tax Due	Interest	Payment	Total Due
1975	3/21/2002	L-020712942	\$1,663.00	-	\$10,163.94	\$0.00	\$11,826.94
1977	6/17/2002	L-021133592	4,218.00	1,294.00	1,840.00	7,352.00	\$0.00
1978	6/10/2002	L-021089455	4,931.00	1,711.00	19,734.50	3,808.00	\$22,568.50
1979	3/25/2002	L-020715470	3,181.00	972.00	19,328.77	0.00	\$23,471.77

After a conciliation conference in the Bureau of Conciliation and Mediation Services (“BCMS”), an order was issued, dated December 26, 2003, which reduced the total tax due for the years 1975, 1977 and 1978 to \$12,981.00 plus interest. The reduction was due to the application of the maximum tax benefit on personal service income that reduced New York State and New York City taxes for 1978. The order stated that previous payments of \$11,160.00 had been applied to the notices for the years 1975, 1977 and 1978. On the conferee’s worksheet

attached to the order it noted that for 1975 interest had been computed on the tax from the date the return was filed, June 16, 1976, to December 10, 2003. There was no mention of interest computation for 1977 or 1978. However, in a "Response to Taxpayer Inquiry," dated June 26, 2000, addressed to Leonard Merkowitz, the Division explained to him that interest for 1977 had been computed from January 15, 1979 and that interest for 1978 had been computed from January 15, 1980. The Response noted that these computations were based on the Division's interpretation of Revenue Ruling 99-40, which directed that interest be computed from the due date of the fourth installment period of each succeeding year's estimated tax account.

A second conciliation order, dated December 26, 2003, was issued with respect to the year 1979 which adjusted the tax due for that year to \$3,870.00 plus interest. A worksheet attached to the order indicated that interest had been computed from the date the return was filed, October 20, 1980, to December 10, 2003.

On January 31, 2001, petitioners filed amended resident income tax returns for the years 1991 and 1992, seeking a refund of \$487.00 for 1991 and \$4,310.00 for 1992. The basis of the claims was an error in reporting pension and annuity income exclusions for both years which led to an overpayment of tax.

By letter, dated March 13, 2001, the Division denied the claims, stating that they were untimely since they were not filed within three years of the date on which the returns for 1991 and 1992 were required to be filed or within two years from the time the tax was paid for those periods. A conciliation order, dated December 26, 2003, sustained the refund denial.

On September 22, 2003, petitioners filed an amended resident income tax return for the year 1982, wherein they reported Federal changes that were related to an Internal Revenue

Service audit statement dated July 8, 1996. Petitioners sought a refund of an overpayment for the year 1982 in the sum of \$2,361.00.

By letter dated December 29, 2003, the Division denied the refund application because it was not filed in a timely manner, i.e., within two years from the time the notice of such change or correction was required to be filed with the Division. The Division explained that since the law required a report of Federal changes within 90 days after the final determination, petitioners should have reported the Federal changes within 90 days of July 8, 1996, and then filed an application for refund within two years of that date. However, petitioners failed to do so.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge concluded that petitioners did not report to the State of New York changes made to their Federal taxable income for the years 1975, 1977, 1978 and 1979 as required by Tax Law § 659. Therefore, the Administrative Law Judge stated that the Division properly issued notices of additional tax due for each of those years. However, petitioners disagreed with the interest calculations for these particular years and the Administrative Law Judge agreed. Thus, he directed the Division to modify the interest calculation to comply with Revenue Ruling 99-40 and the June 26, 2000 Response to Taxpayer Inquiry. The Division has not taken an exception with respect to this issue.

The Administrative Law Judge next addressed the tax year 1982.<sup>1</sup> The Administrative Law Judge concluded that this year was never formally in issue. The Administrative Law Judge noted that the Internal Revenue Service made certain changes to petitioners' income tax which affected the year 1982 as set forth in a statement of audit changes dated July 8, 1996. In order to

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<sup>1</sup>The tax due for the years 1980 and 1981 was resolved by a conciliation order as discussed in the findings of fact above.

timely file for a refund, the Administrative Law Judge stated that such application is required to be filed within 90 days plus two years from the date of the notice of Federal change. Therefore, the Administrative Law Judge held that the time period had well expired for petitioners to seek a credit or refund for 1982.

With respect to the tax years 1991 and 1992, the Administrative Law Judge noted that petitioners filed amended resident income tax returns on January 31, 2001. The Administrative Law Judge stated that the original return for 1991 had been filed on October 15, 1992 and the return for 1992 had been filed on October 15, 1993. The Administrative Law Judge pointed out that for 1991, an overpayment was declared in the amount of \$154.00 and for 1992, there was a balance due of \$1,082.00 which balance was paid with the return on October 15, 1993. Therefore, the Administrative Law Judge determined that the statute of limitations for filing a refund request for both years had long expired.

#### ***ARGUMENTS ON EXCEPTION***

In their exception, petitioners contend that the determination was incorrect in all aspects. They continue to argue that the interest calculations are wrong for the years 1975, 1977, 1978 and 1979. With respect to 1982, it appears that petitioners are arguing that the doctrine of equitable recoupment should be applied. Furthermore, petitioners state that they should be entitled to refunds for the years 1991 and 1992 in light of the fact that the interest amounts for the tax years 1975 through and including 1981 have continued to accrue and, in petitioners' estimation, presently represent five times the amount of tax due for those years.

The Division responds by stating that the determination should be sustained in full. The Division points out that with respect to tax years 1975, 1977-1980, it has modified the interest

calculations as set forth in conclusion of law “B” of the determination. However, the Division notes that petitioners are still arguing over the underlying tax due and application of tax payments rather than a strict interest calculation.

The Division urges the Tax Appeals Tribunal to reject petitioners’ argument under equitable recoupment since they have failed to introduce evidence that would substantiate any entitlement under such doctrine.

### ***OPINION***

Tax Law § 659 provides that where a taxpayer’s Federal taxable income is changed or corrected by the Internal Revenue Service the taxpayer must report such change or correction to the Division within 90 days after the final determination of such change or correction and either concede the accuracy of the Federal change or state the taxpayer’s basis for asserting that the change or correction is erroneous. If the Federal change or correction is not reported within the 90-day period, the Division is authorized by Tax Law § 681(e) to issue a notice of additional tax due. Furthermore, where a taxpayer fails to report the Federal change or correction as required, such a notice may be issued at any time (*see*, Tax Law § 683[c][1][C]).

As noted by the Administrative Law Judge, petitioners did not deny their failure to notify the Division of the changes to their income. Rather, petitioners only argued that the interest computation was in error. The Administrative Law Judge set forth the standard to be applied and directed the Division to modify its interest calculations accordingly. Therefore, we affirm the determination of the Administrative Law Judge on this issue.

With respect to the remaining years, we agree with the Administrative Law Judge that the time frame within which to file a claim for refund for the years 1991 and 1992 had long expired.

Moreover, the Administrative Law Judge completely and adequately dealt with the year 1982 in his determination. Petitioners have not provided any reason for us to modify the determination of the Administrative Law Judge in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Leonard and Lucille Merkowitz is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petitions of Leonard and Lucille Merkowitz are granted to the extent indicated in conclusion of law “B” of the determination, but in all other respects are denied;
4. The Division of Taxation’s denial of refund claims for the years 1982, 1991 and 1992 is sustained; and

5. The Notices of Additional Tax Due for the years 1975, 1977, 1978, 1979 and 1980, as modified by the Bureau of Conciliation and Mediation Services and in accordance with paragraph "3" above, are sustained.

DATED: Troy, New York  
June 14, 2007

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/s/Charles H. Nesbitt  
Charles H. Nesbitt  
President

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/s/Carroll R. Jenkins  
Carroll R. Jenkins  
Commissioner

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/s/Robert J. McDermott  
Robert J. McDermott  
Commissioner