

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
SHLOMO CASSOS : DECISION
for Redetermination of a Deficiency or for Refund of : DTA NO. 823077
New York State Personal Income Tax under Article 22 :
of the Tax Law for the Year 1996. :

Petitioner, Shlomo Cassos, filed an exception to the determination of the Administrative Law Judge issued on February 25, 2010. Shlomo Cassos appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michelle Helm, Esq., and Marie DiCostanzo, Esq., of counsel).

Petitioner did not file a brief in support. The Division filed a letter-brief in opposition. Petitioner did not file a reply brief. Oral argument was not requested.

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

ISSUE

Whether petitioner's refund claim should be granted pursuant to Tax Law § 697(d).

FINDINGS OF FACT

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

Petitioner, Shlomo Cassos, filed federal and New York State resident income tax returns for the year 1996. The returns reported capital gains from the sale of a home in New York City.

Petitioner paid taxes on the reported capital gain to the Internal Revenue Service (IRS) and the Division of Taxation (Division).

At the time the original returns for 1996 were prepared, petitioner was involved in a very difficult divorce, which distracted him from thinking about his tax returns. Several years after filing his returns for 1996, a conversation with his accountant led petitioner to realize that he had not reduced his capital gain by certain expenses.

Petitioner's accountant filed a claim for a refund with the IRS. In a notice dated December 30, 2002, petitioner was advised that, as a result of an examination of his tax return for the year 1996, there was a decrease in his tax in the amount of \$53,545.00. He was also told that a late payment penalty that was previously charged was reduced by \$5,684.86 and that there was a decrease in interest previously charged in the amount of \$5,119.53. These adjustments resulted in a refund check in the amount of \$64,599.82.¹

At the time of the refund, petitioner assumed that the IRS would notify the Division and that, thereafter, New York would proceed to issue a refund without further action on his part. After waiting approximately five and one-half years, petitioner spoke to an employee of the Division who advised him that he would have to prove that he owed no money to the IRS.

On August 29, 2008, on the basis of the federal changes, petitioner filed an amended 1996 New York State personal income tax return requesting a refund in the amount of \$22,798.00. The amended return was the first notification that the Division received of the federal audit changes.

On December 12, 2008, the Division issued a Notice of Disallowance stating that the claim for refund was denied because the amended return was filed beyond the two year and 90 day statute of limitations.

¹ The foregoing adjustments plus a reduction of a federal tax lien resulted in a total refund of \$91,286.47.

Petitioner requested a conciliation conference, which was held on March 5, 2009. In an order dated April 3, 2009, the denial of the refund was sustained. This proceeding followed.

At the time the original returns for 1996 were filed, petitioner realized that he had additional expenses but he did not know that they were supposed to be subtracted. Petitioner cannot locate a copy of his original return for 1996 and does not recall what expenses were claimed on the original return for the year in issue.

Prior to the hearing, the Division made a motion for summary determination on the basis that petitioner's claim for a refund was barred by the statute of limitations provided for in Tax Law § 687(c). Upon review of the motion papers, it was decided that the claim for refund was filed beyond the expiration of the statute of limitations, that the statute of limitations may not be tolled for equitable considerations and that it was not possible to determine whether petitioner was entitled to a refund under Tax Law § 697(d) because it was unclear whether the monies paid by petitioner were paid under a mistake of law or a mistake of fact.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that in the prior Order on motion for summary determination, it was decided that the claim for refund was barred by the statute of limitations. Since petitioner did not challenge that conclusion, the Administrative Law Judge deemed it unnecessary to further address this point.

It remained for the Administrative Law Judge to address whether petitioner's claim could be granted pursuant to the discretionary refund authority given to the Commissioner of Taxation and Finance under Tax Law § 697(d). That section authorizes the Commissioner to refund tax monies even after the period of limitations has expired under certain limited circumstances. Specifically, such refunds are allowed where no questions of fact or law are involved and it

appears from the records (of the Tax Department) that moneys have been erroneously or illegally collected from the taxpayer or the moneys were paid by such taxpayer under a mistake of fact.

Petitioner argued that the fact that moneys were being held and not paid back to him was sufficient evidence that they were erroneously or illegally collected. The Administrative Law Judge rejected this argument, because it was an attempt to re-litigate the issue of “erroneous collection” already decided in the Order on motion for summary determination in this matter. As such, the Administrative Law Judge found the prior conclusion to be the law of the case and that it would not be entertained a second time (*see, generally, Matter of Kasparaitis*, Tax Appeals Tribunal, July 21, 2005).²

The Administrative Law Judge concluded that petitioner made the payment under a mistake of law, not fact. The Administrative Law Judge found from the record that petitioner knew that he had expenses but did not realize that they should have been deducted in determining whether there was a gain on the sale of the home. The Administrative Law Judge noted that there was no showing by petitioner that the failure to properly report the expenses from the sale was due to an understanding of the facts that were different from what they actually were. The Administrative Law Judge therefore concluded that the Division properly denied petitioner’s claim for a refund as untimely, and he denied the petition.

ARGUMENTS ON EXCEPTION

Petitioner argues in his exception, as he did below, that he is entitled to relief under Tax Law § 697(d) because there are no questions of law or fact raised by the Division and that the

²The Administrative Law Judge observed in a footnote that if this argument were accepted, there would, as a practical matter, not be a statute of limitations on claims for a refund because the essence of a meritorious claim for a refund of tax is that monies are being erroneously or illegally held. Such a holding would be contrary to the public policy considerations for enacting a statute of limitations that were articulated by the Tribunal in *Matter of Nierenstein* (Tax Appeals Tribunal, April 21, 1988).

Division failed to prove that monies were not erroneously collected from him. Petitioner also argued that the prior Order upon motion for summary determination was wrong insofar as it concluded that he had failed to demonstrate that there been an erroneous collection under Tax Law § 697(d). In a new wrinkle to this argument, petitioner's exception claims that this conclusion on the erroneous payment issue was error because he was not the movant on the motion for summary determination. Therefore, he states, he was denied an opportunity to present his evidence and argument.

Petitioner continues to argue erroneous collection and urges that an erroneous collection occurs any time that monies are held or retained by the state, after a refund application has been made, and there is no dispute as to the underlying facts of the refund claim. In the alternative, petitioner continues to claim that he is entitled to a refund under Tax Law § 697(d) because the overpayment of tax was due to a mistake of fact arising from neglect or forgetting to include certain expenses that were relevant to the calculation of a capital gain.

The Division argues that the fact that petitioner did not know or forgot that he had expenses that could be deducted from a capital gain from the sale of an existing home constitutes a mistake of law and not fact. Therefore, the Division asserts that petitioner is not entitled to a refund under Tax Law § 697(d).

Petitioner acknowledged that the claim for refund was not filed within the applicable statute of limitations.

OPINION

Petitioner bears the burden of proof to show that the Commissioner erred in failing to exercise his discretionary refund authority to grant petitioner relief (*see*, Tax Law § 689[e]). Tax Law § 697(d) provides, in relevant part, as follows:

Special refund authority. – Where no questions of fact or law are involved and it appears from the records . . . that any *moneys* have been *erroneously or illegally* collected from any taxpayer or other person, *or paid* by such taxpayer . . . *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 . . . , to cause such moneys so paid and being erroneously and illegally held to be refunded

We affirm the determination of the Administrative Law Judge.

In order to prevail here, petitioner was required to show either that: i) *moneys* have been *erroneously or illegally* collected from him; or ii) that he paid tax moneys to the state of New York *under a mistake of facts*.

We reject petitioner’s interpretation of erroneous and illegal collection, i.e., that the Division in not paying him a refund, after he applied for it, and without any legal basis whatsoever (except for the statute of limitations), constitutes an “erroneous and illegal collection.” We agree with the Administrative Law Judge that this was sufficiently addressed in the Order on motion for summary determination. We reject petitioner’s claim that since he was not the moving party on the motion for summary determination, he was not given an opportunity to argue his side of the motion. The record shows that both sides were given an opportunity to present such evidence and argument on the motion. We note that the first paragraph of the Order on motion for summary determination states that petitioner did, in fact, file a response to the motion. Petitioner’s argument is simply not supported by the record.

We also decline petitioner’s invitation to shift the burden of proof to the Division. The burden is on petitioner to show facts demonstrating that he is eligible for refund under Tax Law § 689(e). We, therefore, reject petitioner’s claim that he is entitled to relief under Tax Law § 697(d) because there are no questions of law or fact raised by the Division that proved he was **not** entitled to the refund. Petitioner had the burden to establish that he **was** entitled.

We now address petitioner's alternative claim that he is entitled to a refund under Tax Law § 697(d) because the overpayment of tax was due to a mistake of fact arising from his neglect or forgetting to include certain expenses that were relevant to the calculation of a capital gain.

In *Matter of Wallace* (Tax Appeals Tribunal, March 8, 2001), we stated that:

A mistake of fact has been defined as an understanding of the facts in a manner different than they actually are [citations omitted]. A mistake of law, on the other hand, has been defined as acquaintance with the existence or nonexistence of facts, but ignorance of the legal consequences following from the facts [citations omitted].

In *Wallace*, petitioners reported retirement income that could have been excluded from New York income. They incorrectly assumed that they were required to include the retirement income, which the Tribunal deemed a mistake of law, not fact, and their refund application under Tax Law § 697(d) was denied.

In *Wallace*, Mrs. Wallace admitted that she knew the income was pension income, yet included it on her return as taxable income under a mistake of law, i.e., without knowledge that she was entitled to subtract it pursuant to the provisions of Tax Law § 612. Therefore, in *Wallace*, petitioners' payment of income tax was under a mistake of law and did not warrant use of the commissioner's special refund authority.

Petitioner, like Mrs. Wallace, knew that he had expenses but did not know he had to deduct them to compute his gain on the sale. He also claimed, variously, that he forgot or was negligent when he filed his 1996 personal income tax return, he "did not recall" what expenses were actually taken, he did not know if he had taken *any* expenses as deductions in computing his capital gain, and he did not have a copy of his original filed return for 1996 (Tr., pp. 21-22). Putting the facts in this record in their best possible light, petitioner has not come forward with

sufficient evidence for us to conclude that his payment of income tax was under a mistake of fact.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Shlomo Cassos is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Shlomo Cassos is denied; and
4. The Notice of Disallowance dated December 12, 2008 is sustained.

DATED: Troy, New York
September 30, 2010

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

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

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner