

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ESTATES OF RUTH G. GOTTHELF AND EDWARD B. GOTTHELF	:	DETERMINATION DTA NO. 816200
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1974.	:	

Petitioners, the Estates of Ruth G. Gotthelf and Edward B. Gotthelf, by Philip Gotthelf executor, 7004 Boulevard East, Guttenberg, New Jersey 07093, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1974.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on July 13, 1998 at 12:00 noon, with all briefs to be submitted by December 3, 1998 which date began the six-month period for the issuance of this determination. Petitioners appeared by Philip Gotthelf, executor. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Andrew S. Haber, Esq., of counsel).

ISSUE

Whether petitioners are entitled to a refund of tax for the year 1974.

FINDINGS OF FACT

1. Petitioners, the estates of Ruth G. Gotthelf and Edward B. Gotthelf, and the Division of Taxation (“Division”) entered into a stipulation of facts. The stipulation has been incorporated into the following findings of fact. As will be more fully set forth, this matter spans almost three decades.

2. Petitioners filed a petition, dated November 17, 1997, which challenges the Division's 1996 application of payments to a Notice of Deficiency (Notice No. L 000636428) issued for personal income taxes due for the year 1974. In their petition, petitioners assert, among other things, that the tax due for the year 1974 was fully paid twice: first, by carry forward of tax paid from the 1972 personal income tax return and, second, by refund offsets applied to the Notice of Deficiency as follows: \$348.92 from the 1978 return, applied to the assessment on April 15, 1979; \$1,100.03 from the 1980 return, applied to the assessment on April 15, 1981 and \$407.00 from the 1985 return, applied to the assessment on April 15, 1986.¹ They also argue that the Division failed to allow for the audit adjustments made by the Internal Revenue Service (“IRS”) in the computation of tax asserted in the Notice of Deficiency and in recomputation of tax for the year 1972. Petitioners seek a refund of \$13,483.76.

3. Ruth and Edward Gotthelf filed their 1972 New York State Personal Income Tax Return dated August 13, 1973² without paying the amounts reported due on the return of \$3,227.19 for Edward Gotthelf and \$256.94 for Ruth Gotthelf.

¹A Notice of Assessment Resolution dated August 6, 1993 which explains the refund offsets and how they were applied is attached to the petition as an exhibit.

²Although the stipulated facts state that the 1972 personal income tax return is dated August 13, 1973, the correct date is March 13, 1973. While the stipulated facts do not state the date on which the return was filed with the Division, evidence in the record indicates that it was timely filed.

On February 28, 1974, a warrant against petitioners was docketed in the New York County Clerk's Office for the year 1972, listing tax due in the amount of \$3,484.13, penalty in the amount of \$52.26 and interest in the amount of \$440.13. Subsequently, on October 31, 1975, a subpoena was issued to petitioners for the same year. The subpoena requested that petitioners appear at the offices of the Division's Warrant and Collection Section on November 7, 1975 and present all evidence concerning the payment of income tax for 1972.

4. Petitioners filed their 1973 New York State Personal Income Tax Return without remitting payment of the balance due of \$939.72.³

On February 20, 1975, a warrant against petitioners was docketed in the New York County Clerk's Office for the year 1973 listing tax due in the amount of \$939.72, penalty in the amount of \$14.10 and interest in the amount of \$73.07.

5. Ruth and Edward Gotthelf filed their 1974 New York State Personal Income Tax Return on June 15, 1975 reporting \$2,239.00 in tax due with \$668.36 credited for withholding. Petitioners did not remit the balance due of \$1,570.64.

6. A Notice and Demand for Payment (R7508011525)⁴ for the year 1974 was issued on August 1, 1975 showing tax due in the amount of \$1,570.64, plus interest and penalties.

On December 22, 1975, a warrant against petitioners was docketed in the New York County Clerk's Office for the tax year 1974 reflecting tax due in the amount of \$1,570.64, plus penalty in the amount of \$15.71 and interest in the amount of \$168.59.

7. Petitioners were audited by the IRS for the years 1972 through 1975. Tax years 1972 and 1973 were audited twice and a total of three adjustments were issued by the IRS for those

³The date on which petitioners filed their 1973 return is not part of the record.

⁴The notice also appears in the record under its new number, i.e., L-000636428-2.

years. Petitioners filed returns and amended New York State returns in accordance with Federal audit results for the years 1972 through 1976.⁵ The amended returns for the years 1972 through 1975, filed with the Division on April 11, 1977, were prepared by an accountant, Neal S. Axelrod. The amended returns reported an overpayment of taxes for the years 1972, 1973 and 1974 and claimed a refund due in the amount of \$4,541.00, including interest⁶ to April 15, 1977.

8. In the amended filing for the year 1974, petitioners claimed a total refund of \$467.00, \$399.00 in tax plus interest of \$68.00. The record includes a Notice of Change in Taxable Income, Items of Tax Preference and Claim For Credit or Refund by U.S. Treasury Department Pursuant to Section 659 of the New York State Tax Law (Form IT-115) filed for the year 1974 and an attached computation schedule entitled "Adjustment of Tax Due by IRS & Filing of Amended Return New York State 1974." Review of this schedule indicates that the refund was calculated by subtracting a corrected combined tax of \$1,840.00 from the "COMBINED TAX PER ORIGINAL RETURN (PAID)" of \$2,239.00. As noted above, petitioners did not remit the balance due when they filed the original return for 1974.

9. On August 8, 1977, petitioners filed their 1976 income tax return and requested that the overpayments from the years 1972, 1973 and 1974, \$4,541.00 in State taxes and \$784.00⁷ in New York City taxes, a total of \$5,321.00, be credited to their 1976 taxes. Petitioners claimed an overpayment of \$1,709.00 on their 1976 return. Subsequently, in a letter dated October 15, 1977,

⁵The stipulation incorrectly recites 1976; the correct year is 1975.

⁶The accountant, in his computation of interest due on the claimed overpayment, assumed that the original tax amounts for each of the years had been timely paid.

⁷The asserted New York City tax overpayment amounts also include interest.

petitioners claimed a credit of \$5,835.00 against the 1976 tax due.⁸ The claimed credits resulted in an overpayment of \$2,223.00 on the 1976 return which petitioners then carried over to 1977.

10. From the sparse evidence in the record, it appears that, while the second IRS audit was taking place, petitioners entered into a payment agreement with the Division whereby petitioners agreed to pay \$300.00 per month. According to the Division's records, the only payments which petitioners made are the following: \$500.00 on August 29, 1974; \$1,500.00 on December 22, 1976; \$1,500.00 on May 14, 1977, \$300.00 on August 16, 1977 and \$300.00 in September 1977. The records indicate that payments totaling \$3,800.00 were credited towards the 1972 assessment on June 9, 1978 and \$300.00 was credited towards the 1973 assessment. The assessment for 1972 was closed on January 26, 1981 when the balance was "cancelled or manually abated."

11. The Division sent a letter dated December 19, 1979 to petitioners' accountant concerning tax year 1978. That letter explained that when petitioners' 1978 tax return was machine processed, the overpayment shown on that return was applied to the outstanding 1973 and 1974 tax liabilities. It went on to state that a review of petitioners' 1978 tax return indicated that "there was no 1978 estimated tax payments or credit for 1977 overpayment, as there was no overpayment on taxpayer's 1977 tax return," and, therefore, a Notice and Demand for estimated tax payments claimed on petitioners' 1978 return would be sent to them shortly.

Subsequently, on February 8, 1980, the Division issued a Notice and Demand (Assessment No. P800208779Z) for State personal income tax due in the amount of \$2,190.00, plus interest of \$151.93 for an amount due of \$2,341.93 for the year 1978. On the same date, a Notice and

⁸In that letter, petitioners requested that payments made pursuant to a payment agreement, between October 10, 1976 and September 10, 1977, totaling \$3,600.00, be credited towards the tax liability for 1976.

Demand (Assessment No. P800208780Z) was issued for City personal income tax due in the amount of \$8.00, plus interest of \$.55 for an amount due of \$8.55 for the year 1978. Both notices explained that petitioners' estimated tax payments or credits did not agree with their estimated tax account.

12. A subpoena concerning the year 1978 was issued on April 16, 1980. In lieu of appearing at the Division's Warrant and Collection Section on April 30, 1980, petitioners sent a letter, dated April 28, 1980, addressed to Mr. A. Able of the Warrant and Collection Section. In this letter, petitioners briefly outlined their filing history for the years 1972 through 1978, the Division's notices concerning those filings and their response to the Division's notices.⁹ Petitioners also asserted that the Division, among other things, had: ignored their letters; failed to even minimally communicate with them regarding the years 1972 through 1978; and failed to provide an accounting as promised. They concluded with a request for a review of the entire record and a full explanation.

13. A Voucher for Income Tax Refund, dated February 25, 1982, for the years 1972 and 1973 was issued to petitioners showing a net refund for 1972 and 1973 of \$33.07 and \$1,637.38, respectively, plus interest of \$371.64, less \$2,042.09 applied to petitioners' 1978 assessment P800208779Z for a refund of zero. On the same date, an income tax refund voucher was issued to petitioners for the year 1975 showing a net refund of \$282.88, plus interest of \$149.21, less \$432.09 applied to petitioners' 1978 assessment P800208779 for a refund of zero.

The tax liabilities for the years 1972, 1973 and 1975 were recomputed as a result of a conference held on June 21, 1979 in the New York District Office and IRS audit adjustments

⁹The documentary enclosures referenced in this letter are not part of the record.

made to petitioners' taxable income as reported on the original returns. A detailed recomputation of the tax is set forth in the vouchers. Review of the voucher for the years 1972 and 1973 indicates that the corrected taxable income for both years was based on audit changes set forth in the three IRS adjustments.

14. Petitioners sent a letter dated March 15, 1982 to the Division. The record does not include a copy of this letter. However, the Division's response, an undated letter signed by Phyllis G. Roe, a manager of office audit in the Division's New York District Office, Income Tax Section, ("Roe letter"), is part of the record.¹⁰

In her letter, Ms. Roe stated that, based on a detailed analysis of Mr. and Mrs. Gotthelf's tax years 1972 through 1978, as of January 31, 1985, there were 11 outstanding assessments totaling \$21,300.93: five personal income tax assessments, one for the year 1974 and the remaining four for the year 1976; and, six unincorporated business tax assessments for the years 1972 through 1976 and 1978. Each outstanding assessment was listed by tax type, year, assessment number and the total due. The outstanding amount listed as due on Assessment Number R7508011525, the 1974 personal income tax assessment, was \$1,058.64. A detailed analysis of petitioners' tax filing, payment and assessment history was attached to Ms. Roe's letter. Ms. Roe requested that petitioners review the analysis thoroughly. She also stated that proof of any additional payments should be sent to her directly and that she would retain the file until February 25, 1985, at which time it would be sent to Albany. In addition, Ms. Roe explained that, subsequently, the Tax Compliance Bureau would be contacting petitioners for payment. She also advised petitioners what steps were available to them if they wished to protest

¹⁰The handwritten date 2/5/85 appears below Ms. Roe's signature at the end of the letter.

the imposition of the unincorporated business tax.

15. The detailed analysis attached to the Roe letter consisted of three documents labeled Explanation # 1, Explanation # 2, Explanation # 3 and a spreadsheet of the 1972 through 1978 assessments.

Explanation # 1, a detailed response to petitioners' March 15, 1982 inquiry, reviewed the payments credited for tax years 1972, 1973, 1975 and 1978, explained why the vouchers for income tax refund dated February 25, 1982 for 1972, 1973 and 1975 were correct and how the refunds of those years were applied to the 1978 assessments. This explanation identified that for the years 1972 and 1973 petitioners were credited with payments totaling only \$3,800.00 and \$1,444.28, respectively. It also stated that credit was not given for amounts shown as payments made with the original IT-115s for 1972 and 1973, to wit, \$1,474.00 and \$1,058.11, respectively, because no payment was made at the time of the filing of those returns. The explanation also noted that the 1978 deficiency was now fully paid.

Explanation # 2 contained the analysis of the reasons for the assessments issued for the years 1974, 1976, 1977 and 1978. For the year 1974, the explanation noted that the original return reported total tax of \$2,239.00, withholding of \$668.36 and a balance due of \$1,570.64 which was not paid when the return was filed. According to the explanation, in April of 1979, an additional payment of \$348.92 (part of the overpayment reported on the 1978 return) was applied against the 1974 balance due. This explanation also stated that petitioners had incorrectly claimed credit of \$5,835.00 against the 1976 tax due.

Explanation # 3 set forth the following errors in petitioners' computation of the credit of \$5,835.00:

- a) N.Y. State was not administering the N.Y. City Income Tax at that time and

therefore the \$1,284.00 shown as N.Y. City overpayments cannot be deducted against N.Y. State Taxes due.

b) For 1972, you filed an amended return in April, 1977. You took credit for 1972 taxes previously paid of \$5,326.00 as noted in *explanation # 1 page 1*, you did not pay the balance due on the 1972 original return or the balance due per IT-115 for 1972 of \$1,474.00. Therefore, your taxes previously paid do *not* total \$5,326.00.

c) For 1973, you filed an IT-115 in September, 1977. You took credit for 1973 original taxes paid of \$1,498.00. As noted in *explanation # 1 page 1*, you did not pay the balance due on the 1973 original return. Therefore, your taxes previously paid do *not* total \$1,498.00.

d) For 1974, you took credit for previous taxes paid of \$2,239.00. As noted in *explanation # 2*, you did not pay the balance due on the 1974 original return. Therefore, you [sic] taxes previously paid do *not* total \$2,239.00. (Emphasis in original.)

The spreadsheet of the 1972 through 1976 assessments sets forth detailed computations of the tax due for each year based on original filings and any applicable IRS audit adjustments. Penalties and interest as appropriate are calculated. The spreadsheet also includes a detailed explanation of the application of all payments and credits, including taxes withheld, as well as any refunds determined to be due. Review of the spreadsheet computations for the year 1974 indicates that the adjustments from the IRS audit reduced petitioners' New York State tax due to \$1,400.06 (total New York State tax of \$2,068.42 less withholding of \$668.36). The outstanding unincorporated business tax assessments are listed at the bottom of the spreadsheet.

16. By letter dated February 2, 1987, the Division notified petitioners that the balance of their income tax account, with accrued statutory charges was \$18,525.84. Seven outstanding assessments were listed by assessment number, period, amount of tax, interest and penalties due, payments made and the balance due. Review of the notice reveals that one assessment pertained to the year 1974, assessment number R7508011525, while the remaining six were unincorporated

business tax assessments for the years 1972 through 1976 and 1978. The miscellaneous correspondence in the record indicates that, on at least three occasions, Philip Gotthelf, on behalf of his parents, requested information about and an accounting of the various assessments from the Tax Compliance representative who had sent out the February 2, 1987 notice; however, she failed to respond.

17. On or about May 7, 1987, Philip Gotthelf wrote former Governor Mario Cuomo about the problems associated with his father's tax assessments. The matter was referred back to the Division for handling. By letter dated September 7, 1987, John B. Langer, Deputy Commissioner for Operations, outlined the steps taken by the Division in the review of Edward Gotthelf's tax file and the conclusions reached after review of that file. Mr. Langer wrote that upon review of Edward Gotthelf's file there was no evidence that the tax assessed by the Division was incorrect. He noted that there had been: (1) four letters written to Edward Gotthelf explaining the assessment; (2) a June 21, 1978 conference, attended by both Edward and Philip Gotthelf, at which the accuracy of the issue was discussed; and (3) "the complete presentation of the figures" involved in Edward Gotthelf's assessments, dated February 5, 1985 (the Roe letter). Mr. Langer also wrote that: "[U]pon further review of your father's file, we find no mention of the A.B.L.E. Group that you mentioned in your letter to the Governor, nor have we even heard of such an organization. Our records, furthermore, do not indicate that any warrants were vacated." Mr. Langer concluded by stating that the assessments were accurate and the Division's collection efforts had been delayed because it had been looking into prior inquiries concerning the assessments. He also explained the steps which could be taken, after payment of the assessments, to further contest the matter.

17. According to the correspondence in the record, the assessments for the unincorporated

business taxes were abated or canceled sometime in 1988.

18. The record includes correspondence dated March 29, 1989, written by Philip Gotthelf, on behalf of the petitioners, in response to the Division's efforts to collect the outstanding personal income tax assessments for the years 1974 and 1976. In that correspondence, Mr. Gotthelf continued to take the position that: the tax for 1972 and 1973 was paid twice; the Division's computer system lost the record of the original payment; the Division misapplied future payments prior to final Federal audit results; and the lack of a record of those payments is the reason for the outstanding assessments for the years 1974 and 1976. In this letter, Mr. Gotthelf also asserted that on two separate occasions he had brought the canceled checks as proof of payment to the Division's Warrant and Collection Section located at Two World Trade Center and both times, after review of the canceled checks, the Division canceled the warrants and removed property liens. Mr. Gotthelf further stated that he thought the matter had been resolved in 1980. He asserted that because of the long passage of time he no longer knew where the checks were and thought he might have left them with Warrant and Collection. He concluded the letter by offering to have his mother pay \$2,000.00 if the Division would cancel all assessments and finally close the file. According to the letter, the offer was made after consideration of the additional costs associated with continuing to contest the assessments and in the hope of finally resolving the matter.

The Division did not accept the offer and continued to demand payment on the outstanding assessments.

19. The Division converted its computer system and the assessment for the year 1974, assessment number R7508011525, was renumbered as Notice of Deficiency, Notice Number L-000636428-2.

20. On August 6, 1993, a Notice of Assessment Resolution was issued to Edward Gotthelf referencing the following tax liabilities: Assessment ID: L-000636428-2, L-000635620-1 and L-000644220-7¹¹ and showing a total amount due of \$13,483.76.¹² This notice contained the following advice, among other things:

The Payments/Credits that were applied to the above assessments were the result of refund-offsets.

The refund-offsets that were applied to assessment L000636428 were as follows: \$348.92 from the 1978 return and applied to the assessment on 4/15/79. \$1100.03 from the 1980 return and applied to the assessment on 4/15/81. \$407.00 from the 1985 return and applied to the assessment on 4/15/86.

The refund-offsets applied to L000635620 were as follows: \$1270.16 from the 1980 return and applied to the assessment on 4/15/81. \$132.25 was transferred from the overpayment of assessment no. P800208779Z¹³ to assessment no. L000635620.

The breakdown of the total amount due by assessment is not part of the record.

21. On August 31, 1993, Philip Gotthelf, in his letter to the Audit Division-Central Office -Income Tax -AG4, referencing Assessment ID: L000636428-2, L000635620-1, L000644220-7, wrote, in pertinent part:

Regarding the above, assessments were made well beyond the statute of limitations. The original audit has been disputed from 1972 and taxpayer has not provided the State with an extension of the statute.

A request has been made for a *refund* of \$1,855.95 inappropriately applied to L-000636428-2 and \$1,402.41 inappropriately applied to L-000635620-1 together with interest. (Emphasis in original.)

22. The record indicates that on November 14, 1990 Ruth Gotthelf passed away and,

¹¹Assessments L-000635620-1 and L-000644220-7 are for tax year 1976.

¹²Only the first page of this document is part of the record.

¹³The Notice and Demand for Payment of Income Tax Due for tax year 1978 (*see*, Finding of Fact "11").

subsequently, Philip Gotthelf filed a New York State Estate Tax Return for her estate. By letter dated October 23, 1994, the Division's Transaction and Transfer Tax Bureau notified Mr. Gotthelf that the estate tax return had been accepted but a Discharge of Liability letter would not be issued until the outstanding liability for 1974 was paid. The record indicates that Philip Gotthelf responded in writing to the Division about the liability for 1974, Assessment No. L-000636428-2, asserting that the outstanding liability appeared to be in error.

23. In response to petitioners' correspondence, the Division issued a Notice of Assessment Resolution, dated March 25, 1996, referencing Assessment ID: L-000636428-2, which stated, in pertinent part, as follows:

Assessments L000635620 and L000644220 for the 1976 tax year are closed. No payments are applied to these assessments.

Assessment L000636428 for the 1974 tax year was credited with payments totaling \$2,010.82. Since the warrant had not expired this money was properly applied.

Any overpayment which may result from our adjustment(s) will be refunded with interest.

The "Computation Summary Section" contained the following breakdown of the 1974 tax year assessment: tax in the amount of \$1,400.06, plus interest of \$596.76 and penalty of \$14.00, less assessment payment of \$2,010.82, for a current balance due of zero.

24. Philip Gotthelf, in his letter of April 15, 1996 addressed to the Division's refund correspondence section, wrote, in pertinent part:

I have been informed by Ms. Mazzariello of your collections division that assessments associated with L000636428, L000644220, and L000635620 reflecting tax years 1974 and 1976 have been canceled. Accordingly, refunds with interest are being processed for payments made in the following amounts:

\$1,270.16
\$132.25

\$840.54
\$407.00

Our records reflect the application of taxes withheld on Ruth Gotthelf as per the enclosed Notice of Assessment Resolution dated 2/12/93.¹⁴ Amounts that would have been refunded were applied toward additional assessments that were also reversed or canceled. Further, the tax of 1972 which was paid with a [sic] cashiers checks of \$3,227.19 and \$1,474.00 were “lost in the system” until they were discovered in the possession of New York State's Division of Taxation & Finance (New York City Office) during the hearing when warrants were removed along with property liens.

Given the enormous length of time associated with reconciling this matter, I am requesting that your department process remaining payments on an expedited basis. . . .

25. Philip Gotthelf sent a letter to the Division on May 16, 1996¹⁵ in which he stated, in pertinent part, that:

we have corresponded with the Refund Correspondence office after consulting Ms. Mazzariello concerning the reconciliation of the Taxpayers' account. . . . After a review of this matter, our accountant has informed us that the \$2,010.82 applied against the 1974 income tax assessment L000636428 is inappropriate. The warrant was supposed to be vacated at the same time property liens were lifted following an Administrative Hearing. Procedurally, a warrant cannot stand after the associated liens have been removed.

The records clearly show that a payment plan and schedule was also canceled when the State determined deficiencies resulted from an error in computer postings. While Ms. Mazzariello informed us refunds were being processed, our accountant has instructed us to prepare this letter as a request for a conference with the Bureau of Conciliation and Mediation Services regarding this particular assessment. He believes this assessment should be reversed and a refund for the \$2,010.82 should be processed along with the other payments. . . .

26. After a conciliation conference, the conferee issued a Conciliation Order (CMS No. 155646), dated October 24, 1997, sustaining the Notice of Deficiency (Notice Number L000636428). The following starred notation appeared at the bottom of the Conciliation Order:

¹⁴The February 12, 1993 Notice of Assessment Resolution is not part of the record.

¹⁵This letter references Assessment #L-000636428-2; Estate of Ruth & Edward Gotthelf.

“Credits totalling \$2,010.82 have been applied to this assessment.”

27. Warrants were vacated for all years. The stipulated facts do not indicate the dates on which the warrants were vacated. There is also no evidence in the record of any lien or warrant satisfactions.

28. There is currently no money owed by petitioners.

29. As noted in Finding of Fact “2,” the petition filed in this matter seeks a refund of \$13,483.76. A breakdown of the amount sought as a refund does not appear in the petition. However, according to petitioners' brief, it appears that the refund sought consists of tax payments totaling \$7,384.08 (\$3,584.08 + \$3,800.00), plus interest.¹⁶

30. The Division used three different computer systems during the pendency of this tax matter (1972 through the present).

31. The accounting records regarding petitioners have problems and deficiencies resulting from the Division's record keeping.

32. There is no accounting by the Division that matches assessments with credits or payments as to all particular payments.

33. In 1996, the Division applied overpayments totaling \$2,010.82 to the outstanding assessment for the year 1974. In order to explain how those payments were applied, the Division submitted the affidavit of Theodore Eckler, a Tax Compliance Agent II, in the Division's Tax Compliance Management Services Unit, who has held the position for nine and one half years. As part of his duties, Mr. Eckler is familiar with the accounts receivable records of the Division, including those maintained on computers, which are records of payments by taxpayers and the

¹⁶The \$3,584.08 is the payment which petitioners claim to have made sometime in 1973 for tax due for the year 1972 and the \$3,800.00 consists of the four payments applied by the Division against the tax liability for 1972.

crediting of such payments against tax liabilities owed the Division.

34. In his affidavit, Mr. Eckler stated that “the liabilities for the years 1972 and 1974 were based on the amount due on the filing of returns without proper payment that were further adjusted by the filing of amended returns and consented to statements of federal audit changes.” Based on his review of petitioners' accounts receivable records for personal income tax for the years 1972 and 1974, Mr. Eckler attests that the taxes for both years are fully paid with \$3,800.00 credited against the tax, penalty and interest for the year 1972 and \$2,010.82 for the year 1974. According to Mr. Eckler,

[T]he payments on the liability for the year 1972 were credited as follows: \$500.00 on 8/29/74; \$1,500.00 on 12/22/76; \$1,500.00 on 5/14/77 and \$300 on 8/16/77.

The payments on the liability for the year 1974 were credited as follows: \$132.25 paid from the 1973 income tax refund on 4/15/74; \$348.92 from the 1978 income tax refund on 4/15/79; \$1,529.65 from the 1980 income tax refund on 4/15/81, and \$407.00 from the 1985 income tax refund on 4/15/86. The \$407.00 from the 1985 refund was refunded to petitioners as overpayments of the 1974 taxes on March 19, 1996. \$840.54 from the 1980 refund was refunded to petitioners on April 6, 1996.

Mr. Eckler affirms that the Division's records do not show that there was an overpayment on petitioners' 1972 personal income tax liability applied against petitioners' 1974 personal income tax liability.

35. At the hearing, Philip Gotthelf testified on behalf of petitioners. Mr. Gotthelf explained that the outstanding assessment for 1974, ultimately satisfied by the application of payments in 1996, was the direct result of the Division's failure to account for an additional payment of \$3,543.08 which he stated petitioners made sometime in 1973 by certified check.¹⁷

¹⁷The identity of the financial institution which allegedly issued the certified check is not part of the record.

According to Mr. Gotthelf, petitioners made the payment to a Division office, perhaps Church Street, in response to a Notice of Levy of personal property issued for the year 1972. A copy of the Notice of Levy is not part of the record.

36. Mr. Gotthelf testified that, in 1980, he attended a hearing during which petitioners presented the original canceled check in support of their position that a payment of the tax due for the year 1972 had been made. He stated that the canceled check had a number on the front which indicated how the payment had been applied. The canceled check is not part of the record. While Mr. Gotthelf was hazy in his recollection of the nature and location of the hearing, he did recall that, because the Division's photocopy machine was inoperable, the hearing officer requested that the original check be left with the office. According to Mr. Gotthelf, petitioners agreed but requested that the Division give them a receipt which listed all documents being left. Mr. Gotthelf stated that J. Martin Obten, the attorney representing petitioners at that time, did receive a receipt from the Division. The receipt is not part of the record. Mr. Gotthelf further stated that, at the conclusion of that hearing, petitioners were assured that the outstanding assessment for 1972 would be canceled.

37. In support of their position that the assessment was canceled as a result of the 1980 hearing, petitioners submitted a photocopy of the front page of petitioners' original IT-208 for 1972 which had been filed with the Division in 1973. A label attached to the page contains the following information: "FILES REF # 26108873 CLOSED 012681; ASMT # P7306291530; GOTTHELF -E B & R; ID # 059035869SS ENDING TAX YR 72; BALANCE CANCELLED OR MANUALLY ABATED." In the space located in the lower right-hand corner labeled "For office use only" the following handwritten words appear: "perm x-rctd; 73 # 46163812; 1-29-76;

Arms.”¹⁸ A printed number 26108873 with a line through it also appears in the space. Neither party offered any explanation of the words appearing in the space.

SUMMARY OF THE PARTIES' POSITIONS

38. Petitioners assert that the burden of proof has shifted to the Division in this matter. In support of this assertion, they point to the Division's admissions in the joint stipulation concerning its record keeping and its effect on petitioners' accounts receivable records and its failure to provide an accounting which matches assessments with particular payments. Petitioners argue that because of the Division's admitted record keeping shortcomings it is impossible for them to reconcile the application of payments made by the Division. They maintain that the Division should have presented a reconciliation of petitioners' tax accounts from each computer system to prove continuity and also disprove petitioners' assertion that the original 1972 tax was paid.

Petitioners maintain that the evidence clearly establishes that the Division failed to apply an additional payment made in 1973 towards the 1972 tax liability and, as a result of that failure, the liability for the year 1974 remained outstanding until 1996. In addition, they assert that the Division's recomputation of the 1972 tax liability failed to include the audit adjustments made in the IRS's second and third adjustments and therefore, the recomputed tax should be lower. They also claim that the Division's haphazard application of payments to their tax liabilities for the years 1972 through 1978 has resulted in the assessment of unnecessary additional penalties and interest.

39. The Division admits that there were numerous problems with the crediting of

¹⁸The handwriting is somewhat illegible and it is unclear whether the last letter is an “s” or an “e.”

petitioners' payments from the 1970s and only in 1996 was the matter finally resolved when overpayments were found and applied to petitioners' 1974 tax liability as shown in the 1996 Notice of Assessment Review. The Division asserts that over the course of approximately 27 years it has reviewed the payments made by petitioners on the liability for the year 1972 a number of times and has been unable to confirm the alleged overpayment. It maintains that “even if there was such an overpayment it was never credited against the 1974 liability.”

(Division's brief, p. 4 .) The Division argues that even if there was such an overpayment for 1972, the Division of Tax Appeals lacks jurisdiction to grant a refund for a different year. It also argues that there is no evidence that petitioners ever filed a claim for refund for the year 1972 and therefore no review of petitioners' claim concerning that year can take place. Lastly, the Division asserts that, contrary to petitioners' contention, it does not bear the burden of proof in this matter. It further argues that petitioners' evidence fails to establish that they are entitled to an additional refund for the year 1974.

40. In their reply brief, petitioners assert that they have in fact made numerous claims for refunds through written correspondence. They assert that the “amending of New York State returns subsequent to the second set of Federal audits and in conformity with the findings thereof provided the Division with a clear and unambiguous request for the application of overpayments and/or refunds.” (Petitioners' reply brief, p. 3.) Petitioners also argue that the Division mischaracterized petitioners' assertion that the burden of proof has shifted to the Division. They assert their position is that the burden of proof to challenge the amount due for 1974 rests with the Division due to its failure to keep a proper accounting. Petitioners argue that “[A]bsent payment documents the Division lost, the course of conduct in vacating warrants and lifting tax liens should satisfy the burden of proof emphasized by the Division.” (Petitioners' reply brief, p.

4.) They maintain there is sufficient documentary evidence for a finding in favor of the requested refund.

CONCLUSIONS OF LAW

A. Tax Law former § 687(a), effective for period in issue states:

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, or if no return was filed, within two years from the time the tax was paid. If the claim is filed within the three year period, the amount of 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. If the claim is not filed within the three year period, but is filed within the two year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim. Except as otherwise provided in this section, if no claim is filed, the amount of a credit or refund shall not exceed the amount which would be allowable if a claim had been filed on the date the credit or refund is allowed.

B. It is petitioners' position that the Division's failure to properly account for and apply all payments made towards the payment of the 1972 tax liability created the problems associated with the 1974 tax liability. The Division argues that a timely refund claim was not filed for the year 1972 and, therefore, the merits of petitioners' claim for that year cannot be addressed to resolve the issues pertaining to the year 1974. To resolve this matter, it is first necessary to determine whether or not petitioners filed a timely claim for refund for the year 1972.

As noted above, Tax Law former § 687(a) generally required that a claim for refund or credit under Article 22 be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever term expired later. Petitioners timely filed their 1972 income tax return on or about April 15, 1973 (*see*, Finding of Fact "3"). On April 11, 1977, petitioners filed an amended return for 1972 which claimed a refund of taxes allegedly overpaid based on audit changes made to taxable income pursuant to the IRS adjustments (*see*, Finding of

Fact “7”). By letter dated October 15, 1977, petitioners requested that the payment agreement payments, which they had made between October 10, 1976 and September 10, 1977, be credited towards their tax liability for 1976 (*see*, Finding of Fact “9”). The Division did not have a record of any of the additional payments which petitioners claimed as part of the refund on their amended return for 1972. On June 9, 1978, the Division credited the 1972 assessment with payments totaling \$3,800.00 made pursuant to the payment agreement (*see*, Finding of Fact “10”). Subsequently, the Division issued petitioners a Voucher for Income Tax Refund, dated February 25, 1982, for the years 1972 and 1973. This voucher contained a detailed recomputation of tax for 1972 and showed a net refund of \$33.07 for the year (*see*, Finding of Fact “13”). Petitioners objected to the partial denial of their refund.

The October 15, 1977 letter constitutes an informal claim for refund for the year 1972 (*see*, *Matter of Greenburger*, Tax Appeals Tribunal, September 8, 1994; *Matter of Rand*, Tax Appeals Tribunal, May 10, 1990). While petitioners’ request for refund was not made within three years of the filing of their 1972 return on April 15, 1973, it was filed within two years of payments of \$1,500.00, \$1,500.00 and \$300.00 made on December 22, 1976, May 14, 1977 and August 16, 1977, respectively, which the Division had applied towards the 1972 tax liability. Clearly, petitioners made a timely request for refund (*see*, Tax Law § 687[a]). However, any refund determined to be due would be limited to \$3,300.00, less the prior refund of \$33.07, the amount of tax paid within two years of October 15, 1977.

Where a taxpayer has made a timely request for a refund, Tax Law § 689(c) permits a taxpayer to file a petition with the Division of Tax Appeals for the amounts asserted in the refund claim if, in pertinent part:

(3) either (A) six months have expired since the claim was filed, or (B) the tax

commission has mailed to the taxpayer, by registered or certified mail, a notice of disallowance of such claim in whole or in part.

No petition under this section shall be filed more than *two years* after the *date of mailing of a notice of disallowance*. . . “ (emphasis added).

There is no evidence that the Division ever mailed petitioners a notice of disallowance with respect to the disputed refund for 1972 by registered or certified mail. Accordingly, the refund was deemed denied six months after the amended return was filed (April 11, 1977). Since there is no evidence that petitioners ever filed a petition with the Division of Tax Appeals or its predecessor concerning the denial of their refund claim for 1972, the merits of the denial of the claimed refund for 1972 can be addressed in this matter.

C. The petition filed in this matter challenges the Division's 1996 application of refund offsets to the outstanding assessment for 1974, Notice of Deficiency (Notice No. 1-000636428-2), and seeks a refund of \$13,483.76 which consists of claimed unaccounted for payments made towards the 1972 tax liability in the amounts of \$3,584.08 and \$3,800.00, the total payments applied by the Division against the tax liability for 1972, plus interest. In support of their refund claim, petitioners raise the following arguments. First, they assert that they made an additional earlier payment of the tax reported due on their original 1972 return which is not reflected in their accounts receivable record maintained by the Division and was not taken into account when the Division applied payments against the tax liability for 1972. Second, they assert that the Division's recomputation of tax for the year 1972 fails to include all three of the IRS audit adjustments.

Petitioners argue that their problems with respect to the tax liability for 1974 can be directly traced to the Division's failure to properly credit their accounts receivable record for an earlier payment made with respect to the tax reported due on their original 1972 return. They

maintain that if the earlier payment had been properly credited to their accounts receivable record, the later payments, totaling \$3,800.00, could have been applied towards the tax liability for 1974 rather than the tax liability for 1972. While they admit that they failed to remit a payment when they filed the original return for 1972, they claim to have made a payment by cashiers check to the Division sometime in 1973. Petitioners rely on the testimony of Philip Gotthelf and the fact that the Division vacated all warrants and liens in support of their claim.

Petitioners have failed to prove that an additional payment was made towards the tax liability for 1972. Philip Gotthelf's testimony was vague and general. He did not identify the name of the bank which issued the cashiers check. Nor did he identify the date or amount of the claimed payment. Furthermore, his testimony is totally unsubstantiated. The record does not contain any documentary proof which establishes the amount and date of any additional payment which has not been accounted for by the Division. Therefore, the Division's application of the payments totaling \$3,800.00 towards the tax liability are correct.

Petitioners also claim that the Division incorrectly recomputed the tax liability for 1972. They argue that the Division's recomputation does not accurately reflect all the adjustments made by the IRS for that year. They do not specifically identify what adjustments the Division failed to make. Rather, they make a general claim that the Division based its recomputation of tax solely on the audit adjustments made in the first IRS adjustment. Petitioners' argument is without merit, the Division's recomputation set forth in the Voucher For Income Tax Refund, dated February 25, 1982, was based on the audit changes set forth in the three IRS adjustments (*see*, Finding of Fact "13"). Furthermore, the Roe letter and the attached spreadsheet contain a detailed analysis of how the Division recomputed the tax liability for 1972 (*see*, findings of fact "14" and "15"). Petitioners have failed to prove that the Division incorrectly recomputed their

tax liability for 1972 (Tax Law § 689[e]).

In sum, petitioners have failed to prove by clear and convincing evidence that they made an additional unaccounted for payment for the year 1972 and that the Division's recomputation of the tax due for 1972 was improper.

D. Lastly, petitioners argue that Mr. Eckler's explanation of the source and application of the payments which the Division applied against the tax liabilities for 1972 and 1974 is inconsistent with prior documents issued by the Division, specifically, the February 2, 1987 letter which notified petitioners of seven outstanding liabilities and the Roe letter and spreadsheet. I find petitioners' arguments to be without merit. The 1972 assessment listed as outstanding in the February 2, 1987 letter is the unincorporated business tax liability for 1972, not the personal income tax liability for 1972 as petitioners contend (*see*, Finding of Fact "16"). Mr. Eckler's affidavit explains how the Division actually applied the overpayments to the outstanding liability for 1974 and why the two refunds were made. Petitioners have failed to produce any evidence which shows that the Division's application of the overpayments was incorrect or that additional overpayments exist which should be refunded to them.

E. The petition of the Estates of Ruth G. Gotthelf and Edward B. Gotthelf is hereby denied.

DATED: Troy, New York
May 27, 1999

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE