STATE OF NEW YORK

DIVISION OF TAX APPEALS

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

Petitioners, Harold and Shirley Peterfreund, 271-223 Grand Central Parkway, Floral Park, New York 11005, 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 1982.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 31, 2000 at 10:30 A.M., with all briefs to be submitted by September 1, 2000, which date began the six-month period for the issuance of this determination. Petitioners appeared by Ronald Kassover, CPA. The Division of Taxation appeared by Barbara G. Billett, Esq. (Herbert M. Friedman, Jr. , Esq., of counsel).

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

1. 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.

2. 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.

3. As noted in Finding of Fact "1", 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. 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.

4. 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 Internal Revenue Service, pursuant to IRC § 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.

SUMMARY OF THE PARTIES' POSITIONS

5. Petitioners' representative freely admitted under oath that he advised petitioners that "they did not have to notify New York State of any change" by the Internal Revenue Service to their 1982 income tax liability (tr., p. 55). He explained, in relevant part, as follows:

> Because if I made a mistake and filed a New York State return [for 1982] while technically they were residents of Florida for most of the year, and they were notified later of an assessment eleven, twelve years later by Internal Revenue, I

> did not feel that a return to New York State – it should not have been filed in the first place.

Petitioners' representative asserted that he was told by petitioners that they were residents of Florida since 1977. In her testimony, Mrs. Peterfreund also seemed to assert that she and her husband were not residents of New York in 1982. However, she was unforthcoming and hedged on the issue whether petitioners filed as residents of New York in 1982:

> Attorney Friedman: When you paid the Internal Revenue Service, was it your earlier testimony that you didn't file an amended return with the State of New York for the year 1982?
>
> Mrs. Peterfreund: No. I didn't even think we had to file a State. We were Florida residents for years before then.
>
> Attorney Friedman: But you did file an original 1982 return with New York State: right?
>
> Mrs. Peterfreund: I don't really know if we have been filing State taxes every year from then.
>
> Attorney Friedman: Okay.
>
> Mrs. Peterfreund: Harold [Mr. Peterfreund] might know but we'll wait until he gets on the stand.[1]

But other than these assertions,[2] petitioners offered no proof or documentation, of any sort, that they were not residents of New York for income tax purposes in 1982.

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[1] Mr. Peterfreund who was listed as a witness on petitioners' prehearing memorandum, prepared by petitioner's representative on the morning of the hearing, was not, in fact, called to testify. Immediately following Mrs. Peterfreund's above quoted exchange with the Division's attorney, petitioners' representative decided not to call Mr. Peterfruend explaining as follows: "I was going to call Mr. Peterfreund, but I don't think he remembers the dates. . . . We prefer not to call Mr. Peterfreund as a witness, because I don't think he remembers what I was going to ask him" (tr., p. 49).

[2] Furthermore, petitioners' representative earlier in his testimony hedged on whether petitioners were not residents of New York in 1982. In response to a question by the administrative law judge, who asked whether the representative was testifying that petitioners were residents of Florida in 1982, Mr. Kassover responded: "I'm not sure. I think they did live in Florida, based on what was told to me. I knew that they had the address in Queens that they used, but I was told later on that they were residents in Florida." (Tr., p. 54)

6. According to petitioners, there was "a similar assessment on [Jaclyn Realty] in 1983 for the tax shelter, which is similar to the 1982 return" (tr., p. 60). They attached to their petition a photocopy of an Internal Revenue Service notice dated June 8, 1998 which showed a "decrease in tax because of examination action" of $14,513.00 *in 1983.*

7. According to petitioners, they were discriminated against by the Division because the two certified public accountants, Maurice Baer and Aaron Baer, who were the *general partners* of Jaclyn Realty, were not assessed additional tax on the basis of a disallowance of Jaclyn Realty's partnership loss. Petitioners offered no evidence concerning Jaclyn Realty other than the testimony of their representative, who admitted that he had no personal knowledge concerning Jaclyn Realty. Finally, petitioners maintain that the Division acted improperly by levying upon petitioners' bank account when "Mr. Peterfreund was in the hospital having heart surgery," and since, according to Mr. Kassover, they are "retired people who need that money to live on" (tr., pp. 79-80).

8. The Division counters that pursuant to Tax Law § 659, "[i]t is incontrovertible law that a taxpayer is required to report any federal changes/adjustments to New York State within 90 days of the final federal determination" (Division's letter brief, p. 2). Petitioners never reported such change and therefore the additional New York income tax based on the Federal change could be assessed at any time. According to the Division, petitioners' evidence showing that the Internal Revenue Service might have reversed its decision concerning additional tax due in 1983 is not relevant to the year at issue, 1982.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 689(c)(3), in income tax matters, the Division of Tax Appeals ("Tax Appeals") has jurisdiction to hear and determine a petition which contests a notice of disallowance of a refund claim issued by the Division or, if no notice of disallowance has been issued, if "six months have expired since the claim was filed . . . . " As noted in Finding of Fact "4", the record does not include a notice of disallowance although there is some indication in written comments of a tax technician that petitioners' refund claim was denied. In any event, since it has been more than six months since petitioners filed their refund claim, Tax Appeals has jurisdiction over petitioners' claim to a refund of the $16,588.16 that was collected by the Division by its levy upon Mrs. Peterfreund's bank account, as detailed in Finding of Fact "4".

B. Tax Law § 659, in relevant part, provides as follows:

> If the amount of a taxpayer's Federal taxable income . . . is changed or corrected by the United States internal revenue service . . . or if a taxpayer's claim for credit or refund of Federal income tax is disallowed in whole or in part the taxpayer. . . shall report such change or correction in federal taxable income . . . or such disallowance of the claim for credit or refund within ninety days after the final determination of such change, correction, renegotiation or disallowance, or as otherwise required by the [commissioner], and shall concede the accuracy of such determination or state wherein it is erroneous . . . .

Petitioners do not deny that the IRS determined that they owed additional Federal income taxes for the year at issue, 1982. Consequently, the Division's issuance of the Notice of Additional Tax Due dated April 16, 1993 based upon the Federal adjustment, in the first instance, was proper (***see, Matter of Karayannides***, Tax Appeals Tribunal, March 13, 1997).

C. Tax Law § 681(e)(1) provides that, if a taxpayer fails to comply with section 659 of the Tax Law, then instead of issuing a Notice of Deficiency the Division "may assess a deficiency

based upon such Federal change, correction or disallowance by mailing to the taxpayer a notice of additional tax due . . . . " Further, the deficiencies, interest and additions to tax or penalties stated in a notice of Additional Tax Due are deemed assessed on the date the notice is mailed except in the following circumstances:

> [U]nless within thirty days after the mailing of such notice a report of the federal change, correction or disallowance or an amended return, where such return was required by section six hundred fifty-nine, is filed accompanied by a statement showing wherein such federal determination and such notice of additional tax due are erroneous (Tax Law § 681[e][1]).

However, the Division has not sought to bar petitioners from contesting on the merits the Notice of Additional Tax Due dated April 16, 1993, which provided the basis for its levying upon Mrs. Peterfreund's bank account and the rationale for denying petitioners' refund claim for such levied amounts. This is so despite the apparent failure by petitioners to respond within 30 days after the mailing of the Notice of Additional Tax Due with a statement showing where the Federal adjustment and the Notice of Additional Tax Due were erroneous. Consequently, the merits of petitioners' refund claim may be addressed.

D. Petitioners have 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 (***see, Bello v. Tax Appeals Tribunal***, 213 AD2d 754, 623 NYS2d 363; ***Matter of Korsinsky***, Tax Appeals Tribunal, December 21, 2000). They have attempted to meet this burden by contending that they were not subject to New York personal income tax in 1982 because they were not residents of New York that year. They have offered no proof to support such contention other than bare allegations of their status as residents of Florida and nonresidents of New York in 1982. Petitioners have also attempted to meet their burden of establishing that the Division's assertion of tax due in 1982 was erroneous by contending that the IRS altered its

position concerning the disallowance of partnership losses claimed by Jaclyn Realty. However, their limited proof concerning the year 1983 is irrelevant to the year at issue, 1982. Petitioners have also raised an argument that they were "discriminated upon" by the Division which did not seek to impose additional liability upon the general partners of Jaclyn Realty. To prove a claim of discriminatory enforcement, petitioners need to prove selectivity of enforcement and that the selectivity arose from "an intentional invidious plan of discrimination on the part of the Division" (***Matter of Goetz Energy Corporation***, Tax Appeals Tribunal, November 18, 1999 quoting ***Matter of Petro Enterprises, Inc.***, Tax Appeals Tribunal, September 19, 1991). Petitioners have proven neither. Petitioners have merely *alleged* that the Division did not proceed against the general partners of Jaclyn Realty. No evidence was introduced to support this charge. Furthermore, there is nothing in the record to conclude that the Division intentionally and invidiously discriminated against them by asserting additional State income tax for 1982 based upon a Federal adjustment to petitioners' 1982 Federal income tax. Finally, assuming that petitioners have established the fact that Mr. Peterfreund was hospitalized at the time Mrs. Peterfreund's bank account was levied upon and that they "need" the moneys levied upon by the Division "to live on," such circumstances do not provide a basis for granting their refund claim.

E. Tax Law § 3008(a) was amended, effective September 10, 1997, to provide 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 in performing a managerial act (as well as a ministerial act as under the prior law) (***see***, L 1997, ch 577, § 26). This new law is applicable to interest accruing after the effective date of September 10, 1997 (***see***, L 1997, ch 577, § 56[f]). In the matter at hand, the interest at issue accrued prior to September 10, 1997, and

moreover, the record does not support a conclusion that interest accrued on the underlying deficiency by the unreasonable error or delay of a Tax Department employee. Rather, the interest collected by the Division of $10,303.48, which is approximately twice as large as the underlying tax of $5,326.00, 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. This failure to remit the additional tax due gave petitioners the use of funds which did not belong to them and deprived the State of funds which belonged to it. Consequently, the interest, which was imposed upon the outstanding amount of tax due, compensated the State for its inability to use the funds and encourages timely remittance of tax due (***see***, ***Matter of Mauceri***, Tax Appeals Tribunal, May 13, 1993).

F. As noted in Finding of Fact "4", the Division's levy upon Mrs. Peterfreund's bank account also resulted in the collection of penalty in the amount of $958.68. However, the Notice of Additional Tax Due dated April 16, 1993 asserted additional tax plus interest only. No penalty was asserted due. As a result, petitioners' petition is granted to the extent that a refund of the penalty in the amount of $958.68, collected by levy in July of 1996 by the Division, will be allowed to petitioners.

G. The petition of Harold and Shirley Peterfreund is granted to the extent indicated in Conclusion of Law "F", and a refund in the amount of $958.68 plus applicable interest is allowed, but in all other respects, the petition is denied.

DATED: Troy, New York
January 25, 2001

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE