STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARTIN A. LEVITIN	:	DETERMINATION DTA NO. 818413
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 1982.	:	

Petitioner, Martin A. Levitin, 219 Hillair Circle, White Plains, New York 10605-4516, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 1982.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 90 South Ridge Street, Rye Brook, New York, on December 14, 2001 at 9:15 A.M. Petitioner Martin A. Levitin appeared *pro se.* The Division of Taxation appeared by Barbara G. Billet, Esq. (Susan Parker).

Since neither party elected to reserve time to file a brief, the three-month period for issuance of this determination began as of the date the hearing was held.

ISSUES

I. Whether the deficiency asserted against petitioner for 1982 was issued within the period of limitations on assessment.

II. Whether petitioner should be allowed to offset the tax due for 1982 by an overpayment for 1987.

FINDINGS OF FACT

1. On March 11, 1997, the Internal Revenue Service ("IRS") issued an Income Tax Examination Changes statement to Martin A. Levitin (hereinafter "petitioner") and his wife, Elaine Levitin, for the year 1982 wherein an adjustment was made which disallowed petitioner's claimed partnership loss of $25,275.00 from Golden Gate Associates. It was stated thereon that the adjustment was "based on a Tax Court decision." It was also stated that a greater rate of interest was charged since it was "determined that part of the underpayment of tax is attributable to tax motivated transactions as defined under Section 6621(c) of the Internal Revenue Code." Based on this adjustment, a tax deficiency was asserted by the IRS for 1982 of $12,272.00.

2. On September 10, 1996, which was prior to the issuance of the above statement, the IRS issued an Income Tax Examination Changes statement to petitioner and his wife for the year 1987 wherein an adjustment was made reducing petitioner's reported income by $25,177.00. This adjustment was reported as a "Golden Gates Assoc., Forgiveness of Debt (Sch. E)." It was stated thereon that this statement "is a final report based on the amended return filed by the partnership and the amended K-1" and that the "forgiveness of debt has been reduced to zero." Based on this adjustment, the IRS computed a tax overpayment for 1987 of $7,901.00.

3. On September 11, 1997, the IRS notified the Division of Taxation ("Division") of the 1982 Federal changes. As a result, on December 23, 1999, the Division issued a Notice of Additional Tax Due to petitioner for the 1982 tax year. The notice was issued solely to petitioner because, for New York State purposes, petitioner and his wife filed their 1982 income tax return under filing status "Married filing separately on one return," and the adjustment incorporated therein, which merely represented a carryover to the State return of the $25,275.00 Federal adjustment, was applicable solely to petitioner's 1982 reported income. This notice,

which asserted additional tax of $3,301.90, plus interest of $9,114.51, for a total due of $12,416.41, contained the following explanation:

> Our records indicate that the Internal Revenue Service has made changes to your federal return. Section 659 of the New York State Tax Law requires that federal audit changes be reported to the New York State Tax Department within 90 days of the final federal determination.
>
> A search of our files indicates that you did not report these changes to New York State. . . .
>
> When you do not report federal audit changes as required, the New York Tax Law provides for assessment of the tax due at any time. There is no time limit provided by section 683(c) of the New York Tax Law.
>
> Interest is due on the underpayment of tax from the due date of the return to the date the tax is paid in full. Interest is required under section 684(a) of the New York State Tax Law.
>
> The federal audit changes show an adjustment was made to your distributive share of partnership income/loss from the following partnership(s):
> GOLDEN GATE ASSOC.

4. In response to the Notice of Additional Tax Due, petitioner, on February 28, 2000, submitted an explanatory letter to the Division wherein he stated, *inter alia*, as follows:

> The Federal adjustment for 1982 to which you refer represents only a small part of the total history relating to a coal tax shelter which was fraudulently sold to us by a public corporation, Swanton Corporation, in 1982. We have been the victims of this scheme and not perpetrators of it. As soon as we were able to do so, we reversed the original deductions and paid the additional federal and New York State taxes (in 1987), relating to the abrogation of the original transaction . . .

Additionally, petitioner alleged in said letter that "The Statute of Limitations applicable to the 1982 tax year bars this assessment since at no time and in no proceedings did we waive any statute of limitations."

5. On June 22, 2000, petitioner filed a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services ("BCMS"). Petitioner detailed his basis for

disagreement in a letter dated June 19, 2000, which was annexed to the request. The content of this letter is essentially identical to that of the February 28, 2000 letter.

6. As a result of the BCMS conciliation conference held October 17, 2000, the conferee issued a Conciliation Order on December 29, 2000 which denied petitioner's request and sustained the statutory notice.

7. On March 28, 2001, petitioner filed a petition for a hearing with the Division of Tax Appeals. In his petition he asserted that:

> The Commissioner of Taxation and Finance has erred in the assessment against the taxpayer for the year 1982 by basing that assessment solely on a federal tax assessment for 1982 taken out of context. The federal assessment was part of a global settlement between the general partner of a limited partnership and the IRS which was litigated for fifteen years. The taxpayer on his own initiative reversed the disallowed 1982 deduction on his 1987 state tax returns and paid the taxes due on that "phantom income" at that time. The global settlement by the general partner involved a federal refund for 1987 and a federal assessment for 1982. This result does not extrapolate to the state tax situation and would result in quadruple taxation of the taxpayer if permitted to stand. Such result is neither accurate, fair nor equitable.

8. Review of the hearing record establishes the following sequence of events:

(a) In 1982, petitioner, at the suggestion of an acquaintance, invested $ 10,000.00 in Golden Gate Associates ("Golden Gate"), a limited partnership coal mining program which was sold to him by Swanton Securities, Inc., the placement agent. At that time, petitioner signed a mine development note for approximately $25,000.00. Based on this transaction, petitioner received a 1982 Federal form K-1 from Golden Gate which reported a loss for petitioner in the amount of the note. Petitioner claimed the aforesaid 1982 partnership loss for both Federal and New York State tax purposes.

(b) In 1986, petitioner became aware that an IRS audit was being conducted on Golden Gate and that based on this audit, his claimed 1982 loss was deemed inappropriate. As a

result, petitioner, of his own volition, picked up the 1982 claimed loss as income on his 1987 Federal and New York State returns and paid the appropriate taxes thereon.

(c) Subsequently, the IRS determined that petitioner was not entitled to the claimed partnership loss in 1982. Accordingly, the IRS disallowed the 1982 loss. Additionally, since petitioner "reversed" the 1982 loss by reporting the claimed loss amount as income in 1987, the IRS adjusted out this reported income and granted petitioner a refund for 1987 (***see***, Findings of Fact "1"and "2").

(d) Since petitioner failed to report both the 1982 and 1987 Federal changes to New York State, the Division asserted a deficiency against petitioner for 1982 based on the claimed partnership loss disallowance (***see***, Finding of Fact "3"). However, with respect to 1987, the Division refused to allow petitioner a refund for 1987 on the basis that the statute of limitations on refund had expired.

SUMMARY OF PETITIONER'S POSITION

9. Petitioner argued that the deficiency for 1982 was improperly asserted since the statute of limitations on assessment had expired prior to the Division's issuance of the Notice of Additional Tax due on December 23, 1999. He further argued that since the 1982 claimed loss and the 1987 reported income were with respect to the same transaction, as a matter of equity, he should be allowed to offset the 1982 deficiency by the 1987 overpayment, notwithstanding the fact that for 1987 the statute of limitations on refund had expired.

CONCLUSIONS OF LAW

A. Tax Law § 659 provides, in pertinent part, that:

> If the amount of a taxpayer's federal taxable income . . . is changed or corrected by the United States internal revenue service or other competent authority . . . the taxpayer . . . will report such change or correction in

> federal taxable income . . . within ninety days after the final determination of such change.

B. Tax Law § 683 provides as follows:

> **Limitations on assessment.–**(a) General– Except as otherwise provided in this section, any tax under this article shall be assessed within three years after the return was filed (whether or not such return was filed on or after the date prescribed).
>
> * * *
>
> (c) Exceptions– (1) Assessment at any time– The tax may be assessed at any time if–
>
> * * *
>
> (C) the taxpayer . . . fails to comply with section six hundred fifty-nine in not reporting a change or correction in his federal taxable income.

Since petitioner failed to report the 1982 Federal changes to New York State, the Division was allowed to assess a deficiency against petitioner at any time with respect to such changes.

C. As noted in Conclusion of Law "A" when a taxpayer's Federal income tax return is changed or corrected by the IRS, Tax Law § 659 requires said taxpayer to report these changes to the Division within 90 days of the date that the Federal changes became final. Tax Law § 687, captioned "Limitations on credit or refund," contains, *inter alia*, various provisions which set forth the time period within which a claim for credit or refund must be filed. As pertinent to this proceeding, Tax Law § 687(c) provides that a claim for credit or refund of an overpayment based on the result of IRS changes, which changes were required to be reported to the Division pursuant to Tax Law § 659, must be filed within two years of the date that the notice reporting the changes was required to be filed. In other words, a taxpayer, when filing a claim for credit or refund based on Federal changes, has two-years and ninety-days from the date that the Federal changes became final to file the claim for credit or refund with the Division. In the instant matter, the Federal changes for the 1987 tax year were finalized on September 10, 1996 and there is no evidence in the record before me to prove that petitioner ever reported these changes

to the Division as required by Tax Law § 659 or that he filed a claim for credit or refund for the 1987 tax year based on the Federal changes within two-years and ninety-days of the date that the Federal changes were finalized as required by Tax Law § 687(c). Accordingly, the overpayment for the 1987 tax year cannot be applied against the tax due for 1982 since the statute of limitations on refund provided for in Tax Law § 687(c) has expired. Although this determination may appear inequitable, it must be noted that any inequities are due to petitioner's failure to comply with the provisions of the Tax Law. Petitioner was required, pursuant to Tax Law § 659, to report the Federal changes for both 1982 and 1987 to the Division within 90 days of the date the changes were finalized; however, he chose, for some unknown reason or reasons, not to comply with the clear mandate of the law. Furthermore, petitioner had a substantial amount of time, two-years and ninety-days from the date the Federal changes for 1987 were finalized, to file a claim for credit or refund with the Division and he simply failed to do so.

D. The petition of Martin A. Levitin is denied and the Notice of Additional Tax Due dated December 23, 1999 is sustained.

DATED: Troy, New York
March 14, 2002

/s/ James Hoefer
PRESIDING OFFICER