STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RICHARD S. AND BEVERLY BERRY	:	DETERMINATION DTA NO. 818673
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1988 and 1989.	:	

Petitioners, Richard S. and Beverly Berry, 5 Lakeside Drive, Lawrence, New York 11559, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1988 and 1989.

On July 28, 2002 and July 11, 2002, respectively, petitioners, appearing by Raich Ende Malter & Co. LLP (Norman S. Malter, CPA), and the Division of Taxation, appearing by Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel), consented to have the controversy determined on submission without a hearing. All briefs were due by December 6, 2002 which date commenced the six-month period to issue a determination in this matter.

Upon review of the entire record, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether the claim for refund filed by petitioners beyond the three-year statute of limitations should be granted pursuant to the special refund authority set forth in Tax Law § 697(d).

FINDINGS OF FACT

1. During the years in issue, petitioner Richard S. Berry was the sole shareholder of Richard S. Berry, M.D. P.C., a professional service corporation (the “PSC”).

2. The PSC’s accountant, Harvey Zuckerman, CPA, timely prepared the PSC’s form CT-3, General Business Corporation Franchise Tax Return, and Form IT-2102-1 PC, which was an information return. Thereafter, Dr. Berry timely filed the PSC’s General Business Corporation Franchise Tax Return and Form IT-2102-1 PC for each of the years in issue.

3. For the years 1988 and 1989, petitioners’ share of the PSC’s combined contribution to pension trusts and F.I.C.A. were $80,457.00 and $63,523.00.

4. Mr. Zuckerman prepared petitioners’ 1988 and 1989 resident income tax returns, Form IT-201, which petitioners executed and timely filed. In preparing petitioners’ 1988 Resident Income Tax Return, Mr. Zuckerman mistakenly included the $77,077.00 contribution to pension trust portion of the total $80,457.00 as an add-back to petitioners’ Federal adjusted gross income. Similarly, in preparing petitioners’ 1989 resident income tax return, Mr. Zuckerman mistakenly included the $59,918.00 contribution to pension trust and the $3,605.00 F.I.C.A. (totaling $63,523.00) as an add-back to Federal adjusted gross income. Each of these modifications was reported on the first page of the resident income tax return as a New York addition modification on the line for “other” and was identified as “IT 2102-1 PC.” The amounts reported as the addition modifications were identical to the amounts reported on the Form IT-2102-1 PC.

5. At the time he prepared the resident income tax returns, Mr. Zuckerman was unaware that Tax Law former § 612 (b)(7), which required shareholders of professional service corporations to add back their share of the corporation’s qualified retirement plan contribution to their Federal adjusted gross income, was repealed for taxable years beginning after 1987. He

was also unaware that Tax Law former § 612 (b)(8), which required shareholders of professional service corporations to add back their share of the corporation's F.I.C.A. contributions to their Federal adjusted gross income, was repealed for taxable years beginning after 1988.

6. Petitioners' New York State tax liability for 1988 was $50,724.00 based on New York State taxable income in the amount of $592,456.00, which erroneously included the $77,077.00 contribution to pension trust as an add-back to petitioners' Federal adjusted gross income. This tax liability has been paid. Similarly, petitioners' New York State tax liability for 1989 was based on taxable income in the amount of $640,620.00, which erroneously included the $59,918.00 contribution to pension trust and the $3,605.00 F.I.C.A. as an add-back to petitioners' Federal adjusted gross income. This tax liability has also been paid.

7. Petitioners did not discover Mr. Zuckerman's mistakes until after the statute of limitations for claiming refunds had expired.

8. On or about February 22, 1999, petitioners filed amended resident income tax returns for the years 1988 and 1999 which recalculated their liability by omitting the amounts for contribution to pension trust and F.I.C.A. which Mr. Zuckerman had mistakenly included in their New York taxable income. Each of the amended returns claimed a refund.

9. In separate letters dated May 21, 1999, the Division of Taxation ("Division") denied the refunds for each of the years in issue. In each instance, the Division explained that since certain professional service corporation modifications remained during the years in issue, identifying a modification as "IT-2102-1 PC" would not have made it obvious that a modification was erroneously reported. Consequently, the special refund authority set forth in Tax Law § 697(d) was inapplicable.

SUMMARY OF PETITIONERS' POSITION

10. In support of their position, petitioners argue that the refund provisions of Tax Law § 687(a) were unavailable to them because this section only applies when there is an overpayment of tax. According to petitioners, a taxpayer has not made an overpayment of tax if he or she mistakenly paid monies for which there was no existing law taxing the income that prompted the taxpayer to mistakenly pay the money. It is submitted that a taxpayer may only claim a refund for an overpayment of tax if he or she actually paid tax. Since there was no law in effect which subjected the taxpayer's income to tax, the refund provisions of Tax Law § 687(a) were inapplicable. Further, since there was no law subjecting the taxpayer's income to tax, the amount of money paid was "erroneously or illegally collected moneys" within the meaning of Tax Law § 697(d). Petitioners also reject the suggestion that Tax Law § 697(d) does not apply when there is ignorance or mistake of the law. According to petitioners, if this were the case, there would be no circumstances under which the taxing authority would exercise its discretion to make a refund under this section. Petitioners submit that neither the prior cases nor the other previous authorities considered a situation where a taxing authority erroneously or illegally collected moneys from a taxpayer at a time when no law existed authorizing the collection of such moneys.

CONCLUSIONS OF LAW

A. In general, Tax Law § 687(a) provides that a claim for refund of an overpayment of income tax shall be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever period expires later. Here, there is no dispute that the claim for a refund was not filed within the time period set forth in Tax Law § 687(a). Rather, it is

petitioners' position that this is a proper case to invoke the special refund authority set forth in Tax Law § 697(d). This section provides:

> Special refund authority.--Where no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person 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, upon making a record of its reasons therefor in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certificate to the comptroller.

B. The question to be decided is whether the moneys were paid under a mistake of fact or a mistake of law. When presented with this question in the past, the Tax Appeals Tribunal has utilized the following standard:

> A mistake of fact has been defined as an understanding of the facts in a manner different than they actually are (54 Am Jur 2d Mistake, Accident or Surprise § 4; ***see also***, ***Wendel Foundation v. Moredall Realty Corp***., 176 Misc 1006, 29 NYS2d 451). 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 (54 Am Jur 2d Mistake, Accident or Surprise § 8; ***see also, Wendel Foundation v. Moredall Realty Corp.***, ***supra***). (***Matter of Wallace***, Tax Appeals Tribunal, October 11, 2001.)

C. When evaluated by the foregoing standard, it is clear that petitioners' position is without merit and that petitioners are not entitled to a refund under Tax Law § 697(d). Petitioners' accountant was aware of the character of the amounts in issue. He did not have a different understanding of the facts than what they actually were. Rather, he was unaware that certain provisions of the Tax Law had been repealed and, consequently, he was not aware of the legal consequences following from the facts. This was plainly a mistake of law. If petitioners' argument were accepted, it would clearly eviscerate the apparent legislative intent that the relief offered by Tax Law § 697(d) be confined to very limited circumstances involving a mistake of facts and would play havoc with the administration of the tax laws. The foregoing resolution

renders the question of whether it was apparent from the records of the Division that monies had been erroneously or illegally collected moot.

D. It is noted that petitioners' attempt in their brief to offer facts and arguments pertaining to 1990 is rejected. Petitioners did not file a petition challenging the denial of a refund for this year, and therefore, there is no jurisdiction to consider these additional matters (Tax Law § 2008).

E. The petition of Richard S. and Beverly Berry is denied.

DATED: Troy, New York
May 8, 2003

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE