

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**REGINA M. FORD** : DETERMINATION  
 : DTA NO. 819142  
for Redetermination of a Deficiency or for Refund of :  
Personal Income Tax under Article 22 of the Tax :  
Law and the New York City Administrative Code :  
for the Year 1997. :

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Petitioner, Regina M. Ford, 520 East 81<sup>st</sup> Street, New York City, New York 10028, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 1997.

Pursuant to 20 NYCRR 3000.9(b), by notice of motion dated February 12, 2003, the Division of Taxation (“Division”) moved for summary determination on the grounds that there were no material and triable issues of fact presented by the pleadings, and the uncontroverted facts mandated summary determination in the Division’s favor. Petitioner failed to file a response to the motion. Her response was due on March 14, 2003, which date commenced the 90-day period for issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Margaret T. Neri, Esq., of counsel). After due consideration of the record, Gary R. Palmer, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation properly disallowed petitioner’s claim for refund of New York State and New York City personal income tax for the year 1997.

***FINDINGS OF FACT***

1. Petitioner timely filed her 1997 New York State and New York City personal income tax return on April 15, 1998.

2. On April 18, 2001 petitioner filed her New York State and New York City amended resident income tax return, Form IT-201-X, wherein she claimed the pension and annuity income exclusion pursuant to Tax Law § 612(c)(3-a) and claimed a refund in the sum of \$757.65.

3. On November 13, 2001 the Division issued to petitioner a refund denial letter, which explained that the Tax Law provides for the granting of a refund where the claim therefor is filed within three years of the time the return was required to be filed or within two years from the time the tax was paid, whichever is later.

4. On September 17, 2002 petitioner filed a petition with the Division of Tax Appeals wherein she conceded that her refund claim was untimely and averred that such delay was “out of (the) control of the taxpayer” because the delay was caused by the actions of the overnight delivery service used by her tax preparer to forward petitioner’s signature-ready amended return to her for signing. Attached to the petition is a letter from an Airborne Express employee dated April 16, 2001 to the tax preparer with a copy to petitioner. In this letter Airborne Express acknowledges having received a shipment addressed to petitioner on April 13, 2001 for delivery on April 14, 2001, but due to Airborne’s error, it would not be delivered until April 17, 2001.

5. Petitioner contends that because the delay was due to the fault of Airborne Express, and because Airborne Express is a private delivery service designated by the United States Secretary of the Treasury under 26 USC § 7502, and by the Commissioner of Taxation and Finance pursuant to Tax Law § 691(a)(2)(A) to provide delivery services that are equivalent to those

services provided by the United States Postal Service, then petitioner's delay in filing her amended return until three days after the April 15, 2001 deadline should be excused.

***CONCLUSIONS OF LAW***

A. 20 NYCRR 3000.9(b) provides, in part, as follows:

After issue has been joined . . . , any party may move for summary determination . . . . The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact.

The Division contends that there are no material issues of fact or law revealed in the record, and that it is entitled to a determination denying the petition as a matter of law. The essence of the Division's position is its assertion that petitioner has not complied with Tax Law § 687, which imposes limitations on credits or refunds of overpayments as follows:

(a) 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 the 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.

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(i) Prepaid income tax. - For purposes of this section, any tax paid by the taxpayer before the last day prescribed for its payment, any income tax withheld from the taxpayer during any calendar year, and any amount paid by the taxpayer as estimated income tax for a taxable year shall be deemed to have been paid by him on the fifteenth day of the fourth

month following the close of his taxable year with respect to which such amount constitutes a credit or payment.

B. In taking the measure of petitioner's compliance with section 687(a), it is clear that she failed to file her 1997 amended return claiming the refund within three years of the April 15, 1998 filing date of her 1997 personal income tax return and is not entitled to the refund claimed.<sup>1</sup> In the alternative, if the April 18, 2001 filing date of the amended return is taken to be the filing date of the return within the contemplation of section 687(a), then petitioner's refund claim as stated in that amended return is timely, but her refund is limited to "the portion of the tax paid within the three years immediately preceding the filing of the claim" because by operation of Tax Law § 687(i) the New York State and New York City income tax withheld for tax year 1997 was deemed to have been paid on April 15, 1998, which date is more than three years immediately preceding the date of filing of the amended return claiming the refund at issue (*see, Matter of Petrovich*, Tax Appeals Tribunal, January 20, 2000).

C. The Tax Law leaves no room for exceptions that would benefit a taxpayer who has failed to comply with the time constraints of Tax Law § 687(a). That the private delivery company selected by petitioner's tax preparer to forward the completed amended return to petitioner was a delivery company designated by the Secretary of the Treasury and the Commissioner and which company may have contributed to the late filing of the amended return by petitioner, does not absolve petitioner of the consequences of such late filing. The Commissioner of Taxation and Finance does not warranty the due performance by designated

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<sup>1</sup>Because April 15, 2001 fell on a Sunday, petitioner's claim for refund would have been timely if filed not later than April 16, 2001.

private delivery companies of their contractual obligations to their customers. Petitioner, who has the burden of proof under Tax Law § 689(e), has offered no authority to the contrary.

D. There being no material and triable issues of fact requiring a hearing, the Division's motion for summary determination is granted.

E. The petition of Regina M. Ford is denied and the Division's notice of disallowance of petitioner's claim for refund is sustained.

DATED: Troy, New York  
June 5, 2003

/s/ Gary R. Palmer  
ADMINISTRATIVE LAW JUDGE