

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>SAMUEL AND DIANE KATZ</b>	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 819545
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 1995.	:	

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Petitioners, Samuel and Diane Katz, 128 Surrey Drive, New Rochelle, New York 10804, 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 1995.<sup>1</sup>

A small claims hearing was held before Timothy J. Alston, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on July 27, 2004, at 2:45 P.M., with all briefs to be submitted by October 19, 2004, which date began the three-month period for the issuance of this determination. Petitioners appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Eugene Greco at hearing and Justine Clarke Caplan, Esq., on brief).

***ISSUE***

Whether the Division of Taxation properly denied petitioners' claim for refund pursuant to Tax Law § 687(a).

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<sup>1</sup> The petition also referenced two notices and demands which pertain to 1996 and 1997. Such notices and demands do not relate to petitioners' refund claim for 1995, and at hearing petitioners conceded that such notices and demands were not properly part of their petition in this matter.

***FINDINGS OF FACT***

1. Petitioners, Samuel and Diane Katz, timely filed an automatic extension of time until August 15, 1996 to file their 1995 New York resident income tax return. Petitioners also timely requested and received an additional extension until October 15, 1996 to file their 1995 New York return.

2. Petitioners jointly filed their 1995 New York resident income tax return on January 18, 2000. The return was delivered to the Division of Taxation ("Division") by first class United States Postal Service mail and the envelope bears a United States Postal Service postmark dated January 18, 2000.

3. Petitioners' 1995 return reported an overpayment of tax of \$1,768.00 and requested that such overpayment be applied to petitioners' 1996 estimated tax.

4. By a Notice of Disallowance dated January 5, 2001, the Division disallowed, in full, the claim for refund or credit on petitioners' 1995 New York return. The notice advised that the return was required to be filed by October 15, 1999 to receive a refund. The notice also erroneously stated that petitioners filed their 1995 return on June 18, 2000.

5. The Division does not dispute that petitioners properly computed and reported their income tax liability on their 1995 return. The Division thus does not dispute that petitioners overpaid their 1995 tax liability by \$1,768.00.

6. Petitioners filed their 1994 New York resident return after the due date for such return but within the limitations period for refunds. Petitioners' 1994 return reported an overpayment of \$3,279.00 and requested that such overpayment be applied to petitioners' 1995 estimated tax.

7. By check dated January 27, 1997, the Division issued a refund in the amount of such overpayment. Correspondence accompanying the refund check advised petitioners that it was

“too late to credit your 1995 estimated tax” and that therefore “your overpayment is being refunded.”

8. Petitioners subsequently returned the refund check to the Division, requesting in an accompanying letter that the Division “apply this \$3,279.00 to our 1995 tax account.”

9. On April 23, 1997, following receipt of the returned refund check, the Division posted the payment of \$3,279.00 made in respect of petitioners’ 1995 income tax liability.

10. Petitioners’ 1995 return in evidence contains the signatures of both petitioners. Petitioner Samuel Katz’s signature is dated “12/1/99.” Petitioner Diane Katz’s signature is undated.

11. Petitioners’ jointly filed 1995 Federal income tax return was received by the Internal Revenue Service on December 4, 1997 at its Midtown Manhattan office. The return is signed by both petitioners and dated “12/1/97” by both petitioners.

12. With their post hearing letter-brief, petitioners included an affidavit of Martin Weiselberg dated August 24, 2004 and a letter from the Division to petitioners dated August 3, 2000 which, like the Notice of Disallowance dated January 5, 2001, advised petitioners that their refund claim was denied. These two documents had not been introduced in evidence at hearing and petitioners did not request that the record be held open for the submission of such documents.

13. At the commencement of the hearing the presiding officer advised the parties that the only evidence that he would review in making a decision in this case would be the evidence introduced into the record at the hearing or any specific evidence that the presiding officer allowed to be submitted post-hearing.

**CONCLUSIONS OF LAW**

A. Tax Law § 687(a) imposes a limitations period upon taxpayers who wish to claim a credit or refund of an overpayment of income tax as follows:

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 . . . . 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 . . . .

B. Accordingly, a claim for credit or refund of an overpayment of personal income tax must be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever is later.

C. In this matter, petitioners filed their claim for refund or credit for 1995 with the return filed on January 18, 2000. The three-year limitations period as set forth in Tax Law § 687(a) is thus applicable in this case (*see, Matter of Durkin*, Tax Appeals Tribunal, October 25, 2001; *Matter of Wasserman*, Tax Appeals Tribunal, May 10, 2001). Such filing was obviously within three years of filing the return as prescribed by the statute and was thus timely.

D. As noted above, Tax Law § 687(a) also limits the amount of allowable credit or refund to the portion of the tax paid within the three years preceding the filing of the claim. Petitioners' payment of \$3,279.00 on April 23, 1997 in respect of their 1995 income tax liability was made within the three years preceding the filing of their refund claim. Petitioners' claim for credit or refund of \$1,768.00 does not exceed the portion of tax paid within the three years preceding the filing of the refund claim. Accordingly, the amount of petitioners' claim was allowable.

E. Since petitioners' claim was within the limits set forth in Tax Law § 687(a) with respect to time and amount, and since the substance of the claim is not in dispute (*see, Finding of*

Fact “5”), the claim was in all respects proper and the Division’s disallowance thereof was improper.<sup>2</sup>

F. The petition of Samuel and Diane Katz is granted and the Division of Taxation is directed to refund petitioners’ 1995 refund claim of \$1,768.00, plus interest as allowable under the Tax Law.

DATED: Troy, New York  
November 24, 2004

/s/ Timothy J. Alston  
PRESIDING OFFICER

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<sup>2</sup> The hearing in this matter focused on the date that petitioners filed their 1995 return. Petitioners contended that they filed their 1995 return on December 4, 1997 and that the return filed on January 18, 2000 was a copy. Pursuant to the above discussion, this factual issue is rendered academic. For the record, however, petitioners did not establish that they mailed the 1995 return as claimed on December 4, 1997. Even if they had, proof of ordinary mailing is generally insufficient as a matter of law to prove timely filing (*see, Matter of Dattilo*, Tax Appeals Tribunal, May 11, 1995, *confirmed Dattilo v. Urbach*, 222 AD2d 28, 645 NYS2d 352). To further complete the record, petitioners’ post-hearing submissions of the affidavit of Martin Weiselberg dated August 24, 2004 and the letter from the Division to petitioners dated August 3, 2000 are not accepted into evidence herein. Petitioners did not request that the record be held open for the submission of such documents, notwithstanding the presiding officer’s express statement at the hearing regarding the post-hearing submission of evidence (*see*, Finding of Fact “13”).