STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **LEAH STUPELL** for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1998.	:	SMALL CLAIMS DETERMINATION DTA NO. 820241

Petitioner, Leah Stupell, 50 East 79th Street, New York, New York 10021, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 1998.

A small claims hearing was held before Thomas C. Sacca, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on September 13, 2005 at 2:45 P.M., which date began the three-month period for the issuance of this determination. Petitioner appeared by Nathan Weinflash, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Susan Parker).

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for refund on the basis that said claim was filed after the applicable statute of limitations for credit or refund had expired.

FINDINGS OF FACT

1. On or about November 29, 2002, the Division of Taxation ("Division") notified petitioner, Leah Stupell, that it had no record of a New York State personal income tax return having been filed for the year 1998. In response, petitioner's representative, Nathan Weinflash, CPA, and the preparer of petitioner's return, advised the Division in a letter dated December 31, 2002 that he was in Florida and would send a copy of the return upon his return to New York State in February 2003.

2. On February 28, 2003, the Division received from Mr. Weinflash a copy of petitioner's New York State Resident Income Tax Return for the year 1998. The return indicated an overpayment of tax in the amount of $6,849.00 and requested a refund in the amount of $5,849.00. The remaining $1,000.00 was to be applied to petitioner's 1999 estimated tax account. The copy of the return bears the signature of Mr. Nathan Weinflash, as the paid preparer, but is undated in the paid preparer section. The copy of the return is not signed by petitioner, but is dated August 14, 1999 in the section where the taxpayer would sign. The return was prepared by Mr. Weinflash in August 1999 using the CCH Pro-System. According to Mr. Weinflash, an extension of time to file had been filed with the Division making the due date for petitioner's return August 15, 1999.

3. Attached to the petition in this matter is a second copy of petitioner's 1998 New York State personal income tax return. The return bears the signature of Mr. Weinflash, and is dated August 14, 1999 in the section of the return to be used by the paid preparer. The signature on this return is not the same signature as appears on the return received by the Division on February 28, 2003. The return is not signed or dated in the section reserved for the taxpayer.

4. Petitioner timely filed her 1999 New York State Resident Income Tax Return. On the return, petitioner requested a refund of $4,063.00, which was comprised of $3,063.00 of estimated tax payments made during the year 1999 and the $1,000.00 of estimated tax that was carried forward from 1998. The Division issued to petitioner a refund in the amount of $3,063.00, claiming that the amount requested did not match the amount contained in petitioner's estimated tax account.

5. During the course of the small claims hearing, the Division conceded that petitioner was entitled to a refund in the amount of $1,000.00, stating that the 1999 return put the Division on notice of an informal refund request for the year 1998 in the amount that was to be applied to petitioner's 1999 estimated tax. The Division also indicated that it had searched its records, but was unable to locate any previous filing of a return for 1998 under petitioner's name or social security number.

6. On September 5, 2003, the Division issued to petitioner a Notice of Disallowance of the refund claimed on the New York State Resident Income Tax Return for the year 1998. The letter stated that the refund could not be granted because the deadline for the filing of a refund expired three years from the date the return was due.

CONCLUSIONS OF LAW

A. As relevant to this proceeding, Tax Law § 687, entitled "Limitations on credit or refund" provides 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 . . . . 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 proceeding the filing of the claim . . . .

B. For the year at issue, petitioner's payment of taxes was via estimated tax payments.

Pursuant to Tax Law § 687(i), estimated tax payments for the 1998 tax year are deemed to have been paid by a taxpayer on April 15th of the following year, i.e., April 15, 1999. Accordingly, in order to be entitled to a refund of any of the estimated tax payments, petitioner would be required, pursuant to Tax Law § 687(a), to file a claim for such refund by April 15, 2002. Since it is clear that the 1998 return submitted by petitioner on February 28, 2003 was filed after the statute of limitations for refund had expired, resolution of the controversy herein turns solely on whether petitioner has proven that she filed a return for 1998 on or before April 15, 2002.[1]

C. Tax Law § 691(a) provides, in pertinent part, that:

> If any return . . . required to be filed . . . within a prescribed period or on or before a prescribed date . . . is, after such period or such date, delivered by United States mail . . . the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery . . . . If any document or payment is sent by United States registered mail, such registration shall be prima facie evidence that such document or payment was delivered to the tax commission, bureau, office, officer or person to which or to whom addressed.

When the Division fails to receive a document, the general rule is that proof of ordinary mailing is insufficient as a matter of law to prove timely filing (***Matter of Dattilo,*** Tax Appeals Tribunal, May 11, 1995, ***confirmed Dattilo v. Urbach,*** 222 AD2d 28, 645 NYS2d 352; ***Matter of Schumacher,*** Tax Appeals Tribunal, February 9, 1995; ***Matter of Reeves***, Tax Appeals Tribunal, August 22, 1991; ***Matter of Savadjian***, Tax Appeals Tribunal, December 28, 1990).

D. In the instant matter, I am satisfied that the Division has conducted several searches of its records in an effort to locate the 1998 return allegedly mailed on or before April 15, 2002 and

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[1] Petitioner's claim for refund was also beyond the three-year statute of limitations using a due date for filing of August 15, 1998.

that it has no record of ever receiving this return. Since the Division's records reflect that the first time it received petitioner's return for 1998 was on February 28, 2003, the burden is on petitioner to prove (Tax Law § 689[e]), by one means or another, that she filed her return for 1998 with the Division before the statute of limitations for refund had expired. The testimony concerning the mailing of petitioner's 1998 return on or before August 15, 1999, although forthright and sincere, is not sufficient to permit a conclusion that petitioner has met her burden of proving that the return for 1998 was filed (delivered) to the Division before April 15, 2002 (***see*** **,** ***Matter of Dattilo, supra*****;** ***Matter of Schumacher, supra; Matter of Miller v. United States***, 784 F2d 728, 86-1 US Tax Cas ¶ 9261; ***Matter of Sipam***, Tax Appeals Tribunal, March 10, 1988 [for a general discussion on the filing of various documents with the Division and the Division of Tax Appeals]).

E. Petitioner could have avoided any risk of mishandling of the 1998 return by the Postal Service or by the Division had she used certified or registered mail (Tax Law § 691[a]; 20 NYCRR 2399.2[b]), since certification or registration serves as prima facie evidence that a document or payment was delivered. However, petitioner's representative chose to mail her 1998 return using ordinary first class mail and therefore she bore the risk of nondelivery or mishandling. It is noted that when issuing a Notice of Deficiency or Notice of Disallowance to a taxpayer, the Division is required to send the notices by certified or registered mail (Tax Law § 681[a]; § 689[c][3]) to ensure delivery. Accordingly, the statute is not inequitable since it places the same mailing requirements on a taxpayer to ensure delivery of a document to the Division. Petitioner's representative, once he chose to use ordinary first class mail to mail petitioner's return for 1998, should have followed up on the status of the refund claimed on said

return within the ample three-year period allowed before the statute of limitations for refund expired.

F. While Tax Law § 687(a) provides for a three-year statute of limitations to claim a refund, it must be noted that the Division, once a return has been filed, generally has a like three-year period to issue a Notice of Deficiency to a taxpayer asserting that additional taxes are due. Therefore, it cannot be found that the statutory scheme is unfair since it provides both parties with the same three-year time frame. Both the Tax Appeals Tribunal, in ***Matter of Jones*** (January 9, 1997), and the Appellate Division, in ***Matter of Brault v. Tax Appeals Tribunal*** (265 AD2d 700, 696 NYS2d 579), have upheld the validity of applying the three-year statute of limitations for refund in cases with facts similar to those found in the instant matter. By establishing time frames for the issuance of notices of deficiency and the filing of claims for refund, the Tax Law provides both the State of New York and its taxpayers with the financial stability and security that comes from knowing that a specific tax year is closed.

G. While it is unfortunate that petitioner cannot be granted the refund she is due because of the expiration of the statute of limitations for credit or refund, such conclusion is within the clear mandate of the statute. Tax Law § 687(e) specifically provides that:

> Failure to file claim within prescribed period.--- No credit or refund shall be allowed or made, except as provided in subsection (f) of this section or subsection (d) of section six hundred ninety, after the expiration of the applicable period of limitations specified in this article, unless a claim for credit or refund is filed by the taxpayer within such period. Any later credit shall be void and any later refund erroneous. No period of limitations specified in any other law shall apply to the recovery by a taxpayer of moneys paid in respect of taxes under this article.

H. Finally, petitioner's assertion that the Division should have advised her of its failure to find a 1998 tax return filed under her name or social security number before the statute of limitations for refund expired is without merit. I am not aware of, nor has petitioner pointed to,

any provisions in the Tax Law, regulations or precedent which places such a responsibility on the Division. Also, when the Division adjusted petitioner's 1999 refund in 2000 because it had no record of a $1,000.00 carry-over, she was effectively put on notice that a problem existed with her 1998 return.

I. Except as noted in Finding of Fact "5", the petition of Leah Stupell is denied and the Division's Notice of Disallowance dated September 5, 2003 is sustained.

DATED: Troy, New York
November 17, 2005

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE