STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RONALD BRENHOUSE	:	DETERMINATION DTA NO. 820708
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1994.	:	

Petitioner, Ronald Brenhouse, c/o Malcolm S. Taub, Esq., 1350 Avenue of the Americas, New York, New York 10019, 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 1994.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on June 6, 2006 at 10:30 A.M., with all briefs submitted by October 27, 2006, which date began the six-month period for the issuance of this determination. Petitioner appeared by Malcolm S. Taub, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Margaret T. Neri, Esq., of counsel).

***ISSUE*S**

I. Whether the Division of Taxation's disallowance of petitioner's refund application on the basis that it was untimely pursuant to Tax Law § 687 was improper.

II. Whether the levy on petitioner's funds constituted a payment for the purpose of determining the timeliness of and limits on petitioner's refund application.

III. Whether petitioner was ever given notice of the levy which resulted in the seizure of his assets.

IV. Whether, if the refund application is deemed untimely, petitioner is entitled to equitable relief.

FINDINGS OF FACT

1. On April 23, 1996, the Division of Taxation sent petitioner an "inquiry letter" which informed petitioner that the Division did not have New York State personal income tax returns on file for him for the years 1987 through 1994 and requested that he forward said returns to the Division. Petitioner did not respond to this request.

2. On August 12, 1996, the Division sent petitioner a Statement of Proposed Audit Changes in which it stated that since petitioner had not responded to the letter of April 23, 1996, it estimated his income tax liability for the years 1987, 1989, 1990, 1991, 1992, 1993 and 1994, but also invited him to provide wage and tax statements to substantiate New York taxes withheld. In addition, the statement reiterated that the Division had no personal income tax returns filed under his name or social security number. The amount of additional personal income tax estimated to be due for the aforementioned years was $765,109.00, plus interest of $147,489.69 and penalty of $307,737.53, for a total due of $1,220,336.22. Once again, petitioner failed to respond to this request from the Division, although the statement cautioned that failure to do so by September 11, 1996 would result in the issuance of a Notice of Deficiency.

3. On October 7, 1996, the Division issued to petitioner a Notice of Deficiency, L-012532449-5, which referred to the August 12, 1996 Statement of Proposed Audit Adjustment and its detailed computation of the additional amount of tax found due. As of the date of the Notice of Deficiency, the additional tax due was $765,109.00 plus interest of $158,758.68 and

penalty of $313,372.01, yielding a total balance due of $1,237,239.69. The Notice of Deficiency stated further:

> If we do not receive a response to this notice by 01/05/97:
> This notice will become an assessment subject to collection action.

Petitioner did not respond to this notice.

4. The inquiry letter, Statement of Proposed Audit Changes and Notice of Deficiency were each sent to the same address, i.e., Box 1787, East Hampton, New York 11937, gleaned from petitioner's requests for extension of time to file, forms IT-370 and IT-372, filed for the years 1995, 1996 and 1997. This address was used as petitioner's last known address because the most recent tax return on file with the Division had been filed by petitioner in 1986, while the information from the forms IT-370 and IT-372 was current.

5. On May 17, 1996 and April 17, 1997, the Tax Compliance Division, to which this matter was referred, issued collection letters to petitioner at the same address used by the Audit Division, to wit: P.O. Box 1787, East Hampton, New York. In addition, a warrant was docketed in the Westchester County Clerk's Office on November 14, 1997.

6. On November 20, 1997, the Tax Compliance Division obtained a new address for petitioner by means of "general research": 600 Route 114, East Hampton, New York. On the same date, it mailed a Consolidated Statement of Liabilities and a copy of the warrant filed in the Westchester County Clerk's Office to petitioner at this new address which reflected the amounts due and owing pursuant to the Notice of Deficiency.

7. On November 25, 1997, the Tax Compliance Division served levies on the warrant. Thereafter, on December 4, 1997, the Tax Compliance Division was contacted by petitioner and petitioner's representative, Tom Burke. The Tax Compliance Division explained the assessment

and the failure to file returns and requested that the returns for the period 1987 through 1994 be filed by January 2, 1998. The Division did not abate its collection efforts during the period December 4, 1997 through August 19, 1998, serving additional levies in March and July of 1998. The Division finally received New York personal income tax returns for petitioner for the years 1987 and 1989 through 1993 on August 19, 1998.

8. Between the time petitioner and his representative called the Tax Compliance Division on December 4, 1997 and the date the returns for 1987 and 1989 through 1993 were filed on August 19, 1998, petitioner and his representative had numerous telephone conversations with Peter Ennis, Tax Compliance Agent, concerning production of the missing returns and the pending collection action, which the Division insisted would not be held in abeyance. In the conversation with petitioner on December 4, 1997, Mr. Ennis explained the assessments that had been issued and discussed petitioner's failure to file tax returns for the years 1987 through 1994.

9. On November 25, 1997, a levy payment was received from National Financial Services Corp. in the sum of $44,563.81 and was applied to assessment L-012532449-5. On April 14, 1998, a second levy check was received from Citibank in the sum of $889,054.44, of which $530,844.90 was applied to assessment L-012532449-5. The proceeds applied from both levies, $575,389.79, fully satisfied the modified outstanding balance due as stated in a Notice of Assessment Resolution, dated September 8, 1998, and mailed to petitioner in care of his representative, Mr. Burke. The returns filed by petitioner were used by the Division to more accurately reflect the tax due. However, since no return for 1994 was filed by petitioner, there was no adjustment made for the liability determined for that year.

10. Although requested numerous times by the Division, beginning with the initial letter from the Division of Taxation on April 23, 1996, petitioner did not submit his 1994 personal

income tax return until June 27, 2001. Previously, utilizing information petitioner had provided on his Federal tax return for 1994, the Division had determined a New York adjusted gross income of $4,127,263.00 and tax thereon of $324,550.00. After adjustment for estimated tax paid of $18,200.00, total tax determined to be due for 1994 was $306,350.00, plus penalties and interest.

11. On petitioner's return for 1994, filed on June 27, 2001, he claimed to owe tax of $4,264.00, after deducting his estimated tax payments. Upon a review of petitioner's return, the Division determined that there had been an overpayment of taxes for the year 1994 of $514,720.42.

12. On November 26, 2001, the Division of Taxation issued a Notice of Disallowance wherein it denied petitioner's claim for refund, stating:

> Since your 1994 return was filed on June 27, 2001 and your payment on the assessment was made on April 14, 1998, your claim for refund is outlawed by statute and cannot be refunded.

13. Although petitioner claims not to have received any of the correspondence or notices from the Audit Division and Tax Compliance Division prior to the levies being served, he never argued that the addresses the Division used for him were incorrect. In fact, he was confused about his own addresses when questioned at hearing:

"MS. NERI: Mr. Brenhouse, can you tell me what your address is?

MR. BRENHOUSE: You want my mailing address now? Box 2, 27 West 44th Street, New York, New York 10036.

MS. NERI: How long has that been your address?

MR. BRENHOUSE: A couple of years I've been receiving mail there. I mean, I also have another address at 590 Route 114, East Hampton.

MS. NERI: How long has that been your address?

MR. BRENHOUSE: That was since the mid ‘80's.”

14. The petition filed in this matter on September 8, 2005 listed petitioner’s address as 590 Route 114, East Hampton. The certified letter sent by the Division of Tax Appeals to acknowledge receipt of the petition, dated September 15, 2005, was returned by the United States Postal Service with the remark, “Undeliverable as addressed, forwarding order expired.”

15. In further questioning by the Division’s counsel, petitioner appeared to contradict his statement that his address back to the mid 1980s was 590 Route 114, East Hampton:

“MS. NERI: Prior to living in East Hampton in 2001, where were you living?

MR. BRENHOUSE: Should I answer?

MR. TAUB: Yes.

MR. BRENHOUSE: It was Box 90, Somers, New York.”

16. Petitioner’s memory lapses extended to his filing of the returns requested by the Division. In answer to a question from the Administrative Law Judge, petitioner did not specifically recall filing returns for the years 1987, 1989, 1990, 1991, 1992 and 1993 in August of 1998:

“ALJ PINTO: ...It also states that in August of that year, 1998, you filed income tax returns for other years or prior years including 1987, 1989, 1990, 1991, 1992 and 1993 . Do you have any recollection?

MR. BRENHOUSE: I don’t remember exactly, but that could be, you know. Offhand, I can’t recall.”

SUMMARY OF THE PARTIES' POSITIONS

17. Petitioner argues that the Division's denial of his claim for refund constitutes a taking of property without notice in violation of his right to due process. Petitioner's basis for this contention is that he was not given notice prior to the payment of the levies served on his financial institutions and banks. In making this claim, petitioner argues that the compliance agent with whom he spoke by telephone told him that funds in the institutions which had been served levies had been "blocked"and that the "block" would be removed when petitioner filed his 1994 personal income tax return and that the money "that we freeze and stuff" would "come back" and he would receive interest on the funds.

18. Petitioner reasons that since he had no notice of the levy, it cannot constitute a "payment" for purposes of Tax Law § 687, and the statute of limitations did not begin to run.

19. The Division of Taxation continues to argue that the claim for refund is barred by the clear language of Tax Law § 687(a). In addition, the Division contends that petitioner was on notice of his failure to file returns, including the one for 1994, the assessment arising from his failure to file them, the tax warrant filed in the Westchester County Clerk's Office and the levies served on his banking and financial institutions. The Division argues that petitioner knew that he needed to file his 1994 return to process his refund claim and that it needed to be done in a timely manner, but failed to do so.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 687(a), a limitations period is imposed upon taxpayers who wish to claim a 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. Tax Law § 687(e) provides in pertinent part:

> No credit or refund shall be allowed or made . . . after the expiration of the applicable period of limitation 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.

C. In light of the foregoing, 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. The reasoning for the limitation period with regard to refunds was discussed in ***Matter of Nierenstein*** (Tax Appeals Tribunal, April 21, 1988), where the Tribunal opined:

> The statute of limitations here is three years. Its purpose is to allow a reasonable time for taxpayers who have erroneously filed or paid taxes to realize their error and make application for refund. The State is thus put on notice that there is this three year period during which it may be liable for such claims. At the end of the period, the matter is settled. Anything less than this degree of certainty would make the financial operation of government difficult, if not impossible. In short, the statute of limitations at issue here is a balance between the needs of the State with regard to the protection of its financial resources and the rights of taxpayers to correct their errors.

D. In this matter, petitioner filed his claim for refund for 1994 with the return filed on June 27, 2001. Therefore, his claim for refund was within three years of filing the return as prescribed by statute. However, the limitation on the *amount* of the credit permitted is the tax paid in the three years immediately preceding the filing of the claim plus any extension period, i.e., three years immediately preceding June 27, 2001, or June 27, 1998. It is this second limitation which precludes petitioner from obtaining a refund. That is, all of the tax at issue in

this case was paid on November 25, 1997 and April 14, 1998, when payment on the levies was received from National Financial Services Corp. and Citibank, respectively. Accordingly, the *amount* of refund allowable is zero, because no portion of the overpayment was paid within the three years immediately preceding the filing of the refund claim. Thus, the Division properly denied petitioner's claim pursuant to Tax Law § 687(a).

E. There is no question that the funds received from National Financial Services Corp. and Citibank constituted payments for purposes of determining the limitation on petitioner's recovery. It is well established that "a remittance received by virtue of a levy is deemed to be a payment for purposes of section 6511[1] of the Internal Revenue Code." ***(Theodore A. Pride & Assoc. v. United States***, 2001-1 US Tax Cas ¶50,225.)

Petitioner argues that these payments do not constitute payments within the meaning and intent of Tax Law § 687 because he was not given notice of the payments made on the levies in advance and was misled by a compliance officer, Mr. Ennis, that his accounts were merely being "blocked" or frozen and that the funds would "come back" when the 1994 return was filed. Petitioner characterized this lack of notice and deception by the compliance agent as a taking of his property without affording him his right to due process.

However, this forum has no jurisdiction to review the procedural errors alleged by petitioner with respect to the actions he claims were omitted or committed by the Tax Compliance Division. Further, petitioner's recollection of his telephone conversations with Mr. Ennis, all of which took place almost eight years prior to the hearing, cannot be considered

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[1]New York Tax Law § 687 contains virtually identical provisions as those found in IRC § 6511, specifically the provision regarding the limitation on the amount of the refund allowed, and is thus accorded the same meaning. (Tax Law § 607; ***Matter of Dreyfus Special Income Fund, Inc. v. Tax Comm'n,*** 126 AD2d 368, 514 NYS2d 130, ***affd*** 72 NY2d 874, 532 NYS2d 356.)

credible in light of his very poor memory of other important facts, to wit, his failure to recall when he filed his returns for 1987 and 1989 through 1993; his confusion about his address during the period he failed to file New York State personal income tax returns; his contradiction that his address going back to the mid-1980s was 590 Route 114, East Hampton, but then conceding that he maintained an address at Post Office Box 90, Somers, New York prior to 2001; and, the inexplicable confusion he created when he listed 590 Route 114, East Hampton, on his petition for hearing in the instant matter on August 30, 2005, which was returned as undeliverable "forwarding order expired" less than three weeks later.

F. Petitioner, despite numerous requests by the Division to file a 1994 income tax return, incredibly failed to do so for three and one half years after first being told to do so on December 4, 1997. He never denied that he was requested to file the return for 1994.

Further, he failed to file the 1994 return even after filing his returns for 1987 and 1989 through 1993 in August 1998, knowing that those returns had been accepted as filed and that he had received adjustments to his deficiency based thereon. Despite his knowledge that hundreds of thousands of dollars were "blocked" and would "come back" with interest if he filed the return, he ignored the requests. Through his fragmented testimony and choice of words, it appears that petitioner knew the funds had left his accounts and that his expectation of receiving interest was a recognition that the State had use of the money, i.e., it was in the State's possession.

G. Petitioner's claim for equitable relief must be denied as well. First, the facts upon which he makes the argument for equitable relief are based on his testimony which lacks credibility. Second, his alleged reliance on the words of Mr. Ennis do not provide the basis necessary for estopping the Division from properly enforcing the Tax Law.

Generally, the doctrine of estoppel does not apply to government acts unless there are exceptional facts which require the application of the doctrine in order to avoid a manifest injustice (***Matter of Harry's Exxon Service Station***, Tax Appeals Tribunal, December 6, 1988). When a taxing authority is involved, this rule is considered particularly applicable because public policy supports enforcement of the Tax Law (***Matter of Glover Bottled Gas Corp.***, Tax Appeals Tribunal, September 27, 1990).

In order to determine whether there should be an estoppel, the Tax Appeals Tribunal has utilized a test which asks if there was a right to rely on the representation, whether there was such reliance and whether the reliance was to the detriment of the party who relied upon the representation (***see, Matter of Harry's Exxon Service Station, supra***). Since petitioner has not credibly established the representations upon which he maintains he relied to his detriment, his request for equitable relief is denied.

H. The petition of Ronald Brenhouse is denied and the Division of Taxation's Notice of Disallowance, dated November 26, 2001, is sustained.

DATED: Troy, New York
March 29, 2007

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE