

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
LILIANA KLINGER : DETERMINATION
DTA NO. 820864
for Redetermination of a Deficiency or Refund of New :
York State and New York City Personal Income Tax :
under Article 22 of the Tax Law and the New York City :
Administrative Code for the Years 1993 through 1999.

Petitioner, Liliana Klinger, 700 Columbus Avenue, Apt. 21B, New York, New York 10025, 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 1993 through 1999.

The Division of Taxation, by its representative, Mark F. Volk, Esq. (Margaret T. Neri, Esq., of counsel), brought a motion filed July 11, 2006, seeking summary determination in the above-referenced matter pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b). Petitioner, appearing by her representative, M. Bradford Randolph, Esq., filed an answer to the motion on August 16, 2006. Therefore, August 16, 2006 commenced the 90-day period for issuance of this determination. After due consideration of the motion and the supporting affirmation of Margaret T. Neri, Esq., sworn to July 10, 2006, the affidavit of Philip Horgan with attached exhibits, sworn to July 10, 2006, the affirmation of M. Bradford Randolph and the exhibits attached thereto, the affidavit of Liliana Klinger, sworn to August 16, 2006, and all the pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

I. Whether the Division of Taxation properly denied petitioner’s claim for refund of personal income tax for the years in issue.

II. Whether the Division of Taxation has established that it should be granted summary determination because there are no facts in dispute, and as a matter of law, the facts mandate a determination in the Division’s favor.

FINDINGS OF FACT

1. Petitioner, Liliana Klinger, filed timely New York State personal income tax returns for the years 1993, 1994, 1995, 1996, 1997, 1998 and 1999 (the “years in issue”).

2. On or about September 24, 2004, petitioner filed amended returns for each of the years in issue, seeking a refund of tax erroneously paid on what petitioner characterized as pension income. The amounts claimed for each year were as follows:

Tax Year	Amount of Refund Claimed
1993	\$1,316.00
1994	1,189.00
1995	1,189.00
1996	1,196.00
1997	1,377.00
1998	1,777.00
1999	1,425.00

3. On December 20, 2004 (for the years 1996, 1997, 1998 and 1999) and February 7, 2005 (for the years 1993, 1994 and 1995), the Division of Taxation, Income Tax Desk Audit Unit, denied each of the refund claims in seven separate letters, each one stating the following reason:

The New York State Tax Law does not permit us to allow the refund or credit claimed on your return(s).

The Tax Law provides for the granting of a refund or credit if the request is filed within three years from the time the return was required to be filed or within two years from the time the tax was paid, whichever is later.

Our records show the return on which you requested a refund or credit was filed beyond the statute of limitations as prescribed by the Tax Law.

4. Two of petitioner's forms 1099R were submitted with the Division's motion and filed with petitioner's personal income tax returns for the years 1995 and 1999. These forms indicated that petitioner received an annuity payment from the United States Office of Personnel Management, Retirement Programs, which had a distribution code entitled "3-Disability" for each of the years 1995 and 1999 and the payments were made on retirement claim number CS A3428502. Similar forms 1099R were filed for the other years in issue.

SUMMARY OF THE PARTIES' POSITIONS

5. Petitioner conceded that the refund applications were untimely but contends that the Commissioner of Taxation and Finance erred in not using the special refund authority provided for in Tax Law § 697(d).

6. Petitioner argues that she received Federal retirement benefits for all the years in issue and that she did not subtract them from her New York adjusted gross income as authorized by law and that New York State erroneously collected the taxes paid thereon.

7. In the alternative, petitioner contends that she made a mistake of fact in interpreting the nature of the retirement benefits which resulted in her failure to claim the subtraction from gross income.

8. The Division of Taxation argues that petitioner is not entitled to any relief under Tax Law § 697(d) because there was no mistake of fact. Rather, the Division maintains that

petitioner made a mistake of law when she failed to subtract her Federal pension income from gross income. Further, the special refund authority will not be used where there are outstanding issues of law or fact. The Division contends that the forms 1099R do not clearly indicate that the annuity payments received were Federal pension payments and therefore raise a question of fact.

CONCLUSIONS OF LAW

A. Since petitioner has conceded that the refund applications were not timely, the only issue left for resolution is whether the commissioner erred in not using the special refund authority to grant petitioner relief. Tax Law § 697(d) provides as follows:

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. Given the forms 1099R in evidence, the Division's argument that the payments received were not pension payments is rejected. They were issued by the Retirement Programs Office of the Office of Personnel Management and were paid under a retirement claim. The Division's failure to explain the distribution code and petitioner's half-hearted contention that she was confused by the language of the distribution code (after alleging in both her petition and affidavit that the 1099R's represented pension income) does not create a material issue of fact or law for the purposes of the interpretation of Tax Law § 697(d) in this case. Petitioner's allegations that she did not know the nature of the income received are rejected.

Petitioner's claim that her interpretation of the nature of her own pension benefits, which resulted in her failure to subtract them from gross income, was a mistake of fact which justified

the use of the commissioner's special refund authority, was a weak attempt to circumvent the statute of limitations.

In Matter of Wallace (Tax Appeals Tribunal, March 8, 2001), the Tribunal stated:

A mistake of fact has been defined as an understanding of the facts in a manner different than they actually are [citations omitted]. 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 [citations omitted].

In *Wallace*, the petitioners knowingly reported retirement contributions that could have been excluded from New York income. They incorrectly assumed that they were required to include the contributions, which the Tribunal deemed a mistake of law, not fact, and their refund application which sought relief under the special refund authority of Tax Law § 697(d) was denied.

Petitioner's circumstances, as set forth in her petition, are indistinguishable from those in *Wallace*, and therefore, her appeal for application of the special refund authority was properly rejected. She admitted that she knew the income was pension income, as she referred to it as such in her petition and affidavit, yet included it on her return as taxable income under a mistake of law, i.e., without knowledge that she was entitled to subtract it pursuant to the provisions of Tax Law § 612. Therefore, her payment of income tax was under a mistake of law and did not warrant use of the commissioner's special refund authority.

C. To obtain summary determination, the moving party must submit an affidavit, made by a person having knowledge of the facts, a copy of the pleadings and other available proof. The documents must show that there is no material issue of fact and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the

existence of a triable issue or where the material issue of fact is "arguable" (*Glick & Dolleck, Inc. v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 94; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

Petitioner has introduced no evidence of the existence of either a triable issue or a material issue of fact and none exists in the record. Her pleadings indicated the contrary, acknowledging the true characterization of the income received. She has conceded the refund applications were not timely, and as discussed above, she did not establish that the commissioner's special refund authority was erroneously withheld. Notwithstanding the Division's argument with respect to the 1099R's, it was established that the evidence mandated a determination in its favor.

D. The petition of Liliana Klinger is denied, the Division's denials of petitioner's requests for refund for the years 1993 through 1999, dated December 20, 2004 (for the years 1996, 1997, 1998 and 1999) and February 7, 2005 (for the years 1993, 1994 and 1995) are sustained and the Division's Motion for Summary Determination is granted.

DATED: Troy, New York
October 26, 2006

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