

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :

of :

**MICHAEL A. GOLDSTEIN A NO. 1 TRUST** :

for Redetermination of a Deficiency or for Refund of :  
New York State Personal Income Tax under Article 22 :  
of the Tax Law for the Years 1995, 1996 and 1997. :

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In the Matter of the Petition :

of :

**MICHAEL A. GOLDSTEIN "I" NO. 2 TRUST** : DETERMINATION  
DTA NOS. 822579  
822666 AND 822681

for Redetermination of a Deficiency or for Refund of :  
New York State Personal Income Tax under Article 22 :  
of the Tax Law for the Years 1995, 1996 and 1997. :

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In the Matter of the Petition :

of :

**MICHAEL A. GOLDSTEIN - BORIS GOLDSTEIN** :  
**NO. 3 TRUST** :

for Redetermination of a Deficiency or for Refund of :  
New York State Personal Income Tax under Article 22 :  
of the Tax Law for the Years 1995, 1996 and 1997. :

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Petitioner Michael A. Goldstein A No. 1 Trust filed a petition for redetermination of a  
deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law  
for the years 1995, 1996 and 1997.

Petitioner Michael A. Goldstein “I” No. 2 Trust, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1995, 1996 and 1997.

Petitioner Michael A. Goldstein - Boris Goldstein No. 3 Trust filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1995, 1996 and 1997.

A consolidated hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on July 2, 2009, at 10:30 A.M., with all briefs to be submitted by November 6, 2009, which date began the six-month period for the issuance of this determination. Petitioners appeared by Samson Management LLC (Ray Cruz, Esq.). The Division of Taxation appeared by Daniel Smirlock, Esq. (Marc A. Strange, Esq., of counsel at the hearing and Robert Tompkins, Esq., for the brief).

### ***ISSUES***

I. Whether the Division of Taxation properly paid interest to petitioners on overpayments of tax resulting from federal changes from the date of the filing of amended returns or, in the alternative, whether such interest should have been paid from the date of the filing of the original returns for the years at issue.

II. Whether petitioners have proven that they are entitled to refunds of New York City tax.

III. Whether the Tax Law that determines the interest on overpayments and underpayments violates the U.S. and New York State constitutions.

IV. Whether the Division of Tax Appeals has jurisdiction over the rates of interest charged to taxpayers on underpayments of tax and interest paid to taxpayers on overpayments of tax.

***FINDINGS OF FACT***

***MICHAEL A. GOLDSTEIN A NO. 1 TRUST***

1. In April 2006, the Internal Revenue Service (IRS) issued a form 5278, Statement - Income Tax Change to Michael Adam Goldstein Trust #1 (Trust No. 1), which reduced interest income, thereby reducing taxable income and tax due in the amounts of \$72,088.00 for the year 1995, \$54,553.00 for the year 1996 and \$65,751.00 for the year 1997. On May 18, 2006, Trust No. 1 executed an IRS form 870-AD, Offer to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment, thereby accepting the aforesaid amounts of tax overpayments.

2. As a result of the federal changes, Trust No. 1, on or about July 17, 2006, filed amended New York State fiduciary income tax returns that claimed state refunds in the amounts of \$33,638.00, \$28,028.00 and \$24,832.00 for the years 1995, 1996 and 1997, respectively.

3. On December 15, 2006, the Division of Taxation (Division) issued a Notice of Disallowance to Trust No. 1 for the years 1996 and 1997, and on July 16, 2008, the Division issued a Notice of Disallowance for the year 1995<sup>1</sup> disallowing the claims for refund, in full, stating, in relevant part, as follows:

The refund requested for additional interest on the above refund previously issued based on a federal audit cannot be allowed.

The interest calculated for the refund issued was based on Section 688 of Article 22 of the New York State Tax Law, prior to tax year 1999.

Interest on an overpayment from an amended return is calculated from the date the amended return is filed not the date of the original filed return.

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<sup>1</sup> The Notice of Disallowance for 1995 indicated that the refund issued for that year was \$23,802.47 (the amended return claimed a refund of \$33,638.00). The Notice of Disallowance for 1996 and 1997 does not indicate the amounts of the refunds issued for these years.

4. According to the amended returns filed for each of the years at issue, the calculation of the overpayment made for each year included tax, interest and penalty on the original return. A footnote in the Division of Taxation's brief states as follows:

It is apparent from the Notices of Disallowance in the record that separate claims for refund of interest were likely made after and in addition to the refund claims (amended returns) made for tax overpayments caused by federal changes of income. The Notices of Disallowance state that they deny the refund claims in full and that the refund request for additional interest on the refunds previously issued based on federal audit cannot be allowed. Tax overpayments due to the federal changes were not disallowed.

5. The interest paid by the Division to Trust No. 1 was \$541.47 for 1995, \$404.35 for 1996 and \$349.43 for 1997.

6. On October 21, 2008, Trust No. 1 filed a petition seeking administrative review of the Division's disallowance of its claim for refund of interest from the date of filing of the original returns for the years at issue.

***MICHAEL A. GOLDSTEIN I NO. 2 TRUST***

7. In April 2006, the IRS issued a form 5278, Statement - Income Tax Change to Michael Adam Goldstein Trust #2 (Trust No. 2), which reduced interest income, thereby reducing taxable income and tax due in the amounts of \$62,762.00 for the year 1995, \$57,889.00 for the year 1996 and \$37,887.00 for the year 1997. On May 11, 2006, Trust No. 2 executed an IRS form 870-AD, Offer to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment, thereby accepting the aforesaid amounts of tax overpayments.

8. As a result of the federal changes, Trust No. 2, on or about July 17, 2006, filed amended New York State fiduciary income tax returns that claimed state refunds in the amounts of \$22,249.00 for 1996 and \$5,202.00 for 1997.<sup>2</sup>

9. On December 15, 2006, the Division issued a Notice of Disallowance to Trust No. 2 for the years 1996 and 1997 and, on July 16, 2008, the Division issued a Notice of Disallowance for the year 1995. The notices contained the same language as those issued to Trust No. 1 (*see* Finding of Fact 3).

10. The amended return filed for 1996 indicated that the overpayment included tax, interest and penalties on the original return; the amended return filed for 1997 stated that the overpayment included “tax on original return.”

11. The interest paid by the Division to Trust No. 2 was \$482.95 for 1995, \$378.94 for 1996 and \$100.72 for 1997.

12. On December 3, 2008, Trust No. 2 filed a petition seeking administrative review of the Division’s disallowance of its claim for refund of interest from the date of filing of the original returns for the years at issue.

***MICHAEL A. GOLDSTEIN - BORIS GOLDSTEIN NO. 3 TRUST***

13. In April 2006, the IRS issued a form 5278, Statement - Income Tax Change to Michael Adam Goldstein Trust #3 (Trust No. 3), which reduced interest income, thereby reducing taxable income and tax due in the amounts of \$54,679.00 for the year 1995, \$56,737.00 for the year 1996 and \$59,964.00 for the year 1997. On May 11, 2006, Trust No. 3 executed an

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<sup>2</sup> An amended return was also filed for the year 1995; however, the Division was unable to locate a copy of the 1995 amended return and petitioner did not submit a copy at the hearing. As indicated in the Notice of Disallowance issued by the Division for 1995, a refund in the amount of \$21,229.95 was issued to Trust No. 2.

IRS form 870-AD, Offer to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment, thereby accepting the aforesaid amounts of tax overpayments.

14. As a result of the federal changes, Trust No. 3, on or about July 17, 2006, filed amended New York State fiduciary income tax returns that claimed state refunds in the amounts of \$25,014.00 for 1996 and \$23,928.00 for 1997.<sup>3</sup>

15. On December 15, 2006, the Division issued a Notice of Disallowance to Trust No. 3 for the years 1996 and 1997 and, on July 16, 2008, the Division issued a Notice of Disallowance for the year 1995. The notices contained the same language as those issued to Trust No. 1 (*see* Finding of Fact 3).

16. According to the amended returns filed for 1996 and 1997, the calculation of the overpayment made for each year included “tax and interest on original return.”

17. The interest paid by the Division to Trust No. 3 was \$432.95 for 1995, \$375.21 for 1996 and \$378.58 for 1997.

18. On December 9, 2008, Trust No. 3 filed a petition seeking administrative review of the Division’s disallowance of its claim for refund of interest from the date of filing of the original returns for the years at issue.

19. Since the amended returns filed for each of the trusts were filed within 90 days of the report of the federal changes in accordance with the provisions of Tax Law § 659, the Division paid interest on the overpayments pursuant to Tax Law § 687(c), i.e., interest was computed and paid to each trust from the date of filing of the amended returns claiming such refunds.

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3. An amended return was also filed for the year 1995; however, the Division was unable to locate a copy of the 1995 amended return and petitioner did not submit a copy at the hearing. As indicated in the Notice of Disallowance issued by the Division for 1995, a refund in the amount of \$19,031.95 was issued to Trust No. 3.

20. Each of the petitions filed in this proceeding states: “NYS Tax Department did not refund the entire NYC tax paid as per the amended returns filed.” The amended returns which are in evidence in this proceeding do not indicate that any of the trusts paid City of New York tax.

***SUMMARY OF PETITIONERS’ POSITION***

21. Petitioners assert the following:

- a. The Division should have paid interest on the overpayments of tax made by petitioners from the date of the filing of the original returns for the years at issue, not from the date of the filing of the amended returns that were filed as a result of the federal changes;
- b. As a result of the federal changes and the reduction of taxable income of the trusts, the taxable income of the trust’s beneficiaries increased. These beneficiaries were required to pay interest from the dates of the filing of their original returns. Since the trusts did not receive interest from the dates of the filing of the original returns, an inequity results;
- c. While the Tax Law requires petitioners to report the federal changes to the Division, nothing in the Tax Law requires the filing of an amended return. Therefore, Tax Law § 688(a)(3) is not applicable in this proceeding;
- d. If Tax Law § 688(a) applies herein and an amended return is filed, then that statute is in conflict with Tax Law § 687(c) and § 688(g);
- e. Petitioners argue that there is an inequity in the Division’s rates of interest since the rate of interest charged to taxpayers who have underpaid taxes is greater than the rate paid to taxpayers who have overpaid their taxes; and
- f. Petitioners claim that the Division did not properly refund overpayments of New York City tax made by petitioners.

### ***CONCLUSIONS OF LAW***

A. In the present matter, the tax years at issue are 1995, 1996 and 1997. During those years, Tax Law § 688(a) (former [3]) provided as follows:

Late and amended returns and claims for credit or refund. Notwithstanding the provisions of paragraph one or two of this subsection, in the case of an overpayment claimed on a return of tax which is filed after the last date prescribed for filing such return (determined with regard to extensions), or claimed on an amended return of tax or claimed on a claim for credit or refund, no interest shall be allowed or paid for any day before the date on which such return or claim is filed.

In addition, during the years at issue, Tax Law § 688 (former [c]) stated:

Income tax refund within forty-five days of claim for overpayment.--If any overpayment of tax imposed by this article is credited or refunded within forty-five days after the last date prescribed (or permitted by extension of time) for filing the return of such tax on which such overpayment was claimed or within forty-five days after such return was filed, whichever is later, or within forty-five days after an amended return was filed claiming such overpayment or within forty-five days after a claim for credit or refund was filed on which such overpayment was claimed, or within six months after a demand is filed pursuant to paragraph six of subsection (b) of section six hundred fifty-one of this chapter, no interest shall be allowed under this section on any such overpayment. For purposes of this subsection, any amended return or claim for credit or refund filed before the last day prescribed (or permitted by extension of time) for the filing of the return of tax for such year shall be considered as filed on such last day.

B. For taxable years beginning January 1, 1999, chapter 377 of the Laws of 1999 amended the above provisions of the Tax Law by deleting all references to amended returns and claims for credit or refund in Tax Law § 688(a)(3). Accordingly, Tax Law § 688(a)(3) now provides as follows:

Late returns. Notwithstanding the provisions of paragraph one or two of this subsection, in the case of a return of tax which is filed after the last date prescribed for filing such return (determined with regard to extensions), no interest shall be allowed or paid for any day before the date on which the return is filed.



In addition, Tax Law § 688(c) was also amended by chapter 377 of the Laws of 1999 to read as follows:

Income tax refund within forty-five days of claim for overpayment.--If any overpayment of tax imposed by this article is credited or refunded within forty-five days after the last date prescribed (or permitted by extension of time) for filing the return of such tax on which such overpayment was claimed or within forty-five days after such return was filed, whichever is later, or within six months after a demand is filed pursuant to paragraph six of subsection (b) of section six hundred fifty-one of this chapter, no interest shall be allowed under this section on any such overpayment. In regard to an amended return claiming such overpayment or a claim for credit or refund on which such overpayment was claimed, if such overpayment is refunded within forty-five days of filing such return or such claim, no interest shall be allowed from the date such return or such claim is filed until the day the refund is made. For purposes of this subsection, any amended return or claim for credit or refund filed before the last day prescribed (or permitted by extension of time) for the filing of the return of tax for such year shall be considered as filed on such last day.

C. The Memorandum in Support, New York State Senate, for chapter 377 of the Laws of 1999, stated its purpose as follows: “This bill provides that the state shall pay any interest earned on a tax overpayment from the date an original tax return was filed, rather than the date the same tax return was amended.”

The Memorandum in Support set forth the following as the justification for chapter 377:

Currently, the tax law provides that no interest shall be paid on any tax overpayment for any date before a late or amended return is filed. An amended tax return is not the same as a tax return filed late and this difference should be realized in regard to the payment of interest on any tax overpayment. Responsible taxpayers filing on time, but for whatever reason need to amend their original tax return, should not be deprived of the interest earned on their overpayment from the date the original tax return was filed to the date it was amended. This legislation, if enacted, would change the current law by authorizing the payment of all interest accrued on a tax overpayment from the date the original tax return was filed, and in so doing, give taxpayers filing an amended return the full benefit of all the interest earned on their tax overpayment.

D. The Division's own Technical Services Bureau Memorandum, TSB-M-99(7)I, issued November 19, 1999, explained these amendments as follows:

For tax years beginning on or after January 1, 1999, section 688(a)(3) of the Tax Law is amended relating to the payment of interest on an overpayment of personal income tax as a result of the filing of an amended return or a claim for credit or refund. Under the new law, interest on an overpayment of tax claimed on an amended return or a claim for credit or refund will be payable from the due date of the original return to the date the refund is issued. However, section 688(c) of the Tax Law is also amended to provide that if the Department refunds the overpayment within forty-five days after the amended return or a claim for credit or refund is filed, no additional interest will be paid from the date the amended return or a claim for credit or refund is filed until the date the refund is issued.

E. Clearly, if the taxable years at issue were not years prior to 1999, petitioners would be entitled to the relief sought, and interest would be due and payable on the overpayments made by the trusts from the due date of the original returns filed. However, the amendments made to the Tax Law by chapter 377 of the Laws of 1999 were made prospectively, i.e., for tax years beginning January 1, 1999. There is no ambiguity with respect to the effective date of the amendments made to Tax Law § 688(a)(3) and (c).

For tax years beginning prior to January 1, 1999, Tax Law § 688(a) (former [3]) provided that in the case of an overpayment claimed on an amended return or on a claim for credit or refund which is filed after the last date prescribed for filing the return for the years at issue (petitioners filed amended returns on or about July 17, 2006 for the years 1995, 1996 and 1997, a date which was within 90 days of the final determination of the federal change as required by Tax Law § 659), no interest would be allowed or paid for any day before the date on which the return or claim was filed.

F. Petitioners, in their brief, assert that “[t]he Law is simple - Tax Law 687(c) states that interest is payable for Federal Changes when filed within the 90 day period of the report.”

Therefore, petitioners contend that since they filed within the 90-day period, they should get interest from the due date of the original return. This position is wholly without merit.

Tax Law § 687(c) provides, in pertinent part, that:

[i]f the report or amended return required by section six hundred fifty-nine [this section requires that a taxpayer report a federal change to the Division within 90 days of the final determination of such federal change] is not filed within the ninety day period therein specified, no interest shall be payable on any claim for credit or refund of the overpayment attributable to the federal change or correction.

Since, as previously noted, petitioners did comply with the provisions of Tax Law § 659 by reporting the federal changes to the Division within the 90-day period, they are entitled to interest on the overpayments and, accordingly, Tax Law § 687(c) is relevant only to the extent that it provides the authority for the payment of interest to petitioners from the date of the filing of the amended returns reflecting the federal changes.

In their brief and reply brief, petitioners have conveniently ignored the fact that the relevant provisions of the Tax Law were amended to address the exact circumstances affecting them. Petitioners assert that the failure of the Division to refund interest from the date of filing of the original returns (while requiring the trust beneficiaries to pay interest on their additional taxable income resulting from the federal changes from the date of filing of the original returns for the years at issue) is inequitable or unjust. Clearly, the Legislature agreed with petitioners and amended the relevant sections of the Tax Law to correct this inequity. That being said, the Division of Tax Appeals cannot correct the inequity. This is true for two reasons.

First, unlike the Division of Tax Appeals small claims proceedings where “a just and equitable determination is authorized (Tax Law § 2012), no such equity jurisdiction is granted in proceedings before an Administrative Law Judge (*see* Tax Law § 2010).

Second, an amendment will have prospective application only and will have no retroactive effect unless the language of the statute clearly indicates that it shall receive a contrary interpretation. In the present matter, section 3 of chapter 377 of the Laws of 1999, which amended Tax Law § 688(a)(3) and (c), states: “This act shall take effect immediately and shall apply to taxable years beginning January 1, 1999.”

Accordingly, the Division applied the provisions of Tax Law § 688(a) (former [3]) and Tax Law § 688 (former [c]) which were applicable to the tax years at issue herein (1995, 1996 and 1997) and properly denied refunds of interest to petitioners from the dates of the filing of the original returns for such years to the dates of the filing of the amended returns reflecting the federal changes.

G. In their petitions and during the hearing held in these matters, petitioners contended that the Division did not refund the proper amount of New York City tax paid. However, as noted in Finding of Fact 20, the amended returns that are in evidence in this proceeding do not indicate that any of the trusts paid New York City tax. Since petitioners have offered no additional evidence to show that they paid New York City tax and, therefore, no basis upon which refunds of New York City tax are due and owing, it must be found that they are not entitled to any refunds thereof.

The amended returns filed by petitioners in these matters did not claim a credit or refund of New York City taxes. On July 17, 2006, these petitioners timely reported the federal changes by means of the amended returns filed with the Division. Since petitions asserting that the Division did not refund the entire New York City tax paid were not filed by Trust No. 1, Trust No. 2 and Trust No. 3 until October 21, 2008, December 3, 2008 and December 9, 2008, respectively, such claims, even if meritorious, are time barred since Tax Law § 687(c) provides that a claim for

credit or refund of an overpayment of tax attributable to a federal change must be filed within two years from the time the notice of such change was required to be filed with the Division.

H. As the Division, in its brief, correctly notes, petitioners have attempted to claim a violation of the United States and New York State Constitutions without citing specific provisions which have been violated by the applicable Tax Law statutes.

The essence of petitioners' constitutional argument is contained in the following statement from their brief:

Whether it is a violation of U.S. Constitution, N.Y.S. Constitution and/or Civil Rights Acts of the State of New York when the "department" assesses a taxpayer from the original due date on "Federal Changes" while only allowing a taxpayer on the reciprocal "Federal Change" adjustment to receive interest from a date that the "Federal Changes" were filed and at a lower interest rate, at best.

It is well settled that the Division of Tax Appeals lacks jurisdiction to consider claims alleging that a statute is unconstitutional on its face (*see Matter of A&A Service Station, Inc.*, Tax Appeals Tribunal, October 15, 2009; *Matter of RAF General Partnership*, Tax Appeals Tribunal, November 9, 1995) and at the administrative level, statutes are presumed to be constitutional (*see Matter of Lunding*, 218 AD2d 268, 639 NYS2d 519 [1996], *revd* 89 NY2d 283, 653 NYS2d 62 [1996], *cert granted* 520 US 1227 [1997], *revd* 522 US 287 [1998]).

The Division of Tax Appeals may, however, determine whether tax law statutes are constitutional as applied (*Matter of Eisenstein*, Tax Appeals Tribunal, March 27, 2003, citing *Matter of David Hazan, Inc.*, Tax Appeals Tribunal, April 21, 1988, *confirmed* 152 AD2d 765, 543 NYS2d 545 [1989], *affd* 75 NY2d 989, 557 NYS2d 306 [1990]). The taxpayers bear the burden of proving that a statute, as applied, is unconstitutional (*Matter of Brussel*, Tax Appeals Tribunal, June 25, 1992).

In the present matters, there has been no evidence that these taxpayers were treated any differently than other taxpayers who sought refunds of interest on overpayments resulting from federal changes in taxable years beginning prior to January 1, 1999. Petitioners merely assert that because they were not permitted refunds of interest from the date of filing of the original returns for the years at issue, they were treated differently than the trust beneficiaries who were required to pay interest from the date of filing of such beneficiaries' returns on the additional taxable income resulting from the federal changes. While the transactions are clearly related, the taxpayers, i.e., the trusts with reduced interest income and the beneficiaries with increased interest income are not similarly situated. In fact, the statute that applies to the beneficiaries in these transactions is not the same statute, i.e., because the federal changes resulted in overpayments by petitioners, Tax Law § 688 (Interest on overpayment) applies, while because the federal changes resulted in underpayments by the trust beneficiaries, Tax Law § 684 (Interest on underpayment) is applicable. Accordingly, petitioners' constitutional arguments must be found to be without merit.

I. Finally, petitioners argue that there is an inequity in the fact that the rate of interest charged to taxpayers who have underpaid their taxes is greater than the rate of interest paid to taxpayers who are due refunds because of overpayments.

Tax Law § 697(j) gives the Commissioner of Taxation and Finance the authority to set the overpayment and underpayment rates of interest to be paid pursuant to Tax Law §§ 684, 685 and 688. More specifically, Tax Law § 697(j)(2)(A) and (former [B]), in effect at the time the amended returns were filed, provided that the overpayment rate was the sum of the federal short term rate plus two percentage points while the underpayment rate was the sum of the federal short term rate plus four percentage points. Clearly, therefore, there is statutory authority for the

disparity in the overpayment and underpayment interest, and since the Tax Law grants to the Commissioner of Taxation and Finance the exclusive authority to set these interest rates, the Division of Tax Appeals is without jurisdiction herein.

J. The petitions of Michael Goldstein A No. 1 Trust, Michael A. Goldstein "I" No. 2 Trust and Michael A. Goldstein - Boris Goldstein No. 3 Trust are denied and the notices of disallowance issued to petitioners on December 15, 2006 and July 16, 2008 are sustained.

DATED: Troy, New York  
April 15, 2010

/s/ Brian L. Friedman  
ADMINISTRATIVE LAW JUDGE