STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| **SHLOMO CASSOS** | : | ORDER<br>DTA NO. 823077 |
| for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 1996. | : | |

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Petitioner, Shlomo Cassos, 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 year 1996.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (Michelle Helm, Esq., of counsel), brought a motion dated October 8, 2009 seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner filed a response to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination began on November 9, 2009, the due date for petitioner's response.[1] Based upon the motion papers, the affidavit and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Arthur S. Bray, Administrative Law Judge, renders the following order.

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[1] Since the 30th day from October 8, 2009 was November 7, 2009 which was a Saturday, the response was required to be filed by Monday, November 9, 2009 (***see*** General Construction Law §§ 20, 25-a).

## *ISSUES*

I. Whether petitioner's claim for refund for the 1996 tax year, filed following a federal change in petitioner's taxable income, was filed within the limitations period provided for in Tax Law § 687(c).

II. If not, whether petitioner's refund claim should be granted based upon a claim of unjust enrichment, equitable principles or Tax Law § 697(d).

## *FINDINGS OF FACT*

1. Petitioner, Shlomo Cassos, filed a New York State resident income tax return for the year 1996.

2. On December 30, 2002, petitioner received a report of federal changes for the 1996 tax year.

3. On August 29, 2008, on the basis of the federal changes, petitioner filed an amended 1996 New York State personal income tax return requesting a refund in the amount of $22,798.00. The amended return was the first notification that the Division of Taxation (Division) received of the federal audit changes.

4. The Division issued a Notice of Disallowance, dated December 12, 2008, stating that the claim for refund was denied because the amended return was filed beyond the 2-year and 90-day statute of limitations.

5. Petitioner requested a conciliation conference, which was held on March 5, 2009. In an order dated April 3, 2009, the denial of the refund was sustained. This proceeding followed.

6. In his petition, petitioner explained that he thought that the Internal Revenue Service would provide the Division with a copy of its determination and that the Division would then issue a refund for the tax erroneously paid for 1996. Since a refund was not issued, in August

2008 petitioner filed an amended return for 1996 requesting the refund. The petition concludes with a request for a refund of $27,798.00 plus interest and penalties.

***SUMMARY OF THE PARTIES POSITIONS***

7. The Division maintains that the claim for refund is barred by the statute of limitations and that petitioner's reliance upon equitable considerations is misplaced.

8. Petitioner contends that the Division's motion totally ignores the express claim in his petition that this case is based on claims of unjust enrichment and equitable principles that apply regardless of the statute of limitations. Petitioner further maintains that equitable principles are embodied in Tax Law § 697(d) giving the Division of Tax Appeals the power to grant a refund regardless of the statute of limitations. With respect to the payment of the monies in issue, petitioner's opposing affidavit states:

> Petitioner's claim for a refund is based simply on the fact that the IRS adjusted Petitioner's tax liability for an alleged capital gain which was erroneously reported to the IRS and New York State for 1996. When the IRS made its change, and refunded the erroneously paid tax in 2002, the State was simply required to do the same, and, in the ordinary course of things, should have done so.

According to petitioner, the Administrative Law Judge can and should review all of the circumstances surrounding the claim for refund and avoid an unjust result. Petitioner notes that he was not represented by professional of any kind and could not afford to retain one at the relevant times. He also notes that he is presently threatened with foreclosure of his home and that the monies being retained by the state are his only hope of putting his financial life in order.

***CONCLUSIONS OF LAW***

A. Tax Law § 659 provides that where a taxpayer's federal taxable income is changed or corrected by the Internal Revenue Service the taxpayer must report such change or correction to the Division within 90 days after "the final determination of such change or correction." Tax

Law § 687(c) requires that a refund claim arising from a federal change or correction that must be reported under Tax Law § 659 is required to be reported within two years from the time the notice of such change or correction was required to be filed with the Division. It follows by the operation of these two sections, petitioner had two years and ninety days from the date of the final determination by the IRS of petitioner's Federal taxable income within which to file his claim for a refund (***Matter of Lipner***, Tax Appeals Tribunal, May 13, 2004).

B. In this matter, the date of the federal determination was December 30, 2002. However, the claim for refund was not filed until August 29, 2008. Accordingly, the claim for refund was filed well beyond the expiration of the statute of limitations and, for this reason, must be denied.

C. Petitioner's contention that the statute of limitations may be tolled for equitable considerations has been raised in other cases and rejected. In ***Matter of Levine*** (Tax Appeals Tribunal, August 7, 2008) the taxpayer argued that there should be a tolling of the statute of limitations which the Division had applied to a substantively well founded claim for refund because he was suffering from a medical disability. Relying, in part, upon ***United States v. Brockamp*** (519 US 347 [1997]), the Tribunal rejected this argument and quoted the following portion of the Court's decision:

> To read an "equitable tolling" provision into these provisions, one would have to assume an implied exception for tolling virtually every time a number appears. To do so would work a kind of linguistic havoc. Moreover, such an interpretation would require tolling, not only procedural limitations, but also substantive limitations on the amount of recovery-a kind of tolling for which we have found no direct precedent. Section 6511's detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate to us that Congress did not intend the courts to read other unmentioned, open-ended, "equitable" exceptions into the statute that it wrote. There are no counter-indications. Tax law, afer all, is not normally characterized by case-specific exceptions reflecting individualized equities (519 US, at 352).

The same considerations which were presented in ***Brockamp*** are controlling in this matter.

D. Petitioner also relies upon Tax Law § 697(d) as authority for the proposition that the Division of Tax Appeals may grant the petition for a refund. This section 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.

E. Initially, it is clear that the Division did not erroneously or illegally collect any monies from petitioner. Rather, the monies in question were voluntarily paid by petitioner upon filing a personal income tax return. The question which remains is whether the monies paid by petitioner were paid under a mistake of fact or a mistake of law. In ***Matter of Wallace*** (Tax Appeals Tribunal, October 11, 2001) the Tax Appeals Tribunal adopted the following definitions in order to distinguish a mistake of law from a mistake of fact:

> A mistake of fact has been defined as an understanding of the facts in a manner different than they actually are (54 Am Jur 2d Mistake, Accident or Surprise § 4; ***see also***, ***Wendel Foundation v. Moredall Realty Corp***., 176 Misc 1006, 29 NYS2d 451). 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 (54 Am Jur 2d Mistake, Accident or Surprise § 8; ***see also, Wendel Foundation v. Moredall Realty Corp.***, ***supra***).

F. Unfortunately, the record is virtually barren regarding the circumstances prompting the reporting of the capital gains. It is not clear from any of the papers whether the payment was caused by a mistake of law or fact. To obtain summary determination, 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]). On the other hand, 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 motion (***see***, ***Gerard v. Inglese***, 11 AD2d 381, 206 NYS2d 879). Since it is not possible to resolve the issues presented under Tax Law § 697(d) on the papers presented, the motion for summary determination is denied and the hearing will be held as scheduled.

G. The Division of Taxation's motion for summary determination is denied.

DATED: Troy, New York
November 19, 2009

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE