

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
YANG AND KYUNG H. CHO	:	DETERMINATION
	:	DTA NO. 824624
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law for	:	
the Year 2006.	:	

Petitioners, Yang and Kyung H. Cho, 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 2006.

On December 20, 2011, the Division of Taxation, by its representative, Mark F. Volk, Esq. (Michele W. Milavec, Esq., of counsel), filed a motion for an order granting summary determination to the Division of Taxation pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b) on the ground that there exists no material and triable issue of fact. Petitioners, appearing by their representative, Yoon S. Suh, Esq., filed a response to the motion, upon extension, on February 17, 2011, which date commenced the 90-day period for the issuance of this determination. Based upon the motion papers, the affidavits and documents submitted therewith, the response by petitioners and all the pleadings and documents submitted in connection with this matter, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly denied petitioners' claim for refund of personal income tax for the year 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. Petitioners timely filed their 2006 New York State personal income tax return and paid the tax due of \$16,190.00 by the April 15, 2007 deadline.

2. On May 10, 2010, petitioners filed an amended return with New York for the year 2006 seeking a refund of \$21,610.00. The basis for the amendment was to increase a resident credit for taxes paid to the state of New Jersey. As part of their amended return, petitioners included a letter dated March 22, 2010, from the State of New Jersey's Department of the Treasury, Division of Taxation, informing them of a deficiency for the 2006 tax year in the amount of \$30,031.00.

3. On November 12, 2010, the Division of Taxation (Division) issued a Notice of Disallowance to petitioners disallowing the claimed refund for the year 2006. The subject notice stated, in pertinent part:

The New York State Tax Law does not permit us to allow the refund you claimed on your return of \$21,610.00 for the year 2006. The deadline for filing for a refund expired three years from the date the return was due. Because we did not receive an Extension to File (IT-370), the 2006 amended return would have been due April 15, 2010 for the refund to be issued. Your return was not received until May 10, 2010.

SUMMARY OF THE PARTIES' POSITIONS

4. Petitioners concede that their refund application was untimely but contend that the Commissioner of Taxation and Finance erred in not using the special refund authority provided for in Tax Law § 697(d).

5. Petitioners assert that due to a miscommunication with their accountant, they discovered “sometime around year 2010” that they were entitled to file a New York amended resident income tax return for 2006 to receive credit for additional taxes paid to the state of New Jersey. They state that this miscommunication caused erroneous payment of taxes to New York and, as a result of this “mistake of fact,” the commissioner should invoke his special refund authority under Tax Law § 697(d) and provide petitioners with their claimed refund.

6. The Division argues that petitioners’ refund claim is untimely under Tax Law § 687(a) based on the uncontroverted facts and, thus, was properly denied. The Division adds that since there are no material issues of fact, it is entitled to summary determination as a matter of law.

CONCLUSIONS OF LAW

A. Tax Law § 687 provides, in pertinent part, that:

(a) General. - - Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within (i) three years from the time the return was filed, [or] (ii) two years from the time the tax was paid . . . whichever of such periods expires the latest . . .

* * *

(e) Failure to file claim within prescribed period. - - 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.

As previously noted, petitioners are not contesting the fact that the period of limitation for filing their claim for refund for the year 2006 expired on April 15, 2010. Moreover, they acknowledge that their refund claim at issue was filed on May 10, 2010. Accordingly, their

claim for refund must be denied unless it is found that the special refund authority of Tax Law § 697(d) is applicable in this matter.

B. 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.

C. To invoke the special refund authority, it must be determined whether the money paid by petitioners was paid under a mistake of fact or a mistake of law. In *Matter of Wallace* (Tax Appeals Tribunal, October 11, 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].

D. Under the foregoing standard, it is clear that petitioners' contention that there was a mistake of fact is without merit and that they are not entitled to a refund under Tax Law § 697(d). Petitioners' failure to report and pay the proper amount of tax to New Jersey and to claim the appropriate credit on their 2006 New York income tax return was based on their (or their accountant's) erroneous interpretation of New Jersey law, or their ignorance of the legal consequences following from the facts. Petitioners were aware of all of the income at issue when their New York and New Jersey returns were filed. It was petitioners' treatment of that income under the law that caused the New Jersey deficiency and subsequent New York refund claim. To the extent that they claim the mistake of fact resulted from a miscommunication with their

accountant, petitioners fail to elaborate or provide evidence on this point in their opposition papers. Thus, their failure to timely file a refund claim for the year 2006 was based upon a mistake of law, not a mistake of fact. Additionally, petitioners were informed of their New Jersey deficiency by letter of March 22, 2010, or 24 days before the expiration of New York's statute of limitations for refunds, leaving them ample time to file either a timely refund claim or extension. They obviously did neither. Accordingly, the special refund authority, as provided in Tax Law § 697(d), is inapplicable to this matter (*see Matter of Goodspeed*, Tax Appeals Tribunal, January 29, 2009).

E. Since petitioners admit that the statute of limitations for filing a claim for refund for the year 2006 expired prior to the filing of their refund claim in May 2010, and it has been determined that the special refund authority under Tax Law § 697(d) is not applicable in this proceeding, there remains no material and triable issue of fact. Accordingly, the Division is entitled to summary determination on the law (*see Matter of Klingler*, Tax Appeals Tribunal, June 28, 2007). Petitioners' claim for refund of personal income tax for the year 2006 is time barred and was properly denied as untimely filed pursuant to Tax Law § 687.

F. The Division of Taxation's motion for summary determination is granted; the petition of Yang and Kyung H. Cho is denied; and the Notice of Disallowance, dated November 12, 2010, is hereby sustained.

DATED: Albany, New York
March 22, 2012

/s/ Herbert M. Friedman, Jr. _____
ADMINISTRATIVE LAW JUDGE