

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition

of

ELLIS C. WELLMAN, JR. AND JUNE W. WELLMAN

DETERMINATION

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Years 1979 and 1980.

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Petitioners, Ellis C. Wellman, Jr. and June W. Wellman, 100 Marjorie Street, Syracuse, New York 13205, 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 1979 and 1980 (File No. 66937).

A hearing was held at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on April 29, 1987 at 10:45 A.M. Petitioner Ellis C. Wellman, Jr. appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

#### ISSUE

Whether petitioners filed amended tax returns for 1979 and 1980 within the three year statute of limitations set forth at section 687(a) of the Tax Law.

#### FINDINGS OF FACT

1. On July 23, 1984, the Audit Division received amended income tax returns for 1979, 1980 and 1981 from petitioners, Ellis C. Wellman, Jr. and June W. Wellman. The amended returns were accompanied by a letter from Mr. Wellman which states:

"Original forms IT-201-X were filed 4/14/83. Your computer has no record of their receipt. Thanks for your attention in this matter."

Petitioners claimed a refund of \$255.32 for 1979 and a refund of \$354.47 for 1980.

2. The Audit Division denied the 1979 and 1980 claims for refund on the ground that the amended returns were not filed within three years from the time the original returns were filed.

3. Mr. Wellman mailed the amended returns and petitioners' 1982 personal income tax return to the Audit Division in the same envelope. The records of the Audit Division show that the 1982 return was filed on April 14, 1983.

4. Petitioners received a refund of taxes paid for 1982, but received no response at all to the claim for refund for the earlier years. Consequently, Mr. Wellman contacted the Audit Division in April 1984 and spoke to an individual named Cynthia Kearns in the Computer Retrieval Terminals ("CRT") unit. Ms Kearns accessed petitioners' computer file and found no record of receipt of the amended returns. Mr. Wellman made a second call to the CRT unit thereafter, but he was unable to recall the date of that call or to whom he spoke. He prepared duplicate copies of the amended returns and mailed these to the Audit Division with the cover letter referred to in Finding of Fact "1". The cover letter is dated July 20, 1984. The amended returns are dated April 19, 1984. On December 11, 1984, Mr. Wellman again contacted the CRT unit regarding the status of petitioners' refund. He spoke to an individual named Carol Maloney.

5. Petitioners' 1982 tax returns have been destroyed by the Files Unit, so no physical evidence of the original amended returns is available.

#### CONCLUSIONS OF LAW

A. That Tax Law § 687(a) provides 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".

B. That for purposes of section 687, any return filed before the last day prescribed for its filing **is** considered as filed on such last day (Tax Law § 687[h]).

C. That since there **is** no record of receipt of the original amended returns, petitioners have the burden of proving that those returns were filed within the three year period as provided for in section 687(a) (Tax Law § 689[e]).

D. That petitioners have established through a combination of credible testimony and documentary evidence that amended returns for 1979 and 1980 were timely filed. The Audit Division conceded that petitioners' 1982 tax return was timely filed. Petitioners received a refund of 1982 taxes, and thereafter, they engaged in a course of conduct which would only be consistent with their claim that the amended returns were included with the 1982 return. Mr. Wellman contacted the CRT unit on three separate occasions to inquire about the status of his refund; after being informed that there was no record of receipt of the amended returns, he filed duplicates of those returns; and he sent a cover letter explaining the circumstances under which the duplicates were filed. The only logical conclusion that can be drawn from these established facts **is** that the amended returns were mailed with the 1982 return; and therefore, they were filed within the three year period of limitation.

E. That the petition of Ellis C. Wellman, Jr. and June W. Wellman **is** granted and the Audit Division **is** directed to refund the sums of \$255.32 for 1979 and \$354.47 for 1980, together with such interest as may be lawfully owing.

DATED: Albany, New York

SEP 03 1987

  
ADMINISTRATIVE LAW JUDGE