

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
T. Roland Berner, Theodore Friedlander, Jr. and :  
Gardner L. Friedlander, Trustees :  
under the will of Herman Gardner : AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Personal Income :  
Tax under Article 22 of the Tax Law for the Year :  
1972.

---

State of New York }  
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 9th day of August, 1984, he served the within notice of Decision by certified mail upon T. Roland Berner, Theodore Friedlander, Jr. and, Gardner L. Friedlander, Trustees under the will of f Herman Gardner the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


T. Roland Berner, Theodore Friedlander, Jr. and  
Gardner L. Friedlander, Trustees under the will of Herman Gardner  
c/o Bankers Trust Co.  
280 Park Avenue  
New York, NY 10017

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
9th day of August, 1984.



  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
T. Roland Berner, Theodore Friedlander, Jr. and :  
Gardner L. Friedlander, Trustees :  
under the will of Herman Gardner : AFFIDAVIT OF MAILING  
  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Personal Income :  
Tax under Article 22 of the Tax Law for the Year :  
1972.

---

State of New York }  
ss.:  
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 9th day of August, 1984, he served the within notice of Decision by certified mail upon Aaron Lewittes, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

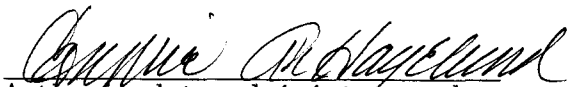
Aaron Lewittes  
Leventritt, Lewittes & Bender  
585 Stewart Avenue  
Garden City, NY 11530

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
9th day of August, 1984.



  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

August 9, 1984

T. Roland Berner, Theodore Friedlander, Jr. and  
Gardner L. Friedlander, Trustees under the will of Herman Gardner  
c/o Bankers Trust Co.  
280 Park Avenue  
New York, NY 10017

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Aaron Lewittes  
Leventritt, Lewittes & Bender  
585 Stewart Avenue  
Garden City, NY 11530  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
of	:	
T. ROLAND BERNER, THEODORE FRIEDLANDER, JR.	:	DECISION
and GARDNER L. FRIEDLANDER, Trustees	:	
under the Will of HERMAN GARDNER	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1972.	:	

---

Petitioners, T. Roland Berner, Theodore Friedlander, Jr. and Gardner L. Friedlander, Trustees under the Will of Herman Gardner, c/o Bankers Trust Co., 280 Park Avenue, New York, New York 10017, 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 1972 (File No. 36779).

On November 28, 1983, petitioners waived the right to a hearing and requested that a decision be rendered by the State Tax Commission based upon the Department of Taxation and Finance file, and briefs to be submitted by March 12, 1984. Upon review of the record, the State Tax Commission renders the following decision.

ISSUE

Whether Tax Law section 697(d) may be applied to petitioners' claim for refund, inasmuch as the claim was filed more than three years after the return was filed and more than two years after the tax was paid.

FINDINGS OF FACT

1. Petitioners, T. Roland Berner, Theodore Friedlander, Jr. and Gardner L. Friedlander, are trustees of a testamentary trust created under paragraph 8B of the Will of Herman Gardner (hereinafter referred to as "the trust").

2. Petitioners timely filed a 1972 New York State income tax fiduciary return for the trust reporting net long-term capital gains of \$232,070.88 and a long-term capital gain deduction of \$116,035.44. Sometime after April 15, 1973, but prior to April 15, 1976, petitioners filed an amended 1972 New York income tax fiduciary return increasing the trust's net long-term capital gain to \$237,065.56 and increasing the long-term capital gain deduction to \$118,532.78. Said amended return reported total tax of \$24,427.92, less tax shown due on the original return of \$23,871.94, leaving a balance to be paid with the amended return of \$555.98. The capital gains were allocated to the principal of the trust.

3. The Department of Taxation and Finance instructions for preparing 1972 fiduciary income tax returns instructed those required to file to include on line 6 of Schedule 2 a modification equal to 20 percent of the net long-term capital gain deduction to the extent allocable to principal. Said modification had the effect of increasing the amount of long-term capital gains taxable to New York State.

4. Petitioners, in accordance with the instructions, made the capital gain deduction modification, thereby increasing the trust's taxable income and the trust's New York income tax.

5. Section 2 of Chapter 718 of the Laws of New York for 1973, enacted June 11, 1973, amended section 618(4) of the Tax Law to provide for the 20 percent modification which was required by the instructions. Section 4 of said Chapter 718 provided, "This act shall take effect immediately and shall apply to all taxable years beginning on or after January first, nineteen hundred seventy-two."

6. The New York Court of Appeals in Holly S. Clarendon Trust v. State Tax Commission, 43 N.Y.2d 933 (decided February 22, 1978), held Tax Law section 618(4) (as amended by L. 1973, Ch. 718 §2) unconstitutional insofar as it applied the 20 percent capital gain deduction modification retroactively to 1972.

7. On March 21, 1979, petitioners, on behalf of the trust, filed a claim for refund for 1972 tax of \$2,863.64. The refund claim was based on the amount of tax paid for 1972 as a result of having made the 20 percent capital gain modification pursuant to the Department's instructions for filing fiduciary returns.

8. The Audit Division denied petitioners' refund claim on April 30, 1979, holding that said claim was not timely filed.

#### CONCLUSIONS OF LAW

A. That Tax Law section 697(d) provides:

"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. That the constitutionality of the retroactive application of Tax Law section 618(4), as amended in 1973, was not resolved until after the time prescribed in Tax Law section 687(a) for the filing of refund claims had expired.

C. That in the Matter of Fiduciary Trust Company of New York and Thomas M. Bancroft (State Tax Comm., October 7, 1983), the Commission determined, on

substantially identical facts as found herein, that it would be inappropriate to exercise the special refund authority since a question of law, namely whether the retroactive application of the 1973 amendment was constitutional, was not resolved until after the expiration of the statute of limitations (See Kreiss et al. v. State Tax Comm., \_\_ N.Y.2d \_\_, rev'g 92 A.D.2d 1048; cf., National Benefit Fund for Hospital and Health Care Employees, State Tax Comm., October 7, 1983). Accordingly, Tax Law section 697(d) may not be applied to petitioners' claim for refund.

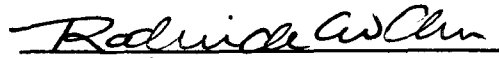
D. That petitioners' claim for refund was required to be filed within three years from the date the return was filed or two years from the time the tax was paid (Tax Law section 687(a)). Since the claim was not filed until March 21, 1979, the Audit Division's denial of said claim was proper.

E. That the petition of T. Roland Berner, Theodore Friedlander, Jr. and Gardner L. Friedlander, Trustees under the Will of Herman Gardner, is denied.

DATED: Albany, New York

STATE TAX COMMISSION

AUG 09 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER