

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOEL AND RONA LEVY : DETERMINATION
DTA NO. 825005
for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax :
Law for the Year 2001. :

Petitioners, Joel and Rona Levy, 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 2001.

On July 24, 2013 and August 1, 2013, respectively, petitioners, appearing pro se, and the Division of Taxation, appearing by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs to be submitted by December 2, 2013, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUES

Whether petitioners are entitled to a refund of personal income tax for the year 2001.

FINDINGS OF FACT

1. Petitioners, Joel and Rona Levy, filed a New York State resident personal income tax return for the year 2001 on October 22, 2002, pursuant to an extension, indicating an overpayment of \$14,664.00, which petitioners chose to apply to their 2002 estimated tax.

2. Petitioners filed a New York State resident personal income tax return for the year 2003 on July 23, 2007 which indicated a net operating loss carryforward to 2004. The original 2003 personal income tax return included a form IT-370, Application for Automatic Extension of Time to File for Individuals, which extended the filing date to October 15, 2004.

3. Petitioners filed an amended New York State resident personal income tax return for the year 2001 on January 18, 2011, in which they requested a refund of \$49,864.00, based on a carryback of the net operating losses sustained in 2003 to 2001.

4. In an attachment to the 2001 amended return, petitioners, through their preparer, Walter J. Mckeever & Company, LLC, stated that petitioners had incurred a net operating loss from their 100% owned S corporation, J.N. Levy, Inc., in the sum of \$722,906.00. As such the loss flowed through to their personal tax returns.

5. Petitioners changed tax return preparers in 2002 for both their personal and S corporation returns. Their new representative, Todd Newman, CPA, of Carmel, New York, was recommended to petitioners by their counsel. Petitioners claim that Mr. Newman did not advise them to carry back the net operating losses to 2001 even though he was aware that they incurred such losses each year since 2002.

6. After a jury trial in 2010, Mr. Newman was convicted of two felonies, grand larceny and repeated failure to file personal income tax returns, and was sentenced to three to nine years in prison. According to a press release issued by the Westchester County District Attorney, Mr. Newman, while the secretary and treasurer of B. Schoenberg and Company, a recycler of plastics and engineering resins located in Yorktown, New York, stole in excess of \$1.9 million dollars between 2003 and 2007 and failed to file his own personal income tax returns with New York State for the years 2005, 2006 and 2007.

7. Between 2002 and 2007, petitioners received frequent notifications from federal and state taxing authorities informing them of late filings of payroll returns and tax deposits and various other delinquency notices. Although petitioners attempted to contact Mr. Newman to resolve issues as they arose, it became increasingly more difficult for them to reach him, either for personal conferences or telephone calls. However, they chose to retain him as their income tax return preparer. Ultimately, Mr. Newman failed to file timely returns for petitioners or the S corporation for 2006 and 2007.

8. Upon receipt of the amended return for 2001 in January 2011, the Division of Taxation (Division) issued to petitioners an Account Adjustment Notice - Personal Income Tax, dated April 29, 2011, which stated that the Division

denied your claim for refund or credit because it was filed too late. The tax law allows a refund or credit if the taxpayer makes the claim within three tax years from the time the return was required to be filed or within two years from the time the tax was paid, whichever was later.

For this reason, and other adjustments that are not in issue, the Division allowed no refund.

9. By Notice of Disallowance, dated May 23, 2011, the Division notified petitioners that their refund application contained in the amended personal income tax return for 2001 had been disallowed because said claim was out of statute.

CONCLUSIONS OF LAW

A. A properly issued notice of deficiency is presumed to be correct and the taxpayer has the burden of demonstrating the incorrectness of such an assessment (*Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768, 589 NYS2d 383 [1992], *lv denied* 81 NY2d 704, 595 NYS2d 398 [1993]). Tax Law § 689(e) provides that in any matter brought before the Division of Tax Appeals under Article 22 of the Tax Law, the burden of proof is upon the petitioner. Accordingly,

it is necessary to ascertain whether petitioners have sustained their burden of proof in showing that they are entitled to the refund they requested in the 2001 amended income tax return filed in 2011.

B. 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

* * *

(d) Overpayment attributable to net operating loss carryback. - - A claim for credit or refund of so much of an overpayment as is attributable to the application to the taxpayer of a net operating loss carryback shall be filed within three years from the time the return was due (including extensions thereof) for the taxable year of the loss, or within the period prescribed in subsection (b) in respect of such taxable year, or within the period prescribed in subsection (c), where applicable, in respect of the taxable year to which the net operating loss is carried back, whichever expires 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 2001 expired on October 15, 2007. (Tax Law § 687[d]; 20 NYCRR 152.1, 152.13 and 157.) Moreover, they acknowledge that their refund claim at issue was filed on January 18, 2011. Accordingly, their claim for refund must be denied unless it is found that some other consideration is applicable in this matter.

C. Although the Division has addressed the inapplicability of the special refund authority provided for in Tax Law § 697(d), petitioners have specifically stated that they do not seek relief pursuant to that section of the Tax Law. Rather, petitioners focus on the criminal conduct of their paid tax return preparer, Todd Newman.

Petitioners lament the fact that they suffered at the hand of a “criminal” but have failed to allege one instance of a fraud perpetrated against them by Mr. Newman. Instead, they assert that Mr. Newman’s criminal conduct, stealing money from his employer and failing to file his own tax return, must have been “distracting” and prevented him from competently representing them. However, they have not identified a causal link between his criminal conduct and their own circumstances, or demonstrated how this qualifies them for a refund that is out of statute. Petitioners’ recourse appears to lie in an action against Mr. Newman. In any event, even after several episodes of neglect on Mr. Newman’s part, petitioners continued to use him to prepare their returns.

D. Petitioners’ arguments for relief amount to a plea for equity. They argue that this forum should perceive them as victims of a fraud, not unlike the victims of a Ponzi scheme, in which the party perpetrating the fraud receives cash or property from investors, purports to earn income for the investors, and reports to the investors income amounts that are wholly or partially fictitious. Payments, if any, of purported income or principal to investors are made from cash or property that other investors invested in the fraudulent arrangement. The party perpetrating the fraud criminally appropriates some or all of the investors’ cash or property. (Rev Proc 2009-20.)

Petitioners note that the Internal Revenue Service, reacting to the massive scheme orchestrated by Bernard “Bernie” Madoff¹, issued a revenue procedure (Rev Proc 2009-20) and a revenue ruling (Rev Rul 2009-9, 2009 I R B. [April 6, 2009]) that provided a safe harbor for the duped investors. The Service recognized “that whether and when investors meet the requirements for claiming a theft loss for an investment in a Ponzi scheme are highly factual determinations that often cannot be made by taxpayers with certainty in the year the loss is discovered.” (Rev Proc 2009-20, § 2.03.)

As mentioned above, petitioners have not established any fraud perpetrated against them by Mr. Newman and, as such, the analogy to a Ponzi scheme is inapposite and rejected.

E. Petitioners have not provided this forum with any guidance, in either statute or case law, that would establish a basis for granting equitable relief to them. (*Matter of Goodspeed*, Tax Appeals Tribunal, January 29, 2009.)

Further, there are no exceptions in the Tax Law that allow for consideration of individual circumstances. Essentially, petitioners seek an equitable tolling of the statute of limitations set forth in Tax Law § 687(a) based on their problems with Mr. Newman’s professional representation. However, this notion of an equitable tolling was rejected by the United States Supreme Court when interpreting Internal Revenue Code (IRC) § 6511, which provides statutory time limitations for filing refund claims similar to Tax Law § 687(a). (*United States v. Brockamp*, 519 US 347 [1997].) In *Brockamp*, the Court held that the statutory time limitations for the filing of a refund claim could not be tolled for nonstatutory equitable reasons. In that case, the petitioner had argued that senility had caused the delay in filing the claim and that the

¹ Mr. Madoff, a former stockbroker, investment advisor and financier, was the admitted operator of a Ponzi scheme that is considered to be the largest financial fraud in United States history. Losses to investors was reported to be 18 billion dollars. In 2009, Mr. Madoff was convicted and sentenced to 150 years in prison.

statutory time limitation should be extended because of the existence of a mental disability. The Court rejected the petitioner's contentions, saying that there was neither an explicit nor implied equitable tolling exception in IRC § 6511. The court stated in part as follows:

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, after all, is not normally characterized by case-specific exceptions reflecting individualized equities (519 US, at 352).

Likewise, there is no reason to interpret the provisions of Tax Law § 687(a) differently in this matter, notwithstanding very compelling personal reasons (*see also Matter of Levine*, Tax Appeals Tribunal, August 7, 2008).

F. The petition of Joel and Rona Levy is denied and the Division's Notice of Disallowance, dated May 23, 2011, is sustained.

DATED: Albany, New York
May 22, 2014

/s/ Joseph W. Pinto, Jr
ADMINISTRATIVE LAW JUDGE