

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HERBERT N. SCHWARTZ (DECEASED)	:	DETERMINATION
AND MARILYNN GESCHWER	:	DTA NO. 831043
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 2016.	:	

Petitioners, Herbert N. Schwartz (deceased) and Marilynn Geschwer, 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 year 2016.

A formal hearing by videoconference was held, on December 2, 2024, before Winifred M. Maloney, Administrative Law Judge, with all briefs to be submitted by April 30, 2025, which date began the six-month period for the issuance of this determination. Petitioners appeared by Harry J. Lufft, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel).

After reviewing the entire record in this matter, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners established that the Division of Taxation improperly denied their claim for credit or refund of personal income tax for the year 2016 on the basis that the claim was filed after the expiration of the applicable statute of limitations.

FINDINGS OF FACT

Pursuant to section 3000.15 (d) (6) of the Rules of Practice and Procedure of the Tax Appeals Tribunal and section 307 (1) of the State Administrative Procedure Act, the Division of Taxation (Division) submitted eight proposed findings of fact. The Division's proposed findings of fact 1, 2, 4 and 6 through 8 are supported by the record and have been incorporated herein. Proposed findings of fact 3 and 5 are rejected as conclusory statements.

1. On August 15, 2020, petitioners, Herbert N. Schwartz (deceased)¹ and Marilyn Geschwer, filed a form IT-203, New York State nonresident and part-year resident income tax return, for the year 2016 (nonresident return). On their nonresident return, petitioners reported an overpayment in the amount of \$5,964.00 and requested a refund of the same amount by paper check. The \$5,964.00 refund requested by petitioners consisted of New York State tax withheld in the same amount.

2. Attachments to petitioners' nonresident return included copies of a form IT-203-D, nonresident and part-year resident itemized deduction schedule, a form IT-182, passive activity loss limitations for nonresidents and part-year residents, a form IT-249, claim for long-term care insurance credit, a 2016 form IT-2 summary of W-2 statements, for Mr. Schwartz listing CBS News Inc. (CBS News) as his employer and reporting New York State (NYS) wages of \$62,000.00 and NYS tax withheld of \$5,964.00, a form W-2 wage and tax statement for tax year 2016 issued by CBS News to Herb N. Schwartz (2016 CBS News W-2) that reported NYS wages of \$62,000.00 and NYS tax withholding of \$5,964.40, the same 2016 CBS News W-2, a form IT-203-D line 9, itemized deduction schedule subtraction adjustments, a part-year resident/nonresident allocation worksheet for tax year 2016, a NYS wages/self-employment

¹ Mr. Schwartz died on March 23, 2017; however, his date of death is incorrectly listed as March 17, 2017 on the nonresident return.

income allocation for 2016, a form IT-203-D line 9, long-term care premium adjustment worksheet for tax year 2016, two pages that contained smart worksheets for federal itemized deductions, nonresident and part-year resident itemized deduction schedule line 9, long-term care insurance credit, allocation of rents and royalties, and an allocation of a net operating loss carryover from a prior year. Also attached to the nonresident return were copies of a two-page cover letter, dated August 13, 2020, from Harry J. Lufft to the Internal Revenue Service (IRS) regarding petitioners' form 1040-X for tax year 2016 (Lufft form 1040-X cover letter), a Department of the Treasury IRS notice CP05, dated March 11, 2019, for tax year 2016, a letter from the IRS, dated August 27, 2019, transmitting a transcript of petitioners' record of account for tax year 2016 to petitioners at a Lake Hopatcong, New Jersey, address, an IRS form 56, notice concerning fiduciary relationship, and a form W-2, wage and tax statement, for tax year 2012 issued by CBS News to Mr. Schwartz.

3. The Lufft form 1040-X cover letter, bearing the signatures of Mr. Lufft, "CPA & Tax Preparer," and Ms. Geschwer, "Surviving Spouse," stated, in part, as follows:

"This cover letter is intended to act as a quick reference guide as to most of the important issues and circumstances involving this Form 1040 return.

The first thing to note is that the taxpayer passed away soon after the tax year ended. Herb's death came after a year long [sic] period of rapidly deteriorating health that ended in an over one month long stay in Dover General Hospital near his home in NJ.

Besides the obvious consuming medical issues that ended in the taxpayers [sic] death, the CBS News W-2 has been the most problematic issue for this tax return. Herb's last prior W-2 from his long time employer CBS News was in year 2012. Soon after his termination, he filed a wrongful termination lawsuit. The next W-2 Herb received was the one dated for year 2016. This W-2 from CBS News (the former employer) is not for work performed, but the settlement of the legal action. Herb's spouse, Marilyn Geschwer has no recollection of ever receiving this W-2 before year 2020. She also does not remember [sic] receiving any legal notice that this W-2 would be the method of settlement payment. In fact, we only recently

(within the last three months of yr. 2020) been delivered the replacement copy of this Year 2016, CBS News, Form W-2.

The first holding problem we encountered after filing this tax return was with the IRS Fraud Department. After the first version of the 1040 was filed, Marilyn actually came to my office here and we both spoke to the IRS Fraud rep on 02/07/2019. We both also thought we were finished with this return, except to wait for the refund. We then however received a CP05 letter dated 03/11/2019 . . . stating that the \$5,808.00 refund was on hold. The letter stated, 'We'll hold your refund until we finish our review'. Surprisingly, we received no other IRS correspondence regarding this return. It was not until 08/27/2019, from a phone call that I initiated did we find out from an IRS Rep in the Holtsville NY, Service Center that we must be missing some major income item on the return because we were missing about \$15,000 in federal withholding tax. The cover letter with the transcript we ordered during that phone call . . . verifies the date of the phone call just mentioned.

I originally thought we were missing a Form 1099-R and not a W-2 Form. By the time our search for the missing income and withholding clearly led us to 'CBS News' we were in the Covid19 [sic] State Governor's mandated business shut down. This furthered our delays because even though we knew from the 'Transcript', the federal related income and deductions, we did not know the New York and/or NJ amounts which were not only needed for those respective returns, but also for the Federal Schedule A. In other words[,] we could not Amend this return until we received the W-2 from CBS News."

4. On September 9, 2020, the Division issued an account adjustment notice – personal income tax (account adjustment notice) that denied petitioners' requested refund in the amount of \$5,964.00. The explanation section of the account adjustment notice stated, in part, the following:

"We denied your claim for the 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 years from the time the return was required to be filed or within two years from the time the tax was paid, whichever is later."

5. On January 15, 2021, the Division issued to petitioners a notice of disallowance that denied the entire \$5,964.00 refund claimed by petitioners for the year 2016, as untimely, for the reasons provided in the account adjustment notice.

6. Petitioners requested a conciliation conference before the Division's Bureau of Conciliation and Mediation Services (BCMS), which was conducted by teleconference and at which petitioners were represented by Mr. Lufft. By conciliation order, CMS number 000331851, dated April 8, 2022, BCMS sustained the notice of disallowance.

7. On July 1, 2022, petitioners timely filed a petition with the Division of Tax Appeals protesting the conciliation order.

8. At the hearing, the Division submitted the affidavit of Monique Place, a Taxpayer Services Specialist 2 in the Division's Individual Liability Resolution Center (ILRC). Ms. Place's duties in ILRC include supervising resolvers who handle protests of personal income tax assessments and adjusted refunds. As part of her duties, Ms. Place facilitates reviews "to ensure that the New York State Tax Law is being abided by during the review process and through any adjustments to taxpayer accounts." Ms. Place also acts as an advocate for conciliation conferences before BCMS and has worked on BCMS cases and advocated at BCMS conferences since August 2023. In her performance of those responsibilities, Ms. Place reviewed the information in the Division's systems including correspondence, case contacts, filing history and other documents for petitioners, including their nonresident return for tax year 2016.

9. Ms. Place avers that because Mr. Schwartz passed away on March 23, 2017, the due date for filing petitioners' nonresident return was extended by 90 days from April 18, 2017 to July 17, 2017, pursuant to Tax Law § 657 (c). Ms. Place reviewed the Division's records and avers that the Division has no record of petitioners filing a NYS personal income tax return for tax year 2016 prior to August 15, 2020. Ms. Place further avers that petitioners' refund claim for tax year 2016 was filed within the three-year period set forth in Tax Law § 687 (a) but subject to limitation on such refund to the amount of taxes paid within the three-year period immediately

preceding the filing of the refund claim plus the period for any extension of time to file the return. Ms. Place asserts that the amount petitioners requested as an overpayment for tax year 2016 was comprised solely of payments and credits deemed paid on April 18, 2017, pursuant to Tax Law § 687 (i). Ms. Place further asserts that petitioners' refund would be limited to tax paid within the three-year and ninety-day period preceding August 15, 2020, i.e., May 17, 2017 through August 15, 2020. Because petitioners' payments and credits were deemed paid on April 18, 2017, Ms. Place claims that petitioners' refund claim for 2016 is untimely and is limited to \$0.00.

10. The Division conducted a search of its records and provided a certification of a Deputy Tax Commissioner in the Disclosure and Government Exchange Unit of the Division's Office of Budget and Management Analysis that a search was made of personal income tax return filings for Herbert N. Schwartz for tax year 2016 and no return filings were found prior to August 15, 2020.

11. At the hearing, Ms. Geschwer testified. Ms. Geschwer stated that her late husband, Herbert Schwartz, became ill in 2016, after the deaths of two of his children "close in proximity" of each other and he passed away on March 23, 2017. Ms. Geschwer testified that Mr. Schwartz last worked in New York for his longtime employer CBS News in July 2012, at which time his employment was terminated. According to Ms. Geschwer, after his termination from CBS News, Mr. Schwartz instituted legal proceedings for wrongful dismissal. Ms. Geschwer testified that after a number of years, a settlement was reached whereby CBS News agreed to pay Mr. Schwartz \$62,000.00 with respect to the termination of his employment with CBS News. Ms. Geschwer admitted receiving a check and a memo statement attached to the check from CBS News that indicated it was for the settlement. Ms. Geschwer testified that the amount of the

check was not \$62,000.00 but a “partial settlement” amount of approximately \$25,000.00.

However, Ms. Geschwer could not recall exactly when she received the settlement check from CBS News but thought it might have been sometime before 2017 or in 2017. According to Ms. Geschwer, she assumed that Mr. Schwartz would receive the full \$62,000.00, and she contacted Mr. Lufft for an explanation. Ms. Geschwer testified that Mr. Lufft told her that because CBS News reported it as income, taxes had to be paid on the full amount.

12. During her testimony, Ms. Geschwer denied receiving the 2016 CBS W-2 in 2017. According to Ms. Geschwer, Mr. Lufft notified her that the 2016 CBS News W-2 was outstanding and was needed to prepare the nonresident return. Ms. Geschwer testified that she contacted an individual in the payroll department of CBS News around the beginning of the COVID-19 pandemic in early 2020. Ms. Geschwer further testified that, because of the COVID-19 restrictions, it took the CBS News employee several months to send her a copy of the 2016 CBS News W-2 and, in turn, she sent a copy of the same to Mr. Lufft so that he could prepare petitioners’ nonresident tax return. Ms. Geschwer admitted that she went to Mr. Lufft’s office and signed petitioners’ nonresident return, as well as the form 1040-X for tax year 2016 and the New Jersey form 1040-X for the same year.

13. A review of petitioners’ nonresident return indicates that Ms. Geschwer signed the return on August 14, 2020, and the postmark on the envelope containing the return shows a mailing date of August 15, 2020. Further review indicates that petitioners’ nonresident return was prepared by Mr. Lufft, on July 9, 2020.

14. At the hearing, petitioners submitted an unsigned copy of their form 1040X, amended U.S. individual income tax return, for tax year 2016 (2016 form 1040-X). A review of the 2016 form 1040-X indicates that it was prepared by Mr. Lufft on August 13, 2020.

15. At the conclusion of the hearing, petitioners requested and were granted additional time until January 3, 2025 to submit a copy of their original form 1040 for tax year 2016, a copy of their original New Jersey form 1040 for tax year 2016, a copy of the acknowledgments that Mr. Lufft received when petitioners federal and New Jersey returns were electronically filed, documentation regarding the settlement between CBS News and Mr. Schwartz and a copy of the check in payment of the settlement. In addition, the Division was granted the right to submit rebuttal documents by January 22, 2025.

16. Petitioners timely submitted the following documents: (i) a copy of the fully executed letter agreement pertaining to the settlement and the release of claims of Mr. Schwartz (letter agreement); (ii) a copy of the 2016 CBS News W-2; (iii) a copy of a form W-2, wage and tax statement, issued by CBS News to Mr. Schwartz for tax year 2012; and (iv) a copy of a form W-2, wage and tax statement, issued by CBS News to Mr. Schwartz for tax year 2011.

17. A review of the letter agreement indicates that in consideration of Mr. Schwartz's agreement to the release of certain claims and "in lieu of any other severance payments," CBS News would pay Mr. Schwartz "the gross amount" of \$62,000.00 (severance payment). The terms of paragraph 1 of the letter agreement provide, among other things, that the severance payment "shall be subject to all necessary deductions, and shall be paid within thirty calendar days following the expiration of the seven day revocation period . . . and the withdrawal" of certain actions. Further review of the letter agreement indicates that Mr. Schwartz, Ms. Geschwer and a representative of the International Brotherhood of Electrical Workers, Local 1212, accepted, agreed to and signed the letter agreement on October 13, 2015, and Frank Governale, Vice President of CBS News, signed the letter agreement on October 15, 2015.

18. Petitioners did not submit a copy of the settlement check that Mr. Schwartz received as the severance payment.

19. Petitioners did not submit any bank statements reflecting when they received the settlement check.

CONCLUSIONS OF LAW

A. The period of limitations for claiming a credit or refund of personal income tax is set forth in Tax Law § 687 (a) that provides, in part, as follows:

“[c]laim 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, or if no return was filed, within two years from the time the tax was paid. If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return If the claim is not filed within the three year period, but is filed within the two year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim.”

B. The Division “denied [petitioners] claim for the refund or credit because it was filed too late.” However, petitioners filed their nonresident return for tax year 2016 on August 15, 2020, and made the refund claim on that nonresident return. Therefore, petitioners’ refund claim was timely filed within the three-year period set forth in Tax Law § 687 (a) and considered timely filed because the refund was claimed with the filing of the nonresident return (*see Matter of Diaz*, Tax Appeals Tribunal, March 17, 2011; *Matter of Petrovich*, Tax Appeals Tribunal, January 20, 2000). However, any refund of an overpayment is limited by the provisions of Tax Law § 687 (a) to the amount of tax paid within the three-year period immediately preceding the filing of the claim for refund plus any extension of time to file the return. Petitioners’ refund is limited to the tax paid within the three-year and ninety-day period preceding August 15, 2020,

the date on which petitioners filed their nonresident return for tax year 2016, i.e., May 17, 2017 through August 15, 2020.

C. Pursuant to Tax Law § 687 (i), any tax paid by a taxpayer, income tax withheld from a taxpayer, and any amount paid by a taxpayer as an estimated income tax for a taxable year is deemed to have been paid on the fifteenth day of the fourth month following the close of the taxable year with respect to which such amount constitutes a credit or payment. The 2016 payments that comprise petitioners' refund claim were deemed paid on April 18, 2017.² Petitioners' refund claim for tax year 2016, though timely filed, exceeds the amount of tax paid within the three-year and ninety-day period immediately preceding that claim and, thus, is limited by Tax Law § 687 (a) to \$0.00.

D. There is no dispute that petitioners did not file their nonresident return for tax year 2016 until August 15, 2020. Petitioners argue that they did not receive the 2016 CBS News W-2 in 2017 that reflected the agreed upon payment of \$62,000.00 made by CBS News to Mr. Schwartz with respect to the termination of Mr. Schwartz's employment with CBS News. However, Ms. Geschwer admitted receiving a settlement check from CBS News at some point before 2017 or in 2017, although she was unsure of the exact date, for the agreed upon settlement amount, minus taxes that were withheld. Ms. Geschwer further testified that she contacted Mr. Lufft, after she received the check, to ask him why the check did not reflect the entire amount of the \$62,000.00 settlement amount. Petitioners claim that their representative, Mr. Lufft, advised Ms. Geschwer that the 2016 CBS News W-2 was needed, and that Ms. Geschwer contacted an individual in the payroll department of CBS News at the beginning of the COVID-19 pandemic.

² April 15, 2017 fell on a Saturday and Emancipation Day, a legal holiday in Washington, D.C., was observed on Monday, April 17, 2017. The national tax filing deadline was April 18, 2017, the next business day (*see* General Construction Law § 25-a [1]).

They further claim that it took several months for the CBS News employee to send a copy of the 2016 CBS News W-2 to Ms. Geschwer due to the government mandated restrictions in place at that time. Petitioners maintain that once Ms. Geschwer received the copy of the 2016 CBS News W-2, she sent a copy of the same to Mr. Lufft so that petitioners' nonresident return for tax year 2016 could be prepared. Petitioners further maintain that they filed their nonresident return as soon as they were able to do so.

In *Matter of Diaz*, the petitioner argued that he did not have the wage information that he needed to file his personal income tax returns for tax years 1998 and 2000, and he had difficulty obtaining the necessary forms W-2 so that he could file within the period of limitations to obtain a refund. After discussing Tax Law former § 687 and the limitation to the amount of taxes paid within the three years immediately preceding the filing of the refund claims, the Tax Appeals Tribunal (Tribunal) stated that “[w]hile it is unfortunate that petitioner cannot be refunded his overpayments, the statute requires this conclusion.” In the instant matter, petitioners’ representative, Mr. Lufft prepared their nonresident return for 2016 on July 9, 2020, however, Ms. Geschwer signed the nonresident return on August 14, 2020 and the same was mailed to the Division on August 15, 2020. Petitioners offered no explanation as to why they waited to August 15, 2020 to file their nonresident return for tax year 2016. Although petitioners’ refund claim was timely filed within the three-year period of limitations set forth in Tax Law § 687 (a), their refund is limited to the tax paid within the three-year and ninety-day period preceding the August 15, 2020 filing date of the nonresident return, i.e., May 17, 2017 through August 15, 2020. The \$5,964.00 refund claimed by petitioners constituted tax withheld from Mr. Schwarz’s 2016 settlement with CBS News and is deemed paid on April 18, 2017 (*see* Tax Law § 687 [i]; General Construction Law § 25-a [1]). As such, petitioners’ refund claim is limited to \$0.00.

E. Further, the circumstances in this matter do not warrant relief under the special refund authority pursuant to Tax Law § 697 (d), which states:

“[w]here 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.”

First, the special refund authority is permissive, not mandatory (*see id.*; *see also Matter of Fiduciary Trust Co. of N.Y. v State Tax Commn.*, 120 AD2d 848, 850 [3d Dept 1986]; *Matter of Nathel v. Commissioner of Taxation & Fin.*, 232 AD2d 836, 836 [3d Dept 1996]). Second, for the special refund authority to apply, the money must have been paid under a mistake of fact and not a mistake of law (*see* Tax Law § 697 [d]; *see also Matter of Wallace*, Tax Appeals Tribunal, October 11, 2001). In *Matter of Wallace*, the Tribunal stated that a mistake of facts is “an understanding of the facts in a manner different [than] they actually are.” A mistake of law, however, is an “acquaintance with the existence or nonexistence of facts, but ignorance of the legal consequences following from the facts” (*id.*). Here, petitioners were clearly operating under a mistake of law in that they were acquainted with the facts (i.e., that they received income from CBS News related to the settlement of Mr. Schwarz’s wrongful dismissal lawsuit and they had not filed their nonresident return for tax year 2016 until August 15, 2020), but were unaware of the legal consequences following the facts, (i.e., that the limitation period for claiming a refund found in Tax Law § 687 [a] was not affected by them not receiving the 2016 CBS News W-2 until 2020). Further, there is no evidence that any monies have been erroneously or illegally collected from or paid by petitioners because of a mistake of fact. Petitioners’ ignorance of the legal consequences of filing their nonresident return for tax year 2016 on

August 15, 2020, was a mistake of law. Petitioners' choice to wait to file their nonresident return for tax year 2016 until August 15, 2020, even after they obtained the 2016 CBS News W-2 in the first half of 2020 and Mr. Lufft prepared such nonresident return on July 9, 2020, carries with it certain tax ramifications and petitioners are held to those ramifications (*see Matter of Faulkner, Dawkins & Sullivan v State Tax Commn.*, 63 AD2d 764, 764 [3d Dept 1978]). Accordingly, the special refund authority in Tax Law § 697 (d) does not apply.

F. The petition of Herber N. Schwarz (deceased) and Marilyn Geschwer is denied, and the notice of disallowance, dated January 15, 2021, is sustained.

DATED: Albany, New York
October 30, 2025

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE