

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
HARRY W. WALLACE AND JO-ANN WALLACE : DECISION
for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax Law :
for the Years 1978 through 1980. :

Petitioners, Harry W. Wallace and Jo-Ann Wallace, P.O. Box 545, Williston Vermont 05495, filed an exception to the determination of the Administrative Law Judge issued on December 8, 1988 with respect to their petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1978 through 1980 (File No. 803801). Petitioners appeared by Carter, Ledyard & Milburn (Jerome J. Caulfield, Esq. of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Both parties filed briefs on exception.

After reviewing the entire record in this matter the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Tax Appeals Tribunal has jurisdiction over applications for refund of taxes pursuant to Tax Law § 697(d) and, if so, whether said claims should be granted.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except that we modify finding of fact "1". Such facts are stated below. We also find additional facts which are stated below.

We modify finding of fact "1" as follows:

Petitioners filed New York State income tax nonresident returns on a calendar year basis showing overpayments of New York State personal income tax as follows:

<u>Year</u>	<u>Date Tax Paid</u>	<u>Date Return Filed</u>	<u>Amount of Overpayment</u>
1978	4/15/79	April 19, 1983	\$ 4,978.00
1979	4/15/80	April 19, 1983	\$31,470.00
1980	4/15/81	October 24, 1984	\$77,905.00

In each instance, the tax return requested that the total overpayment be credited to the following year's estimated tax.

On or about February 10, 1985 petitioners filed claims for credit or refund of personal income tax as follows:

<u>Year</u>	<u>Amount Sought</u>
1978	\$ 4,978.00
1979	\$31,470.00
1980	\$46,405.00

Each claim for refund stated, in part, that petitioners and the accountant who represented them were ill and therefore the returns were prepared late.

On March 25, 1985 the Division issued a notice disallowing petitioners' claims for refund or credit of personal income tax for the years 1978 and 1979. The explanation on the notice stated that petitioners had not submitted any evidence which would allow the refund requested. On May 19, 1986, the Division issued a notice disallowing petitioners' claims for refund or credit of personal income tax for the years 1978 and 1980.¹ The notice explained that the claims had been disallowed for the following reason:

"Since 1978 and 1980 were filed after the statute of limitations had expired consideration for refunds cannot be given. This disallowance is based on timeliness only."

It was Mr. Wallace's practice to rely on his accountant to complete the necessary tax forms. This reliance was considered justified by petitioners' accountant's timely filing of quarterly estimated income tax payments.

¹No explanation was provided as to why petitioners' claim for the year 1978 was disallowed a second time.

During the period in issue, Mr. Wallace was suffering from heart difficulties. These problems led to a heart bypass operation and later to a heart replacement. During this same period of time, Mr. Wallace's accountant was also suffering from a deteriorating medical condition which resulted in his death. However, Mr. Wallace was not aware of his accountant's medical condition and had no means to ascertain the need to file a claim for refund. Following the accountant's death, neither the accountant's representatives nor petitioners have been able to locate all the files pertaining to petitioners' returns.

We find the following additional facts.

In their perfected petition petitioners asserted, among other things, the following:

"The Audit Division erroneously failed to apply the provisions of Section 697(d) of Article 22 of the Tax Laws (sic) of the State of New York calling for the exercise of its Special Refund Authority."

In its answer to the petition the Division stated the following:

". . . the petitioners are not entitled to refunds under Section 697(d) of the Tax Law in that:

a. the tax in question was neither erroneously nor illegally collected from petitioners, nor was it paid under a mistake of fact."

OPINION

The Administrative Law Judge determined a) that the petitioners filed a petition requesting a refund pursuant to Tax Law section 697(d); b) that the Division submitted an answer which, among other things, specifically stated that petitioners were not entitled to a refund under section 697(d) of the Tax Law; and c) that since the rules and regulations do not contain any method to apply for a refund pursuant to section 697(d) of the Tax Law, the answer must be deemed a denial of the refund under section 697(d) of the Tax Law by the Division of Taxation and its head, the Commissioner of Taxation and Finance (Tax Law § 170[1]). Based on the above, the Administrative Law Judge determined the matter is ripe for adjudication before the Division of Tax Appeals.

The Administrative Law Judge concluded, however, that the petitioners' claim for refund was properly denied because the petitioners did not prove that the estimated tax payments were

illegally or erroneously collected by the Division. Further, that the record did not indicate that such estimated payments were made under a mistake of fact.

Petitioners assert that petitioners are entitled to relief under section 697(d) since there are no questions of law or fact involved nor is there any legal basis other than the statute of limitations asserted by the Division as a basis for denying petitioners' claim; that the taxes in question were paid under a mistake of fact; application of the section 697(d) is not discretionary with the Commissioner of Taxation; and that no requirement exists that the taxes be paid under protest as a condition precedent to section 697(d) relief.

The Division, on exception, asserts that despite the allegation in its answer, the petitioners are not entitled to relief under section 697(d), the Commissioner of Taxation and Finance has not yet acted on the claim of the petitioners as such claim was presented to the Division of Tax Appeals, and that a claim under section 697(d) ". . . is never ripe for adjudication before the Division of Tax Appeals". The Division asserts that the special refund authority in section 697(d) is ". . . reserved exclusively to the Commissioner of Taxation and Finance" and is not ". . . encompassed in the phrase 'the administration of the administrative hearing process'" as defined in section 2000 of the Tax Law.

We deal first with the issue of whether a claim for relief under section 697(d) is within the jurisdiction of the Division of Tax Appeals and the Tax Appeals Tribunal. We agree with the determination of the Administrative Law Judge that under the circumstances herein the Division of Tax Appeals and the Tax Appeals Tribunal have jurisdiction to review the Division's actions under section 697(d).

The crux of the Division's claim is that the special refund authority in section 697(d) is a discretionary administrative function which is reserved to the Commissioner of Taxation and Finance and which may be exercised at any time. The Division asserts that the petitioners did not, prior to the filing of their petition, explicitly and specifically request relief under section 697(d) and thus there is no action by the Commissioner which is subject to review by the

Division of Tax Appeals and the Tribunal within the context of the administrative hearing process as defined in section 2000 of the Tax Law.

The Division seeks to distinguish prior decisions of the State Tax Commission which granted relief under section 697(d) by asserting that in those cases where the Commission granted relief under section 697(d) it did so in its administrative capacity and not its judicial capacity notwithstanding that such relief was granted by formal decision of the Commission following a hearing on the matter². The Division asserts that in those cases the petitioner either ceased the hearing process by withdrawal of its petition prior to the Commission's action (Matter of Schwarzler, TSB-H-82-[23]-I), or waived a hearing in the matter (Matter of Herbert F. Tompkins, TSB-H-87-[125]-I), or that the Commission itself first exercised its judicial functions by resolving the substantive legal issues in the case and then acted in its administrative capacity in granting relief under section 697(d) (Matter of Wuebben, TSB-H-83-[56]-I). In essence the Division argues that since relief under section 697(d) is within the administrative discretion of the Commissioner of Taxation and Finance, it is beyond the jurisdiction of the the Tax Appeals Tribunal. We cannot agree.

First, in the instant case we are dealing with the denial of an application for refund of taxes, a matter clearly within the purview of Tax Law section 2000, which states the purpose of the Division of Tax Appeals and provides in relevant part that "[t]he administrative hearing process is the process commenced by the filing of a petition protesting a notice issued by the commissioner of taxation and finance of a determination of tax due . . . a denial of a refund or credit . . . or any other notice which gives a person a right to a hearing under this chapter." (Emphasis added.) Second, the fact that section 697(d) vests discretion in the Commissioner of Taxation and Finance does not determine the jurisdiction of the Tribunal to review whether the exercise of that discretion is proper. The logical extension of the Division's assertion would be to

²Prior to September 1, 1987 the State Tax Commission functioned as both an administrative and judicial body. By Laws of 1986, Chapter 282, effective September 1, 1987, the judicial function of resolving disputes between taxpayers and the Division of Taxation was delegated solely to the Division of Tax Appeals and the Tax Appeals Tribunal through the hearing and exception process. Responsibility for the administration of taxes now rests solely with the Commissioner of Taxation and Finance.

remove from review the manner in which the Commissioner exercises all discretion vested in that office by statute.

We deal next with the issue of whether the petitioners' request for relief in their petition was proper. We conclude it is proper. First, we note there are no rules and regulations which prescribe the procedure to apply for relief under section 697(d), nor are there any other instructions as to how taxpayers are to make application under section 697(d). Second, the Division denied petitioners' application for refund for the years in question which gave the petitioners the right to file a petition for hearing and in so doing to assert the reasons upon which it bases its arguments for relief. Here the Division responded to the petition by its answer and denied the request on the merits by stating that " . . . the tax in question was neither erroneously nor illegally collected from petitioners, nor was it paid under a mistake of fact . . . [and] timely refunds could have been filed by the petitioners." Thus, the issue was joined in the hearing before the Administrative Law Judge. We conclude that the petitioners properly raised the issue.

We deal next with the issue of whether the Division properly denied petitioners' request for refund. We affirm the determination of the Administrative Law Judge.

Tax Law section 697(d) provides as follows:

"(d) 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."

The first condition for recovery under Tax Law section 697(d) is that there be no unresolved questions of fact or law in the matter of the refund claim. Contrary to the assertions of the petitioners, we conclude that there are unresolved issues of fact and law with respect to their refund claims. In their petition for hearing, petitioners alleged that the amount of their tax liability, and thus their refund claim, was not in dispute. The Division of Taxation in its answer to the petition denied this allegation. In the hearing below, petitioners offered no evidence in

support of their claim that the returns were correct as filed for the years in question.

Accordingly, unresolved questions of fact and law exist as to the manner in which the returns were completed and the refund calculated (see, Matter of Martin M. and Mary Jo Filler, Tax Appeals Tribunal, August 24, 1989).

The second condition of section 697(d) is that the money has been erroneously or illegally collected from the taxpayer or paid under a mistake of fact.

Here, petitioners have not asserted that any estimated tax payments were illegally or erroneously collected by the Division, but argue that the excess estimated tax payments were made under a mistake of fact. Our review of the record indicates no evidence to support this contention. Speculation as to why the accountant made such payments or why petitioners relied on the accountant does not prove that the payments were made under a mistake of fact rather than a mistake of law.

Since petitioners have not established that they satisfied the conditions of section 697(d) of the Tax Law, their claim that such section must be applied to grant them a refund necessarily fails (Matter of Estate of David Mackay and Estate of Marjorie Mackay, Tax Appeals Tribunal, March 23, 1989). In any event, the mandatory construction of section 697(d) urged by petitioners was explicitly rejected in Matter of Fiduciary Trust Co. v. State Tax Commn. (120 AD2d 848, 502 NYS2d 119).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Harry W. and Jo-Ann Wallace is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Harry W. and Jo-Ann Wallace is denied.

DATED: Troy, New York
October 5, 1989

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner