

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MARTIN M. AND MARY JO FILLER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Income Taxes under Article 22 of the Tax Law	:	
and Chapter 46, Title T of the Administrative	:	
Code of the City of New York for the Year 1982.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on September 29, 1988 with respect to the petition of Martin M. and Mary Jo Filler, 57 Bay Street, Staten Island, New York 10305 for redetermination of a deficiency or for refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the year 1982 (File No. 803976). Petitioners appeared by Martin M. Filler, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

The Division of Taxation filed a brief on exception. The petitioners submitted a letter in lieu of a brief. Oral argument was heard, at the request of the Division, on May 24, 1989.

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

ISSUES

- I. Did the Administrative Law Judge properly apply section 697(d) of the Tax Law to the facts of the petitioners' refund claim?
- II. Without any prior action by the Division of Taxation under section 697(d), did the Administrative Law Judge have the authority to apply section 697(d)?

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below.

Petitioners reside on Staten Island, New York. Mr. Filler is an attorney. Mrs. Filler is a nurse.

For 1982, petitioners prepared their New York personal income tax returns and showed a refund due of \$1,050.09. The refund resulted from New York State and New York City taxes withheld from wages paid to Mrs. Filler. The wage withholding form (W-2) was attached. Petitioners did not file the return on or before the due date. No extension of time for filing was granted.

The 1982 return was mailed to the Division of Taxation, late, on April 10, 1984. Petitioners' accountant in 1984 had discovered that a previous accountant had not completed the State return, and he completed it himself. Mr. Filler, after consulting the accountant, remembers this and also remembers mailing the return. Petitioners' sworn testimony as to the mailing of the return on that date is credible and is accepted as proof of the fact. This return, however, according to the records of the Division, was never received.

On March 26, 1986, the Division sent petitioners a Statement of Audit Changes asserting taxes due of \$2,471.09. The deficiency was based on information received from the Federal government.

On April 16, 1986, petitioners mailed a letter with copies of their 1982 return showing the claim for refund to the Division and stating that the original return was mailed on April 10, 1984. This letter was received. The copy of the return itself was dated April 10, 1984.

On June 27, 1986, a Notice of Deficiency was issued to petitioners in the amount of \$1,385.00, plus penalty and interest.

The petition in this case was received on September 26, 1986. Attached to it was another copy of the tax return.

On February 11, 1987, the Division, by letter, cancelled the Notice of Deficiency. It acknowledged receipt in April 1986 of copies of the 1982 return and denied any refund as untimely.

OPINION

In the determination below the Administrative Law Judge concluded that the petitioners failed to prove timely filing of the claim for a refund¹. He then went on, however, to grant a refund to the petitioners based upon the special refund authority of Tax Law section 697(d). Specifically, it was stated that this special refund authority was to be invoked because monies had been collected from the taxpayer under a mistake of fact by over-withholding.

On exception the Division of Taxation argues that none of the prerequisite requirements for invoking the special refund authority of Tax Law section 697(d) have been shown to exist. Also, the Division contends that the Administrative Law Judge does not have the authority to grant a refund under Tax Law section 697(d), as this power is reserved exclusively to the Commissioner of Taxation and Finance.

In response, the petitioners have referred this Tribunal to the case of Mutual Life Insurance Company of New York v. State Tax Commn., (142 AD2d 41; 534 NYS2d 565) and a newspaper article from the Los Angeles Times News Service entitled "Study finds IRS loses millions of tax returns". Petitioners also argue that section 697(d) of the Tax Law was designed to provide equitable relief and such relief is warranted here.

We reverse the determination of the Administrative Law Judge.

Before the special refund authority of Tax Law section 697(d) may be implemented a petitioner must meet a series of statutory prerequisites. Tax Law section 697(d) states:

"Special refund authority. - Where no questions of fact or law are involved and it appears from the records of the tax

¹We agree with the conclusion of the Administrative Law Judge that without actual delivery of the refund claim, proof of ordinary mailing is insufficient, as a matter of law, to prove timely filing (Matter of WSD United Transportation, Inc., Tax Appeals Tribunal, July 27, 1989). We note that the case mentioned by petitioners, Mutual Life Insurance Company of New York v. State Tax Commn. (142 AD2d 41; 534 NYS2d 565) involved proof of a tax payment, not the filing of a petition nor a claim for a refund.

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 in Tax Law section 697(d) requires that there be no unresolved questions of fact or law in the matter of the refund claim. Contrary to the determination of the Administrative Law Judge, we find unresolved questions of both fact and law in the petitioners' refund claim for the taxable year 1982. In the hearing below the sole issue considered was the timeliness of the Fillers' claim for refund, while the accuracy of the return itself was never addressed nor substantiated. As a result, several questions of fact and law exist as to items found within the Fillers' tax return for tax year 1982. Specifically, petitioners' entitlement to certain itemized and Schedule C deductions and the amounts of such deductions was not substantiated.² Thus, we conclude that unresolved questions of fact and law do exist which prevent the exercise of Tax Law section 697(d).

The second condition for recovery under Tax Law section 697(d) is that monies must have been erroneously or illegally collected from the taxpayer or paid by the taxpayer under a mistake of fact. We disagree with the Administrative Law Judge's finding that this condition has been met through the alleged overwithholding. We find nothing in the record that would support the claim that if overwithholding had occurred, it was the result of a mistake of fact. In addition, there is nothing in the record to support a conclusion that the taxpayers made a payment based on a mistake of fact.

Since the statutory conditions of Tax Law section 697(d) have not been met, we conclude that the taxpayers' refund claim cannot be granted.

²Examples of the unsubstantiated items include: \$7,258 claimed as interest expense; \$2,091 claimed in casualty and theft losses and miscellaneous deductions; Mrs. Filler's total New York itemized deduction of \$11,684; and the deductions Mr. Filler claimed in Schedule C from his law practice (Exhibit 3).

The Division has also put forward the argument that it was improper for the Administrative Law Judge to exercise Tax Law section 697(d), because the power to exercise the special refund authority under Tax Law section 697(d) is reserved exclusively to the Commissioner of Taxation and Finance. Having already ruled that Tax Law section 697(d) does not apply to the instant case, it is unnecessary for us to decide this issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of Martin M. and Mary Jo Filler is in all respects denied; and
4. The denial of petitioners' refund claim is sustained.

DATED: Troy, New York
August 24, 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