

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
HANS G. AND LIDIA SCHUMACHER : DECISION
for Redetermination of a Deficiency or for Refund of : DTA No. 811358
Personal Income Tax under Article 22 of the Tax Law :
and the Administrative Code of the City of New York :
for the Year 1986. :
:

Petitioners Hans G. Schumacher and Lidia Schumacher, 3 Washington Square Village, Apt. 10-B, New York, New York 10012, filed an exception to the determination of the Administrative Law Judge issued on March 24, 1994. Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

Petitioners filed a letter brief in support of their exception. The Division of Taxation filed a letter in lieu of a brief referring the Tax Appeals Tribunal to its brief to the Administrative Law Judge. Petitioners' reply letter brief was received on August 18, 1994, which date began the six-month period for the issuance of this decision. Petitioners' request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioners made timely claims for refund of personal income taxes paid in the years 1979 through 1983.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "12," "15," "24," "26" and "37" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

Petitioners, Hans G. Schumacher and Lidia Schumacher¹, timely filed a 1986 New York State and City Resident Income Tax Return, filing separately on one return. The return bears a Division date stamp of December 1, 1987. On his 1986 return, petitioner calculated his total New York income as \$118,449.00, with New York State and City taxes due of \$7,095.00. He claimed total tax payments of \$33,571.00 and thus calculated an overpayment of New York State and City tax of \$26,476.00. He requested that \$6,476.00 of this amount be applied towards his 1987 estimated tax and that the remaining \$20,000.00 be refunded to him.

The Division disallowed the refund of \$20,000.00 claimed on the 1986 return by a Notice of Disallowance dated November 5, 1990. The notice states, as pertinent here:

"Your claim has been disallowed for the following reason(s):

"Your 1986 return requested a refund of \$20,000.00, not \$20,981.00.

"Your 1986 overpayment was based, in part, on a credit carried through from your 1983 return. We have no record of a timely filed 1983 return."

The Notice of Disallowance suggests that petitioner made a formal refund request for 1986 in the amount of \$20,981.00, but the record contains no evidence of such a request.

The exact amount of petitioner's 1986 tax refund as calculated by the Division, the approximate date on which the refund was granted and the calculations which resulted in the grant of the refund can be deduced from information found in a number of different documents.

The date and amount of the refund is established in a letter from petitioner to the Division dated January 18, 1988. In that letter, petitioner states that he received a notice of adjusted refund dated January 13, 1988 with regard to his 1986 personal income tax return. According to petitioner's letter, the Division increased Mr. and Mrs. Schumacher's joint tax liability by \$496.00 and refunded tax in the amount of \$464.59. Petitioner goes on to say that he does not

¹Lidia Schumacher is a party to this proceeding by virtue of having filed joint returns with her husband. The facts and issues raised here relate primarily to Mr. Schumacher. In the remainder of this determination, the term "petitioner" applies only to Mr. Schumacher.

know how the amount of the refund was determined, and he asserts that he made payments in 1986 amounting to \$9,700.00 and carried forward an overpayment of \$23,871.00 from his 1985 return. Neither petitioner nor the Division entered in evidence the January 13, 1988 notice of adjusted refund mentioned in petitioner's letter.

The Division offered in evidence four computer-generated worksheets from the Estimated Tax Processing & Revenue Management Division. The worksheet for 1986 shows that petitioner made an installment payment of \$1,500.00 which was received on April 15, 1986 and an installment payment of \$8,200.00 which was received on January 6, 1987. Thus, the Division's record of 1986 installment payments verifies petitioner's claim of tax payments in the amount of \$9,700.00. The worksheet also shows a posted credit from petitioner's 1985 return of \$5,333.03, rather than the \$23,871.00 claimed by petitioner. Total estimated tax payments for 1986 are shown in the Division's records as \$15,033.03. Petitioner's original 1986 return was entered into evidence, and it shows that the amount of estimated tax paid was adjusted on the return from \$33,571.00 to \$15,033.00. Presumably, this adjustment was made on the return by the Division. Mrs. Schumacher had taxes withheld from her income of \$3,837.00, yielding total tax paid by petitioners for 1986 of \$18,870.00. Mr. and Mrs. Schumacher's total tax liability as reported on their 1986 return is \$11,433.00. Assuming that this amount was increased by \$496.00 on audit (as stated in petitioner's letter of January 18, 1988), petitioners' tax liability totalled \$11,929.00. Since they paid taxes of \$18,870.00, they were entitled to a refund of tax in the amount of \$6,941.00. On his 1986 return, petitioner requested that \$6,476.00 be applied towards his 1987 tax liability. Assuming that this was done, the amount of the remaining refund is \$465.00 which reconciles with petitioner's statement in the letter of January 18, 1988 indicating that the Division calculated his 1986 refund as \$464.59. Based on these calculations, the amount in contention should be the difference between the overpayment which petitioner carried forward from his

1985 return, \$23,871.00 (according to his letter of January 18, 1988²) and the amount the Division carried forward from 1985, \$5,333.03. That amount is \$18,538.00.

The Division agrees that petitioners filed a timely 1985 income tax return and it placed a copy of that return, along with an amended 1985 return, in evidence. According to date stamps on the face of the returns, the original was received by the Division on October 17, 1986 and the amendment was received on November 12, 1986.

A letter to the Division from petitioner dated January 20, 1987 establishes that the Division issued a statement of refund adjustment for 1985; however, the actual document was not placed in evidence and the date of issuance of the statement of refund adjustment is not in the record.

As pertinent here, Mr. Schumacher's letter states:

"Attached is a copy of the adjusted statement to our 1985 income tax return. I agree with your calculation of increasing my tax liability by \$135 and that of my wife by \$23 However, your total payments and credits amount to only \$18,460, representing only the 1985 tax withheld and payments made. It does not include the overpayments of \$18,513 from 1984 as reported on my original 1984 return and the additional refund of \$7,121 claimed on the 1984 amended return. I would appreciate your checking your records."

Petitioner placed in evidence an undated notice³ issued by the Division which states:

"We have received your Amended Return for the taxable year shown on the reverse side of this form.

"Due to the large volume of returns that are received at this time of year, there may be a delay in processing your return. Interest will be paid on Amended Refund claims that are not processed within three months after the last date prescribed for the filing of your original return."

The notice identifies the tax year as 1985 and it shows that a file number (xxxxxxxxxx [redacted]) was assigned to the 1985 amended return by the Division. Petitioner believes that he

²Petitioner attached a schedule to his brief which shows a credit carried from 1985 to 1986 in the amount of \$26,100.00. Petitioners filed amended returns for some of the years being discussed here, and the Division adjusted petitioners' tax liability for some years. To attempt to trace the changes in amounts of tax due and overpayments claimed from the original returns to later documents filed by petitioners would merely add confusion to the discussion. To the extent possible, the figures recited in this determination have been taken from the original filed tax returns or copies of returns entered in evidence.

³Petitioner actually placed in evidence two copies of the same notice which were marked and received as separate exhibits.

received one of the notices in February or March 1987, and, as he said, it gave him "the comfort that the matter is being worked on on a timely basis" (tr., p. 18). Apparently, he perceived the notice to be a response to his letter of January 20, 1987.

It is helpful at this point to summarize the evidence and factual conclusions which can be drawn from the evidence. Petitioner timely filed a 1985 income tax return on October 17, 1985 which included a claim for overpayment of taxes based on an overpayment of \$18,513.00 from 1984. As of January 20, 1987, the Division adjusted petitioner's 1985 refund by disallowing the overpayment carried forward from 1984. Also by January 20, 1987, petitioner was referring back to an original filed 1984 return and a filed amended 1984 return. By January 18, 1988, the Division had issued a refund to petitioner of 1986 taxes in the amount of \$464.59, rather than the \$20,000.00 refund requested. In his letters of January 20, 1987 and January 18, 1988, petitioner challenged the Division's adjustments of his 1985 and 1986 refunds, based on his claim that he had substantial refunds carried forward from 1984.⁴

By letter dated March 7, 1988, petitioner requested that the Division respond to his letters of January 18, 1987 and January 20, 1988. In that letter, he mentioned that the Division had issued a form 1099, reporting to the Internal Revenue Service that New York had issued petitioner a refund of State taxes for 1985 in the amount of \$5,333.00. Petitioner placed in evidence copies of form 1099-G issued by the Division for tax years 1986 and 1987 but not one for 1985. The two forms 1099-G issued to petitioners for the year 1986 show refunds in the amounts of \$6,950.54 and \$4,890.67, respectively.

By letter dated March 25, 1988, the Division responded to petitioner's prior correspondence. That letter was signed by "M. Nicholson" who is identified as a Tax Technician

⁴In his letter of January 18, 1988, petitioner refers to the "file number" of his 1984 amended return, which would indicate that such a return was received by the Division and assigned a file number. But the number petitioner refers to, xxxxxxxxx (redacted), is the number assigned to his 1985 return.

I in the Division. The letter is in reference to tax year 1984, file number x-xxxxxxx (redacted).

As pertinent, the Nicholson letter states:

"We do not have all the information needed to process the amended New York State Income Tax Return(s) for the year(s) shown above.

"Please provide the following information:

"Our records indicate no original returns on file for you for tax years 1983 and 1984. Therefore, no credit from your 1983 return was applied to 1984 and no credit from an original 1984 return was applied to 1985. Please send us complete copies of your 1983 and 1984 returns including all schedules and wage and tax statements."

Petitioner responded to the Nicholson letter by placing the following note on the bottom of a copy of the letter and sending it to the Division: "As requested, attached are one copy each of the complete set of the 1984 and 1983 income tax returns. I am looking forward to my refund checks." The note is dated April 1, 1988.

We modify the Administrative Law Judge's finding of fact "12" to read as follows:

A photocopy of petitioner's original 1984 return was placed in evidence by the Division. The numbers "xxxxxxx (redacted)" were stamped in a box labelled "FOR OFFICIAL USE ONLY",

indicating that the return was received and processed by the Division, but the numbers do not reveal the date of receipt. The return was signed by petitioners and dated September 13, 1985. A copy of the amended 1984 return was placed in evidence by petitioner. The Division's representative indicated that at the time of the hearing he had no information with regard to when the original 1984 tax return and the amended 1984 tax return were first received by the Division. On the original 1984 return, petitioner claimed estimated tax payments of \$30,118.00 of which he directed the Division to apply \$12,513.00 to his 1985 tax liability and \$6,000.00 to his wife's 1985 tax liability. Petitioner and the Division agree that actual installment payments made in 1984 totalled \$16,500.00. The difference between the overpayment claimed on the 1984 return and the installment payments made in 1984 represents the amount carried forward by petitioner from 1983.

On the amended 1984 return, petitioner claimed that the actual amount of estimated tax paid was \$37,202.00, and he requested a refund of \$7,126.00. He provided the following explanation: ""Part II, line 26 [NY State estimated tax paid]: Error was made in

summarization of 1983 amounts applied to 1984 and 1984 estimated tax payments." The amended 1984 return was signed by petitioners and dated October 31, 1986.⁵

In July 1988, petitioner received an undated Statement of Refund Adjustment issued by the Division for tax year 1984. The statement contains the following explanation:

"Since no original 1983 return was filed before the statute of limitations expired, no credit from tax year 1983 can be applied toward 1984 tax due. Since no original 1984 return was filed, no credit from 1984 was applied to 1985 estimated tax. Your 1985 and 1986 returns were refunded correctly based on the revised estimated tax credit."

"Your 1984 amended return is being refunded as follows:

		<u>Husband</u>	<u>Wife</u>
Total Tax Due Per Amended Return		\$11,563.00	\$3,503.00
1984 Estimated Tax Account	16,500.00		
Withholding	<u>3,456.67</u>		
Total Tax Paid	\$19,956.67	<u>16,453.67</u>	<u>3,503.00</u>
PERSONAL INCOME TAX REFUND		4,890.67	.00"

Notations on the bottom of the statement, apparently made by Mr. Schumacher, indicate that in July 1988 petitioner received a 1984 tax refund of \$4,890.67, plus interest of \$555.39, for a total refund of \$5,446.06.

The Statement of Refund Adjustment provides evidence that the Division had access to information not found on the 1984 amended return when the refund was calculated. Withholding taxes for Mrs. Schumacher are shown on the statement as \$3,456.67. This amount was rounded down to \$3,456.00 on the photocopy of the original 1984 return entered in evidence and on the

⁵We modify the sixth sentence of the Administrative Law Judge's finding of fact "12" which read:

"On the original 1984 return, petitioner claimed estimated tax payments of \$30,118.00, taxes due of \$11,563.00 and calculated an overpayment of tax of \$18,513.00 which he directed the Division to apply to his 1985 tax liability"

to indicate that petitioner directed \$12,513.00 to be applied to his 1985 tax liability and \$6,000.00 to his wife's 1985 tax liability. The Administrative Law Judge stated that petitioner directed \$18,513.00 to be applied to petitioner's 1985 tax liability. We modified this fact to more accurately reflect the record.

amended return. But attached to the original 1984 return is Mrs. Schumacher's form W-2 for 1984 showing State taxes withheld of \$2,466.30 and local taxes withheld of \$990.37, for a total of \$3,456.67.

We modify the Administrative Law Judge's finding of fact "15" to read as follows:

Upon receipt of the Statement of Refund Adjustment, petitioner sent Ms. Nicholson a letter dated July 21, 1988 challenging the adjustments made by the Division. He asserts in this letter that he has been filing tax returns and making estimated payments since 1979 and applying overpayments from each year to the following tax year. Among other things he states that he is enclosing copies of tax returns for 1979 through 1982 and that, based on prior correspondence, he presumes that Ms. Nicholson has returns available to her for the years 1983 through 1986. Ms. Nicholson never directly responded to this letter; however, the Division issued to petitioner a statement from the Estimated Tax Unit, dated August 10, 1988, acknowledging receipt of petitioner's correspondence of January 18, 1988 and stating that "[A]ction will be taken as quickly as possible."⁶

The Division issued to petitioners a Notice of Disallowance dated September 13, 1988 for tax year 1984. According to the notice, the amount of refund claimed was \$7,121.00; the amount allowed was \$4,891.00; and the amount disallowed was \$2,230.00. The following explanation was offered: "Additional information received does not substantiate that you filed your 1983 return with the New York State Tax Department."

By letter dated March 20, 1989, Patricia Stearns of the Estimated Tax Unit informed petitioner that the Division's records showed estimated tax payments of \$14,900.00 for 1985, rather than the \$33,413.00 in payments claimed on petitioner's 1985 tax return. According to the Division this resulted in an overpayment of \$6,476.00 to be applied to petitioner's 1986 estimated tax account.

⁶We modify the second sentence of the Administrative Law Judge's finding of fact "15" which read:

"He asserts in this letter that he has been filing estimated tax returns and payments since 1979 and applying overpayments from each year to the following tax year"

to more accurately reflect the record.

Petitioner responded to Ms. Stearns's letter by letter dated April 20, 1989. In that letter, he raised two issues which he requested the Division to respond to. Petitioner provided the Division with a schedule of estimated tax payments and salary taxes withheld (Mrs. Schumacher's withholding taxes) for the tax years 1979 through 1983. According to petitioner, this schedule would show an excess of payments over tax due, resulting in a refund due of \$20,744.00 as of 1986 (this schedule was not placed in evidence, although a similar schedule was included with petitioner's brief). He states:

"If the NYS Department of Taxation can trace my estimated payments for my wife's taxes withheld for the years 1979 through 1983 and agrees with the calculations of the tax liabilities as reflected in the tax returns for those years, the essential elements for the refund are established."

Petitioner also requested that the Division explain the audit adjustment which increased his 1986 total income from \$118,449.00 to \$121,449.00.

Petitioner apparently received a communication from Lynn Purcell of the Estimated Tax Unit, requesting copies of petitioner's personal income tax returns for 1979 through 1984. By letter dated August 21, 1989, petitioner forwarded copies of these returns to Ms. Purcell. Ms. Purcell acknowledged receipt of the returns by letter dated September 5, 1989. She also informed petitioner that she had "forwarded all pertinent correspondence and related material to our Audit Division for their review."

By letter dated October 18, 1989, the Division offered petitioner the results of their review of adjustments made to his 1986 income tax return. The letter, as pertinent, states:

"I reviewed your 1986 return and found that your return was adjusted because you were not entitled to the \$3,000.00 deduction for a married couple who both work because you filed separate New York returns.

"I am sorry but the Law does not permit us to allow the refund for 1983. The deadline for filing for the years 1979 through 1983 expired before you filed. You should have filed within three (3) years from the date the returns were due."

On November 5, 1990, the Division issued to petitioner the Notice of Disallowance referred to above and this proceeding ensued.

As suggested in petitioner's letter to Ms. Stearns, one of the issues here is whether the estimated tax payments petitioner claims to have made for the years 1979 through 1983 can be verified. Petitioner offered in evidence cancelled checks showing estimated tax payments for the years 1980 through 1986. The payments for the years 1983 through 1986 correspond to the Division's own records of payments received as shown on computer-generated worksheets offered in evidence by the Division. The Division offered no evidence with regard to tax years 1979 through 1982.

The photocopies of cancelled checks offered in evidence by petitioner each bear a deposit serial number assigned by the Division (seven digits preceded by the letters "s" or "r"), with one exception, a cancelled check in the amount of \$8,900.00 dated December 31, 1981. Petitioner placed a photocopy of the front of the check in evidence, but not the back of the check. The check is made to the order of New York State income tax, and markings on the face of the check indicate that it was negotiated.

The Division's computer-generated records substantiate petitioner's claim that he made installment payments of estimated tax totalling \$12,500.00 for 1983. He placed in evidence a copy of his 1983 return showing a tax liability for 1983 of \$8,961.00.

We modify the Administrative Law Judge's finding of fact "24" to read as follows:

The cancelled checks offered by petitioner establish that he made the following payments of estimated tax: \$11,900.00 in 1980; \$16,320.00 in 1981; and \$16,000.00 in 1982.⁷

Petitioner offered in evidence copies of applications for extensions of time to file State income tax returns for the years 1980 through 1985. These documents show that the Division

⁷We modify finding of fact "24" of the Administrative Law Judge's determination by deleting the Administrative Law Judge's finding that there were cancelled checks for 1979 totaling \$8,068.00. Our review of the record reveals no such substantiation for 1979 was presented. A schedule offered by petitioner, however, alleges that petitioners made estimated payments of \$8,068.00 in 1979.

granted an extension to October 15, 1985 for filing of the 1984 return and an extension to file the 1985 return. The other applications do not show that extensions were actually granted.

Petitioner testified that the Division sometimes sent an approval and sometimes did not, and he assumed the extension was granted as long as he timely requested one and paid the estimated tax due. He offered as evidence a 1983 Estimated Tax Declaration Voucher No. 1 for 1983 showing estimated State and City tax of \$12,000.00 and a payment of \$3,000.00. Line 2 of that form states: "Amount of overpayment credit from 1982 return." There is no entry on that line.

We modify the Administrative Law Judge's finding of fact "26" to read as follows:

The Division offered in evidence what appears to be a memorandum from one employee of the Division (Thomas O'Connor) to another (Kenneth Stewart) again stating that the Division's records show no filed New York State tax returns for the years 1979 through 1983. The memorandum is dated April 23, 1993.⁸

⁸ The memorandum also states the Division's intention of requesting information from the Internal Revenue Service regarding petitioners' filing of Federal income tax returns for the years 1979 through 1983. The Division introduced a memorandum dated June 8, 1993 from Kenneth Stewart to Thomas O'Connor summarizing "what he learned through making a request of the IRS for information that they had available concerning those years" (Tr., p. 7). The memorandum stated "[t]here is no information available on the system for tax years 1979 through 1983" (Exhibit "G"). The Division gave no reason for placing the memorandum in evidence. I can only assume that it was intended to impeach Mr. Schumacher's credibility. After the record was closed to new evidence, Mr. Schumacher offered evidence that the Federal returns for the years 1979 through 1983 were timely filed. This evidence was returned to Mr. Schumacher. Whether petitioners timely filed Federal income tax returns is not a material issue in this proceeding and cannot be determined here. Despite any evidence offered by the Division, I found Mr. Schumacher to be a highly credible witness.⁸

⁸We modify finding of fact "26" of the Administrative Law Judge's determination by changing the footnote of such finding to reflect that the June 8, 1993 memorandum was not a memorandum from the Internal Revenue Service, but a memorandum summarizing what was learned from the Internal Revenue Service.

The footnote of finding of fact "26" of the Administrative Law Judge's determination read as follows:

"The memorandum also states the Division's intention of requesting information from the Internal Revenue Service regarding petitioners' filing of Federal income

Petitioner made the following statement in his petition:

"Staffs told the Petitioner that the filing system prior to and during the years concerned made it very difficult to locate files. They advised Petitioner, that at the time of communication between the Petitioner and the Processing and Revenue Management, Tax Compliance and Audit Divisions of the Dept. of Taxation during 1987-1988, the Dept. could only refer to a (rough) computer printout, since hard copies of tax returns for those years had already been destroyed. Therefore, trying to locate the originals was really not possible."

In its answer, the Division denied having knowledge or information sufficient to determine the truth or falsity of that particular allegation. At hearing, petitioner repeated the assertion that the Division destroyed hard copies of filed returns after two years. He also indicated that he had been told that there were problems with the Division's data processing system which made it difficult for the Division to locate information with regard to filed returns. The Division never responded to these statements. Moreover, the Division never explained its procedure for maintaining records of filed returns or how the various numbers stamped on petitioner's returns by the Division could be interpreted, and it never described the process by which it determined that it had no record of petitioners having filed returns for the years 1979 through 1983. It did not respond to petitioner's assertion that he sent copies of his 1983 and 1984 returns to an employee identified as M. Nicholson on April 1, 1988.

tax returns for the years 1979 through 1983. The Division received a memorandum from the Internal Revenue Service stating it had 'no information available on the system for tax years 1979 through 1983.' Petitioner offered evidence showing that he received Federal tax refunds for 1984 and 1985, based in part on overpayments made in 1983. The Division gave no reason for placing the Internal Revenue Service memorandum in evidence. I can only assume that it was intended to impeach Mr Schumacher's credibility. After the record was closed to new evidence, Mr Schumacher offered evidence that the Federal returns for the years 1979 through 1983 were timely filed. This evidence was returned to Mr. Schumacher. Whether petitioners timely filed Federal income tax returns is not a material issue in this proceeding and cannot be determined here. Despite any evidence offered by the Division, I found Mr. Schumacher to be a highly credible witness."

MOTION TO REOPEN THE RECORD

The Division's denial of petitioner's 1986 refund claim rests on the fact that it has no record of petitioner's timely filing of a personal income tax return before 1985. At hearing, a number of documents were offered in evidence which reflect the Division's position in this regard.

M. Nicholson's letter of March 25, 1988 states:

"Our records indicate no original returns on file for you for tax years 1983 and 1984. Therefore, no credit from your 1983 return was applied to 1984 and no credit from an original 1984 return was applied to 1985."

The undated Statement of Refund Adjustment for 1984 reiterates M. Nicholson's statement.

A memorandum dated May 3, 1993 from Leta Snover of the Division's Computer Audit and Systems Bureau to the Division's representative in this proceeding, Michael J. Glannon, states:

"In response to your memo of April 20, 1993, I have reviewed the department records and files and since there is no record of the taxpayer filing New York tax returns for the years 1979 thru 1983, there can be no consideration of refund in any form."

Ms. Snover's memorandum also indicates that certain documents relating to this case have been lost. She states:

"Although the file does not contain all adjustment documents and communications that transpired in this case, audit properly disallowed all accumulated prior year estimated tax credits and follow thru credits that related to the three year statute."

Petitioner offered in evidence a copy of his Amended 1984 Personal Income Tax Return, and there was a brief exchange with regard to the significance of that return.

Administrative Law Judge: "It was the filing of that return that in some way triggered --"

Mr. Schumacher: "That triggered everything." (Tr., p. 35.)

Later in the hearing, there was a discussion with regard to the date of filing of the amended 1984 return.

Administrative Law Judge: "Let me ask you a question [Mr. Schumacher] in light of what you just said. The 1984 amended return . . ., I take it from your argument that that was filed within the statute of limitations? The amended '84 return."

Mr. Schumacher: "Oh, yes. Yes your Honor."

Administrative Law Judge: "Do we have proof of the date of the filing of that return? Is that in dispute? Is it disputed that the '84 amended return fell within the statute of limitations for filing that return?"

* * *

"It may be that in all of this correspondence we can settle on a date, but I don't have that."

Mr. Schumacher: "Your Honor, I think I have something in the file."

Mr. Glannon: "Judge, I don't have anything at this point that would indicate when the 1984 return was filed or when the amended return was filed."

Administrative Law Judge: "Does the amended return that you have a copy of have an in-date stamp from the Department? Or is there a letter from the Department that indicates receipt?"

Mr. Schumacher: "Yes, your Honor. Just bear with me one minute."

Administrative Law Judge: "Off the record for a minute."

(Discussion held off the record)

"What we decided to do off the record is leave the record open to allow both Mr. Glannon and Mr. Schumacher an opportunity to find whatever evidence they can of when the 1984 amended return was filed. And whatever you come up with, you will send copies of that evidence to me, whether it's an affidavit or document, and copies to each other of whatever evidence you have." (Tr., pp. 52-53.)

At the conclusion of the hearing, the Administrative Law Judge stated:

"I'll remind both of you that today is going to be the last opportunity either side will have to submit evidence in this matter,

with the exception of the evidence and the filing of those amended returns which we specifically left the record open for. The record will be closed after today to additional evidence. So with that in mind, is there anything that anybody wants to add." (Tr., p. 57)

Mr. Glannon and Mr. Schumacher indicated that neither had anything further to add.

On July 29, 1993, petitioner filed a letter and a number of documents which he contends establish that he timely filed his 1984 and 1985 New York State income tax returns. All but one of the documents were already in evidence. The exception is the letter from the Division to petitioner, dated September 13, 1988, which constitutes a Notice of Disallowance of a portion of petitioner's 1984 refund claim (see, above). The letter reiterates the Division's contention that petitioner failed to substantiate that he filed his 1983 income tax return with the Division. It does not establish the exact date on which the Division received the 1984 amended return.

On July 27, 1993, the Division filed a "Certification" signed by Karen McCarthy-Townsend which states:

"This is to certify that I am the Secretary to the Commissioner of Taxation and Finance, that I am authorized under Section 172 of the Tax Law to authenticate copies of all papers and documents in the possession and custody of the Commissioner of Taxation and Finance, that a search has been made of the Personal Income Tax files for the Personal Income Tax returns for the years 1979, 1980, 1981, 1982, 1983 and 1984 of Hans and Linda [sic] Schumacher, social security account numbers (H) xxx-xx-xxxx (redacted), (W) xxx-xx-xxxx (redacted), and that such Personal Income Tax returns were not filed until August 22, 1989."

Petitioner filed a brief on October 8, 1993, enclosing with it a number of additional documents which he sought to place in evidence. These documents were returned to petitioner with a cover letter dated October 22, 1993, stating that the record was closed to additional evidence and no further evidence would be received (see, Footnote "8").

By letter dated November 19, 1993, the Division sought to correct the Certification of Karen McCarthy-Townsend. That letter states:

"Petitioner's brief of October 5, 1993 pointed out that the social security number on the Certification by Karen McCarthy-Townsend was xxx-xx-xxxx (redacted) rather than xxx-xx-xxxx

(redacted). I have asked the Records Management Office to repeat its search for the dates of filing of the 1979 through 1984 income tax returns using ID #xxx-xx-xxxx (redacted). We will then learn whether the search was proper and the ID number nothing more than a typographical error.

"I therefore request that you keep the record open for 30 days to allow me to submit this clarifying information."

The Administrative Law Judge responded to the Division with a letter dated December 2, 1993, stating that additional evidence, even of a clarifying nature, could not be accepted in evidence since the record was closed. She also stated: "If you wish to pursue this, I would suggest that the proper avenue for doing so would be a motion to reopen the record."

We modify the Administrative Law Judge's finding of fact "37" to read as follows:

The Division then moved "for an order allowing the Division of Taxation to submit clarifying information pertaining to a July 20, 1993 Certification previously accepted into the hearing record." In paragraph 5 of an affirmation in support of the motion, the Division's representative describes his understanding of the documents for which the record of this hearing was left open as follows:

"Before concluding the hearing, the Administrative Law Judge allowed petitioners and the Division of Taxation until July 30, 1993 to submit additional evidence regarding the dates of filing of the petitioners' income tax returns."

The Division's rationale for reopening the record is stated in paragraph 13 of the affirmation as follows:

"It is of critical importance that the information contained in the July 20, 1993 Certification be accurate since it may well determine whether a Statute of Limitations problem exists in this matter. It is not a situation where evidence was not introduced while the hearing record was open and is then sought to be introduced for the first time after the record is closed and a determination rendered. The July 20, 1993 certification is already in the record. The Division of Taxation only seeks to advise the Division of Tax Appeals and the petitioners of the correct dates of the filing of their income tax returns per the Tax Department records. It is unfathomable to this affirmant that the Administrative Law Judge rejected my letter request of November 19, 1993 to submit clarifying information as regards the July 20, 1993 certification. I feel an obligation to insure that the evidence provided by the

Division of Taxation is correct and accurate. I therefore seek to verify that the July 20, 1993 Certification is correct as filed or to inform the Division of Tax Appeals of the correct information if it is inaccurate. The Administrative Law Judge should share this concern. The Judge's refusal seems to disregard 20 NYCRR 3000.0 which states in part that the hearing process should avoid undue formality and complexity."⁹

The return date of the motion was January 31, 1994. Petitioner filed a letter in opposition to the Division's motion on January 20, 1994. By letter dated February 22, 1994, the Administrative Law Judge denied the Division's motion to reopen the record.

OPINION

Tax Law § 687(a) provides, in pertinent part, that a:

"[c]laim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within two years from the time the tax was paid."

The Administrative Law Judge stated that:

"[t]he ultimate issue here is whether the Division properly denied petitioners' 1986 claim for refund of taxes. Petitioners and the Division agree that petitioners timely filed personal income tax returns for 1986 and 1985. The Division refunded or allowed a credit for the amount of estimated tax overpayments made in each of those years. The Division also refunded taxes paid by petitioners in 1984 consisting of overpayments of estimated tax made in that year. The Division's denial of a refund stems from petitioner's carryforward of overpayments from 1983 and prior years" (Determination, conclusion of law "A").

First, the Administrative Law Judge examined whether a 1983 return was timely filed. The Administrative Law Judge stated:

"[h]ere, there is no evidence that an original copy of the 1983 return was ever received by the Division. Absent proof from petitioner of certified or registered mailing of that return,

⁹We modify finding of fact "37" of the Administrative Law Judge's determination by adding the third sentence in the quoted affirmation. Apparently, this sentence was inadvertently left out of the quotation.

petitioner's testimony is insufficient to establish that the original 1983 return was received by the Division (see, Matter of Savadjian, Tax Appeals Tribunal, December 28, 1990).

"Furthermore, this case is clearly distinguishable from Matter of Mutual Life Ins. Co. v. New York State Tax Commn. (142 AD2d 41, 534 NYS2d 565). There, the court found that the taxpayer provided compelling evidence that a check for payment of taxes was prepared and mailed in compliance with the taxpayer's normal procedures. This, the court stated, placed the burden on the Department of Taxation and Finance to produce some evidence to show that it had conducted at least a cursory review of its files for the check (Matter of Mutual Life Ins. Co. v. New York State Tax Commn., *supra*, 534 NYS2d at 567). In light of petitioner's failure to produce any evidence to corroborate his own testimony, I cannot find that the Division had a duty to produce any more evidence than it did to establish nonreceipt of the original 1983 return (see, Matter of Savadjian, *supra*)" (Determination, conclusion of law "A").

The Administrative Law Judge examined whether petitioner filed a return within the statutory period for claiming a refund of tax paid in 1983. The Administrative Law Judge stated:

"[t]he earliest date by which a copy of the 1983 return might have been filed is April 1, 1988.

* * *

Since the 1983 return was not filed within three years of the time the return was required to be filed (April 15, 1987), any claim for refund would have to have been made within two years of the time the tax was paid. Pursuant to Tax Law § 687(i), petitioner's estimated payments of income tax for 1983 were deemed to have been made on April 15, 1984; therefore, the time limit for filing a refund request expired on April 15, 1986. Consequently, petitioner's filing of a copy of the 1983 return in April 1988 was not a timely claim for refund of tax paid in 1983" (Determination, conclusion of law "A").

Next, the Administrative Law Judge held that a timely filed 1984 return would constitute a timely refund claim for taxes paid in 1983. As with the 1983 return, the Administrative Law Judge held that the evidence did not support a claim the 1984 return was timely filed. The Administrative Law Judge also held that because of the limitations period for claiming a refund of taxes paid in 1983 (here two years from April 15, 1984, the date on which the 1983 estimated

payments were deemed to have been made), the filing of the 1984 amended return on October 31, 1986 did not constitute a timely claim for refund of taxes paid in 1983.

Second, the Administrative Law Judge denied the Division's motion to reopen the record in order to submit additional evidence. The Administrative Law Judge stated that the record was originally left open "for the limited purpose of allowing the parties an opportunity to establish the date of filing of the 1984 amended return" (Determination, conclusion of law "B"). The Administrative Law Judge denied the motion to reopen the record because the original certification the Division wanted to correct by submitting clarifying information did not address the filing of the amended 1984 return. The Administrative Law Judge stated:

"[t]he Division knew and understood what the issue was before hearing, and it had every opportunity at hearing to offer evidence of the Division's records regarding the tax years in question. To a limited extent, it did so. As the Division offered no compelling justification for reopening the record to additional evidence, its motion was denied" (Determination, conclusion of law "B").

We affirm the determination of the Administrative Law Judge.

On exception, petitioner states that "the Administrative Law Judge reached her conclusion on the facts made available to her" (Petitioner's brief, p. 1). However, petitioner asserts that at the hearing, the Division was obligated "to make all the information available to present it to the judge" (Petitioner's brief, p. 2). Petitioner argues that the Division withheld available information that would have exculpated petitioner. In essence, petitioner asserts that the Division ambushed them at hearing. Furthermore, petitioner asserts that the search process employed by the Division was seriously flawed as evidenced by the certification which contained an incorrect social security number and misspelled Lidia Schumacher's first name as Linda.

Our review of the record does not lead us to believe the Division withheld information from petitioner. Petitioner merely made these allegations without pointing to specific occurrences. Furthermore, the significance of the defective certification is dispelled by the other evidence submitted by the Division concerning petitioner's nonfiling, i.e., M. Nicholson's letter

of March 25, 1988, the undated statement of refund adjustment, the Notice of Disallowance issued on November 5, 1990, and the memorandum of Leta Snover. The determination of the Administrative Law Judge dealt fully and correctly with the arguments presented before her, and we affirm for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Hans G. and Lidia Schumacher is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Hans G. and Lidia Schumacher is denied; and
4. The Notice of Disallowance dated November 5, 1990 is sustained.

DATED: Troy, New York
February 9, 1995

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

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