STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ALVIN NATHEL	:	DECISION DTA No. 812280
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1981 through 1987.	:	

Petitioner Alvin Nathel, c/o Leonard Kreinces, P.C., 488 Great Neck Road, Great Neck, New York 11021, filed an exception to the determination of the Administrative Law Judge issued on February 9, 1995. Petitioner appeared by Leonard Kreinces, P.C. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter in lieu of a brief in opposition. Petitioner's letter in lieu of a reply brief was received on April 20, 1995, which date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioners Dugan and Koenig concur.

ISSUE

Whether petitioner is entitled to a refund of personal income tax pursuant to the special refund authority under Tax Law § 697(d).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Alvin Nathel, was a shareholder of Wishnatzki & Nathel, Inc. ("Wishnatzki"), a New York corporation. From 1981 through 1990 Wishnatzki elected to be taxed as a

subchapter S corporation for Federal income tax purposes, but did not make a subchapter S corporation election for New York State income tax purposes during that same period of time.

Thus, for Federal income tax purposes for the period 1981 through 1990, Wishnatzki's income and deductions were reported on Wishnatzki's returns and were included on a pro rata basis in petitioner's Federal adjusted gross income.

Petitioner timely filed New York State personal income tax returns for that same period. In those returns, however, he did not make any modifications to take out Wishnatzki's income and deductions. Thus, Wishnatzki's income and deductions were included in petitioner's State taxable income. In addition, pursuant to Article 9-A of the Tax Law, Wishnatzki also paid New York franchise tax on its income.

Petitioner timely filed amended New York State personal income tax returns for the years 1988 through 1990 by subtracting Wishnatzki's net income. Petitioner received refunds for the overpayment of taxes for these years.

By application dated July 21, 1992, petitioner requested refunds for the years 1981 through 1987 in the following amounts:

Year	Amount of Refund Requested
1981	$ 22,903.00
1982	$ 36,247.00
1983	$ 38,106.00
1984	$ 42,276.00
1985	$ 26,310.00
1986	$ 42,858.00
1987	$ 34,959.00

In its refund request, petitioner argued that because Wishnatzki paid Federal and State tax on its subchapter S income for the period in question, petitioner, as stockholder of the subchapter S corporation, was permitted to deduct on his State income tax returns the pro rata amount of profits on which payment was made by the corporation to the State. Petitioner asserted that his failure to take such deductions for the years in question constituted mistakes of

fact for which refunds are granted under Tax Law § 697(d) notwithstanding any period of limitations.

By letter dated October 16, 1992, the Division of Taxation ("Division") denied the refund stating that petitioner did not qualify under Tax Law § 697(d) for a refund for the years in question.

Thereafter, petitioner requested an Advisory Opinion. An Advisory Opinion was issued on July 15, 1993. The opinion stated that the special refund authority under section 697(d) can be implemented if there are no questions of fact or law involved and the tax was paid under a mistake of fact. In the opinion, it was opined that petitioner mistakenly paid taxes for the years in question because he did not know that he was entitled to a deduction pursuant to Tax Law § 612(c)(22); therefore, petitioner's failure to take the deductions amounted to ignorance of the law which constituted a mistake of law and not a mistake of fact.

Petitioner filed a petition dated September 28, 1993. The Division filed an answer dated January 3, 1994 affirmatively stating that the Division properly denied petitioner's claim for a refund and that petitioner bears the burden of proving by clear and convincing evidence that the refund denial was erroneous.

OPINION

Petitioner argues that his erroneous inclusion of subchapter S corporation income and deductions as part of his New York State taxable income was a mistake of fact and that the Commissioner may grant a refund pursuant to the special refund authority provided by Tax Law § 697(d). Section 697(d) of the Tax Law provides as follows:

> "[s]pecial 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."

Petitioner argues that his situation is factually identical to that of the petitioner in Matter of Tompkins (State Tax Commn., May 26, 1987) and that the Division is bound by that decision. In Tompkins, the State Tax Commission exercised its discretion to grant a refund to a petitioner who had erroneously included the proceeds of a State pension in his New York adjusted gross income. The State Tax Commission concluded that although the claim for refund was filed beyond the expiration of the applicable limitation period, the payment was a mistake of fact. Therefore, relief was available pursuant to Tax Law § 697(d).

In her decision in the present case, the Administrative Law Judge noted that Tompkins was based on the then-existing audit policy of the Division. In a subsequent Advisory Opinion (Hanrahan, July 15, 1993), the Division disagreed with Tompkins and concluded that the erroneous inclusion of the proceeds of a State pension in New York adjusted gross income was a mistake of law, not of fact. As such, section 697(d) was inapplicable. Tompkins contained no analysis supporting the conclusion that the payment at issue was a mistake of fact. In Hanrahan, however, the Division cited case law distinguishing a mistake of law from a mistake of fact. On the same day that it issued its Hanrahan opinion, the Division issued an Advisory Opinion to petitioner denying him relief pursuant to Tax Law § 697(d).

Petitioner argues that there was no authority for the Division to refuse to follow the precedent set by Tompkins and the Division's actions in doing so were arbitrary and capricious. Petitioner argues that the only reason that the Tompkins decision was not followed here was because in Tompkins, a small refund amount was involved and here, the claimed refund is a significant amount. We disagree with petitioner's position.

The Administrative Law Judge correctly concluded that the Division of Tax Appeals is not bound by decisions of the State Tax Commission, although such decisions are entitled to respectful consideration (citing Matter of Racal Corp., Tax Appeals Tribunal, May 13, 1993). As the Administrative Law Judge notes, the Court of Appeals in Matter of Charles A. Field Delivery Serv. (66 NY2d 516, 498 NYS2d 111) held that an administrative agency may correct a prior erroneous interpretation of law but must provide reasons for changing its position so that

a reviewing court could determine if the position was changed for valid reasons. The Administrative Law Judge found that in Hanrahan, the Division explained its reasons for departing from the audit policy set forth in Tompkins. The Administrative Law Judge noted that the distinction between a mistake of fact and a mistake of law in Hanrahan was previously adopted by this Tribunal in Matter of Estate of Mackay (Tax Appeals Tribunal, March 23, 1989). Therefore, the Administrative Law Judge correctly concluded that the Division's position as to petitioner herein was not arbitrary or capricious.

We find that in her determination, the Administrative Law Judge has correctly dealt with each of the issues raised on exception and, for the reasons set forth in her determination, we sustain the position of the Division and deny the exception of petitioner.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Alvin Nathel is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Alvin Nathel is denied; and
4. The Division of Taxation's denial of the refund claim is sustained.

DATED: Troy, New York
August 31, 1995

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner