

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**GERALD A. GARBER AND HANA R. GARBER** : DECISION  
for Redetermination of a Deficiency or for Refund of : DTA No. 812767  
Personal Income Tax under Article 22 of the Tax Law for :  
the Year 1987. :

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Petitioners Gerald A. Garber and Hana R. Garber, 75 Meadow Woods Lane, Lake Success, New York 11020, filed an exception to the determination of the Administrative Law Judge issued on April 13, 1995. Petitioners appeared by Moris Mostafiz, CPA. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Michael J. Glannon, Esq., of counsel).

Petitioners filed a brief on exception. The Division of Taxation declined to file a brief in opposition by letter received on August 16, 1995, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

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

***ISSUE***

Whether the Division of Taxation properly denied petitioners' claim for refund of New York State personal income tax for the year 1987.

***FINDINGS OF FACT***

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

By a consolidated statement of tax liabilities dated April 12, 1990, the Division of Taxation ("Division") advised Gerald A. Garber and Hana R. Garber ("petitioners") of an outstanding personal income tax liability of \$14,618.05, plus penalty and interest, for a total

liability of \$21,279.40 for the year 1987.<sup>1</sup>

By a letter dated November 25, 1990 (the letter was received by the Division's Audit Services Bureau on December 13, 1990), petitioners indicated that the full amount due (\$21,279.40) had been paid by check and further stated as follows:

"Please note the original tax assessed, \$14,618.00, had been paid via application of overpayment from 1986 to 1987 (copy of 1986 and 1987 income tax returns enclosed).

"After speaking to Tax Compliance over the phone, I was told that you never received the original IT-201 for 1986, so I'm enclosing a copy. Taxpayers never received a notice asking for the 1986 tax return nor did they receive a letter asking them about the application of \$60,000.00 estimated tax payment (copy enclosed) made to N.Y. State Income Tax.

"I'm also enclosing a copy of taxpayers' 1987 IT-201 showing there was an overpayment of \$14,617.00 from 1986 (Line 4, Page 1 Form IT-201)."

The letter also stated that the copy of the 1986 return was a recreation of the original filed by petitioners' prior accountant who refused to release a true copy of the return actually filed. Along with the letter, petitioners submitted Form IT-113X, Claim for Credit or Refund of Personal Income Tax, dated November 25, 1990.

On June 28, 1991, the Division issued a Notice of Disallowance of petitioners' claim for refund which stated, in part, as follows:

"We have no record of a 1986 return being filed by you.

"New York State Tax Law does not permit us to allow the claim for refund. You should have filed your claim within three years from the date the return was due or two years from the date the tax was paid, whichever is later."

For the year 1987, petitioners filed a joint New York State Resident Income Tax Return. Total State income tax due was calculated to be \$17,050.00 (line 71 of return). This return was received by the Division on September 12, 1989 and was mailed in an envelope which bore a United States Postal Service postmark of September 11, 1989. On line 76 of the return,

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<sup>1</sup>The consolidated statement of tax liabilities in evidence herein was issued to Hana R. Garber. It is unclear whether an additional statement was issued to Gerald A. Garber as well. It should be noted that, for the year 1987, petitioners filed a joint resident income tax return.

petitioners indicated that they had paid estimated taxes in the amount of \$16,117.00 (total additional tax due, therefore, was \$933.00). In red ink, the \$16,117.00 figure was crossed out and "1500" was written on line 76 next to the crossed-out number. On lines 4 and 23 of their 1987 return, petitioners included (as income on line 4 and as a New York subtraction on line 23) taxable refunds of State and local income taxes of \$14,617.00.

With the documentation submitted to the Division of Tax Appeals on September 12, 1994, petitioners included a copy of their 1986 New York State return which they contend was prepared by their former accountant, Alexander Hollender, and which was not previously available for inclusion with their November 25, 1990 letter seeking a refund (see, finding of fact below). On the return, on line 73 thereof, it is indicated that estimated tax was paid in the amount of \$60,000.00. A copy of a check dated December 24, 1986 from Gerald A. Garber to New York State Income Tax in the amount of \$60,000.00 was also attached to the documents submitted by petitioners. The check bears a stamp and serial numbers evidencing receipt by the Division. The copy of the 1986 return indicates a filing status of "married filing separately on one return". Total tax due on line 68 of the copy indicates tax due of \$27,278.00 from petitioner Gerald A. Garber and tax due of \$18,105.00 from petitioner Hana R. Garber, or a total due from both petitioners of \$45,383.00. Subtracting this amount from estimated tax paid of \$60,000.00 results in an overpayment (claimed by petitioner Gerald A. Garber) of \$14,617.00. On line 78 of the copy of the 1986 return, petitioners indicate that this \$14,617.00 is to be applied to 1987 estimated tax.

Also included with petitioners' submission of documents to the Division of Tax Appeals are:

- (a) A copy of petitioners' 1986 Federal income tax return;
- (b) A record of 1987 estimated tax payments for Gerald Garber;
- (c) A check from Gerald A. Garber, dated April 15, 1987, payable to Alexander Hollender, CPA, in the amount of \$2,500.00 for "1986 taxes, etc."; and

(d) Instructions for filing petitioners' 1986 Federal tax returns from Tanklow, Hollender & Company, Certified Public Accountants, along with checks, dated April 10, 1987, payable to the Internal Revenue Service (one check was for petitioners' 1986 tax; the other for 1987 estimated tax).

***OPINION***

In the determination below, the Administrative Law Judge first reviewed the pertinent part of Tax Law § 687(a) relative to the time frame for the filing of a claim for credit or refund of an overpayment of income tax, along with Tax Law § 687(i) which deems any early tax payments, income tax withheld and estimated tax payments of a taxpayer to have been paid on the fifteenth day of the fourth month following the close of the taxpayer's taxable year with respect to which such amount constitutes a credit or payment.

The Administrative Law Judge then held: (1) the \$60,000.00 estimated tax payment paid by check dated December 24, 1986 is deemed to have been paid on April 15, 1987; (2) petitioners admit they cannot prove filing a 1986 New York State income tax return; (3) since there is no evidence that a return was ever received by the Division for 1986 from petitioners, allegations including testimony, absent proof of either certified or registered mailing, are insufficient to establish that the Division received the return; (4) petitioners had until April 15, 1989 to file a timely claim for refund or credit; (5) petitioners' 1987 return which was due April 15, 1988 was not filed until September 11, 1989, said document having been the earliest one filed which would have constituted a claim for refund or credit of their 1986 overpayment; and (6) the Division's denial of petitioners' claim was therefore proper.

The Administrative Law Judge also held that petitioners were correct in entering \$14,617.00 on lines 4 and 23 of their 1987 return since that is how it appeared on their Federal return filed for that year and, further, said inclusion is not proof, as the Division contended, that petitioners received a refund of this amount.

On exception petitioners argue:

"it was New York State's mistake that taxpayers did not follow and use their rights as far as provisions of Tax Law Section 687(a) because

taxpayers were never notified that their tax return was not received by the Division although they had \$60,000.00 of taxpayers [sic] money in their possession" (Petitioner's brief, p. 1).

Petitioners, with reference to the Administrative Law Judge's holding that, absent proof of certified mailing, they cannot establish that the return was received by the Division:

- (1) question how many taxpayers mail their returns by certified mail;
- (2) argue that a copy of the tax return, its preparation fee and tax payment was submitted with the brief below and question why would the taxpayers prepare the tax return, pay the tax and not file when they had overpaid their taxes; and
- (3) request consideration that New York State lost the tax return after it was received (petitioners' representative enclosed correspondence relating to an alleged lost tax return of another taxpayer).

Petitioners further argue that while the Administrative Law Judge questioned the late filing of their 1987 return, that is not the dispute. The problem is the application of petitioners' 1986 overpayment.

The Division, which withdrew its exception, argues in opposition to petitioners' exception that: (1) petitioners did not raise any issues on exception which were not considered and decided correctly by the Administrative Law Judge; (2) the statute of limitations prohibits the refund claimed by petitioners; and (3) the determination of the Administrative Law Judge should be affirmed.

The Division, relying on Matter of Schoonover (Tax Appeals Tribunal, August 15, 1991), points out that a document was attached to petitioners' exception which was not part of the hearing record and since the record was closed, the document should not be considered by the Tribunal.

We affirm the determination of the Administrative Law Judge.

We would first like to address that part of petitioners' letter brief filed on exception which references evidence submitted in the brief below, said documents being listed in the determination of the Administrative Law Judge. While the evidence does include unsigned

copies of a 1986 New York State IT-201 Resident Income Tax Return and a 1986 U.S. Individual Income Tax Return 1040, both in petitioners' names, which copies bear the business stamp of Tanklow, Hollender & Company, Certified Public Accountants, the instruction form submitted in evidence entitled "Instructions for Filing Attached Tax Return" from said accounting firm refers only to the filing of a Federal 1986 return with the Internal Revenue Service. The filing instructions contain no reference whatsoever to the filing of a 1986 New York State Resident Income Tax Return.

Next, we must address and reject petitioners' attempt at this late date to place before this Tribunal additional evidence in the form of a document attached to the exception which is not part of the record below.

As we held in Matter of Schoonover (*supra*):

"[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons we must follow our policy of not allowing the submission of evidence after the closing of the record (see, Matter of Oggi Rest., Tax Appeals Tribunal, November 30, 1990; Matter of Morgan Guar. Trust Co. of N.Y., Tax Appeals Tribunal, May 10, 1990; Matter of International Ore & Fertilizer Corp., Tax Appeals Tribunal, March 1, 1990; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989; Matter of Modern Refractories, Tax Appeals Tribunal, December 15, 1988)."

We find no basis in the record before us for modifying the determination of the Administrative Law Judge in any respect. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Gerald A. Garber and Hana R. Garber is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Gerald A. Garber and Hana R. Garber is denied; and

4. The Division's denial of petitioners' refund claim is sustained.

DATED: Troy, New York  
February 8, 1996

/s/John P. Dugan

John P. Dugan  
President

/s/Francis R. Koenig

Francis R. Koenig  
Commissioner

/s/Donald C. DeWitt

Donald C. DeWitt  
Commissioner