STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MAURICE J. AND JUDY G. GOLDSTEIN	:	DECISION DTA No. 813496
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1985.	:	

Petitioners Maurice J. and Judy G. Goldstein, 370 Lexington Avenue/MSI, New York, New York 10017-6503, filed an exception to the determination of the Administrative Law Judge issued on September 19, 1996. Petitioners appeared by Wertheim & Company (Ronald Liebmann, C.P.A.). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Michael J. Glannon, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition to the exception. Petitioners did not file a reply brief. Oral argument was not requested.

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

ISSUE

Whether the Division of Taxation properly denied petitioners' claim for refund of an overpayment of tax for the year 1985 upon the basis that such claim was not timely filed.

FINDINGS OF FACT

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

By a letter dated October 24, 1994, the Division of Taxation ("Division") provided to petitioners, Maurice J. and Judy G. Goldstein, its Notice of Disallowance of a claim for refund filed by petitioners for the Year 1985. This letter explained the Division's basis for disallowance as follows:

> "A claim for refund based on a federal audit must be filed within 2 years and 90 days of the final federal determination. The final federal determination was dated June 30, 1990 and your claim was received on December 29, 1993. Therefore, the deadline for filing for a refund expired before you filed."

The Division's disallowance letter was apparently in response to petitioner's filing of a Report of Federal Changes (Form IT-115).[1] On the Report of Federal Changes, petitioners indicated a final Federal adjustment for the tax year 1985 with respect to Cralin Capital Partners. Specifically, petitioners reported that their 1985 income was decreased by $69,200.00, with said amount representing the difference between "Cralin Income on Return" ($80,000.00) and "Income Required Per IRS Agreement" ($10,800.00). In turn, the Report of Federal Changes indicated that petitioners' 1985 Federal tax liability was decreased from $22,224.00 (as reported) to $8,384.00, thus resulting in a reported Federal overpayment of $13,840.00. This Report showed that based on the Federal adjustment, petitioners' 1985 New York State tax liability should be decreased from $8,496.00 (as reported) to $3,244.00, thus resulting in a claimed refund of $5,252.00.

The record included an IRS Income Tax Examination Changes report for the year 1985 pertaining to petitioners. This one-page report, dated June 30, 1990, reflected the above-described $69,200.00 decrease to petitioners' 1985 income related to Cralin Capital Partners, and calculated the $13,840.00 Federal overpayment for 1985. At the base of this report, the following statement appeared:

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[1]The Report of Federal Changes is the only document in the record which would give rise to a Division response in the form of a Notice of Disallowance as above (i.e., the record does not include nor do the parties make reference to the filing of any other refund claim document such as a Claim for Credit or Refund [Form IT-113X] or an amended income tax return [Form IT-201X]). In addition, while the Report of Federal Changes in the record is not dated, petitioners do not contest the statement that December 29, 1993 was the date of receipt thereof by the Division, as noted in the Division's refund disallowance letter, nor do petitioners assert that such Report or any claim for refund was filed in a timely manner for the year 1985.

> "The enclosed report reflects the refund resulting from the examination of Cralin Capital Partners for 1985 for which we received the settlement agreement Form 906 executed 12/14/90. We have taken your amended return into consideration."

The record does not include the Settlement Agreement Form 906 nor any amended Federal return, as referenced above on the face of the IRS Income Tax Examination Changes.

Petitioners challenged the Division's denial of their claim via the filing of a petition, on which petitioners stated "[t]he refund for 1985 was based on a prior year change in income. In 1984 I had to pay an additional tax. Then I should be entitled to refund in 1985." In response to the petition, the Division's answer asserted that petitioners had not proven that they timely filed their refund claim or that they were otherwise entitled to the refund claimed.

Petitioners offered no documents in evidence. Petitioners' representative, in his brief, asserted that petitioners seek application of the equitable doctrine of recoupment. That is, although acknowledging that a refund of petitioners' overpayment for 1985 was time barred by operation of the statute of limitations, petitioners maintained that the amount of such refund may be allowed as an offset to a deficiency where the deficiency and the refund arise out of the same transaction. Petitioners' representative asserted that the transaction giving rise to the issue herein was a "straddle" aimed to reduce tax liability by generating a loss in an earlier year (1984) while deferring matching gain to a later year (1985). Petitioners' representative stated, in his brief, that petitioners were audited by the IRS and that they agreed to a pretrial settlement of all years. Petitioners' representative described such result as a coordinated settlement of a purchase and sale transaction wherein petitioners conceded certain tax deficiencies while the IRS conceded matching overpayments, noting that each such concession was dependent on the other. Petitioners' representative admitted that reports of the Federal changes were not timely filed with New York by petitioners, and stated that "[c]onsequently, when New York State assessed the deficiencies, the statutes of limitations for the refund years were closed." In turn, petitioners' representative maintained that such circumstances require application of the doctrine of equitable recoupment, stating that it would be ". . . unfair, immoral and unconscionable for

New York State to adopt one leg of this coordinated settlement (the deficiency) without adopting the other leg (the refund)."

In contrast to petitioners' position, the Division pointed out that petitioners did not report their Federal changes, which were finalized as of June 30, 1990, to New York until December 29, 1993 thereby leaving such report and any claim for refund based on such changes untimely. The Division opposed petitioners' claim that equitable recoupment should be allowed, arguing that petitioners failed to establish that the refund claimed for 1985 was generated from the same transaction as the alleged deficiency for 1984. The Division also argued that in any event such circumstances require dealing with different years or periods, whereas equitable recoupment only allows for an offset of a liability (as opposed to a refund) for the same year or period and transaction. Finally, the Division argued that petitioners have not established that, but for the statute of limitations bar, a refund would be due for 1985, or that petitioners seek only an offset of a liability rather than a refund for 1985.

Petitioners' representative maintained, in his reply brief, that one Federal audit report covered both years (i.e., 1984 and 1985), adjusted all aspects of the same transaction, and contained all of the information necessary to establish petitioners' entitlement to a refund for 1985. Petitioners' representative also maintained that petitioners were not actually seeking a refund, but were seeking to apply a 1985 overpayment against taxes that the Division allegedly sought to collect for 1984 (i.e., an offset).

DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In the determination below, the Administrative Law Judge determined that petitioners failed to file a refund claim for overpayment of tax attributable to a Federal change within 2 years and 90 days from the June 30, 1990 final date of the Federal change, as required by operation of Tax Law §§ 659 and 687(c). The Administrative Law Judge noted that petitioners admitted they neither reported the Federal change nor filed a refund claim prior to December 29, 1993, and instead, challenged the disallowance under the theory of equitable recoupment arguing that they were not seeking a refund, but rather, were seeking to offset a

1984 deficiency by application of a 1985 overpayment. Relying on the United States Supreme Court decisions in ***Bull v. United States*** (295 US 247, 79 L Ed 1421), ***Rothensies v. Electric Stor. Battery Co.*** (329 US 296, 91 L Ed 296) and ***United States v. Dalm*** (494 US 596, 108 L Ed 2d 548), and the Tax Appeals Tribunal decision in ***Matter of Turbodyne Corp.*** (Tax Appeals Tribunal, July 3, 1996), the Administrative Law Judge concluded that the doctrine of equitable recoupment did not apply to petitioners' situation inasmuch as the "main action" itself, or refund claim, was not timely filed and there was no evidence in the record showing there was a New York tax deficiency for 1984 against which an offset could be claimed.

ARGUMENT ON EXCEPTION

Petitioners continue to argue that the doctrine of equitable recoupment applies to the facts of their case. Also, they submitted additional evidence in support of their claim that they had a 1984 tax deficiency against which the 1985 requested refund should be applied.

OPINION

We affirm the determination of the Administrative Law Judge.

We first address the submission of documents that petitioners attached to their exception. Essentially, petitioners are requesting that the determination of the Administrative Law Judge be reversed based on the additional evidence provided on this exception. We have a long-standing policy of not allowing the submission of evidence after the close of the record. This policy is essential in order to maintain a fair and efficient hearing system, to provide definition and finality to the hearing, and to protect the adversary's right to question the evidence on the record (***see, Matter of Schoonover*** (Tax Appeals Tribunal, August 15, 1991).

Furthermore, under the regulations, petitioners' opportunity to move to reopen the record, which had been closed prior to the determination of the Administrative Law Judge, has expired (20 NYCRR 3000.16[b]). Therefore, in the interest of fairness and finality, we cannot consider the additional evidence submitted with the exception (***see, Matter of Warnecke***, Tax Appeals Tribunal, January 23, 1997).

As noted by the Administrative Law Judge, Tax Law § 659 requires a taxpayer to report any changes or corrections by the United States Internal Revenue Service in Federal taxable income to the New York State Division of Taxation within 90 days after the final determination of such change or correction. Tax Law § 687(c) provides that a claim for any credit or refund of any overpayment of tax attributable to a Federal change or correction required to be reported pursuant to section 659, "shall" be filed within two years from the time the notice of the Federal correction or change was required to be filed with the Division of Taxation.

In this case, petitioners did not file a report of the Federal changes with the Division of Taxation within 90 days and did not file a claim for a credit or refund with respect to the Federal changes within the 2 years and 90 days required under section 687(c). Petitioners invoke the doctrine of equitable recoupment arguing that they are entitled to a refund for an overpayment in 1985 as an offset to a tax deficiency for an underpayment in 1984. This doctrine permits recoupment of an overpayment of taxes as an offset to a tax deficiency notwithstanding the fact that an independent demand for recovery of an overpayment may be barred by the statute of limitations (***see, Bull v. United States, supra***).

As noted by the Administrative Law Judge, the doctrine of equitable recoupment does not apply in this case for two reasons. First, as a threshold issue, the United States Supreme Court has applied the recoupment doctrine only in those cases where the main action itself is timely commenced and the refund or setoff, which if commenced separately would have been time barred, is instead raised as a defense in the main action (***Stone v. White***, 301 US 532, 81 L Ed 1265; ***Bull v. United States, supra***). As noted by the Court in those cases, recoupment is in the nature of a defense arising out of some feature of a transaction upon which the claimant's action is based and "[s]uch a defense is never barred by the statute of limitations so long as the main action itself is timely" (***Stone v. White, supra***, 81 L ED, at 1272, quoting ***Bull v. United States, supra***, 79 L Ed, at 1428). In contrast, the United States Supreme Court has declined to apply the doctrine under circumstances similar to those of the present case (***United States v. Dalm, supra***). In ***Dalm***, the taxpayer had litigated a tax liability in Tax Court without raising an equitable recoupment claim and then sought recoupment in a separate action for refund that had been barred by the statute of limitations. Therefore, even if there were evidence in the present case that petitioners had been assessed a tax deficiency for the year 1984, because the 1985 refund claim was not raised as a defense in a timely challenge to the alleged 1984 tax deficiency, but instead, brought as a separate action, the recoupment doctrine does not apply and the 1985 refund claim is barred by the statute of limitations (***see also, Rothensies v. Electric Stor. Battery Co., supra***).

Notwithstanding petitioners' failure to meet this threshold requirement for the application of the equitable recoupment doctrine, petitioners also have not shown on this record that the alleged 1984 tax deficiency and 1985 overpayment involve the same taxable transaction. In ***Matter of Turbodyne Corp***. (***supra***), we set forth criteria for the application of the doctrine of equitable recoupment. In that case, we stated that:

> "[t]he doctrine of equitable recoupment allows a taxpayer against whom a deficiency is asserted to offset against that deficiency overpayments which are time barred for claiming a refund and (1) involve the same type of tax as the deficiency; (2) were paid during the period that comprises the deficiency; and (3) involve the same transaction as is the subject of the deficiency. . . ."

As noted by the Administrative Law Judge, there is no evidence in the record as to the nature of the tax transaction for which petitioners claim a refund, nor evidence of a 1984 tax deficiency nor evidence as to the relationship between the alleged 1984 deficiency and 1985 overpayment. In sum, the doctrine of equitable recoupment cannot be applied on this record inasmuch as there is no evidence that (1) petitioners commenced a timely action against which a refund offset may be raised as a defense, and (2) the alleged 1984 deficiency and 1985 overpayment involve the same type of tax and transaction.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Maurice J. and Judy G. Goldstein is denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Maurice J. and Judy G. Goldstein is denied; and

4. The Notice of Disallowance dated October 24, 1994 is sustained.

DATED: Troy, New York
August 21, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner