

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RICHARD S. AND BEVERLY BERRY	:	DECISION
	:	DTA NO. 818673
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 1988 and 1989.	:	

Petitioners Richard S. and Beverly Berry, 5 Lakeside Drive West, Lawrence, New York 11559, filed an exception to the determination of the Administrative Law Judge issued on May 8, 2003. Petitioners appeared by Raich Ende Malter & Co., LLP (Norman S. Malter, CPA). The Division of Taxation appeared by Mark F. Volk, Esq. (Kevin R. Law, Esq., of counsel).

Petitioners did not file a brief in support of their exception. The Division of Taxation filed a brief in opposition to petitioners' exception and petitioners filed a reply brief. Petitioners' request for oral argument was denied.

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

ISSUE

Whether the claim for refund filed by petitioners beyond the three-year statute of limitations should be granted pursuant to the special refund authority set forth in Tax Law § 697(d).

FINDINGS OF FACT

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

During the years in issue, petitioner Richard S. Berry was the sole shareholder of Richard S. Berry, M.D. P.C., a professional service corporation (the "PSC").

The PSC's accountant, Harvey Zuckerman, CPA, timely prepared the PSC's form CT-3, General Business Corporation Franchise Tax Return, and Form IT-2102-1 PC, which was an information return. Thereafter, Dr. Berry timely filed the PSC's General Business Corporation Franchise Tax Return and Form IT-2102-1 PC for each of the years in issue.

For the years 1988 and 1989, petitioners' share of the PSC's combined contribution to pension trusts and F.I.C.A. were \$80,457.00 and \$63,523.00.

Mr. Zuckerman prepared petitioners' 1988 and 1989 resident income tax returns, Form IT-201, which petitioners executed and timely filed. In preparing petitioners' 1988 Resident Income Tax Return, Mr. Zuckerman mistakenly included the \$77,077.00 contribution to pension trust portion of the total \$80,457.00 as an add-back to petitioners' Federal adjusted gross income. Similarly, in preparing petitioners' 1989 resident income tax return, Mr. Zuckerman mistakenly included the \$59,918.00 contribution to pension trust and the \$3,605.00 F.I.C.A. (totaling \$63,523.00) as an add-back to Federal adjusted gross income. Each of these modifications was reported on the first page of the resident income tax return as a New York addition modification on the line for "other" and was identified as "IT 2102-1 PC." The amounts reported as the addition modifications were identical to the amounts reported on the Form IT-2102-1 PC.

At the time he prepared the resident income tax returns, Mr. Zuckerman was unaware that Tax Law former § 612(b)(7), which required shareholders of professional service corporations to add back their share of the corporation's qualified retirement plan contribution to their Federal adjusted gross income, was repealed for taxable years beginning after 1987. He was also unaware that Tax Law former § 612(b)(8), which required shareholders of professional service corporations to add back their share of the corporation's F.I.C.A. contributions to their Federal adjusted gross income, was repealed for taxable years beginning after 1988.

Petitioners' New York State tax liability for 1988 was \$50,724.00 based on New York State taxable income in the amount of \$592,456.00, which erroneously included the \$77,077.00 contribution to pension trust as an add-back to petitioners' Federal adjusted gross income. This tax liability has been paid. Similarly, petitioners' New York State tax liability for 1989 was based on taxable income in the amount of \$640,620.00, which erroneously included the \$59,918.00 contribution to pension trust and the \$3,605.00 F.I.C.A. as an add-back to petitioners' Federal adjusted gross income. This tax liability has also been paid.

Petitioners did not discover Mr. Zuckerman's mistakes until after the statute of limitations for claiming refunds had expired.

On or about February 22, 1999, petitioners filed amended resident income tax returns for the years 1988 and 1989 which recalculated their liability by omitting the amounts for contribution to pension trust and F.I.C.A. which Mr. Zuckerman had mistakenly included in their New York taxable income. Each of the amended returns claimed a refund.

In separate letters dated May 21, 1999, the Division of Taxation ("Division") denied the refunds for each of the years in issue. In each instance, the Division explained that since certain

professional service corporation modifications remained during the years in issue, identifying a modification as “IT-2102-1 PC” would not have made it obvious that a modification was erroneously reported. Consequently, the special refund authority set forth in Tax Law § 697(d) was inapplicable.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In summarizing the provisions of Tax Law § 687(a), the Administrative Law Judge noted that it provides that a claim for refund of an overpayment of income tax shall be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever period expires later. The parties to this proceeding did not dispute that the claim for a refund was not filed within the time period set forth in Tax Law § 687(a). Rather, the Administrative Law Judge noted, petitioners’ rely on Tax Law § 697(d), which provides:

Special 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.

Accordingly, the Administrative Law Judge found that the question to be decided was whether the moneys were paid under a mistake of fact or a mistake of law. The Administrative Law Judge noted that when presented with this question in the past, the Tax Appeals Tribunal has utilized the following standard:

A mistake of fact has been defined as an understanding of the facts in a manner different [than] they actually are (54 Am Jur 2d Mistake, Accident or Surprise § 4; *see also, Wendel Foundation v. Moredall Realty Corp.*, 176 Misc 1006, 29 NYS2d 451). A mistake of law, on the other hand, has been defined as acquaintance with the existence or nonexistence of facts, but ignorance of the

legal consequences following from the facts (54 Am Jur 2d Mistake, Accident or Surprise § 8; *see also, Wendel Foundation v. Moredall Realty Corp., supra*) (*Matter of Wallace*, Tax Appeals Tribunal, October 11, 2001).

Following the foregoing standard, the Administrative Law Judge found that petitioners' position was without merit and that petitioners were not entitled to a refund under Tax Law § 697(d). The Administrative Law Judge explained that petitioners' accountant was aware of the character of the amounts in issue. He did not have a different understanding of the facts than what they actually were. Rather, he was unaware that certain provisions of the Tax Law had been repealed and, consequently, he was not aware of the legal consequences following from the facts. This, the Administrative Law Judge found, was a mistake of law. The Administrative Law Judge opined that if petitioners' argument were accepted, it would eviscerate the apparent legislative intent that the relief offered by Tax Law § 697(d) be confined to very limited circumstances involving a mistake of facts and would play havoc with the administration of the tax laws. The Administrative Law Judge found the foregoing resolution rendered moot the question of whether it was apparent from the records of the Division that monies had been erroneously or illegally paid to it. Therefore, the Administrative Law Judge denied the petition of Richard S. and Beverly Berry.

ARGUMENTS ON EXCEPTION

Petitioners, on exception, did not file a brief in support of their position. Petitioners' exception appears to argue that they rely on the plain meaning of Tax Law § 697(d). Petitioners disagree with the Administrative Law Judge's determination that the tax payments here were made under a mistake of law. Petitioners urge that there are no "questions of law" in this case, so it is irrelevant whether moneys were paid under a mistake of law (Petitioners' exception,

Statement 1, ¶ 2). Petitioners also disagree with the Administrative Law Judge's determination that accepting petitioners' argument would be contrary to the legislative intent of Tax Law § 697(d) that relief under that provision be confined to very limited circumstances involving mistake of facts. Petitioners also disagree with the Administrative Law Judge's determination that accepting petitioners' argument would reek havoc on the administration of the tax laws.

In opposition, the Division agrees with the determination of the Administrative Law Judge and his upholding the Notices of Disallowance issued by the Division in this case. The Division emphasizes that petitioners failed to establish that the amounts paid with their 1988 and 1989 returns were paid under a mistake of fact. Thus, the Division states that the refunds in this case cannot be granted pursuant to the special refund authority provision in the statute.

OPINION

We affirm the determination of the Administrative Law Judge for the reasons stated therein. Petitioners have offered no evidence below or argument on exception that would justify our modifying the determination of the Administrative Law Judge in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Richard S. and Beverly Berry is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Richard S. and Beverly Berry is denied; and

4. The Notices of Disallowance, both dated May 21, 1999, are sustained.

DATED: Troy, New York
January 22, 2004

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner