STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RONALD BRENHOUSE	:	DECISION DTA NO. 820708
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1994.	:	

Petitioner, Ronald Brenhouse, c/o Malcolm S. Taub, Esq., 1350 Avenue of the Americas, New York, New York 10019, filed an exception to the determination of the Administrative Law Judge issued on March 29, 2007. Petitioner appeared by Hutton & Solomon LLP (Stephen L. Solomon, Esq., and Kenneth I. Moore, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Margaret T. Neri, Esq., of counsel).

Petitioner filed a brief in support of his exception and a reply brief. The Division of Taxation filed a brief in opposition. Oral argument, at petitioner's request, was heard on March 10, 2008 in New York, New York.

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

***ISSUE*S**

I. Whether petitioner's claim for refund of personal income tax of the year 1994 was timely under Tax Law § 687(a) and extends to petitioner's payment of tax on April 14, 1998.

II. Whether, if the refund claim was untimely, petitioner is entitled the benefit of 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. We have also made additional findings of fact. The Administrative Law Judge's findings of fact and the additional findings of fact are set forth below.

On April 23, 1996, the Division of Taxation ("Division") sent petitioner an "inquiry letter," which informed petitioner that the Division did not have New York State personal income tax returns on file for him for the years 1987 through 1994 and requested that he forward said returns to the Division. Petitioner did not respond to this request.

On August 12, 1996, the Division sent petitioner a Statement of Proposed Audit Changes in which it stated that since petitioner had not responded to the letter of April 23, 1996, it estimated his income tax liability for the years 1987, 1989, 1990, 1991, 1992, 1993 and 1994, but also invited him to provide wage and tax statements to substantiate New York taxes withheld. In addition, the statement reiterated that the Division had no personal income tax returns filed under his name or social security number. The amount of additional personal income tax estimated to be due for the aforementioned years was $765,109.00, plus interest of $147,489.69 and penalty of $307,737.53, for a total due of $1,220,336.22. Once again, petitioner failed to respond to this request from the Division, although the statement cautioned that failure to do so by September 11, 1996 would result in the issuance of a Notice of Deficiency.

On October 7, 1996, the Division issued to petitioner a Notice of Deficiency, L-012532449-5, which referred to the August 12, 1996 Statement of Proposed Audit Adjustment and its detailed computation of the additional amount of tax found due. As of the date of the Notice of Deficiency, the additional tax due was $765,109.00 plus interest of $158,758.68 and

penalty of $313,372.01, yielding a total balance due of $1,237,239.69. The Notice of Deficiency stated further:

> If we do not receive a response to this notice by 01/05/97:
> This notice will become an assessment subject to collection action.

Petitioner did not respond to this notice.

The inquiry letter, Statement of Proposed Audit Changes and Notice of Deficiency were each sent to the same address, i.e., Box 1787, East Hampton, New York 11937, gleaned from petitioner's requests for extension of time to file, forms IT-370 and IT-372, filed for the years 1995, 1996 and 1997. This address was used as petitioner's last known address because the most recent tax return on file with the Division had been filed by petitioner in 1986, while the information from the forms IT-370 and IT-372 was current.

On May 17, 1996 and April 17, 1997, the Tax Compliance Division, to which this matter was referred, issued collection letters to petitioner at the same address used by the Audit Division, to wit: P.O. Box 1787, East Hampton, New York. In addition, a warrant was docketed in the Westchester County Clerk's Office on November 14, 1997.

On November 20, 1997, the Tax Compliance Division obtained a new address for petitioner by means of "general research": 600 Route 114, East Hampton, New York. On the same date, it mailed a Consolidated Statement of Liabilities and a copy of the warrant filed in the Westchester County Clerk's Office to petitioner at this new address, which reflected the amounts due and owing pursuant to the Notice of Deficiency.

On November 25, 1997, the Tax Compliance Division served levies on the warrant. Thereafter, on December 4, 1997, the Tax Compliance Division was contacted by petitioner and petitioner's representative, Tom Burke. The Tax Compliance Division explained the assessment

and the failure to file returns and requested that the returns for the period 1987 through 1994 be filed by January 2, 1998. The Division did not abate its collection efforts during the period December 4, 1997 through August 19, 1998, serving additional levies in March and July of 1998. The Division finally received New York personal income tax returns for petitioner for the years 1987 and 1989 through 1993 on August 19, 1998.

Between the time petitioner and his representative called the Tax Compliance Division on December 4, 1997 and the date the returns for 1987 and 1989 through 1993 were filed on August 19, 1998, petitioner and his representative had numerous telephone conversations with Peter Ennis, Tax Compliance Agent, concerning production of the missing returns and the pending collection action, which the Division insisted would not be held in abeyance. In the conversation with petitioner on December 4, 1997, Mr. Ennis explained the assessments that had been issued and discussed petitioner's failure to file tax returns for the years 1987 through 1994.

On November 25, 1997, a levy payment was received from National Financial Services Corp. in the sum of $44,563.81 and was applied to assessment L-012532449-5. On April 14, 1998, a second levy check was received from Citibank in the sum of $889,054.44, of which $530,844.90 was applied to assessment L-012532449-5. The proceeds applied from both levies, $575,389.79, fully satisfied the modified outstanding balance due as stated in a Notice of Assessment Resolution, dated September 8, 1998, and mailed to petitioner in care of his representative, Mr. Burke. The returns filed by petitioner were used by the Division to more accurately reflect the tax due. However, since no return for 1994 was filed by petitioner, there was no adjustment made for the liability determined for that year.

Although requested numerous times by the Division, beginning with the initial letter from the Division of Taxation on April 23, 1996, petitioner did not submit his 1994 personal income

tax return until June 27, 2001. Previously, utilizing information petitioner had provided on his Federal tax return for 1994, the Division had determined a New York adjusted gross income of $4,127,263.00 and tax thereon of $324,550.00. After adjustment for estimated tax paid of $18,200.00, total tax determined to be due for 1994 was $306,350.00, plus penalties and interest.

On petitioner's return for 1994, filed on June 27, 2001, he claimed to owe tax of $4,264.00, after deducting his estimated tax payments. Upon a review of petitioner's return, the Division determined that there had been an overpayment of taxes for the year 1994 of $514,720.42.

On November 26, 2001, the Division issued a Notice of Disallowance wherein it denied petitioner's claim for refund, stating:

> Since your 1994 return was filed on June 27, 2001 and your payment on the assessment was made on April 14, 1998, your claim for refund is outlawed by statute and cannot be refunded.

Although petitioner claims not to have received any of the correspondence or notices from the Audit Division and Tax Compliance Division prior to the levies being served, he never argued that the addresses the Division used for him were incorrect. In fact, he was confused about his own addresses when questioned at hearing:

"MS. NERI: Mr. Brenhouse, can you tell me what your address is?

MR. BRENHOUSE: You want my mailing address now? Box 2, 27 West 44th Street, New York, New York 10036.

MS. NERI: How long has that been your address?

MR. BRENHOUSE: A couple of years I've been receiving mail there. I mean, I also have another address at 590 Route 114, East Hampton.

MS. NERI: How long has that been your address?

MR. BRENHOUSE: That was since the mid ‘80's.”

The petition filed in this matter on September 8, 2005 listed petitioner’s address as 590 Route 114, East Hampton. The certified letter sent by the Division of Tax Appeals to acknowledge receipt of the petition, dated September 15, 2005, was returned by the United States Postal Service with the remark, “Undeliverable as addressed, forwarding order expired.”

In further questioning by the Division’s counsel, petitioner appeared to contradict his statement that his address back to the mid 1980s was 590 Route 114, East Hampton:

“MS. NERI: Prior to living in East Hampton in 2001, where were you living?

MR. BRENHOUSE: Should I answer?

MR. TAUB: Yes.

MR. BRENHOUSE: It was Box 90, Somers, New York.”

Petitioner’s memory lapses extended to his filing of the returns requested by the Division. In answer to a question from the Administrative Law Judge, petitioner did not specifically recall filing returns for the years 1987, 1989, 1990, 1991, 1992 and 1993 in August of 1998:

“ADMINISTRATIVE LAW JUDGE PINTO: . . . It also states that in August of that year, 1998, you filed income tax returns for other years or prior years including 1987, 1989, 1990, 1991, 1992 and 1993. Do you have any recollection?

MR. BRENHOUSE: I don’t remember exactly, but that could be, you know. Offhand, I can’t recall.”

We make the following additional findings of fact:

April 15, 1995 fell on a Saturday with the result that the normal due date for petitioner’s 1994 resident personal income tax return, Form IT-201, was April 17, 1995. Petitioner’s tax return preparer filed on petitioner’s behalf an Application for Automatic Extension of Time to File for Individuals, Form IT-370, on April 17,1995 which extended the due date of the return for four months. A copy of the

Form IT-370 was attached to petitioner's 1994 Form IT-201, which was filed on June 27, 2001 (***see***, Division's Exhibit D). In August 1995, petitioner filed an Application for Additional Time to File Income Tax Return (Form IT-372) and was granted a further two-month extension (***see***, Petitioner's brief in support, p. 3; Division's brief in opposition, p. 6).

Petitioner made a payment of $889,054.44 on April 14, 1998 as a result of the Division's levy on his bank account.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that petitioner's refund claim set forth in his 1994 tax return was timely filed within the three-year period prescribed by section 687(a) but that the amount of the permitted refund was zero because the payment on April 14, 1998 was outside the period of the three years preceding the filing of the claim on June 27, 2001 plus the time of extensions to file the return. The Administrative Law Judge also rejected petitioner's assertions based on theories of equity and estoppel.

ARGUMENTS ON EXCEPTION

In support of his exception, petitioner asserts that the determination erred in that it failed to count the period of petitioner's four-month extension in calculating the look-back period, which was three years and four months and not just three years. Petitioner contends that since the payment on April 14, 1998 was within three years and four months of the filing of the claim on June 27, 2001, it was timely.

Petitioner also argues, in reliance on ***Mobil Oil Corporation v. Commissioner of Finance***, 101 AD2d 723 (1st Dept 1984), that even if the refund claim were barred by the statute of limitations, he is entitled to receive the claimed amount pursuant to the special refund authority in section 697(d) of the Tax Law, which applies in circumstances where "moneys have been erroneously or illegally collected . . . or paid . . . under a mistake of facts."

The Division argues in opposition that the three-year look-back period in section 687(a) applies only where the tax return was timely filed and that petitioner "cannot revive the expired extension . . . to extend" the look-back period provided in section 687(a). The Division also claims that the special refund authority of section 697(d) is inapplicable because there was no mistake of fact, as the statute requires.

OPINION

The statute of limitations applicable to petitioner's claim for refund is set forth in Tax Law § 687(a), which reads in part as follows:

> General.- Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within (i) three years from the time the return was filed, or (ii) two years from the time the tax was paid, whichever of such periods expires the later . . . . If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing . . . .

In the present case, the payment was made on April 14, 1998 in the form of a check received pursuant to a levy on petitioner's bank account. The claim for refund of overpayment was made on petitioner's 1994 personal income tax return, which was filed on June 27, 2001. Since the claim was not filed within two years of the payment, the two-year period referred to in the statute is inapplicable. Instead, the outcome of the case depends on the applicability of the two three-year periods in section 687(a).

The first three-year period requires that the claim be filed within three years from the time the return was filed. Since petitioner's 1994 return constitutes both the return and the claim for refund, it appears, as the Administrative Law Judge determined, that the first three-year test is met. There is no reason to think that the statute requires the return and the claim for refund to be

separate documents. Also, the parties agree that for this purpose the statute does not require the return to be filed on time.

Under the second three-year period, the amount of the refund may not exceed the amount of tax paid within three years plus the period of any extension of time for filing. Here, the filing on June 27, 2001 was approximately three years and two and one-half months after the payment on April 14, 1998 and thus would not be timely unless the time covered by filing extensions can be counted. As noted above, petitioner timely filed an application for an automatic four-month extension to file his 1994 return and later filed an application for a further two-month extension. If the time of the first of these extensions can be counted in the calculation, the payment on April 14, 1998 would be within the reach of the June 27, 2001 claim for refund under the second three-year requirement of section 687(a). The statute specifically provides that "the period of any extension of time for filing" is to be added to the three-year period in making the calculation. The question arises on the present facts whether the time of an extension can be added only if the extension was actually used by the taxpayer by filing within the extended due date. Petitioner's extensions expired in October of 1995 and he did not file his 1994 return until June of 2001.

While decisions of the Federal courts interpreting the Internal Revenue Code are not binding precedent in interpreting the provisions of the Tax Law, following such interpretations has long been favored by the courts of New York where, as here, the New York statute is patterned on the Federal one (***see, Matter of Delese v. Tax Appeals Tribunal***, 3 AD3d 612 (3d Dept 2004). The Court of Appeals thus stated as follows in ***Matter of Marx v. Bragalini***, 6 NY2d 322 (1959), at 333:

> It has long been the policy of our courts to adopt, whenever reasonable and practical, the Federal construction of substantially similar tax provisions . . . . The doctrine is in furtherance of the legislative policy

> of maintaining uniformity in the administration of the two tax laws. As this court observed in *Matter of Cregan* (275 N.Y. 337, 341), we give great weight to the Federal decisions "for the purpose of maintaining uniformity of administration of the Tax Law which the Legislature has sought to achieve." The reasons for applying the doctrine are particularly strong and persuasive, where, as here, the State act and regulations were modeled upon the Federal law and regulations and both statutes and regulations closely resemble each other.

Moreover, the Tax Law commands conformity with Federal law in the application of the personal income tax in the following provision:

> Any term used in this article shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required but such meaning shall be subject to the exceptions or modifications prescribed in this article or by statute (Tax Law § 607[a]).

The portions of section 687(a) at issue here are taken from section 6511(a) and section 6511(b)(2)(A) of the Internal Revenue Code, which read as follows:

> Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.
>
> * * *
>
> If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return.

In ***Weisbart v. United States***, 222 F3d 93 (2d Cir 2000), the taxpayer obtained an automatic four-month extension to file his 1991 Federal income tax return, which extended the deadline to August 17, 1992. He did not actually file the return until August 17, 1995. The return claimed a refund of tax previously paid through payroll withholding and deemed to have

been paid on April 15, 1992 pursuant to section 6513(b)(1) of the Internal Revenue Code. The court found that the refund claim in the taxpayer's return was not barred by the three-year period in section 6511(a). The court relied principally on amendments to the statute enacted in the Technical Amendments Act of 1958 and the legislative history of those amendments, which changed the prior rule requiring a timely filed return. The court also observed that this proposition had been accepted by Federal Courts of Appeal for the First Circuit (***see, Oropallo v. United States***, 994 F2d 25, 30 n 7, 31 (1st Cir 1993), the Fourth Circuit (***see, Webb v. United States***, 66 F3d 691, 700 (4th Cir 1995), and the Seventh Circuit (***see, Curry v. United States***, 774 F2d 852, 855 (7th Cir 1985). Subsequently, the United States Court of Appeals for the Ninth Circuit agreed in ***Omohundro v. United States***, 300 F3d 1065 (9th Cir 2002) overruling its earlier decision in ***Miller v. United States***, 38 F3d 473 (9th Cir 1994). Also, the Internal Revenue Service has accepted the proposition that section 6511(a) does not require a timely filed return (***see,*** Rev. Rul. 76-511, 1976-2 C.B. 428).

The Division's argument to the contrary is twofold. *First*, although it agrees that the first three-year requirement of section 687(a) has been met, the Division asserts that the second three-year "look-back" test applies only if the taxpayer's return was timely filed. In this regard it relies principally on the Ninth Circuit's decision in ***Miller*** (***see,*** Division's brief in opposition, p. 5; Oral Argument Tr., p. 10). *Second*, it argues that petitioner is not entitled to add the time of his filing extensions to the three-year period because he did not file his 1994 return within the time allowed by the extensions and those extensions "expired on October 15, 1995" (***see***, Division's brief in opposition, p. 6; Oral Argument Tr., pp. 10-13).

As to the first argument, we can find no reason for interpreting the second three-year requirement differently than the first. If we were to conclude, as the Division urges, that the

three-year look-back period applies only where the return was timely filed, a taxpayer would be left with a two-year look-back, which would have the practical effect of nullifying the qualification of the late return under the first three-year rule. In light of the weight of Federal precedent concluding that a late filed return qualifies as a return for purposes of section 6511, the Division's position cannot be sustained.

As to the second argument, the Division states that the purpose of adding the time of extensions to the three-year look-back period is to cover situations where the taxpayer has made a payment with a timely extension request on April 15th or, presumably, is deemed to have paid estimated taxes or withholding taxes on April 15th pursuant to Tax Law §§ 687(i) or (j), which are similar to sections 6513(b) and (c) of the Internal Revenue Code. Essentially, the Division is asserting that even if a timely return is not required to come within the two three-year rules, a timely return is required in order to tack onto the three-year look-back period the time of an extension to file. We do not read so narrowly the Federal cases rejecting the requirement of a timely filed return in applying section 6511. Moreover, the argument is inconsistent with the holding of the Court of Appeals for the Second Circuit in ***Weisbart*** where, as here, the taxpayer obtained an extension but did not file his return until several years later (***see also***, ***Weigand v. United States***, 760 F2d 1072 [10th Cir 1985]; ***Tsutomu Tedokon***, T.C. Memo. 2002-308, 84 TCM 657 [2002]). Since the Second Judicial Circuit comprises all of New York State, we think that the decisions of that court are particularly noteworthy.

The Division chose not to address the ***Weisbart*** case and other unfavorable precedents in its brief but only stated at oral argument that the case was erroneously decided because it gives a taxpayer who files within the extended period "a shorter period of limitation and . . . a shorter look back period than a taxpayer who is non-compliant" (Oral Argument Tr., p 13). The periods

are in fact the same–*viz.* three years and three years plus extensions, respectively. What the Division seems to mean is that the periods occur at a later date for the late filing taxpayer than the timely filer. This is, however, a necessary result of treating the filing of a late return as the filing of a return for purposes of section 6511, a premise that is not in dispute.

Since we find that petitioner's refund claim was timely and it extends to his payment on April 14, 1998, we need not consider his other arguments.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ronald Brenhouse is granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of Ronald Brenhouse is granted; and

4. The Notice of Disallowance dated November 26, 2001 of petitioner's claim for refund is cancelled.

DATED: Troy, New York
September 4, 2008

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

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

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner