

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :

of :

**LILIANA KLINGER** :

DECISION  
DTA NO. 820864

for Redetermination of a Deficiency or Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1993 through 1999.

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Petitioner Liliana Klinger, 700 Columbus Avenue, Apt. 21B, New York, New York 10025, filed an exception to the determination of the Administrative Law Judge issued on October 26, 2006. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (Margaret T. Neri, Esq., of counsel).

Petitioner did not file a brief in support of her exception. The Division filed a letter in lieu of a formal brief in opposition and petitioner filed a letter in reply. Oral argument, at petitioner's request, was denied.

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

***ISSUES***

I. Whether the Division of Taxation properly denied petitioner's claim for refund of personal income tax for the years in issue.

II. Whether the Administrative Law Judge properly granted summary determination because there are no triable issues of fact in dispute and, as a matter of law, the facts mandate a determination in the Division of Taxation's favor.

***FINDINGS OF FACT***

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

Petitioner, Liliana Klinger, filed timely New York State personal income tax returns for the years 1993, 1994, 1995, 1996, 1997, 1998 and 1999 (the "years in issue").

On or about September 24, 2004, petitioner filed amended returns for each of the years in issue, seeking a refund of tax erroneously paid on what petitioner characterized as pension income. The amounts claimed for each year were as follows:

Tax Year	Amount of Refund Claimed
1993	\$1,316.00
1994	1,189.00
1995	1,189.00
1996	1,196.00
1997	1,377.00
1998	1,777.00
1999	1,425.00

On December 20, 2004 (for the years 1996, 1997, 1998 and 1999) and February 7, 2005 (for the years 1993, 1994 and 1995), the Division of Taxation ("Division"), Income Tax Desk Audit Unit, denied each of the refund claims in seven separate letters, each one stating the following reason:

The New York State Tax Law does not permit us to allow the refund or credit claimed on your return(s).

The Tax Law provides for the granting of a refund or credit if the request is filed within three years from the time the return was required to be filed or within two years from the time the tax was paid, whichever is later.

Our records show the return on which you requested a refund or credit was filed beyond the statute of limitations as prescribed by the Tax Law.

Two of petitioner's forms 1099R were submitted with the Division's motion and filed with petitioner's personal income tax returns for the years 1995 and 1999. These forms indicated that petitioner received an annuity payment from the United States Office of Personnel Management, Retirement Programs, which had a distribution code entitled "3-Disability" for each of the years 1995 and 1999 and the payments were made on retirement claim number CS A3428502. Similar forms 1099R were filed for the other years in issue.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge observed that since petitioner conceded that the refund applications were not timely filed, the only issue remaining for resolution is whether the Commissioner erred in not granting petitioner relief using his special refund authority. Tax Law § 697(d) provides as follows:

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.

The Administrative Law Judge rejected the Division's claim that the payments made to petitioner were not pension payments, given that the forms 1099R in evidence were issued by the

Retirement Programs Office of the Office of Personnel Management and were paid under a retirement claim.

However, the Administrative Law Judge found that the Division's failure to explain the distribution code and petitioner's half-hearted contention that she was confused by the language of the distribution code (after alleging in both her petition and affidavit that the 1099R's represented pension income) did not create a material issue of fact or law for the purposes of the interpretation of Tax Law § 697(d) in this case.

The Administrative Law Judge also rejected petitioner's claim that she did not know the nature of the income. Petitioner claimed that her interpretation of the nature of her own pension benefits resulted in her failure to subtract payments from gross income, which was a mistake of fact justifying the use of the Commissioner's special refund authority. The Administrative Law Judge found this argument to be a weak attempt to circumvent the statute of limitations. The Administrative Law Judge pointed out that:

A mistake of fact has been defined as an understanding of the facts in a manner different than they actually are [citations omitted]. 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 [citations omitted] (*Matter of Wallace*, Tax Appeals Tribunal, October 11, 2001).

In *Wallace*, the petitioners knowingly reported retirement contributions that could have been excluded from New York income. The Wallaces, like this petitioner, sought relief under the special refund authority of Tax Law § 697(d), because they incorrectly assumed that they were required to include the retirement contributions. The Administrative Law Judge noted that the Tax Appeals Tribunal deemed this error to be a mistake of law, not fact, and denied their refund application.

The Administrative Law Judge found that petitioner's facts are indistinguishable from those in *Wallace* and concluded that petitioner's appeal for application of the special refund authority was properly rejected. The Administrative Law Judge concluded that petitioner's payment of income tax was under a mistake of law and it did not warrant use of the Commissioner's special refund authority.

On the issue of summary determination, the Administrative Law Judge pointed out that the moving party must submit an affidavit, made by a person having knowledge of the facts, a copy of the pleadings and other available proof. The documents must show that there is no material issue of fact and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]). On the other hand, if material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879).

The Administrative Law Judge found petitioner introduced no evidence of the existence of either a triable issue or a material issue of fact and that none exists in the record. In fact, the Administrative Law Judge noted, her pleadings indicated the contrary and reflected the true nature of the income received, i.e. pension income. Further, petitioner conceded the refund applications were not timely, and failed to establish that the Commissioner's special refund authority was erroneously withheld. Accordingly, based on this record, the Administrative Law Judge granted the Division's motion for summary determination.

***ARGUMENTS ON EXCEPTION***

Petitioner on exception argues that her failure to deduct pension income she received from her reported gross income for the subject years constituted a mistake of fact which entitles her to a refund of personal income tax pursuant to the Commissioner's special refund authority under Tax Law § 697(d).

***OPINION***

We affirm the determination of the Administrative Law Judge for the reasons stated therein. After a thorough review of this record, we can find no basis for modifying the determination of the Administrative Law Judge in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Liliana Klinger is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Liliana Klinger is denied; and

4. The Division of Taxation's denials of petitioner's requests for refund for the years 1993 through 1999, dated December 20, 2004 (for the years 1996, 1997, 1998 and 1999) and February 7, 2005 (for the years 1993, 1994 and 1995) are sustained.

DATED: Troy, New York  
June 28, 2007

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

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

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