STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ROBERT AND MARGALIT PASHAYAN	:	DECISION DTA NO. 821270
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1995 through 2000.	:	

Petitioners, Robert and Margalit Pashayan, filed an exception to the determination of the Administrative Law Judge issued on February 28, 2008. Petitioners appeared by Irving Kaufman & Co., CPA, PC (H. Sheldon Kaufman, CPA). The Division of Taxation appeared by Daniel Smirlock, Esq. (Kevin R. Law, Esq., of counsel).

Petitioners filed a brief in support of their exception and a reply brief. The Division of Taxation filed a letter in lieu of a formal brief in opposition. 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' claims for refund of New York State personal income tax for the years at issue.

FINDINGS OF FACT

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

On December 5, 2005, the Division of Taxation ("Division") received from Robert and Margalit Pashayan (petitioners), forms IT-201-X, amended resident income tax returns for the years 1999 and 2000, which claimed refunds of New York State personal income tax in the amounts of $2,906.00 and $1,826.00, respectively. The amended returns indicated that the taxpayers had erroneously reported income from a federal S corporation, Yard Goods, Inc., which had not elected to be taxed as an S corporation for New York State. Accordingly, the amended returns for 1999 and 2000 eliminated income in the amounts of $37,123.00 and $26,662.00, respectively.

On May 5, 2005, the Division issued a Notice of Disallowance, which advised petitioners that their claims had been disallowed, in full, because:

> The Tax Law provides for the granting of a refund or credit if it is applied for 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.

Since the refund claims were received on December 5, 2005 for the tax years 1999 and 2000, the claims were not timely filed and, accordingly, were denied.

On June 15, 2006, the Division received from petitioners, forms IT-201-X, amended resident income tax returns for the years 1995, 1996, 1997 and 1998, which claimed refunds of New York State personal income tax in the amounts of $5,622.00, $4,706.00, $8,137.00 and $5,128.00, respectively.

On July 14, 2006, the Division, acknowledging that petitioners' refund claims for 1995 through 1998 were received on June 15, 2006 and that their refund claims for 1999 and 2000 were received on December 5, 2005, denied, in full, all of such claims for refund for the reasons previously set forth (***see***, Finding of Fact above).

For the years 2001 and 2002, which are not at issue in this proceeding, petitioners, on their 2001 and 2002 New York State personal income tax returns, reported an S corporation loss flowing through from the same entity, Yard Goods, Inc. In response, the Division disallowed the loss for each year and assessed tax based upon such disallowances. Petitioners agreed with the Division's disallowances of these losses and paid the tax due thereon.

While petitioners did not appear in person at the hearing held in this matter, a concession was made by their representative that the amended returns filed for the years 1995 through 2000 were filed after the expiration of the statute of limitations as set forth in Tax Law § 687(a).

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that Tax Law § 687(a) provides that a claim for refund of personal income tax must be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever was later. The Administrative Law Judge also noted that it is undisputed that petitioners' claims for refund were filed after the expiration of the time periods set forth in Tax Law § 687(a). However, petitioners asserted that their claims should be granted based upon the special refund authority in Tax Law § 697(d) or, in the alternative, the doctrine of equitable recoupment.

The Administrative Law Judge concluded that since petitioners did not offer testimony at the hearing as to why they had originally included income from the federal S corporation on their New York State personal income tax returns for the years at issue, it can be inferred that they mistakenly believed that since an S corporation election had been made for federal income tax purposes, such election was also effective for New York State. The Administrative Law Judge determined that petitioners' mistake was a mistake of law, not a mistake of fact. Therefore, the

Administrative Law Judge determined that the special refund authority provided in Tax Law § 697(d) is inapplicable.

The Administrative Law Judge noted that petitioners contend that the doctrine of equitable recoupment should be applied to remedy the "inequity" suffered by petitioners. The Administrative Law Judge noted that for the years 2001 and 2002, the Division disallowed petitioners' claimed losses from Yard Goods, Inc., and asserted personal income tax deficiencies resulting from such disallowance. The Administrative Law Judge found that those deficiencies were subsequently paid by petitioners without filing a petition with the Division of Tax Appeals. Accordingly, the Administrative Law Judge concluded that the Division of Tax Appeals has no jurisdiction over such years.

The Administrative Law Judge determined that petitioners are seeking to use the doctrine of equitable recoupment to avoid the expired statute of limitations and open the otherwise time-barred refund claims. The Administrative Law Judge concluded that petitioners overpayment related to the years 1995 through 2000, while the deficiencies asserted by the Division were for the years 2001 and 2002. Accordingly, since the overpayments and deficiencies were for different years, the doctrine of equitable recoupment is inapplicable to this proceeding.

ARGUMENTS ON EXCEPTION

On exception, petitioners argue that whether or not a New York State election had been made is strictly factual. Petitioners assert that Tax Law § 697(d) should be invoked where no questions of fact or law are involved or where any moneys have been erroneously or illegally collected.

Petitioners also argue that equitable recoupment should be applied whenever there is an inequity and not only in cases of offset. Petitioners argue that the Division's action in 2001 and

2002 indirectly acknowledged that there was no mistake of law or fact and, therefore, equity alone calls for allowance of petitioners' claims. Petitioners assert that their case is similar to ***Matter of Dresser Indus.***, Tax Appeals Tribunal, April 14, 1997.

In opposition, the Division argues that there is no evidence in the record to establish that the tax was paid under a mistake of fact. Further, neither the pleadings nor the refund claims specify that the tax was paid on the mistaken belief that a separate New York State S Corporation election was in place. Nor was there any testimony to this effect at the hearing.

The Division also argues that the doctrine of equitable recoupment is not applicable herein because there are no deficiencies asserted against petitioners within the jurisdiction of the Division of Tax Appeals to be offset against the time-barred refund claims. Accordingly, the Division asserts that the Administrative Law Judge's determination sustaining the denial of the refund claims must be affirmed.

OPINION

We affirm the determination of the Administrative Law Judge.

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 the 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.

Here, petitioners have failed to show that they erroneously reported income from a federal S corporation that had not elected to be taxed as an S corporation for New York State under a mistake of fact. A mistake of fact has been defined as an understanding of the facts in a manner

different than they actually are (***see***, ***Wendell Foundation v. Moredall Realty Corp.***, 174 Misc 1006 [1941]; ***see also, Matter of Wallace***, Tax Appeals Tribunal, October 11, 2001). 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 (***see***, ***Wendell Foundation v. Moredall Realty Corp., supra***; ***see also, Matter of Wallace, supra***).

We agree with the Administrative Law Judge. There is no evidence in the record to establish that petitioners paid the tax under a mistake of fact. Neither the pleadings nor the refund claims specify that the tax was paid on the belief that a separate New York State election was in place. Further, there was no testimony from petitioners at the hearing as to why they had included income from the federal S corporation on their personal income tax returns. Therefore, it can be inferred that petitioners mistakenly believed that since an S corporation election had been made for federal income tax purposes, such election was also effective for New York State. Petitioners mistake was a mistake of law, not a mistake of fact. Accordingly, the special refund authority provisions of Tax Law § 697(d) are not applicable herein.

We next address petitioners assertion, relying on ***Dresser***, that equitable recoupment be applicable without the condition of offset between tax years.

We conclude that petitioners reliance on ***Dresser*** is misplaced. We agree with the Division in that, in ***Dresser***, we used time-barred refunds to offset tax deficiencies. However, we did not allow refunds of the amount in excess of the deficiencies after offset. In the instant matter, the deficiencies had already been paid by petitioners, so there are no deficiencies to offset.

The doctrine of equitable recoupment allows a taxpayer, against whom a deficiency is asserted, to offset against that deficiency overpayments that 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 (***Matter of Turbodyne Corp.***, Tax Appeals Tribunal, July 3, 1996, ***confirmed*** 245 AD2d 976 [1997], ***lv denied*** 91 NY2d 812 [1998]). This doctrine is not available because petitioners, in their own right, have no overpayment of tax for the same period as the deficiencies entail. Accordingly, since the overpayments and the deficiencies were for different years, i.e. the overpayments involve tax years 1995 thorough 2000 and the deficiencies involve tax years 2001 and 2002, the doctrine of equitable recoupment in inapplicable.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Robert and Margalit Pashayan is denied;

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

3. The petition of Robert and Margalit Pashayan is denied; and

4. The Notices of Disallowance, dated May 5, 2005 and July 14, 2006, are sustained.

DATED: Troy, New York
December 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