STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	DECISION DTA No. 821619
RATI AND KAMLA PANCHAL	:	
for Redetermination of Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1999, 2000 and 2001.	:	
	:	

Petitioners, Rati and Kamla Panchal, filed an exception to the determination of the Administrative Law Judge issued August 2, 2007. Petitioners appeared *pro se.* The Division of Taxation appeared by Daniel Smirlock, Esq. (Barbara J. Russo, Esq., of counsel).

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

ISSUE

Whether the Division of Taxation properly disallowed petitioners' claim for refund for the years 1999, 2000 and 2001 on the basis that the claims were filed after the applicable statute of limitations for credit or refund had expired.

FINDINGS OF FACT

Petitioners, Rati and Kamla Panchal, timely filed their New York State income tax return for the tax year 1999 on April 15, 2000. Petitioners also timely filed their New York State income tax return for the tax year 2000 on April 15, 2001 and timely filed their New York State income tax return for the tax year 2001 on April 15, 2002.

Petitioners, on their 1999 tax return, reported adjusted New York State gross income of $53,522.00, New York State taxes due of $1,921.00 and reported a refund of $1,795.00. On their 2000 tax return, petitioners reported their adjusted New York State gross income of $57,743.00, New York State taxes due of $2,201.00 and reported a refund of $1,933.00. On their 2001 tax return, petitioners reported adjusted New York State gross income of $76,371.00, New York State taxes due of $3,451.00 and reported a refund of $2,166.00.

For New York State and City income tax purposes, if an individual has attained the age of 59½, the first $20,000.00 of an IRA distribution or pension and annuity is not taxable and pursuant to Tax Law § 612(c)(3-a) is subtracted from Federal gross income in computing New York State gross income. Petitioners had attained the age of 59½ for the tax years at issue; however, petitioners failed to make such claims on their original tax returns for those years.

Petitioners filed amended resident income tax returns for tax years 1999, 2000 and 2001 on February 27, 2006 requesting refunds of $794.00 for 1999, $1,484.00 for 2000, and $1,539.00 for 2001, respectively.

The Division issued a Notice of Disallowance dated June 30, 2006, disallowing petitioners' claim for refund for the years 1999, 2000 and 2001 because the claim was not timely filed. The notice stated in part:

> The provisions of the New York State Income Tax Law require us to provide you with this notice disallowing your claim for refund, in full, for the following reasons:
>
> The New York State Tax Law does not permit us to allow the refunds claimed on your returns.
>
> 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.

Your claim was received on 3/8/06.

On or about March 22, 2007 petitioners filed a petition with the Division of Tax Appeals seeking refunds for the tax years at issue.

In support of its motion for summary determination, the Division submitted copies of petitioners' 1999, 2000 and 2001 resident income tax returns, copies of the amended resident income tax returns for the years 1999, 2000 and 2001, a copy of the Notice of Disallowance, a copy of the Conciliation Order, a copy of the petition and a copy of the Division's answer.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Chief Administrative Law Judge noted that Tax Law § 687(a) provides that a claim for credit or refund of an overpayment of 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 is later. The Chief Administrative Law Judge observed that petitioners timely filed their tax returns for the years at issue. However, petitioners did not file their amended resident income tax returns claiming refunds for the tax years 1999, 2000 and 2001 until February 27, 2006 which is beyond the three-year statutory time limit. The Chief Administrative Law Judge determined since the claim for refund was filed after the three-year period had expired, Tax Law § 687(a), (e) bars recovery of the refund.

The Chief Administrative Law Judge concluded that since petitioners failed to respond to the Division's motion for summary determination, and therefore were deemed to have admitted that no question of fact requiring a hearing exists, the Division's motion for summary determination must be granted.

ARGUMENTS ON EXCEPTION

On exception, petitioners note that they agree with the law and the Chief Administrative Law Judge's determination. However, petitioners request that an exception be granted because they mistakenly overpaid without realizing the exclusion at 59 ½ years of age. Further, petitioners argue that they could not respond to the motion for summary determination because one of the petitioners fell ill.

The Division, in opposition, argues that petitioners have offered no evidence below, and no new argument on exception, that demonstrates that the Chief Administrative Law Judge's determination is incorrect.

Petitioners, in reply, argue that after 1991, every time they contacted the State Tax information number, they were told that irrespective of age, the pensions were fully taxable at the City and State levels.

OPINION

Tax Law § 687(a) provides 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, (ii) two years from the time the tax was paid, whichever of such periods expires the later . . . .

As the Chief Administrative Law Judge noted, section 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides, in part, that a motion for summary determination may be granted:

> . . . if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

That section further provides that a motion for summary determination is subject to the same provision as a motion for summary judgment pursuant to CPLR § 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (***see***, ***Winegrad v. New York Univ. Med. Ctr***, 64 NY2d 851 [1985], ***citing Zuckerman v. City of New York***, 49 NY2d 557 [1980]).

Generally, to defeat a motion for summary judgment the opponent must produce evidence in admissible form sufficient to raise an issue of fact requiring a trial (CPLR 3212[b]). Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (***see***, ***Alvord & Swift v. Muller Constr. Co.***, 46 NY2d 276 [1978]). We agree with the Chief Administrative Law Judge that because petitioners failed to respond to the motion of the Division for summary determination, they have admitted that no question of fact requiring a hearing exists (***see***, ***Kuehne & Nagel v. Baiden***, 36 NY2d 539 [1975]; ***Costello v. Standard Metals***, 99 AD2d 227 [1984], ***appeal dismissed*** 62 NY2d 942 [1984]).

We affirm the determination of the Chief Administrative Law Judge for the reasons stated therein. The Chief Administrative Law Judge has completely and correctly addressed the issue and arguments raised by petitioners. Petitioners have produced no evidence below, nor arguments on exception, that would justify our modifying the determination of the Chief Administrative Law Judge in any respect.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Rati and Kamla Panchal is denied;

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

3. The petition of Rati and Kamla Panchal is denied; and

4. The Notice of Disallowance, dated June 30, 2006, is sustained.

DATED:Troy, New York
March 6, 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