

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petitions	:	
of	:	DECISION
<b>JAMES MCNULTY (DECEASED)</b>	:	DTA Nos. 822715,
<b>AND SHARI MCNULTY<sup>1</sup></b>	:	822951, 822952, 822953,
	:	822954, 822955, 822956
	:	and 823085
for Redetermination of Deficiencies or for Refunds	:	
of New York State and New York City Personal	:	
Income Taxes under Article 22 of the Tax Law and	:	
the New York City Administrative Code for the	:	
Years 1995 through 1998 and 2004.	:	
	:	

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Petitioners, James McNulty (Deceased) and Shari McNulty, Shari L. Goldstein “L” SL#4 Trust, Shari L. Goldstein “A” SL#6 Trust, Shari L. Goldstein “T” SL#7 Trust, Scott D. Goldstein No. 4 Trust, Scott D. Goldstein “A” SD#6 Trust, Scott D. Goldstein “T” No. 7 Trust and Shari McNulty, filed an exception to the determination of the Administrative Law Judge issued on February 24, 2011. Petitioners appeared by Samson Management, LLC (Ray W. Cruz, Esq., CPA, of counsel). The Division of Taxation appeared by Mark Volk, Esq. (Robert Tompkins, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. 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.

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<sup>1</sup> This matter involves eight petitions consolidated into a single determination. See the appendix for a complete listing of the petitions and petitioners.

### ***ISSUES***

I. Whether the Division of Taxation erred in determining that interest began to accrue on refunds arising from the individual petitioners' filing of amended fiduciary income tax returns, from the date that the amended returns were filed rather than the date that the original returns were due.

II. Whether the individual petitioners have established that interest on their 1995 deficiency from reporting federal audit changes should not begin accruing until the date that a tax overpayment on the original return was refunded.

III. Whether the payment of interest on refund claims based upon the special mortgage recording tax credit are precluded by Tax Law § 606(f)(3)(B).

### ***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. We have also made and additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

The petitions in this matter concern personal income tax and fiduciary income tax. The findings of fact initially address the personal income tax claims and then the facts that are pertinent to the fiduciary income tax returns.

#### ***Personal Income Tax***

Petitioners James and Shari L. McNulty filed a 1994 New York State Resident Income Tax Return. The return claimed a refund in the amount of \$25,223.00. Thereafter, on the basis of federal audit changes, petitioners filed a 1994 Amended New York State Resident Income Tax Return stating that taxes were due in the amount of \$5,101.00.

James and Shari McNulty filed a 1995 New York State Resident Income Tax Return, which claimed a refund in the amount of \$58,292.00. Thereafter, on the basis of federal audit changes, they filed a 1995 Amended New York State Resident Income Tax Return, which reported that tax was due in the amount of \$37,720.00.

James and Shari McNulty filed a 1996 New York State Resident Income Tax Return, which reported that a refund was due in the amount of \$8,874.00. Subsequently, petitioners filed an Amended New York State Resident Income Tax Return for 1996, which reported federal audit changes and claimed a refund in the amount of \$8,874.00.

James and Shari McNulty filed a New York State Resident Income Tax for the year 1997, which claimed a refund in the amount of \$5,622.00. Thereafter, they filed an Amended New York State Resident Income Tax Return for 1997, which reported federal audit changes and claimed a refund in the amount of \$5,622.00.

The refunds resulting from the reported federal audit changes for the years 1996 and 1997 were applied against the 1995 tax deficiency of \$37,720.00 as of the due dates of the original 1996 return, April 15, 1997, and the 1997 original return, April 15, 1998.

On November 22, 1996, the Division paid petitioners \$69,216.00, which constituted a refund from an overpayment on the original income tax return for 1995.<sup>2</sup>

Shari McNulty filed an Amended New York State Resident Income Tax Return for 2004, form IT-201-X, bearing a signature dated March 8, 2007. The return included a form IT-256,

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<sup>2</sup> Setting forth the procedural context of this refund claim is difficult because the record does not include the original form IT-201 for 1995. It also does not include a refund claim or a notice of disallowance concerning additional interest for 1995. As pointed out by the Division, the only jurisdictional document that concerns 1995 is a notice of disallowance for 1996 and 1997, which states that refunds for those years were applied against the 1995 deficiency and that, pursuant to Tax Law § 688, interest on an overpayment was payable from the date the amended return was filed to the date the refund was issued.

Claim for Special Additional Mortgage Recording Tax Credit, which claimed a credit in the amount of \$38,767.00. This claim was satisfied in the amount of \$20,833.00 through a payment on or about August 31, 2007. In a letter dated June 6, 2007, the Division requested additional information regarding the claim for the mortgage recording tax credit. This information was supplied and, on February 6, 2008, the Division paid an additional \$17,934.00, satisfying the balance of the outstanding claim.

Shari McNulty filed an IT-113X for the year 2004 requesting a refund of interest that was not included with the refund computed on the IT-201-X submitted for 2004. The refund was based upon the IT-256, Claim for Special Recording Tax Credit, that was filed with the IT-201X amended return.

In a letter dated June 5, 2009, the claim for a refund was denied on the basis that the Tax Law does not provide for interest on an overpayment.

*Fiduciary Income Tax*<sup>3</sup>

(a) The petition of Shari Goldstein “L” SL#4 Trust for years 1995 through 1998.

Petitioner filed amended fiduciary income tax returns for the years 1995, 1996, 1997 and 1998, respectively, dated May 23, 2006,<sup>4</sup> which reported federal audit changes. The Division issued a Statement of Tax Refund, dated November 13, 2006, which, after making certain

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<sup>3</sup> As set forth above, the only issue presented with respect to the trusts is whether interest on the refunds arising from the filing of amended fiduciary tax returns reporting federal audit changes should accrue from the time of the filing of the amended return or the due date of the original returns. Setting forth the procedural history of these claims is difficult because the refund claims requesting the additional interest do not appear in the record.

<sup>4</sup> The signature on the return for 1998 was dated May 22, 2008.

adjustments,<sup>5</sup> calculated refunds for each of the years. For each claim, interest was accrued from the date of the refund claim until the date the payment was approved, that is, November 1, 2006 for 1995 and November 2, 2006 for 1996 through 1998. The amount of interest computed for the years 1995 through 1998 was as follows: \$282.00, \$388.92, \$355.92 and \$159.16, respectively.

Tax and interest were refunded.

(b) Petition of Shari Goldstein “A” SL #6 Trust for the years 1995 through 1998.

Petitioner filed amended fiduciary income tax returns on May 23, 2006. The Division issued adjusted refunds for the years 1995 through 1998 and, in the process, accrued interest from the date of the refund claim, May 23, 2006, until the date approved for payment, November 1, 2006 for 1995 and 1998 and October 24, 2006 for 1996 and 1997. The amount of interest computed for the years 1995 through 1998 was as follows: \$427.94, \$542.28, \$506.50 and \$233.71, respectively. Tax and interest were refunded.

(c) Petition of Shari Goldstein “I” SL #7 Trust for the years 1995 through 1998.

Petitioner filed amended fiduciary income tax returns for the years 1995 through 1998 reporting federal audit changes. The signature on each of the returns was dated May 23, 2006. The statements of refund adjustment show that for each claim, interest was accrued from the date of the refund claim, May 23, 2006, until the date approved for payment of the claim, November 1, 2006 for 1995, October 31, 2006 for 1996 and 1997 and October 25, 2006 for 1998. The interest computed for the years 1995 through 1998 was as follows: \$277.37, \$367.23, \$346.52 and \$45.97, respectively. Tax and interest were refunded.

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<sup>5</sup> The adjustment to the amount of the refund of tax is not in issue in this proceeding or the other related proceedings.

(d) Petition of Scott D. Goldstein Trust #4 for the years 1995 through 1998.

Petitioner reported federal audit changes on amended fiduciary income tax returns on May 23, 2006. After adjustments, interest was computed from the date of the refund claim, May 23, 2006, to the date approved for payment, November 1, 1996 for 1996 and October 26, 2006 for 1997 and 1998, respectively. The interest computed for the years 1995 through 1998 was as follows: \$161.60, \$170.38, \$166.74 and \$13.30, respectively. Tax and interest were refunded.

(e) Petition of Scott D. Goldstein Trust #6 for the years 1995 through 1998.

On or about May 23, 2006, petitioner filed amended fiduciary income tax returns, which reported federal audit changes. For each claim, interest was computed from May 23, 2006, the date of the refund claim, until the date approved for payment, October 26, 2006. The interest computed for the years 1995 through 1998 was as follows: \$79.86, \$82.67, \$80.94 and \$50.95, respectively. Tax and interest were refunded.

(f) Petition of Scott D. Goldstein Trust #7 for the years 1995 through 1997.

On or about July 17, 2006, petitioner filed amended fiduciary income tax returns, which reported federal audit changes. After making adjustments to the claims for refund, the Division computed interest from July 18, 2006, the approximate date the returns were filed, until the date approved for payment, which was November 1, 2006 for 1995 and 1997 and October 31, 2006 for 1996. The interest computed for the years 1995 through 1997 was as follows: \$174.98, \$130.62 and \$128.18, respectively. Tax and interest were refunded.

We make the following additional finding of fact.

In 2006, petitioners received Federal Change Reports for the years 1995, 1996, 1997 and 1998. Petitioners reported these changes within 90 days of their receipt

by submitting amended returns to the Division.<sup>6</sup>

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

The Administrative Law Judge noted the foregoing facts. The parties disputed no issues of fact and the Division conceded several arguments raised by petitioners before the Administrative Law Judge. The Administrative Law Judge summarized the conceded points as follows:

(a) Initially, a portion of this matter concerned the Amended New York State Resident Income Tax Return of James McNulty (deceased) and Shari McNulty for 1995, 1996 and 1997, which reported federal income tax audit changes by the Internal Revenue Service and the Amended New York State Resident Income Tax Return for 2004 requesting a refund of special mortgage recording tax. The federal changes for 1995 increased income resulting in a deficiency while the federal changes for 1996 and 1997 reduced income resulting in overpayments. The Division allowed the overpayments for 1996 and 1997 to reduce the deficiency for 1995 as of the due date for the overpayment years, which, in turn, minimized interest of the deficiency for 1995. Since this is what petitioners sought, their contention that this should be allowed was withdrawn in their brief.

(b) In their brief, petitioners ask that interest on the deficiency for 1995 not begin accruing until November 22, 1996, which is the date of a refund payment made on the original 1995 return. The Division has agreed to this request but only to the extent that petitioners can substantiate the amount of the refund.

(c) In its brief, the Division noted that petitioners' representative inquired about whether petitioners paid interest and penalties on the late payment of tax on the original fiduciary income tax returns. In response, the Division has agreed to recalculate interest and penalties for the reduction in income for all applicable tax years and to refund any resulting reductions in interest and penalties accruing from the refund application date, which is also the amended fiduciary income tax return filing date.

(d) In their brief, the petitioners that are trusts, request that penalties and interest charged for late payments on the original returns be refunded to the extent

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<sup>6</sup> We make this fact to more accurately reflect the record (*see* Notice of Admissions, dated December 11, 2009 #21- 28).

that a recalculation based upon the federal recalculation of income causes a reduction in the interest and penalties originally calculated. The Division has agreed to this request.

(e) Petitioners' brief states that James and Shari McNulty will not continue their dispute for 1994. In a different paragraph of their brief, petitioners' representative explained that petitioners had requested application of the refunds for 1996 and 1997 as of the original due date of the returns rather than the date of the amended returns. Petitioners' brief also states that they have discontinued their dispute regarding the years 1996 and 1997. Therefore, further attention to these years will not be pursued.

(f) Paragraph 2 of the facts in petitioners' brief contends that refunds from an overpayment on the original return filed for 1995 were paid on November 22, 1996 in the amount of \$69,216.00 and on December 17, 2002 in the amount of \$24,331.62. In its brief, the Division acknowledged the refund in the amount of \$69,216.00 but stated that there was no evidence to support the finding that there was a refund of \$24,331.62. This point was not pursued in the reply brief.

On page 8 of their brief, petitioners request that in computing interest on the deficiency in tax for 1995, the accrual of interest should not begin on the portion of the deficiency equal to the 1995 refund payments until the date that the refund was issued, relying upon *Matter of Unicorp American Corporation* (Tax Appeals Tribunal, December 28, 1995). In its brief, the Division agreed to apply *Unicorp* by not accruing interest on the first \$69,216.00 of the 1995 deficiency (the amount of the 1995 refund payment, which has been established) until the date that this amount was refunded. Since the deficiency for 1995 was less than \$69,216.00, the entire deficiency will not accrue interest until November 22, 1996.

(g) In the course of this litigation, petitioners requested that the Division search its records for documents indicating whether they paid interest and penalties on the late payment of tax on the fiduciary income tax returns that were initially filed. In response, the Division has agreed to recalculate interest and penalties for the reductions in income for all applicable tax years and refund any resulting reductions in interest and penalties accruing from the date of the filing of the Amended New York State Fiduciary Income Tax Return, which is viewed as the refund application date.

The Administrative Law Judge noted that, in their brief, petitioners addressed arguments that were rendered moot by the foregoing, as well as tax years outside the subject periods at issue. The Administrative Law Judge dismissed these points because they were either addressed



by the Division's concessions or dealt with a period outside the tax years at issue.

The Administrative Law Judge determined that the only remaining issues were whether the Division properly calculated interest for petitioners' pre-1999 tax refunds using the date the amended return was filed and whether petitioners were entitled to overpayments of the special mortgage recording tax on their 2004 return.

The Administrative Law Judge found that petitioners were not entitled to interest for the period between filing the original return and filing the amended return. The Administrative Law Judge noted that during the subject tax years 1995, 1996, 1997 and 1998, Tax Law § 688(a)(former [3]) was in effect. This statute provided that no interest would be allowed or provided for *before* the filing of the amended return. Accordingly, the Administrative Law Judge concluded that the Division properly denied petitioners' refund requests for interest on the period between the filing of the original return and the amended return.

The Administrative Law Judge found no merit in petitioners' arguments. The Administrative Law Judge rejected petitioners' argument that compliance with Tax Law § 687(c) entitled petitioners to receive interest from the date when the original return was filed. Reading Tax Law § 687(c) *in pari materia* with Tax Law § 688(a)(former [3]), the Administrative Law Judge determined that it is only permissible to calculate interest from the filing of the amended return. As such, the Administrative Law Judge concluded that petitioners sought an interpretation of Tax Law § 688(a)(former [3]) and Tax Law § 687(c) that was contrary to basic principles of statutory construction. The Administrative Law Judge also found no jurisdiction to consider petitioners' challenge to the constitutionality of Tax Law § 688(a)(former [3]).

On the 2004 return, the Administrative Law Judge also found that no interest was due for

overpayments of the special mortgage recording tax. The Administrative Law Judge noted that Tax Law § 606(f)(3)(B) provides that no interest may be paid on the overpayment of special mortgage recording tax. As such, the Administrative Law Judge concluded that the Division properly calculated the special mortgage recording tax credit (SMRTC) for the year 2004 and sustained the subject Notice of Disallowance.

### ***ARGUMENTS ON EXCEPTION***

On exception, petitioners raise the same legal arguments as those raised before the Administrative Law Judge, but have attempted to bolster such arguments with hypothetical questions. Petitioners' primary argument utilizes neighboring sections of Tax Law § 688(a)(former [3]) to try to produce a reading that permits the calculation of interest from the date when the original return was filed. In addition, petitioners also challenge the Administrative Law Judge's determination on the grounds that sustaining the subject Notices of Disallowance violates principles of equity, as well as the U.S. Constitution. For the foregoing reasons, petitioners argue that we should reverse the determination below.

The Division argues that the determination of the Administrative Law Judge should be affirmed based on our decision in *Matter of Michael A. Goldstein A No. 1 Trust* (Tax Appeals Tribunal, June 29, 2011). The Division argues that, therein, this Tribunal held that the clear language of Tax Law § 688(a)(former [3]) does not permit the calculation of interest from the original return date, but instead from the date when the amended return was filed. With regard to the SMRTC on the 2004 return, the Division agrees to accrue and pay interest on this refund, as requested by petitioners (*see* Division's Letter Brief in Opposition, p. 1). As such, the Division requests that the SMRTC issue be discontinued and the remainder of the Administrative Law

Judge's determination be affirmed.

### ***OPINION***

We find that Issue III is rendered moot by virtue of the Division's concession. We also find that the Administrative Law Judge properly concluded that this forum lacks subject matter jurisdiction to consider petitioners' arguments below regarding other notices involving different taxpayers and tax years. Petitioners failed to adduce evidence or any justification for modifying the interest calculation on their 1995 deficiency. Accordingly, the sole remaining issue is whether interest under Tax Law § 688(a)(former [3]) should be calculated from the date the original return was filed or from the date the amended return was filed.

As noted by the Division, we have previously ruled on this question of law in ***Matter of Michael A. Goldstein A No. 1 Trust (supra)***; see also ***Matter of Michael A. and Janice L. Goldstein*** (Tax Appeals Tribunal, September 22, 2011). Therein, we concluded that the clear language of Tax Law § 688(a)(former [3]) prohibited the payment of interest to taxpayers prior to their filing of an amended return. The instant matter presents no matter of either law or fact that would require a different analysis than in the foregoing cases. Accordingly, we affirm the determination of the Administrative Law Judge insofar as it is consistent with our previous decisions on this issue.

The instant matter involves overpayment of tax for the years 1995, 1996, 1997 and 1998. As a result of federal changes for those tax years, petitioners filed amended returns during 2006. During the tax years at issue, Tax Law § 688(a)(former [3]) provided as follows:

Late and amended returns and claims for credit or refund. Notwithstanding the provisions of paragraph one or two of this subsection, in the case of an overpayment claimed on a return of tax which is filed after the last date prescribed for filing such return (determined with regard to extensions), or claimed on an

amended return of tax or claimed on a claim for credit or refund, no interest shall be allowed or paid for any day before the date on which such return or claim is filed.

In addition, during the years at issue, Tax Law § 688(former [c]) stated:

Income tax refund within forty-five days of claim for overpayment.--If any overpayment of tax imposed by this article is credited or refunded within forty-five days after the last date prescribed (or permitted by extension of time) for filing the return of such tax on which such overpayment was claimed or within forty-five days after such return was filed, whichever is later, or within forty-five days after an amended return was filed claiming such overpayment or within forty-five days after a claim for credit or refund was filed on which such overpayment was claimed, or within six months after a demand is filed pursuant to paragraph six of subsection (b) of section six hundred fifty-one of this chapter, no interest shall be allowed under this section on any such overpayment. For purposes of this subsection, any amended return or claim for credit or refund filed before the last day prescribed (or permitted by extension of time) for the filing of the return of tax for such year shall be considered as filed on such last day.

The Legislature amended the above provisions of the Tax Law, beginning January 1, 1999, in Chapter 377 of the Laws of 1999, by deleting all references to “amended returns” and “claims for credit or refund” in Tax Law § 688(a)(3). Accordingly, Tax Law § 688(a)(3), which remains in force, provides as follows:

Late returns. Notwithstanding the provisions of paragraph one or two of this subsection, in the case of a return of tax which is filed after the last date prescribed for filing such return (determined with regard to extensions), no interest shall be allowed or paid for any day before the date on which the return is filed.

In addition, Tax Law § 688(c) was also amended by chapter 377 of the Laws of 1999 to read as follows:

Income tax refund within forty-five days of claim for overpayment.--If any overpayment of tax imposed by this article is credited or refunded within forty-five days after the last date prescribed (or permitted by extension of time) for filing the return of such tax on which such overpayment was claimed or within forty-five days after such return was filed, whichever is later, or within six months after a demand is filed pursuant to paragraph six of subsection (b) of section six

hundred fifty-one of this chapter, no interest shall be allowed under this section on any such overpayment. In regard to an amended return claiming such overpayment or a claim for credit or refund on which such overpayment was claimed, if such overpayment is refunded within forty-five days of filing such return or such claim, no interest shall be allowed from the date such return or such claim is filed until the day the refund is made. For purposes of this subsection, any amended return or claim for credit or refund filed before the last day prescribed (or permitted by extension of time) for the filing of the return of tax for such year shall be considered as filed on such last day.

The Memorandum in Support, New York State Senate, for chapter 377 of the Laws of 1999, stated its purpose as follows: “This bill provides that the state shall pay any interest earned on a tax overpayment from the date an original tax return was filed, rather than the date the same tax return was amended.” The Memorandum in Support set forth the following as the justification for chapter 377:

Currently, the tax law provides that no interest shall be paid on any tax overpayment for any date before a late or amended tax return is filed. An amended tax return is not the same as a tax return filed late and this difference should be realized in regard to the payment of interest on any tax overpayment. Responsible taxpayers filing on time, but for whatever reason need to amend their original tax return, should not be deprived of the interest earned on their overpayment from the date the original tax return was filed to the date it was amended. This legislation, if enacted, would change the current law by authorizing the payment of all interest accrued on a tax overpayment from the date the original tax return was filed, and in so doing, give taxpayers filing an amended return the full benefit of all the interest earned on their tax overpayment.

The Division’s own Technical Services Bureau Memorandum, TSB-M-99(7)I, issued November 19, 1999, explained these amendments as follows:

For tax years beginning on or after January 1, 1999, section 688(a)(3) of the Tax Law is amended relating to the payment of interest on an overpayment of personal income tax as a result of the filing of an amended return or a claim for credit or refund. Under the new law, interest on an overpayment of tax claimed on an amended return or a claim for credit or refund will be payable from the due date of the original return to the date the refund is issued. However, section 688(c) of the Tax Law is also amended to provide that if the Department refunds the overpayment within forty-five days after the amended return or a claim for credit

or refund is filed, no additional interest will be paid from the date the amended return or a claim for credit or refund is filed until the date the refund is issued.

It is clear that, if the taxable years at issue were not years prior to 1999, petitioners would be entitled to the relief sought, and interest would be due and payable on the overpayments made by the trusts from the due date of the original returns filed. However, the amendments made to the Tax Law by chapter 377 of the Laws of 1999 were made only prospectively, i.e., for tax years beginning January 1, 1999 and thereafter. There is no ambiguity with respect to the effective date of the amendments made to Tax Law § 688(a)(3) and (c).

For tax years beginning prior to January 1, 1999, Tax Law § 688(a)(former [3]) provided that, in the case of an overpayment claimed on an amended return or on a claim for credit or refund that is filed after the last date prescribed for filing the return for the years at issue, no interest would be allowed or paid for any day before the date on which the return or claim was filed.

Petitioners raise the argument that Tax Law § 687(c) states that interest is payable for federal changes when filed within the 90-day period of the report. Therefore, petitioners contend that since they filed within the 90-day period, they are entitled to interest from the due date of the original return.

Tax Law § 687(c) provides, in relevant part, that:

If the report or amended return required by section six hundred fifty-nine [this section requires that a taxpayer report a federal change to the Division within 90 days of the final determination of such federal change] is not filed within the ninety day period therein specified, no interest shall be payable on any claim for credit or refund of the overpayment attributable to the federal change or correction.

Tax Law § 687(c) is only relevant insofar as it provides the requisite authority to pay

interest to taxpayers from the date of reporting a federal change to the Division through either a report or amended return. We note that the statute places limitations on this authority such that failure to report within 90 days of a federal change results in no interest being payable on the claim, credit or refund of the overpayment. Tax Law § 687(c) makes no reference to the date from which interest is payable. Accordingly, we reject petitioners' argument that Tax Law § 687(c) requires a ruling in their favor.

We also reject petitioners' equity arguments to grant interest from the due date of the original return. In essence, petitioners ask that we disregard the applicable statute for the period at issue, *to wit*, Tax Law § 688(a)(former [3]), and grant them interest from the filing of the original return, as provided in current Tax Law § 688(a)(3). Petitioners assert that the failure of the Division to refund interest from the date of filing of the original returns (while requiring the trust beneficiaries to pay interest on their additional taxable income resulting from the federal changes from the date of filing of the original returns for the years at issue) is inequitable or unjust. The Legislature amended the relevant sections of the Tax Law to correct this inequity, but only prospectively. This Tribunal shall apply the law in accordance with how it was enacted.

The Tax Appeals Tribunal is an adjudicative body with limited jurisdiction and power granted by statute (*see generally* Tax Law § 2000). The rules of statutory construction forbid retroactive application of amendments to a statute unless the language of the statute clearly indicates that the amendment should be applied retroactively. In the present matter, section 3 of chapter 377 of the Laws of 1999, which amended Tax Law § 688(a)(3) and (c), states: "This act shall take effect immediately and shall apply to taxable years beginning January 1, 1999." Accordingly, we find that the Division properly denied petitioners' claims for refund of interest

from the dates of filing their respective original 1995, 1996, 1997 and 1998 returns because Tax Law § 688 (a)(former [3]) and Tax Law § 688(former [c]) provide that interest is to be paid from the filing of the amended return reflecting the federal changes.

Petitioners also attempt to claim a violation of the United States and New York State Constitutions without citing specific provisions that have been violated by the applicable Tax Law statutes. It is well settled that the Division of Tax Appeals lacks jurisdiction to consider claims alleging that a statute is unconstitutional on its face (*see Matter of A&A Serv. Sta.*, Tax Appeals Tribunal, October 15, 2009; *Matter of RAF Gen. Partnership*, Tax Appeals Tribunal, November 9, 1995) and at the administrative level, statutes are presumed to be constitutional (*see Matter of Lunding*, 218 AD2d 268 [1996], *revd* 89 NY2d 283 [1996], *cert granted* 520 US 1227 [1997], *revd* 522 US 287 [1998]).

As with the Division of Tax Appeals, the Tax Appeals Tribunal may determine whether tax law statutes are constitutional as applied (*Matter of Eisenstein*, Tax Appeals Tribunal, March 27, 2003, *citing Matter of David Hazan*, Tax Appeals Tribunal, April 21, 1988, *confirmed* 152 AD2d 765 [1989], *affd* 75 NY2d 989 [1990]). We note that, “[t]axing statutes, like other social and economic legislation that neither classify on the basis of a suspect class nor impair a fundamental right, must be upheld if the challenged classification is rationally related to achievement of a legitimate State purpose” (*Trump v. Chu*, 65 NY2d 20, 25 [1985], *appeal dismissed* 474 US 915 [1985]). “The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it” (*Madden v. Kentucky*, 309 US 83, 88 [1940]).

We reject petitioners’ constitutional argument because they failed to adduce sufficient



evidence supporting their theory of disparate treatment. Initially, we note that there is no indication that any statute at issue herein relates to a suspect class or fundamental right. Rather, petitioners assert disparate treatment because interest on overpayments, resulting in a refund, are calculated from the date of filing of the amended return, whereas trust beneficiaries who file an amended return showing underpayment of tax, and have taxes due, are required to pay interest calculated from the date of filing of the original return. While related, the taxpayers, i.e., the trusts with reduced interest income and the beneficiaries with increased interest income, are not similarly situated. In fact, the statute that applies to the beneficiaries in these transactions is not the same statute. Because the federal changes resulted in overpayments by petitioners, Tax Law § 688 (interest on overpayment) applies, while Tax Law § 684 (interest on underpayment) is applicable where the federal changes resulted in underpayments by the trust beneficiaries. Further, petitioners have not raised any serious argument alleging that no rational basis or support exists for Tax Law § 688. Accordingly, we reject petitioners' constitutional arguments because they lack merit.

We also reject petitioners' equity argument based upon the difference in the rate of interest charged to taxpayers who have underpaid their taxes and the rate of interest paid to taxpayers who are due refunds because of overpayments. Tax Law § 697(j) gives the Commissioner of Taxation and Finance the authority to set the overpayment and underpayment rates of interest to be paid pursuant to Tax Law §§ 684, 685 and 688. Specifically, Tax Law § 697(j)(2)(A) and (former [B]), in effect at the time the amended returns were filed, provided that the overpayment rate was the sum of the federal short term rate plus two percentage points while the underpayment rate was the sum of the federal short term rate plus four percentage

points. Clearly, there is statutory authority for the differences between the overpayment and underpayment interest rates, and because the Tax Law grants to the Commissioner of Taxation and Finance the exclusive authority to set these interest rates, the Tax Appeals Tribunal will not reverse or reset these rates.

We have considered petitioners' remaining arguments and find them without merit. Petitioners failed to present any persuasive argument that would prove that the determination was erroneous in any way.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of James McNulty (Deceased) and Shari McNulty, Shari L. Goldstein "L" SL#4 Trust, Shari L. Goldstein "A" SL#6 Trust, Shari L. Goldstein "I" SL#7 Trust, Scott D. Goldstein No. 4 Trust, Scott D. Goldstein "A" SD#6 Trust, Scott D. Goldstein "I" No. 7 Trust and Shari McNulty is granted to the extent that the Division of Taxation agrees to accrue and pay interest on the special mortgage recording tax credit refund for the year 2004, but is otherwise denied;

2. The determination of the Administrative Law Judge is modified to the extent of the concessions made by the Division of Taxation, both before the Administrative Law Judge and as indicated in paragraph "1" above, but is otherwise affirmed;

3. The petitions of James McNulty (Deceased) and Shari McNulty, Shari L. Goldstein "L" SL#4 Trust, Shari L. Goldstein "A" SL#6 Trust, Shari L. Goldstein "I" SL#7 Trust, Scott D. Goldstein No. 4 Trust, Scott D. Goldstein "A" SD#6 Trust, Scott D. Goldstein "I" No. 7 Trust and Shari McNulty are granted to the extent indicated in paragraphs "1" and "2" above, but are otherwise denied; and

4. The Notices of Disallowance, dated July 16, 2008, June 5, 2009, July 17, 2009, and December 25, 2006 are modified in accordance with paragraphs “1” and “2” above, but such Notices are otherwise sustained.

DATED: Troy, New York  
January 23, 2012

/s/ James H. Tully, Jr.  
James H. Tully, Jr.  
President

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
Commissioner

<b>Petitioner</b>	<b>DTA#</b>
James McNulty (Deceased) and Shari McNulty	822715
Shari L. Goldstein "L" SL #4	822951
Shari L. Goldstein "A" SL#6	822952
Shari L. Goldstein "I" SL#7	822953
Scott D. Goldstein No.4	822954
Scott D. Goldstein "A" SD #6	822955
Scott D. Goldstein "I" No. 7	822956
Shari McNulty	823085