STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALPHA R. SCHOONOVER AND CATHERINE A. SCHOONOVER	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1982 through 1984.	:	

Petitioners, Alpha R. Schoonover and Catherine A. Schoonover, 77 R.D. #1, Box 8F, Millerton, Pennsylvania 16936, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1982 through 1984 (File No. 800568).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 164 Hawley Street, Binghamton, New York, on June 9, 1989 at 10:30 A.M., with all briefs and additional evidence to be submitted by May 7, 1990. Petitioners appeared by Richard D. Keyser, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether petitioners' claims for refund of personal income taxes for the years 1982 through 1984 are barred by the period of limitations set forth in Tax Law § 687(a) or whether such period of limitations was extended by agreement between petitioners and the Division of Taxation pursuant to Tax Law § 687(b).

II. Whether, under the facts and circumstances herein, the Division of Taxation should be estopped from asserting the period of limitations setforth in Tax Law § 687(a) as a bar to refunds claimed by petitioners for the years 1982 through 1984.

FINDINGS OF FACT

By an agreement dated April 1, 1977, petitioners, Alpha R. Schoonover and

Catherine A. Schoonover, agreed to convey to Westover Hills South Mobile Park, a partnership, a certain parcel of real property located in Chemung County, New York. The property had certain improvements and was used as a mobile home park. The terms of the sale provided, inter alia, for the purchasers to make installment payments to petitioners. Such installment payments included interest only for the first five years and principal and interest thereafter.

At the time of the conveyance noted above, petitioners were residents of New York. Petitioners became residents of Pennsylvania in 1978. Petitioners filed a New York State Resident Income Tax Return and New York State Unincorporated Business Tax Return for 1977. Petitioners timely filed New York nonresident income tax returns (Form IT-203) for the years 1978 through 1986.

On April 14, 1981, the Division of Taxation ("Division") issued to petitioners a Notice of Deficiency which asserted unincorporated business tax due of $423.27, plus penalty and interest, for the year 1977.

On April 8, 1983, the Division issued to petitioners a Notice of Deficiency which asserted $3,324.78 in personal income tax due, plus penalty and interest, for the years 1978 through 1980.

Both of the aforementioned notices of deficiency assert tax arising from the sale of real property outlined in Finding of Fact "1". Specifically, the Division asserted capital gains tax on the sale and also asserted tax due on the interest income accruing to petitioners as a result of the deferred payment arrangement in respect of the transfer.[1]

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[1]The Division's assertion of tax due was premised upon the provisions of Tax Law former § 654 which required an individual whose status changed from New York resident to nonresident to accrue items of income, gain, loss or deduction (including unrealized income from an installment sale) which, under an accrual method of accounting, would be reportable on the nonresident and part-year resident return for the year that the change of residence occurred. These accruals were required even though such individual normally reported on a cash basis. These special accruals were not required, however, if the taxpayer filed a bond or other acceptable security with the Tax Department and agreed to report the accruable amounts on future returns as if a change of resident status had not occurred. (Cf. Tax Law §§ 636[e]; 637[b]; 638[c].)

On or about July 5, 1983, petitioners filed a petition with the former Tax Appeals Bureau in respect of the April 8, 1983 Notice of Deficiency. A hearing in the matter of said petition was scheduled for hearing in Binghamton, New York on May 23, 1985. At that time, prior to the commencement of the hearing, representatives of the Division[2] along with petitioners and their representative, Richard D. Keyser, Esq., reached an agreement to settle the dispute arising from the issuance of the notices of deficiency dated April 14, 1981[3] and April 8, 1983. Pursuant to this agreement, petitioners conceded their liability in respect of the unincorporated business tax of $423.27, plus interest, as asserted in the April 14, 1981 Notice of Deficiency. (The Division apparently withdrew or cancelled its assertion of penalty in respect of this notice.) With respect to the April 8, 1983 notice, petitioners conceded their liability with respect to the Division's assertion of capital gains tax arising out of the sale of the mobile home park. In connection with such liability, petitioners agreed to submit to the Division a letter of credit to secure payment of any capital gains taxes due as a result of the transaction in question. Also with respect to the April 8, 1983 notice, the Division conceded that since petitioners were nonresidents of New York from 1978 forward, any interest income to them arising out of the deferred payments due pursuant to the mobile home park contract was not subject to New York State personal income tax. The Division therefore cancelled the portion of the April 8, 1983 deficiency arising from the Division's assertion of tax due on such interest income.

The meeting on May 23, 1985 also included a discussion regarding refunds of personal income tax paid on interest income arising from the deferred payments received on the land contract for the years 1982 through 1984. Petitioners had reported and paid tax on such interest income on its nonresident returns for those years. The discussions at the May 23, 1985 meeting

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[2]The Division was represented at the meeting by Deborah J. Dwyer, Esq., and Roger Hall, Jr., Tax Technician II.

[3]Since it appears from the record that no petition was filed in respect of the April 14, 1981 notice, it is unclear how said notice became part of the settlement discussions.

with respect to refunds of such taxes were general in nature. That is, there was general agreement among the parties present that petitioners had overpaid their New York State personal income taxes for the years 1982 through 1984 by their reporting and payment of tax in respect of such interest income. There was no discussion at the May 23, 1985 meeting with respect to the procedural mechanisms by which petitioners could obtain refunds of such overpaid taxes. The Division's representatives did not give any advice (nor did petitioners or their representative request such advice) regarding the filing of amended nonresident returns for the years 1982 through 1984 or the filing of a claim for refund for those years. Also, there was no discussion as to the relevant period of limitations with respect to any such refund claims.

Also at the May 23, 1985 meeting the Division advised petitioners and their representative that Mr. Hall would recompute petitioners' capital gains tax liability arising from the mobile home park sale and thereby determine the amount of the letter of credit necessary to secure payment of such taxes.

By letter dated May 27, 1986, the Division's representative advised petitioners' representative of the amount of the letter of credit necessary to secure the payment of any capital gains tax arising out of the mobile home park sale.

By letter dated June 27, 1986, petitioners' representative sought a reduction in the letter of credit amount to $14,500.00. Pursuant to a telephone conversation between petitioners' representative and the Division's representative on July 17, 1986, it was agreed that the letter of credit amount should be reduced to $14,500.00.

Subsequently, by letter dated August 18, 1986, petitioners' representative transmitted to the Division's representative a check in the amount of $530.31 in payment of the unincorporated business tax due, plus interest, per the April 14, 1981 Notice of Deficiency. Also transmitted in the same correspondence was the letter of credit in the amount of $14,500.00 and an executed Withdrawal of Petition and Discontinuance of Case in respect of the April 14, 1981 Notice of Deficiency. The August 18, 1986 letter also set forth petitioners' understanding of the terms of the settlement agreement as follows:

"1] Schoonovers will pay to the New York State Department of Taxation and Finance Unincorporated Business Tax in the amount of $423.27 pursuant to Assessment No. A810406069C, together with interest, and

2] Alpha and Catherine Schoonover will pay Capital Gains Tax to the New York State Department of Taxation and Finance arising out of the sale of the mobile home park located in the Town of Ashland, County of Chemung and State of New York, pursuant to an agreement dated April 1, 1977, and

3] That for the period of time Alpha and Catherine Schoonover are non-residents of the State of New York, interest income arising out of deferred payments due pursuant to the above referenced contract of sale will not be subject to taxation by New York State.

To secure the payment of the Capital Gains Tax which will become due upon receipt of the installment payments pursuant to the aforementioned contract, Alpha and Catherine Schoonover submit the enclosed Irrevocable Letter of Credit No. 196-86.

If the terms of this settlement are acceptable, please process the enclosed documents and advise us of additional interest due on the Unincorporated Business Tax. If these are not the terms of the settlement, please advise immediately."

By letter dated October 20, 1987, petitioners' representative provided the Division's representative with a copy of petitioners' 1986 New York State Nonresident Income Tax Return. This letter also stated the following:

"The only item which I believe still remains open is for a calculation of refunds due the Schoonovers as a result of the years which were open and under question. Speifically [sic], the Schoonovers included interest in those returns which ultimately was agreed upon in our settlement that need not be included. Consequently, I believe that the tax paid on this interest should be refunded.

Please advise whether we should file amended returns or whether this will be processed by the State."

Subsequently, by letter dated June 21, 1988, the Division's representative advised petitioners' representative as follows:

"In our last communication I advised you that you would have to file amended returns with me and I would have them processed. This advice was given to you in response to your letter of October 20, 1987. To date I have not received the amended returns.

Please advise me what action you wish to take on this matter."

Thereafter, the Division's representative transmitted the following to petitioners' representative by letter dated January 27, 1989:

"The reason why this case has been listed for a potential hearing is because

> the petition has never been withdrawn. As you know, you were to have supplied me with amended returns several years ago, in order to conclude our settlement. You have never done this, and so, as far as the Division of Tax Appeals is concerned, there is still a viable controversy.
>
> Please advise me as to how you intend to proceed."

By letter dated February 14, 1989, petitioners' representative forwarded amended New York State nonresident income tax returns for the years 1982, 1983 and 1984. Said letter also provided as follows:

> "Enclosed herewith please find ammended [sic] Forms IT-203 for the years 1982, 1983 and 1984. Our review of the New York State returns filed by our client indicate that these are the only years in which the interest income earned from the sale of the Mobile Home Park was included in the non-resident returns. Pursuant to the terms of the settlement agreement this amount is not taxable by New York and thus the ammended [sic] returns have been prepared upon that basis."

On their amended returns for the years 1982, 1983 and 1984, petitioners claimed refunds of $1,589.96, $857.97 and $1,599.05, respectively. The Division did not dispute that petitioners had overpaid their New York State personal income taxes for the years in question by said amounts.

The Division's representative acknowledged receipt of the amended returns by letter dated February 21, 1989 as follows:

> "I am in receipt of the amended returns in the above-referenced matter. I have sent them to the Audit Division where they will be reviewed. Assuming everything has been correctly done, as soon as I receive confirmation from the Audit Division, I will send you withdrawals of petition, and the case will be concluded."

Subsequent to the Division's receipt of petitioners' amended returns for 1982 through 1984, the Division informally advised petitioners that the amended returns had been filed beyond the applicable period of limitations and that therefore petitioners' refund claims as set forth in the amended returns were denied. This issue was the subject of the hearing held on June 9, 1989 in Binghamton, New York.[4]

Petitioners subsequently filed a petition in respect of the Division's denial of the claimed

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[4]It should be noted that all issues arising from the notices of deficiency dated April 14, 1981 and April 8, 1983, respectively, and the petition filed on July 5, 1983 have been resolved.

refunds for the years 1982 through 1984.

The Division declined to exercise its special refund authority under Tax Law § 697(d) with respect to the refunds claimed herein.

In their post-hearing brief, petitioners submitted a copy of a warrant docketed July 14, 1989 by the Division of Taxation indicating personal income tax owed by petitioners for the year 1983 of $1,603.54. Petitioners reported $1,603.54 in tax due on their original 1983 return, a copy of which was also submitted with the post-hearing brief. As noted previously, petitioners claimed a refund of $857.97 on their amended 1983 return.

The Division objected to the receipt of the warrant and 1983 return into the record herein contending that the record herein was closed in accordance with the statement of the Administrative Law Judge at the conclusion of the hearing.

CONCLUSIONS OF LAW

A. Before addressing the substantive issues presented by the parties, it is appropriate to note briefly the basis of the Division of Tax Appeals' jurisdiction herein. The substantive issue in this matter involves whether petitioners may properly be granted refunds of personal income tax paid for the years 1982 through 1984 in the amounts set forth in petitioners' amended returns for those years. Although the Division advised petitioners that the refund claims were denied, the Division did not give petitioners notice of disallowance of the refund claims pursuant to Tax Law § 689(c)(3)(B). Inasmuch as more than six months have passed since the filing of the amended returns on February 14, 1989, the refund claim is deemed denied and petitioners' petition with respect to such refund claims is properly filed with the Division of Tax Appeals pursuant to Tax Law § 689(c)(3)(A).

B. Generally, claims for credit or refund for overpayment of income tax must be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever is later (Tax Law § 687[a]). This period of limitation may be extended, however, if an agreement extending the period for assessment of income tax is made pursuant to Tax Law § 683(c)(2), provided that such agreement under Tax Law § 683(c)(2) is made within

the period prescribed in Tax Law § 687(a) for the filing of a claim for credit or refund (Tax Law § 687[b]). Under an extension of the period of limitations pursuant to Tax Law § 687(b), the period for filing a claim for credit or refund "shall not expire prior to six months after the expiration of the period within which an assessment may be made pursuant to the agreement [made under Tax Law § 683(c)(2)] or any extension thereof." (Tax Law § 687[b].) If a taxpayer fails to file a claim for credit or refund within the period of limitation set forth in Tax Law § 687(a) and (b), no credit or refund shall be allowed (Tax Law § 687[e]).

C. As noted above, Tax Law § 683(c)(2) provides for extension of the period of limitations for assessment by agreement. This section requires the consent of both the Division of Taxation and the taxpayer, in writing, to such extension prior to the expiration of the assessment period as set forth in Tax Law § 683.

D. Pursuant to the statutory provisions discussed above, in order to extend the period of limitation for credit or refund, the taxpayer and Division must agree to extend the period of limitation for assessment under Tax Law § 683(c)(2). If an extension of the assessment period is agreed to pursuant to said section, then the period of limitations for credit or refund is concomitantly extended to six months past the expiration of the assessment extension period. The Tax Law thus makes no provision for a separate extension of the limitations period for credits or refunds independent of an extension of the assessment period under Tax Law § 683(c)(2).

Accordingly, petitioners' contention that the extension period herein was extended pursuant to Tax Law § 687 is rejected. There is no evidence in the record of any extension of the period of assessment pursuant to Tax Law § 683(c)(2) in respect of the years 1982 through 1984. Absent such an extension, there can be no extension of the limitations period under Tax Law § 687 for the years 1982 through 1984.

Additionally, it should be noted that an extension under Tax Law § 683(c)(2) must be <u>in writing</u>. Thus, even if the above-noted impediment were removed, petitioners' position would nonetheless fail, for there is clearly no written extension agreement in the record.

E. Turning next to petitioners' estoppel argument, generally, the doctrine of estoppel does not apply to government acts "absent a showing of exceptional facts which require its application to avoid a manifest injustice" (Matter of Harry's Exxon Service Station, Tax Appeals Tribunal, December 6, 1988, citing Matter of Sheppard-Pollack, Inc. v. Tully, 64 AD2d 296, 298, and Matter of Turner Construction Co. v. State Tax Commn., 57 AD2d 201, 203, 394 NYS2d 78). The doctrine should be applied with the "utmost caution and restraint" and only in situations where a "profound and unconscionable injury" has resulted from reliance upon the government's action (see, Schuster v. Commr., 312 F2d 311, 317). This general rule is particularly applicable with respect to the Division of Taxation, for public policy favors full and uninhibited enforcement of the Tax Law (Matter of Turner Construction Co. v. State Tax Commn., supra, 394 NYS2d at 80).

F. In this case there are simply no facts present to support a finding of "manifest injustice". The record makes clear that discussions regarding refunds for the years 1982 through 1984 at the May 23, 1985 meeting only went so far as to establish agreement among the parties present that petitioners had apparently overpaid income tax for the years 1982 through 1984 to the extent that they reported interest income in respect of the land contract on their 1982 through 1984 New York returns. There was clearly no discussion with respect to the procedural prerequisites to the payment of such refunds. There was also no discussion regarding applicable periods of limitation or extensions thereof. To contend, as do petitioners, that the Division consented to an extension of the period of limitations by this general discussion on May 23, 1985 is unreasonable. Moreover, the record herein clearly shows that the Division made no misrepresentations at the May 23, 1985 meeting. The fact that the Division did not advise petitioners of the need to file amended returns to obtain a refund or of the applicable period of limitations does not bar the Division from asserting the statute in the instant matter.

Petitioners further contend that the Division's consent to extend the period of limitation may be inferred from the correspondence between the representatives. This contention is also rejected. The August 18, 1986 letter from petitioners' representative merely restates the general

agreement of the May 23, 1985 meeting that interest income arising from the land contract was not subject to income tax. A review of this letter merely confirms the fact that necessary procedures to obtain refunds for 1982 through 1984 were not discussed at the May 23, 1985 meeting. In fact, the first specific reference to the procedure to be followed for petitioners to obtain refunds for the years 1982 through 1984 is contained in the October 20, 1987 letter from petitioners' representative to the Division's representative. While it appears from the Division's response to this correspondence that the Division was unaware, at that time, that the refund claims might be beyond the statute, such a lack of awareness does not constitute a consent to extend the period of limitations and certainly does not estop the Division from asserting the statute herein.

G. Turning next to the question of whether the warrant and petitioners' original 1983 tax return should be received into evidence herein, it is noted that, with a single exception (not relevant at this point), the Administrative Law Judge advised the parties that the record herein would be closed at the conclusion of the hearing. It is also noted that by their submission of these documents petitioners raise an issue not raised previously herein, i.e., whether petitioners made payment of the tax due on their 1983 return. Inasmuch as this issue was not addressed by either party at hearing, it would be inappropriate to attempt to reach a conclusion herein as to whether such tax was, in fact, paid. Accordingly, the documents submitted by petitioners together with their brief are not received into the record herein.[5]

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[5]In addition, it should be noted that if petitioners' contention regarding these documents were accepted as fact, then petitioners would have failed to pay $1,603.54 in income tax due for 1983. If this were established, the period of limitations would be open at this time (Tax Law § 687[a]). Petitioners, however, would obviously not be entitled to the refund claimed of $857.97 for that year since payment of tax is a prerequisite to the granting of a refund. Just as obviously, if said amounts have not been paid, the Division should offset any amount owed pursuant to the warrants by the amounts claimed in the amended returns.

H. The petition of Alpha R. Schoonover and Catherine A. Schoonover is denied.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE