

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

HANS G. AND LIDIA SCHUMACHER :
DETERMINATION :

DTA NO. 811358

for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law and the Administrative Code of :
the City of New York for the Year 1986.

Petitioners, Hans G. Schumacher and Lidia Schumacher, 3 Washington Square Village, Apt. 10-B, New York, New York 10012, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 1986.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 30, 1993 at 1:15 P.M. The Division of Taxation did not file a brief but submitted a letter dated September 3, 1993 stating its position. Petitioners filed a brief on October 8, 1993. Petitioners appeared pro se and by Hans G. Schumacher. The Division of Taxation appeared by William F. Collins (Michael J. Glannon, Esq., of counsel).

SUMMARY OF THE PARTIES' POSITIONS

The record in this case is extremely confusing. Correspondence between the parties refers to documents which were not placed in evidence; important facts must be inferred from a myriad of documents; and there are gaps in the proof. What follows is a summary of the facts and the positions of the two parties, placed at the beginning of this determination in order to provide a roadmap to the Findings of Fact which follow.

Petitioners, Hans G. Schumacher and Lidia Schumacher, timely filed a 1986 New York State and City personal income tax return. On that return, they requested a refund of tax in the

amount of \$20,000.00. To calculate the \$20,000.00, petitioners reached back to installment payments made and returns allegedly filed for the years 1979 through 1985. Mr. Schumacher claims to have filed New York State and City personal income tax returns for the years 1979 through 1986 and states that he made timely payments of estimated tax for each of those years. He claims that in every year he paid more in estimated tax than was owed and that he consistently applied the overpayments from one year to the subsequent year, until 1986 when he requested a refund of what by then were accumulated overpayments of \$20,000.00. Thus, on his 1985 personal income tax return, Mr. Schumacher claimed an overpayment of tax in the amount of \$23,871.00 which he directed the Division of Taxation ("Division") to apply to his 1986 tax liability. The 1985 overpayment claimed by petitioner was premised on a claimed overpayment of \$18,513.00 from 1984 which itself was premised on a claimed overpayment of \$20,744.00 from 1983 and so on.

There is no disagreement between the parties about the amount of tax paid by petitioners for the years 1983 through 1986. Rather, the Division disputes petitioners' claim that they timely filed New York income tax returns for the years 1979 through 1984. The Division contends that it has no record of the filing of those returns, hence any claim for refund of 1986 taxes based on taxes paid for taxable year 1983 and before are barred by the statute of limitations. Petitioners cannot prove the date and fact of filing of returns for the years 1979 through 1984 with certified mail receipts or similar evidence. What they have attempted to do is to use circumstantial evidence to establish that the returns were timely filed. That evidence consists primarily of correspondence between Mr. Schumacher and the Division. For its part, the Division takes the position that petitioners have failed to prove that they made overpayments of tax in the years prior to 1984 or that they filed timely claims for refund.

ISSUE

Whether petitioners made timely claims for refund of taxes paid in the years 1979 through 1983.

FINDINGS OF FACT

Petitioners, Hans G. Schumacher and Lidia Schumacher¹, timely filed a 1986 New York State and City Resident Income Tax Return, filing separately on one return. The return bears a Division date stamp of December 1, 1987. On his 1986 return, petitioner calculated his total New York income as \$118,449.00, with New York State and City taxes due of \$7,095.00. He claimed total tax payments of \$33,571.00 and thus calculated an overpayment of New York State and City tax of \$26,476.00. He requested that \$6,476.00 of this amount be applied towards his 1987 estimated tax and that the remaining \$20,000.00 be refunded to him.

The Division disallowed the refund of \$20,000.00 claimed on the 1986 return by a Notice of Disallowance dated November 5, 1990. The notice states, as pertinent here:

"Your claim has been disallowed for the following reason(s):

"Your 1986 return requested a refund of \$20,000.00, not \$20,981.00.

"Your 1986 overpayment was based, in part, on a credit carried through from your 1983 return. We have no record of a timely filed 1983 return."

The Notice of Disallowance suggests that petitioner made a formal refund request for 1986 in the amount of \$20,981.00, but the record contains no evidence of such a request.

The exact amount of petitioner's 1986 tax refund as calculated by the Division, the approximate date on which the refund was granted and the calculations which resulted in the grant of the refund can be deduced from information found in a number of different documents.

The date and amount of the refund is established in a letter from petitioner to the Division dated January 18, 1988. In that letter, petitioner states that he received a notice of adjusted refund dated January 13, 1988 with regard to his 1986 personal income tax return. According to petitioner's letter, the Division increased Mr. and Mrs. Schumacher's joint tax liability by \$496.00 and refunded tax in the amount of \$464.59. Petitioner goes on to say that he does not know how the amount of the refund was determined, and he asserts that he made payments in 1986 amounting to \$9,700.00 and carried forward an overpayment of \$23,871.00 from his 1985

¹Lidia Schumacher is a party to this proceeding by virtue of having filed joint returns with her husband. The facts and issues raised here relate primarily to Mr. Schumacher. In the remainder of this determination, the term "petitioner" applies only to Mr. Schumacher.

return. Neither petitioner nor the Division entered in evidence the January 13, 1988 notice of adjusted refund mentioned in petitioner's letter.

The Division offered in evidence four computer-generated worksheets from the Estimated Tax Processing & Revenue Management Division. The worksheet for 1986 shows that petitioner made an installment payment of \$1,500.00 which was received on April 15, 1986 and an installment payment of \$8,200.00 which was received on January 6, 1987. Thus, the Division's record of 1986 installment payments verifies petitioner's claim of tax payments in the amount of \$9,700.00. The worksheet also shows a posted credit from petitioner's 1985 return of \$5,333.03, rather than the \$23,871.00 claimed by petitioner. Total estimated tax payments for 1986 are shown in the Division's records as \$15,033.03. Petitioner's original 1986 return was entered into evidence, and it shows that the amount of estimated tax paid was adjusted on the return from \$33,571.00 to \$15,033.00. Presumably, this adjustment was made on the return by the Division. Mrs. Schumacher had taxes withheld from her income of \$3,837.00, yielding total tax paid by petitioners for 1986 of \$18,870.00. Mr. and Mrs. Schumacher's total tax liability as reported on their 1986 return is \$11,433.00. Assuming that this amount was increased by \$496.00 on audit (as stated in petitioner's letter of January 18, 1988), petitioners' tax liability totalled \$11,929.00. Since they paid taxes of \$18,870.00, they were entitled to a refund of tax in the amount of \$6,941.00. On his 1986 return, petitioner requested that \$6,476.00 be applied towards his 1987 tax liability. Assuming that this was done, the amount of the remaining refund is \$465.00 which reconciles with petitioner's statement in the letter of January 18, 1988 indicating that the Division calculated his 1986 refund as \$464.59. Based on these calculations, the amount in contention should be the difference between the overpayment which petitioner carried forward from his 1985 return, \$23,871.00 (according to his letter of January 18, 1988²)

²Petitioner attached a schedule to his brief which shows a credit carried from 1985 to 1986 in the amount of \$26,100.00. Petitioners filed amended returns for some of the years being discussed here, and the Division adjusted petitioners' tax liability for some years. To attempt to trace the changes in amounts of tax due and overpayments claimed from the original returns to later documents filed by petitioners would merely add confusion to the discussion. To the extent possible, the figures recited in this determination have been taken from the original filed tax

and the amount the Division carried forward from 1985, \$5,333.03. That amount is \$18,538.00.

The Division agrees that petitioners filed a timely 1985 income tax return and it placed a copy of that return, along with an amended 1985 return, in evidence. According to date stamps on the face of the returns, the original was received by the Division on October 17, 1986 and the amendment was received on November 12, 1986.

A letter to the Division from petitioner dated January 20, 1987 establishes that the Division issued a statement of refund adjustment for 1985; however, the actual document was not placed in evidence and the date of issuance of the statement of refund adjustment is not in the record. As pertinent here, Mr. Schumacher's letter states:

"Attached is a copy of the adjusted statement to our 1985 income tax return. I agree with your calculation of increasing my tax liability by \$135 and that of my wife by \$23 However, your total payments and credits amount to only \$18,460, representing only the 1985 tax withheld and payments made. It does not include the overpayments of \$18,513 from 1984 as reported on my original 1984 return and the additional refund of \$7,121 claimed on the 1984 amended return. I would appreciate your checking your records."

Petitioner placed in evidence an undated notice³ issued by the Division which states:

"We have received your Amended Return for the taxable year shown on the reverse side of this form.

"Due to the large volume of returns that are received at this time of year, there may be a delay in processing your return. Interest will be paid on Amended Refund claims that are not processed within three months after the last date prescribed for the filing of your original return."

The notice identifies the tax year as 1985 and it shows that a file number (xxxxxxxxxx [redacted]) was assigned to the 1985 amended return by the Division. Petitioner believes that he received one of the notices in February or March 1987, and, as he said, it gave him "the comfort that the matter is being worked on on a timely basis" (tr., p. 18). Apparently, he perceived the notice to be a response to his letter of January 20, 1987.

It is helpful at this point to summarize the evidence and factual conclusions which can

returns or copies of returns entered in evidence.

³Petitioner actually placed in evidence two copies of the same notice which were marked and received as separate exhibits.

be drawn from the evidence. Petitioner timely filed a 1985 income tax return on October 17, 1985 which included a claim for overpayment of taxes based on an overpayment of \$18,513.00 from 1984. As of January 20, 1987, the Division adjusted petitioner's 1985 refund by disallowing the overpayment carried forward from 1984. Also by January 20, 1987, petitioner was referring back to an original filed 1984 return and a filed amended 1984 return. By January 18, 1988, the Division had issued a refund to petitioner of 1986 taxes in the amount of \$464.59, rather than the \$20,000.00 refund requested. In his letters of January 20, 1987 and January 18, 1988, petitioner challenged the Division's adjustments of his 1985 and 1986 refunds, based on his claim that he had substantial refunds carried forward from 1984.⁴

By letter dated March 7, 1988, petitioner requested that the Division respond to his letters of January 18, 1987 and January 20, 1988. In that letter, he mentioned that the Division had issued a form 1099, reporting to the Internal Revenue Service that New York had issued petitioner a refund of State taxes for 1985 in the amount of \$5,333.00. Petitioner placed in evidence copies of form 1099-G issued by the Division for tax years 1986 and 1987 but not one for 1985. The two forms 1099-G issued to petitioners for the year 1986 show refunds in the amounts of \$6,950.54 and \$4,890.67, respectively.

By letter dated March 25, 1988, the Division responded to petitioner's prior correspondence. That letter was signed by "M. Nicholson" who is identified as a Tax Technician I in the Division. The letter is in reference to tax year 1984, file number xxxxxxxxxx (redacted). As pertinent, the Nicholson letter states:

"We do not have all the information needed to process the amended New York State Income Tax Return(s) for the year(s) shown above.

"Please provide the following information:

"Our records indicate no original returns on file for you for tax years 1983 and 1984. Therefore, no credit from your 1983 return was applied to 1984 and no credit from an original 1984 return was applied to 1985. Please send us complete copies of

⁴In his letter of January 18, 1988, petitioner refers to the "file number" of his 1984 amended return, which would indicate that such a return was received by the Division and assigned a file number. But the number petitioner refers to, xxxxxxxxxx (redacted), is the number assigned to his 1985 return.

your 1983 and 1984 returns including all schedules and wage and tax statements."

Petitioner responded to the Nicholson letter by placing the following note on the bottom of a copy of the letter and sending it to the Division: "As requested, attached are one copy each of the complete set of the 1984 and 1983 income tax returns. I am looking forward to my refund checks." The note is dated April 1, 1988.

A photocopy of petitioner's original 1984 return was placed in evidence by the Division. The numbers "xxxxxxx" (redacted) were stamped in a box labelled "FOR OFFICIAL USE ONLY", indicating that the return was received and processed by the Division, but the numbers do not reveal the date of receipt. The return was signed by petitioners and dated September 13, 1985. A copy of the amended 1984 return was placed in evidence by petitioner. The Division's representative indicated that at the time of the hearing he had no information with regard to when the original 1984 tax return and the amended 1984 tax return were first received by the Division. On the original 1984 return, petitioner claimed estimated tax payments of \$30,118.00, taxes due of \$11,563.00 and calculated an overpayment of tax of \$18,513.00 which he directed the Division to apply to his 1985 tax liability. Petitioner and the Division agree that actual installment payments made in 1984 totalled \$16,500.00. The difference between the overpayment claimed on the 1984 return and the installment payments made in 1984 represents the amount carried forward by petitioner from 1983.

On the amended 1984 return, petitioner claimed that the actual amount of estimated tax paid was \$37,202.00, and he requested a refund of \$7,126.00. He provided the following explanation: "'Part II, line 26 [NY State estimated tax paid]: Error was made in summarization of 1983 amounts applied to 1984 and 1984 estimated tax payments." The amended 1984 return was signed by petitioners and dated October 31, 1986.

In July 1988, petitioner received an undated Statement of Refund Adjustment issued by the Division for tax year 1984. The statement contains the following explanation:

"Since no original 1983 return was filed before the statute of limitations expired, no credit from tax year 1983 can be applied toward 1984 tax due. Since no original 1984 return was filed, no credit from 1984 was applied to 1985 estimated tax. Your 1985 and 1986 returns were refunded correctly based on the

revised estimated tax credit."

"Your 1984 amended return is being refunded as follows:

	<u>Husband</u>	<u>Wife</u>
Total Tax Due Per Amended Return	\$11,563.00	\$3,503.00
1984 Estimated Tax Account	16,500.00	
Withholding	<u>3,456.67</u>	
Total Tax Paid	\$19,956.67	<u>16,453.67</u> <u>3,503.00</u>
PERSONAL INCOME TAX REFUND	4,890.67	.00"

Notations on the bottom of the statement, apparently made by Mr. Schumacher, indicate that in July 1988 petitioner received a 1984 tax refund of \$4,890.67, plus interest of \$555.39, for a total refund of \$5,446.06.

The Statement of Refund Adjustment provides evidence that the Division had access to information not found on the 1984 amended return when the refund was calculated.

Withholding taxes for Mrs. Schumacher are shown on the statement as \$3,456.67. This amount was rounded down to \$3,456.00 on the photocopy of the original 1984 return entered in evidence and on the amended return. But attached to the original 1984 return is Mrs. Schumacher's form W-2 for 1984 showing State taxes withheld of \$2,466.30 and local taxes withheld of \$990.37, for a total of \$3,456.67.

Upon receipt of the Statement of Refund Adjustment, petitioner sent Ms. Nicholson a letter dated July 21, 1988 challenging the adjustments made by the Division. He asserts in this letter that he has been filing estimated tax returns and payments since 1979 and applying overpayments from each year to the following tax year. Among other things he states that he is enclosing copies of tax returns for 1979 through 1982 and that, based on prior correspondence, he presumes that Ms. Nicholson has returns available to her for the years 1983 through 1986. Ms. Nicholson never directly responded to this letter; however, the Division issued to petitioner a statement from the Estimated Tax Unit, dated August 10, 1988, acknowledging receipt of petitioner's correspondence of January 18, 1988 and stating that "[A]ction will be taken as quickly as possible."

The Division issued to petitioners a Notice of Disallowance dated September 13, 1988 for tax year 1984. According to the notice, the amount of refund claimed was \$7,121.00; the amount allowed was \$4,891.00; and the amount disallowed was \$2,230.00. The following explanation was offered: "Additional information received does not substantiate that you filed your 1983 return with the New York State Tax Department."

By letter dated March 20, 1989, Patricia Stearns of the Estimated Tax Unit informed petitioner that the Division's records showed estimated tax payments of \$14,900.00 for 1985, rather than the \$33,413.00 in payments claimed on petitioner's 1985 tax return. According to the Division this resulted in an overpayment of \$6,476.00 to be applied to petitioner's 1986 estimated tax account.

Petitioner responded to Ms. Stearns's letter by letter dated April 20, 1989. In that letter, he raised two issues which he requested the Division to respond to. Petitioner provided the Division with a schedule of estimated tax payments and salary taxes withheld (Mrs. Schumacher's withholding taxes) for the tax years 1979 through 1983. According to petitioner, this schedule would show an excess of payments over tax due, resulting in a refund due of \$20,744.00 as of 1986 (this schedule was not placed in evidence, although a similar schedule was included with petitioners' brief). He states:

"If the NYS Department of Taxation can trace my estimated payments for my wife's taxes withheld for the years 1979 through 1983 and agrees with the calculations of the tax liabilities as reflected in the tax returns for those years, the essential elements for the refund are established."

Petitioner also requested that the Division explain the audit adjustment which increased his 1986 total income from \$118,449.00 to \$121,449.00.

Petitioner apparently received a communication from Lynn Purcell of the Estimated Tax Unit, requesting copies of petitioner's personal income tax returns for 1979 through 1984. By letter dated August 21, 1989, petitioner forwarded copies of these returns to Ms. Purcell. Ms. Purcell acknowledged receipt of the returns by letter dated September 5, 1989. She also informed petitioner that she had "forwarded all pertinent correspondence and related material to our Audit Division for their review."

By letter dated October 18, 1989, the Division offered petitioner the results of their review of adjustments made to his 1986 income tax return. The letter, as pertinent, states:

"I reviewed your 1986 return and found that your return was adjusted because you were not entitled to the \$3,000.00 deduction for a married couple who both work because you filed separate New York returns.

"I am sorry but the Law does not permit us to allow the refund for 1983. The deadline for filing for the years 1979 through 1983 expired before you filed. You should have filed within three (3) years from the date the returns were due."

On November 5, 1990, the Division issued to petitioner the Notice of Disallowance referred to in Finding of Fact "2" and this proceeding ensued.

As suggested in petitioner's letter to Ms. Stearns, one of the issues here is whether the estimated tax payments petitioner claims to have made for the years 1979 through 1983 can be verified. Petitioner offered in evidence cancelled checks showing estimated tax payments for the years 1980 through 1986. The payments for the years 1983 through 1986 correspond to the Division's own records of payments received as shown on computer-generated worksheets offered in evidence by the Division. The Division offered no evidence with regard to tax years 1979 through 1982.

The photocopies of cancelled checks offered in evidence by petitioner each bear a deposit serial number assigned by the Division (seven digits preceded by the letters "s" or "r"), with one exception, a cancelled check in the amount of \$8,900.00 dated December 31, 1981. Petitioner placed a photocopy of the front of the check in evidence, but not the back of the check. The check is made to the order of New York State income tax, and markings on the face of the check indicate that it was negotiated.

The Division's computer-generated records substantiate petitioner's claim that he made installment payments of estimated tax totalling \$12,500.00 for 1983. He placed in evidence a copy of his 1983 return showing a tax liability for 1983 of \$8,961.00.

The cancelled checks offered by petitioner establish that he made the following payments of estimated tax: \$8,068.00 in 1979; \$11,900.00 in 1980; \$16,320.00 in 1981; and \$16,000.00 in 1982.

Petitioner offered in evidence copies of applications for extensions of time to file State income tax returns for the years 1980 through 1985. These documents show that the Division granted an extension to October 15, 1985 for filing of the 1984 return and an extension to file the 1985 return. The other applications do not show that extensions were actually granted. Petitioner testified that the Division sometimes sent an approval and sometimes did not, and he assumed the extension was granted as long as he timely requested one and paid the estimated tax due. He offered as evidence a 1983 Estimated Tax Declaration Voucher No. 1 for 1983 showing estimated State and City tax of \$12,000.00 and a payment of \$3,000.00. Line 2 of that form states: "Amount of overpayment credit from 1982 return." There is no entry on that line.

The Division offered in evidence what appears to be a memorandum from one employee of the Division (Thomas O'Connor) to another (Kenneth Stewart) again stating that the Division's records show no filed New York State tax returns for the years 1979 through 1983. The memorandum is dated April 23, 1993.⁵

Petitioner made the following statement in his petition:

"Staffs told the Petitioner that the filing system prior to and during the years concerned made it very difficult to locate files. They advised Petitioner, that at the time of communication between the Petitioner and the Processing and Revenue Management, Tax Compliance and Audit Divisions of the Dept. of Taxation during 1987-1988, the Dept. could only refer to a (rough) computer printout, since hard copies of tax returns for those years had already been destroyed. Therefore, trying to locate the originals was really not possible."

In its answer, the Division denied having knowledge or information sufficient to

⁵The memorandum also states the Division's intention of requesting information from the Internal Revenue Service regarding petitioners' filing of Federal income tax returns for the years 1979 through 1983. The Division received a memorandum from the Internal Revenue Service stating it had "no information available on the system for tax years 1979 through 1983." Petitioner offered evidence showing that he received Federal tax refunds for 1984 and 1985, based in part on overpayments made in 1983. The Division gave no reason for placing the Internal Revenue Service memorandum in evidence. I can only assume that it was intended to impeach Mr. Schumacher's credibility. After the record was closed to new evidence, Mr. Schumacher offered evidence that the Federal returns for the years 1979 through 1983 were timely filed. This evidence was returned to Mr. Schumacher. Whether petitioners timely filed Federal income tax returns is not a material issue in this proceeding and cannot be determined here. Despite any evidence offered by the Division, I found Mr. Schumacher to be a highly credible witness.

determine the truth or falsity of that particular allegation. At hearing, petitioner repeated the assertion that the Division destroyed hard copies of filed returns after two years. He also indicated that he had been told that there were problems with the Division's data processing system which made it difficult for the Division to locate information with regard to filed returns. The Division never responded to these statements. Moreover, the Division never explained its procedure for maintaining records of filed returns or how the various numbers stamped on petitioner's returns by the Division could be interpreted, and it never described the process by which it determined that it had no record of petitioners having filed returns for the years 1979 through 1983. It did not respond to petitioner's assertion that he sent copies of his 1983 and 1984 returns to an employee identified as M. Nicholson on April 1, 1988.

MOTION TO REOPEN THE RECORD

The Division's denial of petitioners' 1986 refund claim rests on the fact that it has no record of petitioners' timely filing of a personal income tax return before 1985. At hearing, a number of documents were offered in evidence which reflect the Division's position in this regard.

M. Nicholson's letter of March 25, 1988 states:

"Our records indicate no original returns on file for you for tax years 1983 and 1984. Therefore, no credit from your 1983 return was applied to 1984 and no credit from an original 1984 return was applied to 1985."

The undated Statement of Refund Adjustment for 1984 reiterates M. Nicholson's statement.

A memorandum dated May 3, 1993 from Leta Snover of the Division's Computer Audit and Systems Bureau to the Division's representative in this proceeding, Michael J. Glannon, states:

"In response to your memo of April 20, 1993, I have reviewed the department records and files and since there is no record of the taxpayer filing New York tax returns for the years 1979 thru 1983, there can be no consideration of refund in any form."

Ms. Snover's memorandum also indicates that certain documents relating to this case have been lost. She states:

"Although the file does not contain all adjustment documents and communications that transpired in this case, audit properly disallowed all accumulated prior year estimated tax credits and follow thru credits that related to the three year statute."

Petitioner offered in evidence a copy of his Amended 1984 Personal Income Tax Return, and there was a brief exchange with regard to the significance of that return.

Administrative Law Judge: "It was the filing of that return that in some way triggered --"

Mr. Schumacher: "That triggered everything." (Tr., p. 35.)

Later in the hearing, there was a discussion with regard to the date of filing of the amended 1984 return.

Administrative Law Judge: "Let me ask you a question [Mr. Schumacher] in light of what you just said. The 1984 amended return . . ., I take it from your argument that that was filed within the statute of limitations? The amended '84 return."

Mr. Schumacher: "Oh, yes. Yes your Honor."

Administrative Law Judge: "Do we have proof of the date of the filing of that return? Is that in dispute? Is it disputed that the '84 amended return fell within the statute of limitations for filing that return?"

* * *

"It may be that in all of this correspondence we can settle on a date, but I don't have that."

Mr. Schumacher: "Your Honor, I think I have something in the file."

Mr. Glannon: "Judge, I don't have anything at this point that would indicate when the 1984 return was filed or when the amended return was filed."

Administrative Law Judge: "Does the amended return that you have a copy of have an in-date stamp from the Department? Or is there a letter from the Department that indicates receipt?"

Mr. Schumacher: "Yes, your Honor. Just bear with me one minute."

Administrative Law Judge: "Off the record for a minute."

(Discussion held off the record)

"What we decided to do off the record is leave the record open to allow both Mr. Glannon and Mr. Schumacher an opportunity to find whatever evidence they can of when the 1984 amended return was filed. And whatever you come up with, you will send copies of that evidence to me, whether it's an affidavit or document, and copies to each other of whatever evidence you have." (Tr., pp. 52-53.)

At the conclusion of the hearing, the Administrative Law Judge stated:

"I'll remind both of you that today is going to be the last opportunity either side will have to submit evidence in this matter, with the exception of the evidence and the filing of those amended returns which we specifically left the record open for. The record will be closed after today to additional evidence. So with that in mind, is there anything that anybody wants to add." (Tr., p. 57)

Mr. Glannon and Mr. Schumacher indicated that neither had anything further to add.

On July 29, 1993, petitioner filed a letter and a number of documents which he contends establish that he timely filed his 1984 and 1985 New York State income tax returns. All but one of the documents were already in evidence. The exception is the letter from the Division to petitioner, dated September 13, 1988, which constitutes a Notice of Disallowance of a portion of petitioner's 1984 refund claim (Finding of Fact "16"). The letter reiterates the Division's contention that petitioner failed to substantiate that he filed his 1983 income tax return with the Division. It does not establish the exact date on which the Division received the 1984 amended return.

On July 27, 1993, the Division filed a "Certification" signed by Karen McCarthy-Townsend which states:

"This is to certify that I am the Secretary to the Commissioner of Taxation and Finance, that I am authorized under Section 172 of the Tax Law to authenticate copies of all papers and documents in the possession and custody of the Commissioner of Taxation and Finance, that a search has been made of the Personal Income Tax files for the Personal Income Tax returns for the years 1979, 1980, 1981, 1982, 1983 and 1984 of Hans and Linda [sic] Schumacher, social security account numbers (H) xxx-xx-xxxx (redacted), (W) xxx-xx-xxxx (redacted), and that such Personal Income Tax returns were not filed until August 22, 1989."

Petitioner filed a brief on October 8, 1993, enclosing with it a number of additional documents which he sought to place in evidence. These documents were returned to petitioner with a cover letter dated October 22, 1993, stating that the record was closed to additional evidence and no further evidence would be received (see, Footnote "5").

By letter dated November 19, 1993, the Division sought to correct the Certification of Karen McCarthy-Townsend. That letter states:

"Petitioner's brief of October 5, 1993 pointed out that the social security number on the Certification by Karen McCarthy-Townsend was xxx-xx-xxxx rather than xxx-xx-xxxx (redacted). I have asked the Records Management Office to repeat its

search for the dates of filing of the 1979 through 1984 income tax returns using ID #xxx-xx-xxxx (redacted). We will then learn whether the search was proper and the ID number nothing more than a typographical error.

"I therefore request that you keep the record open for 30 days to allow me to submit this clarifying information."

The Administrative Law Judge responded to the Division with a letter dated December 2, 1993, stating that additional evidence, even of a clarifying nature, could not be accepted in evidence since the record was closed. She also stated: "If you wish to pursue this, I would suggest that the proper avenue for doing so would be a motion to reopen the record."

The Division then moved "for an order allowing the Division of Taxation to submit clarifying information pertaining to a July 20, 1993 Certification previously accepted into the hearing record." In paragraph 5 of an affirmation in support of the motion, the Division's representative describes his understanding of the documents for which the record of this hearing was left open as follows:

"Before concluding the hearing, the Administrative Law Judge allowed petitioners and the Division of Taxation until July 30, 1993 to submit additional evidence regarding the dates of filing of the petitioners' income tax returns."

The Division's rationale for reopening the record is stated in paragraph 13 of the affirmation as follows:

"It is of critical importance that the information contained in the July 20, 1993 Certification be accurate since it may well determine whether a Statute of Limitations problem exists in this matter. It is not a situation where evidence was not introduced while the hearing record was open and is then sought to be introduced for the first time after the record is closed and a determination rendered. The Division of Taxation only seeks to advise the Division of Tax Appeals and the petitioners of the correct dates of the filing of their income tax returns per the Tax Department records. It is unfathomable to this affirmant that the Administrative Law Judge rejected my letter request of November 19, 1993 to submit clarifying information as regards the July 20, 1993 certification. I feel an obligation to insure that the evidence provided by the Division of Taxation is correct and accurate. I therefore seek to verify that the July 20, 1993 Certification is correct as filed or to inform the Division of Tax Appeals of the correct information if it is inaccurate. The Administrative Law Judge should share this concern. The Judge's refusal seems to disregard 20 NYCRR 3000.0 which states in part that the hearing process should avoid undue formality and complexity."

The return date of the motion was January 31, 1994. Petitioner filed a letter in opposition to the Division's motion on January 20, 1994. By letter dated February 22, 1994, the

Administrative Law Judge denied the Division's motion to reopen the record.

CONCLUSIONS OF LAW

A. The ultimate issue here is whether the Division properly denied petitioners' 1986 claim for refund of taxes. Petitioners and the Division agree that petitioners timely filed personal income tax returns for 1986 and 1985. The Division refunded or allowed a credit for the amount of estimated tax overpayments made in each of those years. The Division also refunded taxes paid by petitioners in 1984 consisting of overpayments of estimated tax made in that year. The Division's denial of a refund stems from petitioner's carryforward of overpayments from 1983 and prior years. The question then is whether petitioner made timely claims for refund of taxes paid in the years 1979 through 1983.

The first year that needs to be examined in addressing this issue is 1983. Petitioner claims to have timely filed an original 1983 personal income tax return; however, there is no evidence in the record establishing that such a return was filed. Petitioner offered a copy of the return in evidence but no documents to establish that it was in fact filed with the Division. The Division offered evidence that its own files contain no record of the filing of the original 1983 return (as opposed to copies of that return provided after correspondence with the Division). In her letter to petitioner of March 25, 1988, M. Nicholson states that the Division has no record of the 1983 return having been filed. This statement is repeated in the undated Statement of Refund Adjustment issued with regard to the 1984 tax year and in the Notice of Disallowance issued on November 5, 1990. In addition, in a memorandum to the Division's attorney, Leta Snover, an employee of the Division's Computer Audit & Systems Bureau, states that she reviewed the Division's records and files and found no record of petitioners having filed tax returns for the years 1979 through 1983.

Tax Law § 691(a) and the Administrative Code of the City of New York § 11-1791(a) provide as follows:

"If any . . . document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date . . . is, after such period or such date, delivered by United States mail . . ., the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery If

any document or payment is sent by United States registered mail, such registration shall be prima facie evidence that such document or payment was delivered to the tax commission, bureau, office, officer or person to which or to whom addressed."

Here, there is no evidence that an original copy of the 1983 return was ever received by the Division. Absent proof from petitioner of certified or registered mailing of that return, petitioner's testimony is insufficient to establish that the original 1983 return was received by the Division (see, Matter of Savadjian, Tax Appeals Tribunal, December 28, 1990).

Furthermore, this case is clearly distinguishable from Matter of Mutual Life Ins. Co. v. New York State Tax Commn. (142 AD2d 41, 534 NYS2d 565). There, the court found that the taxpayer provided compelling evidence that a check for payment of taxes was prepared and mailed in compliance with the taxpayer's normal procedures. This, the court stated, placed the burden on the Department of Taxation and Finance to produce some evidence to show that it had conducted at least a cursory review of its files for the check (Matter of Mutual Life Ins. Co. v. New York State Tax Commn., *supra*, 534 NYS2d at 567). In light of petitioner's failure to produce any evidence to corroborate his own testimony, I cannot find that the Division had a duty to produce any more evidence than it did to establish nonreceipt of the original 1983 return (see, Matter of Savadjian, *supra*).

Next, evidence of the filing of a copy of the 1983 return must be examined to determine whether a copy of the 1983 return was filed within the statutory period for claiming a refund of tax paid in 1983. The earliest date by which a copy of the 1983 return might have been filed is April 1, 1988. Petitioner's note, written on the bottom of a copy of the letter sent to him by M. Nicholson, indicates that he forwarded a copy of the 1983 return to her on or about that date. But even if a copy of the 1983 return was forwarded to M. Nicholson on April 1, 1988 (and I believe that to be the case), this did not constitute a timely claim for refund of taxes paid in 1983.

Tax Law § 687(a) provides that a:

"[c]laim for credit . . . of an overpayment of income tax shall be filed . . . within three years from the time the return was filed or two years from the time the tax was paid . . . or, if no return was filed, within two years from the time the tax was paid."

Since the 1983 return was not filed within three years of the time the return was required to be filed (April 15, 1987), any claim for refund would have to have been made within two years of the time the tax was paid. Pursuant to Tax Law § 687(i), petitioner's estimated payments of income tax for 1983 were deemed to have been made on April 15, 1984; therefore, the time limit for filing a refund request expired on April 15, 1986. Consequently, petitioner's filing of a copy of the 1983 return in April 1988 was not a timely claim for refund of tax paid in 1983.

At hearing and in his brief, petitioner claimed that a 1984 return was timely filed on or about September 15, 1985 which, if proven, would provide a basis for finding a timely claim for refund of taxes paid in 1983 (see, Matter of Miles, Tax Appeals Tribunal, September 13, 1990). Again, the Division claims it has no record of receipt of that return. M. Nicholson's letter of March 25, 1988 evidences the Division's claim that it did not receive the 1984 return. In the absence of evidence of mailing of the 1984 return by registered or certified mail, I cannot find that the original 1984 return was timely filed.

Petitioner claims that even if the original 1984 return was not timely filed, the filing of the amended 1984 return serves as a timely request for refund of taxes paid in 1983. As noted above, the limitations period for filing a request for refund or credit of taxes paid in 1983 expired on April 15, 1986 (not April 15, 1987 as petitioner seems to believe). By his own account, the amended 1984 return was not filed until October 31, 1986, after the statute of limitations for filing for a refund of 1983 taxes had expired.

In sum, I conclude that petitioner failed to make a timely request for refund of taxes paid in 1983. In addition, there is no evidence in the record that petitioner timely filed returns or made a claim for refund of taxes paid for years prior to 1983. Inasmuch as petitioners' 1986 income tax refund made a claim for refund of taxes paid in 1983 and prior years, the Division correctly denied the refund.

B. In view of the fact that this determination sustains the Division's denial of a refund claim, the denial of the Division's motion asking to be allowed to submit additional evidence is of little consequence. However, to create a complete record of these proceedings, the grounds

for denying that motion will be set forth here.

The Tax Appeals Tribunal has adopted a policy of strictly limiting the submission of evidence after the close of a hearing (see, Matter of Laurino, Tax Appeals Tribunal, May 20, 1993; Matter of Blake, Tax Appeals Tribunal, April 23, 1992; Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991). In Schoonover, the Tax Appeals Tribunal stated:

"[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing."

This case demonstrates the confusion which may result from allowing evidence to be submitted after the close of a hearing. As shown by the quoted portions of the transcript of the hearing, the record in this proceeding was left open for both parties to present evidence of the date of filing of the amended 1984 personal income tax return. At the time of hearing, petitioners claimed that the amended 1984 return would serve as a timely claim for refund of taxes paid in 1983, even if the Division had not received the original 1984 return. The Division's representative stated that he had no information in his files to show when the amended return was filed. Without having an opportunity to review the documents submitted by the parties and lacking a clear explanation of the Division's position with regard to petitioners' contention, it appeared at the time of the hearing that the date of filing of the amended 1984 return was a crucial fact which could determine whether petitioners are entitled to any additional refund of tax. Neither party requested an opportunity to provide evidence with regard to filing of any other returns, and the record was not left open for the admission of any evidence other than that relating to the filing of the 1984 amended return.

By the prescribed date for filing the additional evidence, petitioners filed a letter and copies of documents which, with one exception, were already received in evidence. The additional document which was received in evidence had some relevance to the date of filing of the amended 1984 return. That document was the Division's Notice of Disallowance of petitioner's claim for refund of 1984 tax, and it established that on or about September 13, 1988 the Division denied the refund petitioner claimed on the amended return. The additional

document did not, however, prove the date of filing of the amended return which was critical to petitioners' case. The Division submitted a Certification from the Secretary to the Commissioner of Taxation and Finance which stated that a search had been made of the Division's Personal Income Tax files for the years 1979 through 1984 and that no returns were filed by petitioners until August 22, 1989. This too was received in evidence, although it was irrelevant to the issue for which the record was left open, the date of filing of the amended 1984 return, and in conflict with evidence in the record showing that copies of the 1983 and 1984 returns were sent to and received by the Division in April 1988. Petitioner later pointed out that the social security numbers shown in the Certification do not accurately correspond to petitioners' social security numbers, and the Division requested time to conduct a second search of its records using the correct social security numbers.

It is apparent from the Division's motion papers that the Division's representative believes that the record was originally left open to allow the parties to offer any evidence they wished with regard to petitioners' filing of tax returns for the years 1979 through 1984. It was not. The record was left open for the limited purpose of allowing the parties an opportunity to establish the date of filing of the 1984 amended return. The Certification originally submitted by the Division went well beyond this limited purpose, but it did not address the date of filing of the 1984 amended return. The motion to be allowed time to correct the Certification was also silent with respect to that issue. It was, perhaps, an error to have accepted the Certification into evidence in the first place since it did not refer to the amended 1984 return. That error would only be compounded by reopening the record to further evidence.

Finally, the Division seems to argue that it has been denied an opportunity "to advise the Division of Tax Appeals and the petitioners of the correct dates of the filing of their income tax returns per the Tax Department records" (Affirmation in Support of the Division's Motion). This is not the case. Whether petitioner filed income tax returns for the years 1979 through 1984 has been the point of controversy since 1988. The fact that the Division had no record of receipt of those returns was the basis for denying petitioner's 1986 claim for refund of taxes.

Whether petitioner filed those returns was the subject of the pleadings and the hearing. The Division knew and understood what the issue was before hearing, and it had every opportunity at hearing to offer evidence of the Division's records regarding the tax years in question. To a limited extent, it did so. As the Division offered no compelling justification for reopening the record to additional evidence, its motion was denied.

C. The petition of Hans G. and Lidia Schumacher is denied and the Notice of Disallowance dated November 5, 1990 is sustained.

DATED: Troy, New York
March 24, 1994

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE