STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BARRY YAMPOL	:	
for Redetermination of a Deficiency or for Refund of Personal Income Tax Under Article 22 of the Tax Law for the Years 1981, 1982 and 1983.	:	DETERMINATION DTA NO. 813261
	:	

Petitioner, Barry Yampol, 19667 Turnberry Way, North Miami, Florida 33180, 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 1981, 1982 and 1983.

On August 8, 1995, petitioner, by his representative, Arthur R. Rosen, Esq. and the Division of Taxation by Steven U. Teitelbaum, Esq. (Kenneth J. Schultz, Esq., of counsel) waived a hearing and agreed to submit this case for determination. All documents and briefs to be submitted were due by January 26, 1996, which date began the six-month period for the issuance of this determination. The Division of Taxation submitted its documents on October 5, 1995. Petitioner's brief and one additional document were submitted on November 13, 1995, and the Division's brief was received on January 8, 1996. Petitioner's reply brief was filed on January 26, 1996. After due consideration of the record, Frank W. Barrie, Administrative Law Judge, renders the following determina\tion.

ISSUES

I. Whether the tax forms (IT-115) filed by petitioner, to report Federal changes in income for each of the years at issue, conceded the accuracy of the Federal changes due to his failure to provide in a statementwherein the Federal changes were erroneous, so that such filings constituted self-assessments of tax.

II. Whether the Division properly denied petitioner's refund claims because petitioner did not report to New York State the Federal determination pertaining to his Federal amended tax

returns, within 90 days from the date the Internal Revenue Service denied his refund claims of Federal income taxes paid, as set forth in such amended returns.

FINDINGS OF FACT

1. Petitioner timely filed New York personal income tax returns for 1981, 1982 and 1983, the years at issue.

2. The Internal Revenue Service ("IRS") audited petitioner's Federal income tax returns for the years at issue determining that petitioner owed additional Federal income taxes for each of the years. On February 19, 1991, the IRS issued its final determination to petitioner concerning additional taxes due,[1] and in or about April of 1991, petitioner paid to the IRS the amounts asserted as due.

3. On or about May 3, 1991, petitioner timely filed separate forms IT-115, Report of Federal Changes, with respect to the Federal changes resulting from the IRS audit for each of the years at issue.

For the year 1981, petitioner reported the following summary of Federal changes in Part I of the IT-115:

Federal adjustments	
Contributions	$1,025,534.00
Schedule E (Partnership deduction)	339.00
Schedule C	394.00
Net Federal adjustments-increase	$1,026,267.00
Plus: Previously reported Federal taxable income	4,811,933.00
Corrected Federal taxable income	$5,838,200.00
Corrected Federal tax	$3,996,419.00
Less: Federal tax shown on return	3,610,206.00
Increase in Federal tax	$ 386,213.00
Plus: Interest	677,755.00
Total Federal amount assessed	$1,063,968.00

In Part II of the form IT-115 for 1981, petitioner calculated the "amount you owe" of $134,405.00 as a result of the above Federal changes as follows:

New York net income previously reported	$6,768,420.00

[1]The IRS issued a separate Statement of Tax Due on Federal Tax Return for each of the three years at issue.

Net federal adjustment-increase	1,026,267.00
Corrected New York net income	$7,794,687.00
Maximum tax	$1,085,350.00
Recalculation of minimum income tax	(8,579.00)
Net tax	$1,076,771.00
Less: Tax previously reported	942,366.00
Amount you owe	$ 134,405.00

For the year 1982, petitioner reported the following summary of Federal changes in Part I of the IT-II5:

Federal adjustments	
Contributions	$ 945.297.00
Net Federal Adjustments-increase	945,297.00
Plus: Previously reported Federal taxable income	299,755.00
Corrected Federal taxable income	$1,245,052.00
Corrected Federal tax	$ 483,781.00
Less: Federal tax shown on return	265,368.00
Increase in Federal tax	$ 218,413.00
Plus: Interest	313,884.00
Total Federal amount assessed	$ 532,297.00

In Part II of the form IT-115 for 1982, petitioner calculated the "amount you owe" of $107,542.00 as a result of the above Federal changes as follows:

New York net income previously reported	$1,987,471.00
Net Federal adjustment-increase	945,297.00
Corrected New York net income	$2,932,768.00
Maximum tax	$ 408,175.00
Recalculation of minimum income tax	(23,827.00)
Net tax	$ 384,348.00
Less: Tax previously reported	276,806.00
Amount you owe	$ 107,542.00

For the year 1983, petitioner reported the following summary of Federal changes in Part I of the IT-115:

Federal adjustments	
Contributions	$ 592,203.00
Net Federal adjustments-increase	$ 592,203.00
Plus: Previously reported Federal taxable income	859,390.00
Corrected Federal taxable income	$1,451,593.00
Corrected Federal tax	$ 817,285.00
Less: Federal tax shown on return	698,845.00
Increase in Federal tax	$ 118,440.00
Plus: Interest	123,928.00
Total Federal amount assessed	$ 242,368.00

In Part II of the form IT-115 for 1983, petitioner initially calculated the "amount you owe" of $77,934.00, which was recalculated and corrected apparently by the Division to $80,114.00 on such form as follows:

New York net income previously reported	$ 417,606.00
Net Federal adjustment-increase	592,203.00
Corrected New York net income	$1,009,809.00
Maximum tax	$ 139,933.00
Recalculation of minimum income tax	(4,974.00)
Net tax	$ 134,959.00
Less: Tax previously reported	54,845.00
Amount you owe	$ 80,114.00

A review of petitioner's forms IT-115 establishes that the basis for the Federal changes reported was the disallowance by the IRS of petitioner's charitable deductions of $1,025,534.00, $945,297.00 and $592,203.00 for the years 1981, 1982, and 1983, respectively.[2]

4. On each of the three Forms IT-115, petitioner drew a line through type-printed language on the form that stated:

> "In accordance with Section 659 of the New York State Tax Law, I concede the accuracy of the above federal change or correction. (If you do not so concede, see instructions.)"

The instructions for the Forms IT-115 filed by petitioner provided, in relevant part, as follows:

> "Your signature - You must sign and date this report even if you do not concede the accuracy of the federal change or correction. If you do not so concede, draw a line through the concession statement above the signature line, sign and date this report and attach a statement of the reasons you disagree with the federal change or correction."

5. Petitioner signed each of the Forms IT-115 and wrote on each form above his signature: "See attached statement". The statement attached to each form was labelled a rider and provided as follows:

> "Taxpayer does not agree to the federal change. He intends to file a claim for refund with the Internal Revenue Service and pursue the matter, if necessary, in Federal Court."

6. Approximately a year and one-half after petitioner filed his report of Federal changes on the requisite forms, the Division on November 16, 1992 issued a Notice and Demand (a copy

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[2]For 1981, there were also two very minor Federal adjustments apparently not at issue.

is attached to the petition, which was marked into the record as Exhibit "1", as an Exhibit "B" to the petition) to petitioner requesting payment of the additional New York State personal income tax attributable to the Federal changes for each of the years at issue. The Notice and Demand explained that "An amount is due for the Tax Type indicated above" (i.e., "personal income"). A second page to the Notice and Demand is captioned "Consolidated Statement of Tax Liabilities" and includes "the liability(ies) referred to in the enclosed Notice and Demand for Payment of Tax Due." This consolidated Statement of Tax Liabilities shows a "tax amount assessed" of $322,061.00 plus interest which corresponds to the additional New York personal income tax related to the Federal changes reported by petitioner. The Notice and Demand noted that:

> "If we do not receive full payment of the total amount due or your disagreement by 11/26/92: We will take legal action to compel payment of the balance due."

It should be noted that at no time subsequent to the filing of the Forms IT-115 has the Division issued a Notice of Deficiency concerning such forms and the related Federal changes.

7. By a letter dated December 1, 1992, Richard Savetsky, petitioner's accountant, responded to the Notice and Demand by noting that "we disagree with the amount due", and he enclosed drafts of the amended U.S. individual income tax returns for each of the years at issue, which would be eventually filed, as noted below, to show that petitioner intended to seek refunds of the additional taxes paid to the IRS as a result of the Federal changes.

8. On March 30, 1993, petitioner filed a Form 1040X, Amended U.S. Individual Income Tax Return for each of the years at issue. Such forms claimed a refund of the respective amounts paid to the IRS on or about April of 1991, as noted in Finding of Fact "2". Petitioner articulated two basic grounds in support of his refund claims: (1) the Federal assessments were not timely because petitioner had revoked his "Form 872 consent to extend the time to assess tax", and (2) the IRS incorrectly disallowed petitioner's charitable deductions which, according to petitioner, properly reflected the fair market value of his gifts to charity. The IRS denied

petitioner's refund claims approximately six months later, by a letter dated July 12, 1993 (Exhibit "19"), which provided, in relevant part, as follows:

> "We have disallowed the claim[s] because our records indicate that the tax assessments for the above years were made on a timely basis. You have not presented new or previously unconsidered information. You had six months from the date the tax was assessed to file a claim. We are unable to consider the claims since they were filed outside the required period.
>
> If you want to sue to recover tax, penalties, or other amounts, you may file a lawsuit with the United States District Court having jurisdiction or the United States Claims Court. These courts are independent bodies and have no connection with the Internal Revenue Service.
>
> The law permits you to do this within two years from the mailing date of this letter."

9. It is observed that petitioner never filed amended New York State personal income tax returns for the years at issue. Neither did he ever report the denial of his refund claims by the IRS to the Division.

10. Coincidentally, about a month after the denial by the IRS of petitioner's refund claims, the Division's Tax Compliance Division sent a collection letter dated September 1, 1993, which was almost a year after it issued its Notice and Demand described in Finding of Fact "6", to petitioner showing a balance due of $800,751.64 and providing, in relevant part, as follows:

> "The balance of your account, with accrued statutory charges, is shown above. Unless this balance is paid within ten days from the date of this notice, a tax warrant may be filed against you. The warrant will affect your credit rating, serve as a lien against your personal and real property, and allow us to enforce collection through our agents and courts in your area."

11. In response to the collection letter dated September 1, 1993, petitioner brought a CPLR Article 78 proceeding in Supreme Court, Albany County to prevent the Division from issuing any warrant for the years at issue. Justice Joseph Harris, as a condition for his signing petitioner's order to show cause and temporary restraining order with a return date of September 24, 1993 (Exhibit "9"), which commenced the Article 78 proceeding, required petitioner to establish an escrow account in a commercial bank in the City of Albany in the amount of $801,410.02 "subject to further order of this court". Approximately six months later, on March

31, 1994, the proceeding was dismissed by Justice John G. Connor on the grounds that petitioner had failed to exhaust his administrative remedies. Pursuant to the subsequent judgment of Justice Connor dated in May 1994 (the day is not readable on the photocopy in the record designated Exhibit "13"), petitioner was ordered to pay to the Division the $801,410.02 which had been placed in escrow, and the Division was prohibited from issuing any warrant against petitioner for the years at issue if any further balance alleged to be owed by petitioner was paid to the Division. On June 9, 1994, the amount of $851,405.91 was paid to the Division, which represented payment in full of New York personal income tax totalling $322,061.00, consisting of $134,405.00 for 1981, $107,542.00 for 1982 and $80,114.00 for 1983, plus interest.

12. Petitioner's payment of the total amount of $851,405.91 was transmitted to the Division by his representative's letter dated June 9, 1994 which noted that "[t]his payment is being made under protest." In his petition, petitioner alleged that the Division deemed this transmittal letter a request for refund of the $851,405.91 payment. However, the Division in its answer denied such allegation. It is observed that petitioner transmitted photocopies of Claims for Credit or Refund of Personal Income Tax, forms IT-113X, by a letter dated June 24, 1994, and the originals of such claims by a transmittal letter dated August 15, 1994. In any event, the Division issued a Notice of Disallowance dated August 31, 1994, which denied in full petitioner's request for refund of such payment. The Notice of Disallowance provided, in relevant part, as follows:

> "Since you did not attach a Statement to your Forms IT-115 when filed, stating why you did not agree with the Federal adjustments, we have properly issued a Notice and Demand in assessing the New York State tax due.
>
> Furthermore, since you did not report to New York State the final Federal determination pertaining to your Federal Amended Returns, Forms 1040X, within 90 days from the date the Internal Revenue Service denied your claim for refund, there is no Statute of Limitations.
>
> Therefore, [the assessment] has been sustained."

13. On July 11, 1995, petitioner and his wife filed a complaint in the United States District Court for the Southern District of Florida (Petitioner's Exhibit "A") against the United

States of America seeking a refund of the additional Federal income taxes for the years at issue which petitioner had paid to the IRS in or about April of 1991, as noted in Finding of Fact "2". As noted in Finding of Fact "8", the IRS had denied petitioner's claims for refund of such taxes by its letter dated July 12, 1993.

14. The parties entered into a stipulation dated August 7, 1995 (Exhibit "17"), of which relevant portions have been incorporated herein.

SUMMARY OF THE PARTIES' POSITIONS

15. Petitioner maintains that his report of Federal changes did not concede the accuracy of such changes, and therefore, he did not self-assess additional New York personal income taxes for the years at issue. Rather, the Division was required to issue a Notice of Deficiency in order to assert additional taxes due. A Notice and Demand may not be issued unless a tax liability has been assessed and remains unpaid. Consequently, the Notice and Demand issued against petitioner is invalid. Petitioner categorized the Division's position that his filing of the Forms IT-115 constituted self-assessments because he did not attach statements explaining why he disagreed with the Federal adjustments as "incredible":

> "By attaching a statement to each Form IT-115 stating that he 'does not agree to the federal change', Petitioner stated that the entire federal change was erroneous and thus satisfied Section 659 by indicating in what respect (i.e., 'wherein') the federal determination was erroneous" (Petitioner's brief, p. 11).

In the alternative, petitioner, citing the decision of the State Tax Commission in Matter of Di Lorenzo (December 29, 1982), contends that even if he did not comply with the exact requirements of section 659, he substantially complied with such provision:

> "[T]he crossing out of the concession statement on each Form and the statement on the attachment to each Form surely constitutes substantial compliance with the statutory provision sufficient to satisfy the statute as Petitioner informed the Division of the federal changes and clearly notified the Division that he did not concede the accuracy of such changes" (Petitioner's brief, pp. 12-13).

Petitioner also cites the well-established principle that a notice of deficiency may be viewed as valid although it might not be in exact compliance with the law so long as the taxpayer has not been prejudiced. Similarly, petitioner's report of Federal changes on which he did not concede liability should be viewed as valid although the accompanying statement was

not in exact conformity with Tax Law § 259. According to petitioner, the Division has not been prejudiced by any inexact compliance with the requirement that he report Federal changes:

> "[T]he Division cannot claim that it was prejudiced by Petitioner's actions since it was aware that Petitioner did not concede any of the federal changes and if the Division needed more information to determine whether any tax was due, it had two years from the filing of the Forms IT-115 to seek such information form Petitioner. The Division cannot now claim that it was prejudiced for its failure to issue a Notice of Deficiency if it believed tax was owed by Petitioner" (Petitioner's brief, p. 18).

Petitioner also maintains that he "was under no obligation to notify the Division of the federal denial [of his refund claims] because it did not constitute a final determination" (Petitioner's brief, p. 21). Petitioner points out, as noted in Finding of Fact "13", that he is seeking a reversal of such denial in United States District Court, and therefore, "the IRS' denial does not constitute a final determination by the IRS" (Petitioner's brief, p. 20). Further, petitioner contends that:

> "[E]ven if the IRS' refund denial is, or ultimately becomes, a final determination, it could result in no potential increase to Petitioner's New York tax liability. Consequently, an assessment cannot be issued at any time as a result of the denial of the federal refund claims" (Petitioner's brief, p. 22).

16. The Division counters that:

> "[T]he requirement to 'state wherein [the Federal determination] is erroneous' is an integral part of a report of federal changes and a taxpayer who has failed to comply with this requirement has not properly reported those federal changes. To the extent that Petitioner argues that noncompliance with this requirement can be dispensed with to enable him to obtain a refund, the Division of Taxation disagrees, since to adopt such an argument is to treat the language in § 659 which requires the taxpayer to 'state wherein [the Federal determination] is erroneous' as meaningless surplusage" (Division's brief, p. 6).

Alternatively, the Division maintains that pursuant to Tax Law § 682(a), "the tax and interest in dispute was assessed when it was paid to the Division of Taxation in June of 1994" (Division's brief, p. 10). The Division argues that the Notice and Demand described in Finding of Fact "6" may be viewed as a "Notice of Additional Tax Due", despite the varying caption, "because Petitioner was fully apprised that the Division of Taxation was asserting a deficiency as a result of the federal changes" (Division's brief, p. 11). Consequently, according to the Division, because the letter of petitioner's accountant, as noted in Finding of Fact "7", did not

include a statement showing wherein such notice of additional tax due and Federal determination were erroneous, pursuant to Tax Law § 681(e)(1) and § 682(a), the tax and interest were assessed 30 days after November 16, 1992, the date of the Notice and Demand which may be treated as a Notice of Additional Tax Due.

Finally, the Division argues that "there is an unlimited statute of limitations here" (Division's brief, p. 12), because petitioner failed to comply with Tax Law § 659.

17. In his reply brief, petitioner argues that many of the Division's arguments are irrelevant because he did comply with Tax Law § 659. He cautions that the Division's other arguments are "potentially misleading" (Petitioner's reply brief, p. 10). In particular, petitioner emphasizes that Tax Law § 686(g) provides that income tax collected after the expiration of the period of limitations is considered an overpayment.

CONCLUSIONS OF LAW

A. As noted in Finding of Fact "2", the IRS audited petitioner's Federal income tax returns for the years at issue and determined that he owed additional Federal income taxes. When the IRS issued the statements of tax due against petitioner on February 19, 1991, petitioner was required to report to the Division the determination by the IRS that he owed additional taxes. In order to resolve this matter, a close review of Tax Law § 659, which requires a taxpayer to report Federal changes to his personal income, is necessary. In relevant part, this statute provides as follows:

> "If the amount of a taxpayer's federal taxable income . . . is changed or corrected by the United States internal revenue service . . . or if a taxpayer's claim for credit or refund of federal income tax is disallowed in whole or in part, the taxpayer . . . shall report such change or correction in federal taxable income . . . or such disallowance of the claim for credit or refund within ninety days after the final determination of such change, correction, renegotiation or disallowance, or as otherwise required by the [commissioner], and shall concede the accuracy of such determination or state wherein it is erroneous . . . . Any taxpayer filing an amended federal income tax return . . . shall also file within ninety days thereafter an amended return under this article, and shall give such information as the [commissioner] may require."

B. Pursuant to Tax Law § 682(a), if a taxpayer concedes the accuracy of the Federal change in his report filed pursuant to Tax Law § 659, any resulting deficiency in New York

personal income tax "shall be deemed to be assessed on the date of filing such report . . . and such assessment shall be timely notwithstanding section six hundred eighty-three."[3] Consequently, if petitioner conceded the accuracy of the Federal changes in the Forms IT-115 filed on or about May 3, 1991, as detailed in Finding of Fact "3", the Division properly denied his refund claims because he had self-assessed the taxes at issue. In such circumstances, it was not necessary for the Division to issue a Notice of Deficiency against petitioner. Rather, a taxpayer is not entitled to petition rights where tax is self-assessed by virtue of a report of Federal changes (see, Matter of Schenectady Turbine Services, Ltd., Tax Appeals Tribunal, February 24, 1994).

C. However, it cannot be so concluded herein. As noted in Finding of Fact "4", petitioner drew a line through the type-printed language on each of the forms that conceded the accuracy of the Federal changes. The Division is correct that petitioner did not include a statement of the reasons he disagreed with the Federal changes, and it is also correct that Tax Law § 659 requires a taxpayer to "state wherein" the Federal changes are erroneous. However, counterbalancing such minor failure, as noted in Finding of Fact "3", the reports filed by petitioner clearly disclosed that he contested the disallowance by the IRS of the charitable deductions of $1,025,534.00, $945,297.00 and $592,203.00 for 1981, 1982, and 1983, respectively. Further, the riders attached to the Forms IT-115 plainly stated that petitioner did not agree to the Federal changes and that he intended to file refund claims with the IRS. Petitioner has argued that by noting his disagreement with the entire Federal change, he indicated "wherein" the Federal determination was erroneous. But moreover, the reports do, in fact, disclose that petitioner disagreed with the disallowance of charitable deductions by the IRS, which sufficiently indicates "wherein" the Federal determination was erroneous, albeit such specificity is not included in the attached riders.

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[3]Tax Law § 683(a) provides that, "Except as otherwise provided in this section, any tax under this article shall be assessed within three years after the return was filed. . . ."

D. It is observed that petitioner has analogized to cases involving the validity of notices of deficiency which are lacking in some necessary quality or element. So long as the taxpayer has not been prejudiced, such notices of deficiency have been given effect (see, e.g., Matter of Cheakdkaipejchara, Tax Appeals Tribunal, April 23, 1992). But an even better analogy, which focuses upon the taxpayer and not the Division, is to the liberal standard applied in determining what constitutes a valid informal claim by a taxpayer for refund. In Matter of Rand (Tax Appeals Tribunal, May 10, 1990), the Tribunal, in reversing the administrative law judge decided that a rider to a tax return, which did not use the word "refund" or specifically request the return of the money paid with the return, was nonetheless a valid informal claim:

> "The purpose of the claim for refund is to notify the Department of the taxpayer's position so that the Department, if it so chooses, can investigate and determine the merits of the taxpayer's claim at a point in time reasonably close to the tax year for which the claim is made [citations omitted].
>
> * * *
>
> [I]t is clear that the intent of the rider is to convey the belief that petitioner is not subject to tax and that no tax is due from petitioner. From this it can be reasonably inferred that a refund is sought for the entire amount of tax being paid for the tax year for which a return is being filed."

E. By viewing the Forms IT-115 filed by petitioner as contesting the Federal changes reported thereon, the language in Tax Law § 659, requiring the taxpayer to "state wherein [the federal determination] is erroneous", is not being treated as "meaningless surplusage" as contended by the Division. Rather by concluding that petitioner has not conceded the Federal changes, the Division's attempt to use such procedural requirement to convert a report of Federal changes, which thoroughly challenges the Federal changes, into a concession of such changes is properly rejected. In the circumstances at hand, if the Division believed that it needed more information and that the report did not adequately disclose "wherein" the Federal changes were erroneous, it had a ready remedy. Tax Law § 683(c)(3) allows the Division to issue an assessment against a taxpayer, who complies with Tax Law § 659 and does not concede the Federal changes, "at any time within two years after such report . . . was filed." In other words, the Division had two years from the filing of the Forms IT-115 to obtain additional information

from petitioner or, if it so chose, to commence an audit and issue a Notice of Deficiency if it determined tax was due from petitioner as a result of the Federal changes.

F. In sum, because it is concluded that petitioner's filing of the Forms IT-115 did not constitute a concession that the Federal changes were correct, the taxes at issue were not self-assessed. As a result, the Division was required to issue a Notice of Deficiency in order to assess additional taxes due against petitioner as a result of the Federal changes. Pursuant to Tax Law § 683(c)(3), since more than two years have elapsed since petitioner's filing of the Forms IT-115, the Division now lacks the authority to issue a Notice of Deficiency. Consequently, petitioner is correct that the Division may not seek additional taxes from petitioner since there is no assessment, and the Division is therefore precluded from seeking to collect such taxes by use of a Notice and Demand.

G. The Division's argument that its Notice and Demand should be viewed as a valid Notice of Additional Tax Due authorized by Tax Law § 681(e) is without merit. In light of the above conclusion that petitioner complied with the requirement of Tax Law § 659 to report the Federal changes at issue, the Division was not authorized to proceed against petitioner by issuance of a Notice of Additional Tax Due or a Notice and Demand. It is observed that Tax Law § 681(e) is an exception to the requirement of Tax Law § 681(b) and (c) that a Notice of Deficiency must be issued in order to assess a deficiency in tax. Such exception would be allowable if the taxpayer failed to comply with Tax Law § 659, which is not the case herein.

H. The decision of the former State Tax Commission in Matter of Lorenzo (December 29, 1982) lends support to the conclusion that petitioner adequately complied with the requirements of Tax Law § 659. In Lorenzo, the taxpayers responded to a Notice of Additional Tax Due issued by the Division pursuant to Tax Law § 681(e) by filing a Form IT-115, on which they failed to cross out the type-print language conceding the accuracy of the Federal change. Nonetheless, the Commission decided that the taxpayers, in fact, had contested the Federal change based upon a cover letter transmitting the form which noted that they did not concede the accuracy of the Federal changes. Further, it is noted that the facts, as recited by the

Commission, indicated that the taxpayers in Lorenzo also failed to state wherein the Federal changes were erroneous when they filed their Form IT-115. However, it is observed that in Lorenzo, the Commission merely referred the matter to audit because the taxpayers were not arguing that they had complied timely with the requirements of Tax Law § 659 and that the two-year period of limitations for an assessment had expired. Rather, in Lorenzo, the taxpayers failed to file the Form IT-115 within 90 days of the Federal determination and the issue to be resolved by the Commission was whether the Lorenzo taxpayers would be able to challenge the propriety of the Federal changes on the basis that they had, pursuant to Tax Law § 681(e), within 30 days after the mailing of the notice of additional tax due, filed a Form IT-115 as required by Tax Law § 659 "accompanied by a statement showing wherein such federal determination and such notice of addition tax due are erroneous." In sum, although the Lorenzo matter is not "on all fours" with the situation at hand, it does, nonetheless, provide support for petitioner.

I. As noted in Conclusion of Law "A", Tax Law § 659 provides that "Any taxpayer filing an amended federal income tax return . . . shall also file within ninety days thereafter an amended return under this article, and shall give such information as the commissioner may require." As noted in Finding of Fact "9", petitioner never filed amended New York State personal income tax returns for the years at issue. Neither did he ever report the denial of his refund claims by the IRS to the Division. Nonetheless, such failure is irrelevant to the central matter at issue herein: whether petitioner reported and contested the Federal determination of additional tax issued by the IRS on February 19, 1991. Furthermore, even though petitioner failed to follow Tax Law § 659 with reference to his later Federal claims for refund, there would nonetheless be no increase in New York tax attributable to such Federal denial of his refund claims.

J. In conclusion, since any amount of income tax collected or assessed after the expiration of the statute of limitations is considered an "overpayment" under Tax Law § 686(g),

and petitioner filed timely refund claims as detailed in Finding of Fact "12", he is entitled to the refund of his payment of $851,405.91 plus interest.

K. The petition of Barry Yampol is granted.

DATED: Troy, New York
June 27, 1996

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE