STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PHILIP MAYERSON AND JOY G. UNGERLEIDER MAYERSON (DECEASED)	:	**DETERMINATION**
	:	DTA No. 815137
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1989.	:	
	:	

Petitioners, Philip Mayerson and Joy Ungerleider Mayerson (Deceased), 4 Oak Lane, Hommocks, Larchmont, New York 10638, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1989.

On March 4, 1997 and March 11, 1997, respectively, petitioners, by Peter A. Nussbaum, CPA, and the Division of Taxation, by Steven U. Teitelbaum, Esq. (Michael J. Glannon, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs submitted by July 14, 1997, which date commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether a Notice of Deficiency was barred by the three-year period of limitations pursuant to Tax Law § 683(a), or whether, by their failure to report a reduction in their allowable resident credit, petitioners triggered the limitations period applicable to the recovery of erroneous refunds under Tax Law § 683(c)(5).

FINDINGS OF FACT

1. At all times relevant herein, petitioners, Philip Mayerson and Joy G. Ungerleider Mayerson, were New York State residents. Petitioners were shareholders of Central National-Gottesman, Inc. ("CNG"), a New York S-corporation that conducts its business operations in a number of states. In accordance with Tax Law § 660, petitioners had consistently included in their New York adjusted gross income one hundred percent of their share of S-corporation income from CNG.

2. Petitioners timely filed their joint 1989 New York resident income tax return on or about October 15, 1990.[1] Petitioners claimed a total resident credit of $144,387.00 on their 1989 return with respect to income taxes paid by CNG to other states for that year.

3. On September 23, 1993, petitioners filed an amended New York State 1989 income tax return (Form IT-201X). Petitioners claimed an additional resident credit totaling $67,341.00 which was explained on the amended return as follows:

> "The taxpayers are residents of New York State and are shareholders in a New York State 'S' corporation, Central National - Gottesman, Inc. In accordance with the Tax Appeals Tribunal decision in *Baker* TSB-90(13) [*Matter of Baker*, Tax Appeals Tribunal, October 11, 1990] the taxpayers are entitled to a resident credit against New York State tax for tax which the corporation has paid to non-resident

---

[1]Petitioners' original 1989 return was not entered into the record herein. However, a copy of Forms IT-370 (Application for Automatic Extension of Time to File for Individuals) and IT-372 (Application for Additional Extension of Time to File for Individuals) were attached to petitioners' amended 1989 return which was submitted into the record. These forms indicate that petitioners were granted an extension of time until October 15, 1990 to file their 1989 return. Given this evidence and considering that petitioners' amended return/refund claim (*see*, Finding of Fact "3") was apparently timely filed on September 23, 1993 and that the Division does not dispute that the Notice of Deficiency herein (*see*, Finding of Fact "7") was issued more than three years from the filing date of petitioners' original return, it is concluded that petitioners' original return was filed on or about October 15, 1990.

states on income earned in those states which do not recognize 'S' status. . . . The additional credit provided for in this return is as follows:

State	Additional Credit
Connecticut	$ 13,132.00
Massachusetts	36,653.00
New Jersey	17,556.00
Total	**$ 67,341.00**"

4. The Division adjusted the additional resident credit claimed on petitioners' amended return by reducing the credit claimed for taxes paid to Massachusetts to $21,492.00 to correspond to the amount shown on the Form IT-112-R (New York State Resident Tax Credit) submitted as part of the amended return. This adjustment reduced the additional resident credit per the amended return to $52,180.00. The Division also modified petitioners' New York adjusted gross income as reported on the amended return by increasing Federal AGI for petitioners' share of total income taxes deducted by CNG pursuant to Tax Law § 612(b)(3). This adjustment reduced the amount of refund claimed on petitioners' amended return to $46,825.00. Petitioners do not contest the adjustments made by the Division with respect to their amended return. On or about July 22, 1994 the Division issued a refund check of $48,990.09 to petitioners, which included the adjusted refund claim plus $2,165.09 in interest.

5. On March 27, 1992, the Commonwealth of Massachusetts had denied an application for an alternative apportionment made by CNG to preclude Massachusetts from including in CNG's apportionable tax base for corporation excise tax purposes, interest, dividends and capital gains generated by CNG's investment division located in New York. CNG had asserted that the activities of its investment division were not unitary with those of its operating division. The denial by the Commonwealth was due to pending litigation involving the same issue at the time of CNG's request, where the Commonwealth was asserting its right to include such income in

such apportionable tax base, so that if CNG's request were allowed, the Commonwealth would, in effect, be repudiating a position it was defending in a pending litigation. Prior to the denial, CNG filed an Application for Abatement because the Commonwealth had not yet acted on CNG's application.

6. Subsequent to the Division's payment of the refund to petitioners, the Commonwealth of Massachusetts notified CNG that the position taken by CNG in its Application for Abatement was correct, thereby reducing CNG's Massachusetts corporation excise tax liability for the year ended December 31, 1989. Petitioners did not report the reduction of CNG's Massachusetts corporation excise tax to the Division of Taxation. Nor did they report that the reduction of CNG's Massachusetts liability reduced the resident income tax credit properly claimed by petitioners on their 1989 New York income tax return.

7. On December 12, 1994, the Division issued to petitioners a Notice of Deficiency which asserted $48,990.00 due for the year 1989. An Attachment Sheet appended to the Notice explained:

> "Available information indicates that the personal Massachusetts resident tax credit was overstated due to the amending of Central-National Gottesman's Massachusetts Corporation Tax Return. Since you failed to file an amended New York State return reflecting the Massachusetts changes, we have adjusted your allowable resident tax credit."

8. The attachment sheet further indicated that petitioners' allowable resident credit for the year 1989 was reduced to $104,954.00 and that personal income tax due from petitioners for 1989 was $93,778.00. The attachment sheet stated, however, that:

> "The Statute of Limitations has expired on your original 1989 New York State return. The Tax Law limits the amount we can assess to that of the refund amount previously issued on your amended return.
> AMOUNT NOW DUE $48,990.00."

SUMMARY OF THE PARTIES' POSITIONS

9. Petitioners contend, first, that the period of limitations for assessment of personal income tax commences upon the filing of the original return and that the filing of an amended return does not toll the otherwise applicable period of limitations. Accordingly, petitioners assert that the date of filing of their 1989 amended return is immaterial to the determination of the expiration of the relevant period of limitations.

10. Petitioners also note that the Division's regulations provide a procedure to be followed where an adjustment is required in the amount of the resident credit claimed on a New York personal income tax return as a result of a redetermination of income taxes paid to another state. Petitioners assert that such procedure is subject to the general three-year period of limitations for assessment under Tax Law § 683(a). Petitioners contend that none of the specifically enumerated exceptions to the general limitations period set forth in Tax Law § 683(c) are applicable herein.

11. Finally, petitioners assert that the five-year limitations period for assessment to recover an erroneous refund as provided for in Tax Law § 683(c)(5) is not applicable in this matter because the refund in question was issued as part of a claim made by petitioners and not as a result of an error of a Division employee.

12. The Division contends that the five-year limitations period for the recovery of erroneous refunds pursuant to Tax Law § 683(c)(5) is applicable to the instant matter because petitioners misrepresented a material fact. Specifically, the Division asserts that petitioners overstated their resident credit on their amended return with respect to taxes paid to Massachusetts. The Division contends that this misstatement and petitioners' failure to advise

the Division of their correct tax liability constituted a misrepresentation of a material fact which led to the refund, and that, accordingly, the five-year period of limitations is applicable.

CONCLUSIONS OF LAW

A. Tax Law § 683(a) sets forth the following general rule regarding limitations on assessments of personal income tax under Article 22 of the Tax Law:

> "Except as otherwise provided in this section, any tax under this article shall be assessed within three years after the return was filed (whether or not such return was filed on or after the date prescribed)."

B. The period of limitations for assessment of personal income tax under Tax Law § 683(a) runs from the date of filing of the original return and not from the date of filing of an amended return (*Matter of Bello*, Tax Appeals Tribunal, July 8, 1993, *confirmed* 213 AD2d 754, 623 NYS2d 363). Here, the December 12, 1994 Notice of Deficiency was issued more than three years from the October 15, 1990 date of filing of petitioners' original 1989 tax return. Under *Bello*, petitioners' filing of an amended return on September 23, 1993 did not toll the period of limitations for assessment. Accordingly, absent the application of an exception to the general three-year limitations period, the Notice of Deficiency issued to petitioners was time-barred pursuant to Tax Law § 683(a).

C. As noted previously, the Division contends that the erroneous refund exception to the general three-year statute of limitations, set forth below, is applicable in this matter:

> "Recovery of erroneous refund.- An erroneous refund shall be considered an underpayment of tax on the date made, and an assessment of a deficiency arising out of an erroneous refund may be made at any time within two years of the making of the refund, except that the assessment may be made within five years from the making of the refund if it appears that any part of the refund was induced by fraud or misrepresentation of a material fact." (Tax Law § 683[c][5].)

D. The Division's regulations define the term *erroneous refund* as follows:

> For purposes of section 683(c)(5) and section 684(m) of the Tax Law, the term *erroneous refund* means a refund which is issued as a result of an error made by an employee of the Department of Taxation and Finance, including an error made in an audit of a New York State income tax return. However, a refund in the amount requested by a taxpayer on a New York State income tax return, including a refund of such amount issued after verification of such return for mathematical error by an employee of the Department, is not an erroneous refund as defined in this subdivision, up to or in any part of the amount claimed, since such refund is issued relying entirely on the claims made therein by the taxpayer." (20 NYCRR 107.7[a].)

E. The refund in question was issued relying entirely on claims made by petitioners on their amended return and not as a result of an error made by an employee of the Department of Taxation and Finance. The refund was therefore not an erroneous refund within the meaning of Tax Law § 683(c)(5) and 20 NYCRR 107.7(a). Accordingly, the limitations period of Tax Law § 683(c)(5) does not apply to the instant matter.

F. The case cited by the Division in support of its position that the five-year period of limitations under section 683(c)(5) is applicable, *O'Bryant v. United States*, (49 F3d 340), is clearly distinguishable from the instant matter. In *O'Bryant*, the Internal Revenue Service mistakenly credited a payment twice and issued a refund, clearly an erroneous refund under the relevant Internal Revenue Code provisions and also under Tax Law § 683(c)(5) and 20 NYCRR 107.7(a). As discussed above, however, the refund in this case was not an erroneous refund as defined in the Division's regulations, and the limitations period of Tax Law § 683(c)(5) is not applicable herein. Moreover, even if the refund in question was an erroneous refund, whether it was induced by fraud or misrepresentation is irrelevant since the Notice of Deficiency was issued within two years from the date the refund was made.

G. Pursuant to 20 NYCRR 120.2(a)[2], petitioners were required to "immediately notify" the Division of the Commonwealth of Massachusetts' redetermination of their Massachusetts tax liability and the corresponding reduction of the amount of New York resident credit to which they were entitled. Petitioners did not notify the Division of this change as required. Petitioners' failure, however, was immaterial in this case because the statute of limitations had run by the time Massachusetts notified petitioners of the reduction in their tax liability. Specifically, the three-year period expired on October 15, 1993, and Massachusetts notified petitioners subsequent to the issuance of the refund on July 22, 1994.

H. It is observed that the controlling law and result in this case contrasts sharply with the situation involving changes to a taxpayer's Federal taxable income. Similar to the Division's regulation which requires taxpayers to report changes in their tax liability to another state (20 NYCRR 120.2[a]), Tax Law § 659 requires taxpayers to report changes, corrections or disallowances in Federal taxable income. In contrast to the situation involving the resident credit, however, where a taxpayer fails to report such Federal changes the Division may assess additional income tax arising from the Federal changes at any time - there is no statute of limitations (*see*, Tax Law § 683[c][1][C]). There is no similar exception to the three-year limitations period for failure to report changes in a taxpayer's liability to another state.

---

[2] 20 NYCRR 120.2(a) provides in pertinent part:

"If a taxpayer on his New York State personal income tax return claims a credit . . . for the income tax or taxes (or any portion thereof) of another jurisdiction, and it is later determined that the amount of such tax or taxes (or the portion for which credit was claimed) is more or less than the amount of credit claimed on the taxpayer's New York State personal income tax return, he must immediately notify the Income Tax Section of the Audit Division of the New York State Department of Taxation and Finance. . . ."

.

Accordingly, pursuant to the explicit language of Tax Law § 683(a), the three-year statute of limitations is applicable herein and the subject Notice of Deficiency was untimely.

I. The petition of Philip Mayerson and Joy G. Ungerleider Mayerson (Deceased) is granted and the Notice of Deficiency dated December 12, 1994 is canceled.

DATED: Troy, New York
January 12, 1998

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE