

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LEONARD A. AND ROSALIE WALKER	:	
for Redetermination of a Deficiency or for Refund of	:	DETERMINATION
Personal Income Tax under Article 22 of the Tax Law	:	DTA NO. 816403
for the Year 1990.	:	

Petitioners, Leonard A. and Rosalie Walker, 992 Mercer Road, Princeton, New Jersey 08540, 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 1990.

Pursuant to 20 NYCRR 3000.9(b), by a motion dated June 15, 1998, petitioners moved for summary determination on the grounds that there were no material and triable issues of fact presented by the pleadings, and the undisputed facts mandated a finding in petitioners' favor. By answering papers dated July 13, 1998, the Division of Taxation requested summary determination in its favor. Papers in reply dated August 12, 1998, which commenced the 90-day period for issuance of this determination, were submitted by petitioners. Petitioner Leonard A. Walker appeared *pro se* and for his wife, Rosalie Walker. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel). After due consideration of the record, Frank W. Barrie, Administrative Law Judge, hereby renders the following determination.

ISSUE

Whether the Division of Taxation properly disallowed petitioners' claim for refund of personal income taxes for the year 1990.

FINDINGS OF FACT

1. Petitioners failed to file a timely New York State income tax return for 1990.

2. Petitioners filed a New York State income tax return for 1990 on November 10, 1994.

By this late-filed return, petitioners sought a refund of 1990 income tax in the amount of \$766.00, representing income tax that had been overwithheld during 1990 from the wages of one of the petitioners. A copy of the 1990 income tax return was not made a part of the record created by the parties, reflecting the fact that the factual record is limited.¹

3. The Division contends that the due date for petitioners' filing of their 1990 income tax return was extended to August 15, 1991. In an affidavit dated July 13, 1998, a Tax Technician II, Charles Bellamy, stated that he "personally checked the [Department's] master records for the extensions petitioner referred to in the petition." According to Mr. Bellamy:

3. In this case, the Department's records reflect that petitioner filed only one extension with New York State to file his 1990 return. This entitled the petitioner to one 4-month extension to file his return.

4. Petitioner may have filed other forms for extensions with the federal government. However, forms filed with the federal government do not automatically extend the New York deadline. Taxpayers must file either the New York extension form (IT-370) or the federal form clearly marked "New York State Copy" in the top margin.

* * *

8. Consequently, petitioner's 1990 return was due August 15, 1991, and the latest date petitioner could file for a refund was August 15, 1994.

¹Nonetheless, as noted in the Conclusions of Law, it is possible to render a determination based upon the limited facts that may be established from a review of the record.

4. In contrast, petitioners argue that the due date for their 1990 tax return had been extended to November 15, 1991. In addition to the four-month extension until August 15, 1991 noted by the Division, petitioners maintain that they obtained a two-month extension until October 15, 1991 by filing a Federal form 2188 and an additional 30-day extension until November 15, 1991 pursuant to a phone conversation on July 18, 1994 with an employee of the Division referred to by petitioners as Mr. Jegabbi. Petitioner Leonard A. Walker by a letter dated August 30, 1994 referenced his phone conversation with Mr. Jegabbi as follows:

By telephone on July 18, 1994, you were considerate enough to allow me thirty (30) days' time in which to respond to the above-referenced inquiry.²

5. Petitioners' late-filed return for 1990 was treated by the Division as a claim for refund of \$766.00. The Division denied this refund claim as untimely.³

CONCLUSIONS OF LAW

A. 20 NYCRR 3000.9(b) provides, in part, as follows:

After issue has been joined . . . , any party may move for summary determination. . . . The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact.

B. The record on this motion is bare concerning certain relevant facts, as noted in Finding of Fact "2". However, there are no material and triable issues of fact that would necessitate a hearing. The Division did not show facts sufficient to require a hearing of any issue of fact in its

²This letter referenced a case # X-270278011 involving tax years 1990, 1991, and 1992.

³The Division's letter denying petitioners' refund claim was not made a part of the record. Included in the record is a letter dated December 10, 1996 from a Tax Technician II, Dorothy Doucet, which elaborated on the Division's reasons for denying the claim by referencing prior decisions of the State Tax Commission and the Tax Appeals Tribunal.

response to petitioners' motion for summary determination. Rather, the Division in its response to petitioners' motion has requested summary determination in its favor. Consequently, a summary determination can be made herein as a matter of law.

C. Pursuant to Tax Law § 687(i), "any income tax withheld from the taxpayer during any calendar year . . . shall be deemed to have been paid by him on the fifteenth day of the fourth month following the close of his taxable year" Consequently, the \$766.00 withheld from one of the petitioner's wages during 1990 is properly deemed to have been paid by petitioners on April 15, 1991 (*see, Matter of Savadjian*, Tax Appeals Tribunal, December 28, 1990; *see also Davison v. Commissioner*, 64 TCM 1517, *affd* 9 F3d 1538 [wherein the Tax Court interpreted the comparable Federal provision at I.R.C. § 6513(b)(1) in a similar fashion]).

D. Pursuant to Tax Law § 687(a), a limitations period is imposed upon taxpayers who wish to claim a refund of an overpayment of income tax as follows:

Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within two years from the time the tax was paid. If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return. . . .

E. The Tax Appeals Tribunal in *Matter of Burkhardt* (January 9, 1997) noted that New York's income tax refund procedures have been recognized as a "constitutionally sound scheme which . . . simultaneously [respected] the State's fisc [citation omitted]." Consequently, the limitations period detailed in Conclusion of Law "C" is properly applied to petitioners.

F. As noted in Finding of Fact "2", petitioners filed their 1990 New York income tax return on November 10, 1994. This return was properly treated by the Division as a claim for

refund (*cf.*, *Matter of Miles*, Tax Appeals Tribunal, September 13, 1990). Further, since the Division received petitioners' 1990 tax return and their claim for refund, which was contained therein, on the same day, i.e., November 10, 1994, petitioners' claim for refund was therefore "within three years from the time the return was filed," and under Tax Law § 687(a), "the amount of the . . . refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return."

G. As noted in Finding of Fact "3", the Division maintains that the extension period for filing the 1990 return was limited to four months. Petitioners, on the other hand, contend that the extension period was until November 15, 1991, i.e., 6 months plus 30 days. Initially, it is noted that based on the factual record created for this motion, it is not possible to resolve whether petitioners obtained a two-month extension until October 15, 1991 by filing a Federal form 2188 with the State. However, even if it was determined that petitioners did, in fact, obtain such two-month extension, their claim for refund would be untimely unless a finding can also be made that they obtained a third extension consisting of 30 days to November 15, 1991.

H. Petitioners' contention that they obtained a third extension consisting of 30 days to November 15, 1991 is rejected. The letter dated August 30, 1994 of petitioner Leonard A. Walker, as detailed in Finding of Fact "4", does not represent an extension to file petitioners' 1990 income tax return, which at the time of the letter of August 30, 1994 was years late. Consequently, petitioners' claim for refund of November 10, 1994 was untimely filed. At best, even if petitioners could be found to have obtained the second extension of two months, which would have meant their 1990 return was due on October 15, 1991, their claim for refund was still filed more than three weeks after the period of limitation of three years plus an extension of six months had run.

I. The motion for summary determination of Leonard A. and Rosalie Walker is denied. The cross-motion for summary determination of the Division of Taxation is granted, and the Division's denial of petitioners' claim for refund is sustained.

DATED: Troy, New York
October 1, 1998

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE