

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>JAMES AND BARBARA PAYNE</b>	:	DETERMINATION DTA NO. 816905
for Redetermination of a Deficiency or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1972, 1973, 1976, 1980, 1981, 1984, 1987, 1988 and 1989.	:	

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Petitioners, James and Barbara Payne, 239 Dakota Street, Paterson, New Jersey 07503, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1972, 1973, 1976, 1980, 1981, 1984, 1987, 1988 and 1989.

A hearing was held before Roberta Moseley Nero, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 13, 1999 at 10:30 A.M., with all briefs to be submitted by February 7, 2000, which date began the six-month period for the issuance of this determination. Petitioners appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Kathleen D. Chase, Esq., of counsel).

***ISSUES***

I. Whether petitioners made certain payments with respect to their income tax liabilities and if so, whether the Division of Taxation gave petitioners proper credit for such payments.

II. Whether petitioners' refund claim is barred by the time limitations set forth in Tax Law § 687(a), and if not, whether petitioners have proven that they are entitled to a refund.

### ***FINDINGS OF FACT***

The Division of Taxation proposed 67 findings of fact pursuant to 20 NYCRR 3000.15(d)(6). Proposed Findings of Fact "1" through "3", "34", "63" and "64" have been substantially adopted in this determination with only slight changes in the wording. Proposed Findings of Fact "13" through "16", "25", "38" through "40", "45" through "47", "52" through "54", and "59" through "62" have been partially adopted in this determination to the extent that they were supported by the evidence in the record and partially disregarded to the extent that they were not supported by the evidence in the record. Proposed Findings of Fact "4" through "12", "17" through "24", "26", "27" through "33", "35" through "37", "41" through "44", "48" through "51" and "55" through "58" have been disregarded as not supported by the evidence in the record. Proposed Finding of Fact "67" has been disregarded as unnecessary.

### ***General Background***

1. During the tax years at issue herein, petitioners resided in the State of New York.
2. During the tax years at issue herein, petitioner James Payne was employed in the State of New Jersey.
3. During the tax years at issue herein, petitioner Barbara Payne was employed by Irving Trust Company, One Wall Street, New York, New York.

### ***1972 Tax Year***

4. Petitioners failed to file a 1972 New York State Resident Income Tax Return (form IT-201). The Division of Taxation ("Division") sent a letter to petitioners dated August 15, 1974 regarding their failure to file such return.

5. When petitioners failed to respond to the Division's letter dated August 15, 1974, the Division issued a Statement of Audit Changes dated January 26, 1976 wherein petitioners' tax liability for the 1972 tax year was calculated utilizing information on file with the Division.

6. A Notice and Demand was authorized to be issued on July 21, 1976. Sometime between July 21, 1976 and February 11, 1997, Notice and Demand (notice No. L-000711817) was issued for \$817.60 in tax, plus penalty and interest. As of February 11, 1997 the interest due was \$4,624.79 and the penalty due amounted to \$388.30. After application of a payment of \$834.47 there was a balance remaining due on Notice and Demand No. L-000711817 of \$4,996.22 as of that date.

7. The Division issued a Statement of Income Tax Refund dated May 21, 1997 to petitioner Barbara Payne. The statement explained that her 1996 personal income tax refund of \$250.00 had been applied to the outstanding balance on Notice and Demand No. L-000711817.

8. The Division executed a levy against petitioners' bank accounts. On October 22, 1997, a payment in the amount of \$1,023.94 was made by the Bank of New York to the Division to be applied to the outstanding balance on Notice and Demand No. L-000711817.

#### *1973 Tax Year*

9. Petitioners failed to file a timely 1973 New York State Resident Income Tax Return (form IT-201). The Division sent several letters to petitioners regarding their 1973 tax liability.

10. When petitioners failed to respond to the Division's letters, the Division issued a Statement of Audit Changes dated May 23, 1977, wherein petitioners' tax liability for the 1973 tax year was calculated utilizing information obtained from the Internal Revenue Service.

11. A Notice and Demand was authorized to be issued on September 27, 1977. Sometime between September 27, 1977 and June 4, 1991, Notice and Demand (notice No. L-000748666) was issued for \$759.08 in tax, plus penalty and interest.

12. On June 4, 1991 petitioners mailed or delivered a payment of \$15,501.74 to the Division.

13. The Division applied \$3,543.94 of the \$15,501.74 payment to Notice and Demand No. L-000748666 (tax, plus accrued penalties and interest) and closed the notice as fully paid.

*1976 Tax Year*

14. Petitioners filed a timely 1976 New York Resident Tax Return (form IT-201/208) indicating a balance of tax due in the amount of \$328.41.

15. No remittance accompanied petitioners' 1976 return.

16. Sometime between when petitioners filed their return and February 11, 1997, the Division issued two notices and demands (Nos. L-000718463 [New York State] and L-000718464 [New York City]) for the combined New York State ("State") and New York City ("City") tax shown to be due on petitioners' 1976 return of \$328.41, plus penalties and interest. As of February 11, 1997 the combined State and City interest due was \$1,512.13, and the combined State and City penalty due amounted to \$81.67.

17. Petitioners were given credit for the amount of taxes claimed to have been withheld from petitioners' W-2 wages on their 1976 return. Petitioners also received the resident tax credit for taxes paid to New Jersey that they claimed on their 1976 return.

*1980 Tax Year*

18. Sometime between 1981 and February 11, 1997, the Division issued two notices and demands (Nos. L-000715286 and L-000715287) to petitioners for the 1980 tax year for a

combined balance due of \$429.00 in tax. As of February 11, 1997 the combined interest due was \$1,478.64 and the combined penalty due amounted to \$203.77. As of the same date no payments had been applied to either notice. As of October 12, 1999, Notice and Demand No. L-000715287 was closed by the Division, but Notice and Demand No. L-000715286 remained open with a balance due.

*1981 Tax Year*

19. Sometime between 1982 and February 11, 1997, the Division issued two notices and demands (Nos. L-000715288 and L-000715289) to petitioners for the 1981 tax year for a combined balance due of \$470.00 in tax. As of February 11, 1997 the combined interest due was \$1,457.90 and the combined penalty due amounted to \$223.25. As of the same date no payments had been applied to either notice. As of October 12, 1999, notices and demands Nos. L-000715288 and L-000715289 remained open.

*1984 Tax Year*

20. Sometime between 1985 and June 4, 1991, the Division issued two notices and demands (Nos. L-000724787 and L-000724788) to petitioners for the 1984 tax year.

21. On June 4, 1991, petitioners mailed or delivered a payment totaling \$15,501.74 to the Division. (This is the same payment as referenced in Finding of Fact “12”.)

22. The Division applied \$7,976.93 of the \$15,501.74 payment to notices and demands Nos. L-000724787 and L-000724788 (tax, plus accrued interest and penalties).

23. The Division abated the balance due on Notice and Demand No. L-000724787 on June 4, 1991, and on the same date closed notices and demands Nos. L-000724787 and L-000724788 as fully paid.

*1987 Tax Year*

24. Sometime between 1988 and June 4, 1991, the Division issued a Notice and Demand (No. L-000722935) to petitioners for the 1987 tax year.

25. On June 4, 1991, petitioners mailed or delivered a payment totaling \$15,501.74 to the Division. (This is the same payment as referenced in Findings of Fact “12” and “21”.)

26. The Division applied \$956.76 of the \$15,501.74 payment to Notice and Demand No. L-000722935 (tax, plus accrued interest and penalties).

27. The Division abated the balance due and closed Notice and Demand No. L-000722935 as fully paid on June 4, 1991.

*1988 Tax Year*

28. Sometime between 1989 and June 4, 1991, the Division issued a Notice and Demand (No. L-001173600) to petitioners for the 1988 tax year.

29. On June 4, 1991, petitioners mailed or delivered a payment totaling \$15,501.74 to the Division. (This is the same payment as referenced in Findings of Fact “12”, “21” and “25”.)

30. The Division applied \$632.58 of the \$15,501.74 payment to Notice and Demand No. L-001173600 (tax, plus accrued interest and penalties).

31. The Division abated the balance due and closed Notice and Demand No. L-0007222935 as fully paid on June 4, 1991.

*1989 Tax Year*

32. Sometime between 1990 and June 4, 1991, the Division issued a Notice and Demand (No. L-001689182) to petitioners for the 1989 tax year.

33. On June 4, 1991, petitioners mailed or delivered a payment totaling \$15,501.74 to the Division. (This is the same payment as referenced in Findings of Fact “12”, “21”, “25” and “29”).)

34. The Division applied \$2,391.53 of the \$15,501.74 payment to Notice and Demand No. L-001689182.

35. The Division abated the balance due and closed Notice and Demand No. L-001689182 as fully paid on June 4, 1991.

#### *Procedural Background*

36. Petitioners filed a refund claim in the amount of \$15,501.74 for the tax years 1973, 1984 and 1987 through 1989. The Division issued a Notice of Disallowance to petitioners dated June 13, 1997 wherein it was stated that the reason for the disallowance of petitioners' claim for refund was failure to file the claim within three years from the date the return was due or two years from the date the tax was paid, whichever is later.

37. Petitioners filed a Request for Conciliation Conference which included a request that their protest regarding the Notice of Disallowance dated June 13, 1997 be associated with a pending case, presumably covering the tax years 1972, 1976, 1980 and 1981 since these years were listed on the Conciliation Order together with the years 1973, 1984 and 1987 through 1989. The Conciliation Order, dated November 13, 1998 sustained the Division's notices (L-000715286 [1980], L-000715288 [1981], L-00715289 [1981], L-000718463 [1976], L-000718464 [1976] and L-000711817 [1972]) and denied petitioners' request for a refund.

38. A petition was filed with the Division of Tax Appeals on January 7, 1999 contesting the conciliation order.<sup>1</sup>

*Additional Payment History*

39. Petitioners paid \$5,777.29<sup>2</sup> in income taxes by personal checks between May of 1986 and April of 1996,<sup>3</sup> as follows:

<i>Check Number</i>	<i>Amount</i>	<i>Payment Date</i>
509	\$1,574.80	May 8, 1986
111	\$ 88.40	January 23, 1987
130	\$ 240.00	May 8, 1987
138	\$ 242.00	June 29, 1987
156	\$ 242.00	October 9, 1987
159	\$ 2.75	November 3, 1987
174	\$ 200.00	January 26, 1988
175	\$ 242.00	January 28, 1988
190	\$ 200.00	March 7, 1988
198	\$ 200.00	April 5, 1988
207	\$ 550.00	May 6, 1988
221	\$ 550.00	July 11, 1988
253	\$ 550.00	November 10, 1988
353	\$ 550.00	May 31, 1990
829	\$ 89.15	April 18, 1994
145	\$ 256.19	April 18, 1996
Total	\$5,777.29	

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<sup>1</sup>The Division's assertion that the 1973 tax year was not included in the petition is rejected since a copy of the conciliation order was attached to the petition.

<sup>2</sup>Petitioners submitted two additional checks not included in this total. Check number 709 in the amount of \$203.88 specifically noted that it was for "1992 Income tax" and 1992 is not at issue in the present matter. Check number 830 in the amount of \$257.00 was not included because it was payable to the Internal Revenue Service.

<sup>3</sup>The payment date is the earliest date stamp on the face of each check whether a Division stamp or a bank stamp.



40. In summary, the Division has closed as fully paid the notices at issue for the tax years 1973, 1984 and 1987 through 1989. As of February 11, 1997, the latest evidence in the record regarding the amount of outstanding liabilities indicates that there were open liabilities for the years 1972, 1976, 1980 and 1981 reflecting a total due of \$11,180.99 in tax, penalty and interest. At least two other payments totaling \$2,273.94 made after February 11, 1997 were applied to petitioners' tax liability for the 1972 tax year (Finding of Facts "7" and "8").

### ***SUMMARY OF THE PARTIES' POSITIONS***

41. Petitioners argue that the Division has not given them sufficient credit for all of the payments they have made for the tax years in question. In particular they assert that all returns were timely filed and paid and that additional payments were made including a \$15,501.74 payment on June 4, 1991, a \$5,878.58 payment resulting from the garnishment of petitioner Barbara Payne's wages, a \$250.00 payment by application of a later year tax refund, a payment of \$1,023.94 resulting from a levy against petitioners' bank account and various other payments made by personal check. Petitioners assert that the Division issued double assessments for the years 1976, 1980, 1981 and 1984 and that they did not get credit for taxes paid to the state of New Jersey. Petitioners claim that they did not discover that they had overpaid their taxes until February of 1997, and that the Division should not be unjustly enriched by denying their refund claim on the theory that it was filed after the expiration of the statute of limitations (Tax Law § 687[a]). They ask that pursuant to the Division's special refund authority (Tax Law § 697[d]), the outstanding assessments for the years 1972, 1976, 1980 and 1981 be corrected to show a zero balance due and a refund be issued to them for the years 1973,<sup>4</sup> 1984, 1987, 1988 and 1989.

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<sup>4</sup>Petitioners' argument includes the year 1973 as an outstanding assessment. However, since it is clearly a fully paid closed assessment, I have included it in petitioners' refund argument.

42. The Division argues that petitioners' refund claim is time barred pursuant to Tax Law § 687(a) which provides that a claim for refund be filed within three years after a return is filed or two years from when the tax was paid whichever is later. The Division points to the facts that petitioners' refund claim was filed in 1997 which was six years after the \$15,501.74 payment was made, approximately six years after the latest garnishment of petitioner Barbara Payne's wages and, with the exception of one check, approximately three years after any payments made by personal check. With regard to the one check dated April 14, 1996, and the remainder of the checks also, the Division argues that petitioners have not proven that the checks were submitted for the purpose of paying the assessments at issue herein. Finally, the Division argues that petitioners' reliance on Tax Law § 697(d) is misplaced since the Commissioner of Taxation and Finance's authority to grant a refund pursuant to this section is discretionary and not mandatory and the circumstances of the present case, where petitioners could have filed a timely refund but simply failed to do so, do not warrant exercise of that discretion.<sup>5</sup>

### ***CONCLUSIONS OF LAW***

A. The first issue to be addressed is whether petitioners have been given credit for all of the payments they made for the years at issue. While petitioners did not use the terminology, what they presented is an application of payments case and the Division of Tax Appeals has the jurisdiction to review the records in the case, and determine if petitioners received proper credit for their payments (*Matter of O'Connor*, Tax Appeals Tribunal, February 24, 1994).

B. Petitioners assert that returns for the years at issue were timely filed and paid. In support of this assertion petitioners submitted copies of tax returns and petitioner James Payne testified that the returns were timely filed and paid. With the exception of the copy of the

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<sup>5</sup>The Division's argument that the doctrine of equitable recoupment does not apply to the present circumstances will not be addressed since it was not raised or addressed by petitioners.

1976 New York Resident Tax Return,<sup>6</sup> there was no proof of mailing or any other evidence offered by petitioners tending to show that the Division ever received these returns, much less that they were timely filed. For 1980 petitioners did not even submit a New York State return, but provided only a copy of a Federal 1040 tax return. Even had petitioners shown the returns were timely filed, there is no proof in the record that payments were timely received.

Petitioners have provided no copies of canceled checks where the date and amounts of the checks correspond to the copies of the returns submitted by petitioners. With little probative evidence submitted by petitioners, they are left only with the testimony of petitioner James Payne that the returns were timely filed and paid. This unsupported testimony is not enough to prove that timely payments were received by the Division (*see, Matter of Savadjian*, Tax Appeals Tribunal, December 28, 1990).

C. As detailed in Finding of Facts “12”, “13” and “20” through “35” the Division has adequately explained how the June 4, 1991 payment of \$15,501.74 was applied to petitioners’ 1973, 1984, 1987, 1988 and 1989 tax liabilities and how the notices for these years were all closed as fully paid. This explanation was provided by the affidavit of Bradley Fear, an account clerk who has been employed by the Division in its Assessments Receivable Management Unit since 1988. Mr. Fear’s affidavit, together with an attachment consisting of a printout of computer records, specifically shows to which liabilities and in what amounts this payment was applied.

D. Petitioners assert that payments were also made through the garnishment of petitioner Barbara Payne’s wages and submitted pay stubs in support of this assertion. The pay stubs show a deduction from the paychecks of \$87.74 which on some is labeled

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<sup>6</sup>As indicated by Findings of Fact “14” through “17” the copy of the 1976 return was accepted as a return that had been received by the Division. There were markings on the space marked “For office use only” that indicated the return had been received by the Division and the Division did not contest the fact that the return had been timely filed.

“GARNISHMNT” [sic] and in others is labeled “ASSIGNMT” [sic]. Petitioners have provided no further information. It is simply impossible to determine from these pay stubs either the source of the garnishment or if the Division received these funds. Therefore, petitioners have failed to prove that these payments were made to the Division (*see*, Tax Law § 689[e]).

E. As set forth in Findings of Fact “7” and “8” both the \$250.00 from petitioner Barbara Payne’s 1996 personal income tax refund and the \$1,023.94 the Division obtained from a bank levy against petitioners’ accounts were applied to the open assessment for the tax year 1972. This application was shown in detail by documents submitted by petitioners regarding each incident.

F. Petitioners also paid \$5,777.29 in income taxes by personal check between May of 1986 and April of 1996 as detailed in Finding of Fact “39”. The Division argues that petitioners have not proven that these checks were submitted as payment for the tax liabilities for the years at issue in the present proceeding. I disagree with the Division that petitioners were required to make such a showing in the first instance. Petitioners want to insure that they have received credit for all of their tax payments. To this end they presented canceled checks at the hearing. All of the checks were for income tax and were cashed by the Division. Since these checks were presented to the Division for the first time at the hearing, the Division requested that the record remain open after the hearing so that it could respond to this evidence with evidence of its own. This request was granted, but the Division provided neither any additional evidence regarding the application of the payments represented by these checks nor any explanation as to why it could not provide this evidence. Furthermore, this lack of a response is all the more unsettling when contrasted with the Division’s detailed explanation of

the application of the \$15,501.74 payment discussed in Conclusion of Law “C”. In the face of petitioners’ evidence, the Division was required to respond (*Matter of O’Connor, supra; see also, Matter of Mutual Life Ins. Co. of New York v. New York State Tax Commn.*, 142 AD2d 41, 534 NYS2d 565). In light of the Division’s failure to respond to petitioners’ evidence, it is concluded that petitioners have proven payments in the amount of \$5,777.29 to be applied to the tax years with open liabilities, i.e., 1972, 1976, 1980 and 1981. The Division is directed to credit petitioners with such payments as of the date the payments were made as set forth in the table in Finding of Fact “39”.

G. The second issue to be addressed is whether petitioners’ refund claim is barred by the time limitations set forth in Tax Law § 687(a), and if not, whether petitioners have proven that they are entitled to a refund. The refund claim is not in evidence. The Division did submit into evidence a copy of its Notice of Disallowance of petitioners’ refund claim dated June 13, 1997 from which it can be inferred that the claim existed. However, for the Division to prove that the claim is prohibited by Tax Law § 687(a) it must establish when the refund claim was filed (*see, Matter of Jencon*, Tax Appeals Tribunal, December 20, 1990 [party raising statute of limitations must show receipt or mailing after statutory period has expired]). The record is completely devoid of any evidence regarding the date the refund claim was filed.<sup>7</sup> Therefore, petitioners’ claim for refund is not prohibited by the time limitations set forth in Tax Law § 687(a).

H. The final question is whether petitioners have proven that they are entitled to a refund for the years 1973, 1984, and 1987 through 1989 which have been closed as fully paid

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<sup>7</sup>Both petitioners and the Division make various assertions as to when the refund claim was filed, but assertions in documents such as requests for conciliation conference or proposed findings of fact in a brief are simply assertions, not evidence.

by the Division. Pursuant to Conclusions of Law “B” through “F”, petitioners have been credited for all payments that they were able to prove. Therefore, to be entitled to a refund petitioners must prove that they did not owe the amount of tax originally asserted by the Division in the paid notices.

I. Petitioners argue that the Division issued double assessments for the tax year 1984. Petitioners base this assertion simply on the existence of two separate notices for 1984. The existence of two personal income tax notices for the same year does not prove that the Division assessed the same tax twice. There is no proof in the record before me that petitioners were issued two notices for the same tax for the tax year 1984.<sup>8</sup> Therefore, the portion of petitioners’ refund claim based upon this argument must fail (*see, Matter of Linker-Martin*, Tax Appeals Tribunal, September 3, 1998).

Petitioners also argue that they were not given credit for taxes paid to the State of New Jersey. For the years at issue in petitioners’ refund claim (1973, 1984, and 1987 through 1989) I have no evidence from which I can determine whether petitioners were given credit for taxes paid to New Jersey or not.<sup>9</sup> It was petitioners’ burden pursuant to Tax Law § 689(e) to prove that they were entitled to a refund because the Division did not allow the proper credits. Having no evidence that the Division did not allow such credits, I must hold that petitioners have failed to meet their burden of proof (*see, Matter of Linker-Martin, supra*).

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<sup>8</sup>The Division in its proposed statement of facts included facts that would have explained the existence of two notices for one tax year. However, there was no evidence to support those facts. The Division also asserted that it presumed some of petitioners’ records were destroyed pursuant to “the expiration of the three-year statutory period for the retention of records.” However, there is no evidence that Division even looked for the records or any evidence regarding the Division’s procedures on records destruction. Tax Law §697(e)(3) merely provides that “Reports and returns shall be preserved for three years and thereafter until the commissioner orders them to be destroyed.”

<sup>9</sup>The Division in its proposed findings of facts asserted that petitioners were given credit for taxes paid to the State of New Jersey. Again, there was no reliable evidence proffered in support of this assertion.

J. The petition of James and Barbara Payne is granted to the extent that the Division is directed to apply certain payments to their outstanding tax liabilities pursuant to Conclusion of Law "F", but is in all other respects denied. The Notice of Disallowance of the refund claim of James and Barbara Payne dated June 13, 1997 is sustained and the refund claim is disallowed. The Notices and Demands issued to James and Barbara Payne for the tax years 1972, 1973, 1976, 1980, 1981, 1984, 1987, 1988 and 1989 are sustained.

DATED: Troy, New York  
July 13, 2000

/s/ Roberta Moseley Nero  
ADMINISTRATIVE LAW JUDGE