STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
LEONARD AND LUCILLE MERKOWITZ	:	DETERMINATION DTA NOS. 819012 AND 819928
for Redetermination of Deficiencies 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 1975, 1977, 1978, 1979, 1980, 1981, 1982, 1991 and 1992.	:	

Petitioners, Leonard and Lucille Merkowitz, 192-04 L 71 Crescent, Fresh Meadows, New York 11365, filed petitions for redetermination of deficiencies 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 1975, 1977, 1978, 1979, 1980, 1981, 1982, 1991 and 1992.

On April 1, 2005 and May 4, 2005, respectively, petitioners, appearing *pro se,* and the Division of Taxation, appearing by Christopher C. O'Brien, Esq. (Michelle M. Helm, Esq., of counsel), consented to have the controversy determined on submission without a hearing. All documentary evidence and briefs were submitted by August 25, 2005, which date began the six-month period for issuance of this determination. After due consideration of the record, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation's notices of additional tax due issued for 1975, 1977, 1978, 1979, 1980 and 1981 should be sustained.

II. Whether the Division of Taxation's denial of refunds for the years 1982, 1991 and 1992 should be sustained.

FINDINGS OF FACT

1. This matter involves two separate and distinct petitions. The first, DTA No. 819012, involves the years 1980 and 1981. The Division issued to petitioner Leonard Merkowitz two notices of additional tax due, dated May 4, 2000. The first, assessment number L-017674359-4, set forth additional tax due for the year 1980 in the sum of $489.00 plus interest, which was due to unreported Federal changes for the same period. The second notice, assessment number L-017674360-4, set forth additional tax due for the year 1981 in the sum of $577.00 plus interest, which also was asserted for unreported Federal changes.

2. A conciliation order, dated February 1, 2002, sustained the statutory notice for the year 1980 and canceled the notice for 1981. A footnote on the order stated that the 1981 overpayment in the amount of $11,060.00 plus applicable interest was available as an offset against outstanding assessments for the years 1977, 1978 and 1979.

3. Petitioners filed a petition, dated April 29, 2002, with the Division of Tax Appeals in response to the conciliation order. In the petition, other than noting that the conciliation order incorrectly included Lucille Merkowitz when she was not listed on the notice of additional tax due for 1980, petitioners did not contest the tax determined to be due for 1980. Although the Notice of Additional Tax Due for 1981 was canceled, petitioners claimed that they were not apprised of the calculations that led to that cancellation and questioned the accuracy of the calculations. In addition, petitioners contended that 1982 should have been included in any revision for 1981 since the Federal information included information on 1982 as well, although petitioners conceded the tax year 1982 was not "docketed" by the Internal Revenue Service.

4. Petitioners entered into a stipulation of settlement with the Internal Revenue Service for the years 1980 and 1981 on July 21, 1993 which resulted in adjustments to petitioners' income for those years. These changes were never reported to the State of New York.

5. The second petition filed by petitioners, dated March 15, 2004 and assigned DTA No. 819928, concerned petitioners' New York State and New York City personal income taxes for the years 1975, 1977, 1978, 1979, 1982 , 1991 and 1992.

6. The Division issued notices of additional tax due to petitioners for the years 1975, 1977, 1978 and 1979 for additional tax that was due because petitioners did not report changes to their Federal returns for each of these years as required by Tax Law § 659. The notices issued are set forth on the following table:

Year	Date	Notice Number	NYS Tax Due	NYC Tax Due	Interest	Payment	Total Due
1975	3/21/2002	L-020712942	$1,663.00	-	$10,163.94	$0.00	$11,826.94
1977	6/17/2002	L-021133592	4,218.00	1,294.00	1,840.00	7,352.00	$0.00
1978	6/10/2002	L-021089455	4,931.00	1,711.00	19,734.50	3,808.00	$22,568.50
1979	3/25/2002	L-020715470	3,181.00	972.00	19,328.77	0.00	$23,471.77

7. After a conciliation conference in the Bureau of Conciliation and Mediation Services ("BCMS"), an order was issued, dated December 26, 2003, which reduced the total tax due for the years 1975, 1977 and 1978 to $12,981.00 plus interest. The reduction was due to the application of the maximum tax benefit on personal service income that reduced New York State and New York City taxes for 1978. The order stated that previous payments of $11,160.00 had been applied to the notices for the years 1975, 1977 and 1978. On the conferee's worksheet attached to the order it noted that for 1975 interest had been computed on the tax from the date the return was filed, June 16, 1976, to December 10, 2003. There was no mention of interest computation for 1977 or 1978. However, in a "Response to Taxpayer Inquiry," dated June 26,

2000, addressed to Leonard Merkowitz, the Division explained to him that interest for 1977 had been computed from January 15, 1979 and that interest for 1978 had been computed from January 15, 1980. The Response noted that these computations were based on the Division's interpretation of Revenue Ruling 99-40, which directed that interest be computed from the due date of the fourth installment period of each succeeding year's estimated tax account.

8. A second conciliation order, dated December 26, 2003, was issued with respect to the year 1979 which adjusted the tax due for that year to $3,870.00 plus interest. A worksheet attached to the order indicated that interest had been computed from the date the return was filed, October 20, 1980, to December 10, 2003.

9. On January 31, 2001, petitioners filed amended resident income tax returns for the years 1991 and 1992, seeking a refund of $487.00 for 1991 and $4,310.00 for 1992. The basis of the claims was an error in reporting pension and annuity income exclusions for both years which led to an overpayment of tax.

10. By letter, dated March 13, 2001, the Division denied the claims, stating that they were untimely since they were not filed within three years of the date on which the returns for 1991 and 1992 were required to be filed or within two years from the time the tax was paid for those periods. A conciliation order, dated December 26, 2003, sustained the refund denial.

11. On September 22, 2003, petitioners filed an amended resident income tax return for the year 1982, wherein they reported Federal changes that were related to an Internal Revenue Service audit statement dated July 8, 1996. Petitioners sought a refund of an overpayment for the year 1982 in the sum of $2,361.00.

12. By letter dated December 29, 2003, the Division denied the refund application because it was not filed in a timely manner, i.e., within two years from the time the notice of

such change or correction was required to be filed with the Division. The Division explained that since the law required a report of Federal changes within 90 days after the final determination, petitioners should have reported the Federal changes within 90 days of July 8, 1996, and then filed an application for refund within two years of that date. However, petitioners failed to do so.

SUMMARY OF THE PARTIES' POSITIONS

13. Petitioners argue that the interest calculations for the years 1977, 1978 and 1979 are incorrect because in 1977 there was a credit balance carried forward from a previous year or years which must be absorbed by subsequent years before interest can be calculated. Petitioners also argue that they should receive interest for the period of time there was a credit balance outstanding. Petitioners argue that ***Matter of Unicorp American Corporation*** (Tax Appeals Tribunal, December 28, 1995) supports their position on this issue.

14. Petitioners contend that for the year 1981 they should have been credited with $437.00 which represents interest, or the difference between the tax paid per the Division's records and the credits for a carryforward from 1980 and tax paid with the 1981 return.

15. Petitioners argue that an overpayment should have been recorded for 1982 when the Division was adjusting the income for 1981 and 1980. Petitioners point out that the Internal Revenue Service made adjustments to 1982 even though it was not "docketed" before it. Petitioners claim that they filed a New York State tax protective claim for refund at the time of the Federal adjustments, but have no record of same. They argue that the existence of a Federal protective claim is proof that they filed one for New York State.

16. For the years 1991 and 1992, petitioners claim that the fact that there were capital loss carry-overs held the period open for their amended returns and the refund applications contained

therein, which were based on petitioners' failure to deduct their IRA distributions in each of the two years.

17. The Division of Taxation argues that it properly issued notices of additional taxes due to petitioners for 1975, 1977, 1978, 1979, 1980 and 1981, because they failed to report Federal changes and now bear the burden of proof to show that the assessments were unreasonable or inaccurate. It is the Division's position that petitioners have not demonstrated that the notices were incorrect and that they owed the tax and interest assessed. In addition, the petitioners have not shown that the interest was not calculated correctly, consistent with Revenue Ruling 99-40.

18. The Division contends that petitioners' refund request for 1982 was untimely because it was filed on September 22, 2003, while the statement of Federal changes was dated July 8, 1996. The Division rejected petitioners allegation that they filed a protective claim form for 1982 because no evidence of same was submitted.

19. Finally, the Division argues that it was correct in denying the refund applications for 1991 and 1992 because they were untimely,

CONCLUSIONS OF LAW

A. Tax Law § 659 provides that where a taxpayer's Federal taxable income is changed or corrected by the Internal Revenue Service the taxpayer must report such change or correction to the Division of Taxation within 90 days after the final determination of such change or correction and either concede the accuracy of the Federal change or state the taxpayer's basis for asserting that the change or correction is erroneous. If the Federal change or correction is not reported within the 90-day period, the Division is authorized by Tax Law § 681(e) to issue a notice of additional tax due. Furthermore, where a taxpayer fails to report the Federal change or correction as required, such a notice may be issued at any time. (***See***, Tax Law § 683[c][1][C].)

In this matter, petitioners did not comply with the provisions of Tax Law § 659 by notifying the State of New York of the changes to their Federal taxable income for the years 1975, 1977, 1978 and 1979. They did not deny their failure to notify the Division of the changes to their income, they only argued that the interest computation was in error. Therefore, the Division's assessment of tax against petitioners by notice of additional tax due was proper for each of the years 1975, 1977, 1978 and 1979. (***See***, Tax Law § 681[e][1]; § 683[c][1][C].)

B. Petitioners contend that the Division did not properly calculate the interest on the tax due for 1975, 1977, 1978 and 1979. There is conflicting evidence in the record with respect to the interest calculation. In the Response to Taxpayer Inquiry, dated June 26, 2000, the Division stated that interest was computed from the due date of the fourth installment period of each succeeding year's estimated tax account, or January 15th. However, in the conciliation orders issued with respect to the years 1975, 1977, 1978 and 1979, the conferee's worksheets indicated that interest had been calculated from the filing dates of the returns.

The resolution of this conflict lies in Revenue Ruling 99-40, cited by the Division in its June 26, 2000 Response to Taxpayer Inquiry, which provides that when a taxpayer reports an overpayment on his tax return, interest will be assessed on that portion of a subsequently determined deficiency for the overpayment return year that is less than or equal to the overpayment as of the date on which the overpayment is applied to the succeeding year's estimated taxes.

The result is similar to that found in Revenue Ruling 88-98, which stated that when a taxpayer claims an overpayment on a return filed either on the original due date or on extension, and the claimed overpayment is applied in full against an installment of the succeeding year's estimated tax, interest on a subsequently determined deficiency for the earlier year runs from the

due date of that installment. This reasoning followed the case of ***Avon Products, Inc. v. United States*** (588 F2d 342), which determined that interest on a deficiency can only be charged when the tax is both due and unpaid. The underlying rationale was that the date the overpayment became a payment on account of the succeeding year's estimated tax, determined the date the prior year's tax became unpaid. Before that date, the government had the use of the funds, i.e., the prior year's tax, without interest. As petitioners noted in their arguments, the Tribunal adopted this reasoning in ***Matter of Unicorp American Corporation (supra)***, and the Division should have abided by it.

The Division is directed to modify the interest calculation for the years 1975, 1977, 1978 and 1979, *as necessary*, to comply with Revenue Ruling 99-40 and the June 26, 2000 Response to Taxpayer Inquiry.

C. Although petitioners have protested the year 1982, it was never formally in issue. It appears that the Internal Revenue Service included calculations which affected the year 1982 in its statement of income tax audit change, dated July 8, 1996. The year 1982 had been previously recalculated by the Internal Revenue Service in 1987. At that time, petitioners had filed a protective claim for refund of an overpayment with the Internal Revenue Service. However, no such protective claim was filed with New York State. Further, petitioners never advised the Division of Federal changes for 1982, nor did they seek a credit or refund within the time prescribed by the Tax Law. In this instance, the time period for filing a claim for credit or refund was within two years from the time the notice of Federal changes was required to be filed with the Division (Tax Law § 687[c]). As stated above, the report of Federal changes was due within 90 days after the final determination of the change. (***See,*** Tax Law § 659.)

Upon learning of the Federal changes for 1980 and 1981, the Division of Taxation issued two notices of additional tax due, dated May 4, 2000. The notice for 1980, assessment no. L-017674359-4, was issued only to Leonard Merkowitz. The notice for 1981 was issued to both petitioners. A conciliation order in this matter, which also dealt with only 1980 and 1981, imposed tax for 1980 in the sum of $489.00 and cancelled the tax for 1981. It was in the petition of these notices, dated April 29, 2002, and the conciliation order, dated February 1, 2002, where petitioners first requested a refund for 1982, based upon Federal changes.

The Division of Taxation correctly pointed out in its answer that this forum does not have jurisdiction over 1982 as part of this matter, designated DTA No. 819012.[1] The petition, dated April 29, 2002, was filed in response to the notices of additional tax due for the years 1980 and 1981. There was no statutory notice of deficiency or notice of disallowance issued for 1982 prior to the petition. Further, petitioners' claim in the petition that a refund was due for 1982 did not so much as state an amount or explain a basis for the claim other than to mention that the Internal Revenue Service had made an adjustment for 1982. Therefore, since petitioners never filed a claim for refund for 1982 upon which the Division acted, they had no basis on which to file a petition for review. (Tax Law § 689[c].)

Petitioners' contention that the Internal Revenue Service made adjustments for 1982 at the same time it modified income for 1980 and 1981 is not a basis for making an adjustment for 1982 in DTA No. 819012. Facts with relation to taxes from other years shall be considered to determine correctly the tax for the years in issue, but in so doing shall not confer jurisdiction to determine the overpayment or underpayment of tax for any other year. (Tax Law § 689[g];

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[1]It is important to note that petitioners asserted a second refund application for 1982, which is dealt with below on other than jurisdictional grounds.

Matter of Corin, Tax Appeals Tribunal, November 26, 2003.) Therefore, even if petitioners had established a relationship between the modifications made for 1980 and 1981 and those made for 1982, which they specifically did not, there is no jurisdiction to modify 1982 in the matter DTA No. 819012.

On September 22, 2003, petitioners filed a report of Federal changes and an Amended Resident Income Tax Return for 1982 in which they sought a refund of $2,361.00 based upon changes made by the Internal Revenue Service on July 8, 1996. The Division of Taxation properly denied the application by letter, dated December 29, 2003, indicating that the request was not timely pursuant to Tax Law § 659 and Tax Law § 687(c) since the Division received notice of the Federal changes on July 21, 2001 only after requesting the changes on its own. Petitioners first reported the changes on September 22, 2003, well beyond the 2 years and 90 days after the final determination by the Internal Revenue Service. Therefore, this attempt to circumvent the original arguments in the petition must fail. This second attempt by petitioners to claim a refund for 1982 was contained in the petition in matter DTA No. 819928.

Petitioners did not contest the results of the conciliation order with respect to 1980 and all tax was canceled for 1981 with the overpayment applied to 1977 and 1978.

D. Finally, petitioners filed amended resident income tax returns on January 31, 2001 for the years 1991 and 1992, seeking a refund of $487.00 for 1991 and $4,310.00 for 1992, based on an error in reporting pension and annuity income exclusions for both years that led to an overpayment. The Division denied the requests on the ground that they were not timely filed.

Tax Law § 687(a) provides that a claim for credit or refund must be filed within three years from the time the return was filed or within two years of the time the tax was paid. Here, petitioners filed their amended returns in which they requested refunds on January 31, 2001.

The original return for 1991 had been filed on October 15, 1992 and the return for 1992 had been filed on October 15, 1993. For 1991, an overpayment was declared in the sum of $154.00 and for 1992, there was a balance due of $1,082.00. The balance due was paid with the return on October 15, 1993. Therefore, the statute of limitations for filing a refund request for both 1991 and 1992 had long expired.

E. The petitions of Leonard and Lucille Merkowitz are granted to the extent provided for in Conclusion of Law "B", but in all other respects the petitions are denied; the Division of Taxation's denial of petitioners' refund applications for the years 1982, 1991 and 1992 is sustained; and the notices of additional tax due for the years 1975, 1977, 1978, 1979 and 1980, as modified by the Bureau of Conciliation and Mediation Services and the provisions of Conclusion of Law "B", are sustained.

DATED: Troy, New York
February 16, 2006

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE