STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROBERT AND ALEXANDRA BRAUN	:	DETERMINATION DTA NO. 820418
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2000 and 2001.	:	

Petitioners, Robert and Alexandra Braun, 42 Fresh Meadow Drive, Trumbull, Connecticut 06611, 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 2000 and 2001.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on December 6, 2005 at 10:30 A.M., which date began the six-month period for the issuance of this determination. Petitioner Robert Braun appeared *pro se* and on behalf of his spouse. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Margaret T. Neri, Esq., of counsel).

ISSUE

Whether interest imposed on petitioners' late payment of tax should be abated.

FINDINGS OF FACT

1. Petitioners, Robert and Alexandra Braun, nonresidents of New York, jointly filed their 2000 and 2001 New York nonresident income tax returns (Form IT-203), reporting New York tax due of $2,704.00 and $3,083.00, respectively.

2. On both returns petitioner Robert Braun allocated a portion of his employment income to New York. Schedules attached to the returns report that a part of Mr. Braun's income was salary, apportioned to New York based on a ratio of days worked in New York to total days worked. The returns also report that a portion of Mr. Braun's employment income was commissions, allocated to New York based on the volume of business in New York.

3. All of petitioner Robert Braun's employment income in 2000 and 2001 was reported on W-2's issued by his employer.

4. Petitioners' 2000 and 2001 returns were subsequently audited by the Division of Taxation ("Division"). The Division determined that petitioner Robert Braun had improperly allocated his New York income for both years and recomputed his New York tax liability accordingly. Specifically, the Division allocated Mr. Braun's income for the years in question based on a ratio of days worked in New York to total days worked. The Division made no allocation based upon volume of business in New York and thus made no allowance for commissions. The Division also made a significant adjustment to the number of days worked in New York by Mr. Braun. On his original returns for both 2000 and 2001 he reported 90 days worked at home and classified such days as days worked outside New York. On audit the Division deemed all days worked at home to be New York work days.

5. On January 8, 2004, the Division issued to petitioners statements of proposed audit changes for the years 2000 and 2001. On each statement the Division detailed the changes made to petitioner Robert Braun's income allocation as noted above and also detailed the resulting changes to petitioners' tax liability. The statements of proposed audit changes asserted New York income tax liability for 2000 and 2001 of $32,069.77 and $30,279.44, respectively. After allowing for tax previously reported and paid, the statement for 2000 asserted additional tax due

of $29,365.46, plus interest of $5,306.88 for a total amount due of $34,672.34. The 2001 statement asserted $27,194.70 in additional tax due, plus interest of $2,981.95 for a total amount due of $30,176.65.

6. On February 19, 2004, petitioners paid $34,904.00 in respect of their 2000 liability and $30,376.00 in respect of 2001. Such payments included tax due for each year as asserted by the statements of proposed audit changes plus such interest as asserted due by the Division as of the date of payment.

7. On March 4, 2004 the Division issued to petitioners two notices of deficiency for the years 2000 and 2001. Consistent with the previously issued statements of proposed audit changes, the notices asserted additional tax due of $29,365.46 and $27,194.70 for 2000 and 2001, respectively, plus interest.

8. Petitioners filed amended nonresident returns for the years 2000 and 2001 dated March 7, 2004. Consistent with the statements of proposed audit changes, petitioner Robert Braun allocated his New York income based on a ratio of days worked in New York to total days worked. Petitioners' 2000 amended return reported New York tax due of $29,790.00. The 2001 amended return reported New York tax due of $27,324.00.

9. The Division accepts petitioners' amended returns as filed. The Division thus acknowledges that petitioners have overpaid their New York income tax liability for the years at issue and are entitled to a refund of such overpayments. The Division computes such overpayments as follows:

	2000	2001
Tax Due Per Amended Return	$29,790.00	$27,324.00
Tax Due and Paid Per Original Return	$ 2,704.00	$ 3,085.00
Net Tax Due	$27,086.00	$24,239.00

Interest From Due Date to Date of Payment (2/18/04)	$ 5,116.00	$ 2,844.00
Total Amount Due	$32,202.00	$27,083.00
Payment Made on 2/18/04	$34,904.00	$30,376.00
Overpayment	$ 2,699.00	$ 3,293.00

10. Following a conciliation conference on January 19, 2005, a conciliation order dated February 25, 2005 was issued to petitioners which recomputed the tax and interest asserted due in this matter. The amount of tax and interest due pursuant to the conciliation order was consistent with the net tax due and interest amounts listed in Finding of Fact "9." The Conciliation Order also accurately noted petitioners' February 18, 2004 payment and the resulting overpayment as indicated above.

11. On January 31, 2005 the Division transmitted to Mr. Braun by facsimile a document purporting to calculate the amount of overpayment due to petitioners for the years in question. Such calculations did not include the interest due on petitioners' late payment of tax from the due date of the respective returns to the February 18, 2004 date of payment.

12. In its answer filed in this matter the Division set forth its computation of petitioners' overpayments in this matter in a manner similar to that set forth in Finding of Fact "9." In its computation of the overpayment for 2001, however, the Division did not include the interest of $2,844.00 calculated from the due date of the 2001 return to the date of payment and thus asserted an overpayment of $6,135.00 for 2001. At hearing the Division moved to amend its answer to account for such interest. Petitioner objected to such amendment. The administrative law judge granted the Division's motion.

13. Petitioners offered no evidence either to the Division during the audit or at hearing to show that any portion of Mr. Bauer's compensation during the years at issue was commission income.

14. In preparing their returns for the years at issue, petitioners attempted to follow the income allocation instructions for Form IT-203 (New York nonresident income tax return), which provide in relevant part as follows:

> If your income subject to allocation depends entirely on the volume of business transacted, as in the case of a salesperson working on commission . . .[d]ivide the volume of business transacted in the state by your total volume of business transacted both in and out of New York State. Multiply your total income subject to allocation by this percentage. This is the amount of your income allocated to New York state.
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> If any amount included on line 1 of Form IT-203 in the Federal amount column represents wage and salary income earned both inside and outside New York State while a nonresident, and that income does not depend directly on the volume of business transacted, figure the amount earned in New York State by completing a Schedule A [calculation of the ratio of days worked in New York to total days worked] for each job where such wages or salaries were earned inside and outside New York State.

15. The Division's Revised Manual for Nonresident Audits, District Office Audit Manual, dated September 5, 1997 provides, in relevant part:

> If the compensation for services performed by a nonresident sales person, agent or other employee depends directly on the volume of business transacted, allocation may be made based on the proportion that the volume of business transacted in New York bears to the total volume of business transacted everywhere. (20 NYCRR 132.17.) However, if the compensation is not based solely on the volume of sales, i.e., commission plus salary, the allocation shall be based on days worked within and without New York State.

SUMMARY OF PETITIONERS' POSITION

16. Petitioners seek the abatement and refund of all interest imposed and paid in connection with their late payment of tax for the years at issue. Petitioners contend that their failure to timely pay their tax liabilities for 2000 and 2001 resulted from the assertedly "unclear and misleading wording" in the Division's instructions for Form IT-203. Petitioners also contend that they honestly and reasonably followed the instructions to the best of their ability

and that the need for better instructions may be seen in the existence of a differently-worded explanation in the Division's District Audit Manual.

17. Petitioners also take issue with the Division's handling of this matter, characterizing it as casual and cavalier. Petitioners point to the wording of the IT-203 instructions, a claimed lack of preparedness by the Division for the conciliation conference, and the failure to mail the statements of proposed audit changes by certified mail as examples of such casual and cavalier attitude. Petitioners assert that such lax handling led to the accrual of additional interest.

18. Petitioners also contest the Division's motion to amend its answer at the hearing.

CONCLUSIONS OF LAW

A. Article 22 of the Tax Law generally requires the imposition of interest on any underpayment of tax. Tax Law § 684(a) provides that:

> If any amount of income tax is not paid on or before the last date prescribed in this article for payment, interest on such amount . . . *shall* be paid for the period from such last date to the date paid. . . . (Emphasis added.)

The Tax Appeals Tribunal explained the rationale for the requirement of the imposition of interest in ***Matter of Rizzo*** (Tax Appeals Tribunal, May 13, 1993):

> Failure to remit tax gives the taxpayer the use of funds which do not belong to him or her, and deprives the State of funds which belong to it. Interest is imposed on outstanding amounts of tax due to compensate the State for its inability to use the funds and to encourage timely remittance of tax due (Tax Law §1145).

B. Tax Law § 3008(a) does provide for the abatement of interest attributable to certain unreasonable errors or delays by the Division. The application of this provision is limited, however, to unreasonable errors or delays by Division employees in performing "ministerial or managerial" acts. Petitioner's primary complaint in this matter is that the Division's instructions to Form IT-203 were unclear and misleading. The creation of instructions involves the interpretation of tax statutes and regulations and thus is clearly not a "ministerial or managerial"

act as those terms are defined in the relevant Federal regulations (***see***, Treas Reg § 301.6404-2[b], [c], example 12).[1] Accordingly, the relief afforded by Tax Law § 3008(a) is unavailable to petitioners.

C. Petitioners' other complaints regarding the Division's casual or cavalier attitude also fail to justify abatement of interest under Tax Law § 3008(a). Since petitioners' payment on February 18, 2004 stopped the further accrual of interest, any conduct by the Division subsequent to that date, although objectionable to petitioners, did not result in the accrual of any additional interest and thus may not justify the abatement of interest. Petitioners' curious claim about the mailing of the statements of proposed audit changes as a basis for abatement of interest clearly lacks merit.

D. Regarding petitioners' objection to the Division's motion to amend its answer (***see***, Finding of Fact "12"), the proposed amended answer merely corrects the calculation of the 2001 overpayment in the answer by accounting for the interest accrued from the due date of the return to the date of payment. Considering that, as noted above, such interest is generally required under Tax Law § 684(a), that the Conciliation Order dated February 25, 2005 accounted for such interest, and that the waiver of such interest is the central issue in this proceeding, it is concluded that petitioners were in no way prejudiced by the administrative law judge's granting of the motion.

E. The petition of Robert and Alexandra Braun is in all respects denied; the notices of deficiency dated March 4, 2004, as modified pursuant to Finding of Fact "9", are sustained; and

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[1] Tax Law § 3008 is modeled after Internal Revenue Code § 6404. It is appropriate, therefore, to look to the relevant Federal regulations for guidance (***see***, ***Matter of Dattilo***, Tax Appeals Tribunal, May 11, 1995).

the Division of Taxation is directed to refund to petitioners the overpayments for the years at issue as indicated in Finding of Fact "9," plus such interest as may be lawfully due and owing.

DATED: Troy, New York
March 23, 2006

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE