

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>YAKOV AND FANIA ROGATSKY</b>	:	SMALL CLAIMS DETERMINATION
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1992 and 1993.	:	DTA NO. 820665

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Petitioners, Yakov and Fania Rogatsky, 690 Crown Street, Brooklyn, New York 11213, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1992 and 1993.

A small claims hearing was held before Frank W. Barrie, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 5, 2006 at 10:45 A.M., which date began the three-month period for the issuance of this determination. Petitioners appeared by Moishe D. Rosenbluh.<sup>1</sup> The Division of Taxation appeared by Mark F. Volk, Esq. (Vernon S. Kirton).

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<sup>1</sup> Mr. Rosenbluh, who is a preparer of tax returns, pursuant to 20 NYCRR 3000.2(a)(4) obtained special permission dated October 6, 2005 from the Tax Appeals Tribunal to appear in this matter since he is neither an attorney, a certified public accountant, a public accountant, nor an enrolled agent as specified in 20 NYCRR 3000.2(2). Mr. Rosenbluh prepared petitioners' tax returns during the years at issue. Petitioners did not appear personally at the hearing.

***ISSUE***

Whether the Division of Taxation properly disallowed petitioners' claim for refund of personal income tax for the years 1992 and 1993.

***FINDINGS OF FACT***

1. Petitioners, Yakov and Fania Rogatsky, filed a Claim for Credit or Refund of Personal Income Tax (form IT-113-X), dated August 10, 2003, seeking a refund of "total tax paid" for the years 1992 and 1993 in the amount of \$16,503.00. They described their claim as a "protest of paid bill." The Division of Taxation issued a notice of disallowance dated April 9, 2004, rejecting petitioners' claim for refund on the basis that it was not timely filed.

2. Petitioners' New York personal income tax returns for 1992 and 1993 were audited by the Division of Taxation ("Division") resulting in the issuance of two statements of personal income tax audit changes. One dated January 3, 1997 asserted "audit increases" to their New York State income for 1992 in the amount of \$54,029.00; the other, dated July 16, 1997, asserted "audit increases" to their New York State income for 1993 in the amount of \$62,736.00.

3. The auditor who conducted the audit of petitioners for 1992 and 1993, Vernon S. Kirton, also appeared at the hearing as the advocate for the Division of Taxation. According to Mr. Kirton, petitioners reported income from the operation of a business on a Schedule C for each of the years at issue. The audit increases noted above represented additional income estimated by the Division for such business.

4. A consolidated statement of tax liabilities dated June 15, 1998 showed a current balance due of \$14,387.52 for 1993 consisting of the following: "tax amount assessed" of \$8,562.47 plus interest of \$3,528.08 and penalty of \$2,296.97. An assessments receivable overpayment notice dated April 10, 2000 shows that the Division received a payment in the

amount of \$16,503.27 in payment of the assessment detailed in the consolidated statement. This overpayment notice calculated a net refund due petitioners of \$22.24 based upon “outstanding tax liabilities” of \$16,481.03, which presumably included the accrual of additional interest and penalty on the “tax amount assessed” of \$8,562.47. This overpayment notice informed petitioners that “You should receive your refund with appropriate interest, within 60 days.”

5. The payment in the amount of \$16,503.27 received by the Division was in the form of a check dated February 4, 2000 on the “Attorney Special Acct. IOLA Fund” of attorney Marc A. Ziropiannis. According to petitioners’ representative, the source of these funds was from proceeds of a mortgage taken out by petitioners.

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

A. 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. This statutory provision provides, in relevant part, as follows:

Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within . . . two years from the time the tax was paid . . . .

B. As noted in Finding of Fact “5”, the tax at issue was paid by petitioners by an attorney’s check dated February 4, 2000 which was received by the Division no later than April 10, 2000, in light of the overpayment notice dated April 10, 2000 as detailed in Finding of Fact “4”. Consequently, petitioners’ refund claim dated August 10, 2003 was not filed within “two years from the time the tax was paid” since the facts establish it was filed more than three years after the tax was paid.

C. There is no basis in the law to waive the limitations period on refund claims. Even in the very extreme case where a senile taxpayer, who was 93 years old, mailed a check for \$7,000.00 instead of \$700.00 to the Internal Revenue Service, the United States Supreme Court,

in reversing the Federal Court of Appeals, recognized that there was no legal authority to waive the period of limitations for filing a refund claim (*United States v. Brockamp*, 519 US 347, 117 S Ct 849, 136 L Ed 2d 818, *revg* 67 F3d 260).

D. The petition of Yakov and Fania Rogatsky is denied, and the notice of disallowance dated April 9, 2004 is sustained.

DATED: Troy, New York  
January 4, 2007

/s/ Frank W. Barrie  
PRESIDING OFFICER