

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
NEAL AND ALETHA MYERBERG : DETERMINATION
for Redetermination of a Deficiency or for Refund of New : DTA NO. 820705
York State and New York City Personal Income Taxes under :
Article 22 of the Tax Law and the Administrative Code of :
the City of New York for the Years 1992, 1994 and 1995. :
:

Petitioners, Neal and Aletha Myerberg, 179 Shore Road, Old Greenwich, Connecticut 06870, 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 Administrative Code of the City of New York for the years 1992, 1994 and 1995.

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 May 24, 2006 at 10:30 A.M. The final brief in this matter was due by August 23, 2006, which date commenced the six-month period for the issuance of this determination. Petitioner Neal Myerberg appeared *pro se* and on behalf of his spouse, Aletha Myerberg. The Division of Taxation appeared by Mark F. Volk, Esq. (Barbara J. Russo, Esq., of counsel).

ISSUE

Whether the Division of Taxation improperly denied petitioners' application for tax amnesty for the years at issue and whether it improperly declined to use certain overpayments of taxes as an offset against liabilities for those years.

FINDINGS OF FACT

1. Petitioners, Neal and Aletha Myerberg, moved to Connecticut from New York City in 1991. Petitioner Neal Myerberg continued to work in New York City from 1991 through 2001.

2. Petitioners failed to timely file their New York nonresident and part-year resident returns (Form IT-203) for the years 1991 through 2001.

3. On January 31, 2003, petitioners jointly filed their nonresident and part-year resident returns for the years 1991 through 2001 together with an application filed under the 2002 Amnesty Program (*see*, L 2002, ch 85).

4. Petitioners' returns reported tax due or claimed refunds for those years as follows:

<i>Year</i>	<i>Tax Due or Refund</i>	<i>Amount</i>
1991	Tax Due	\$7,130.88
1992	Tax Due	\$7,628.40
1993	Refund	\$2,846.42
1994	Tax Due	\$6,645.90
1995	Tax Due	\$8,843.81
1996	Refund	\$3,740.98
1997	Refund	\$9,662.68
1998	Refund	\$18,361.54
1999	Refund	\$8,178.63
2000	Refund	\$8,700.97
2001	Refund	\$8,791.57

5. Petitioners did not remit any payment with the filing of their 1991, 1992, 1994 or 1995 returns.

6. The Division of Taxation ("Division") granted petitioners' 1999 and 2000 refunds as claimed and applied such refund amounts to petitioners' 1991 and 1992 tax liabilities. The

application of the 1999 refund and \$4,166.96 of the 2000 refund fully paid the tax and interest due for 1991. The Division thus granted petitioners' amnesty application with respect to 1991 and waived any penalties in connection with that year.

7. The Division applied the remaining portion of the 2000 refund (\$4,534.01) against petitioners' 1992 liability. Such amount did not fully satisfy the 1992 liability.

8. The Division denied as untimely petitioners' claims for refund for the years 1993, 1996, 1997 and 1998. The Division thus did not apply any of those claimed amounts against the balance of petitioners' tax liability for 1992 or against their liability for 1994 or 1995.

9. Pursuant to a Statement of Amnesty Account issued by the Division to petitioners, payment for all tax and interest due and owing for 1992, 1994 and 1995 was due by May 14, 2003. Since such tax and interest remained due and owing as of May 14, 2003, the Division denied petitioners' application for amnesty with respect to those years.

10. Petitioners filed their 2001 return on January 31, 2003 without wage and tax statements. The Division therefore deemed such return to be not in processable form and returned it to petitioners on April 30, 2003. Petitioners resubmitted the 2001 return with the appropriate wage and tax statements on August 2, 2003. In its review of the return the Division determined an error which adjusted the amount of the overpayment to \$6,144.77. The Division granted the refund claim as adjusted and applied such overpayment to petitioners' 1992 liability effective August 2, 2003.

11. On November 10, 2003 the Division issued to petitioners three notices and demands which asserted tax due as reported on petitioners' returns, plus penalty and interest, for the years 1992, 1994 and 1995. The 1992 notice credited petitioners with payments totaling \$10,678.78 as a result of the application of refunds from 2000 and 2001 (*see*, Findings of Fact "7" and "10").

12. Each of the November 10, 2003 notices and demands contained the following statement:

This Notice and Demand is being issued because you did not pay the amnesty balance due of tax and interest as required for this tax period. Accordingly, tax, penalty and interest are due as shown.

13. All taxes paid by petitioners for the years 1991 through 2001 were withholding taxes.

14. Petitioners submitted into the record a letter dated May 7, 2003 from Mr. Myerberg and addressed to the Division which states:

I have received the enclosed Statement of Amnesty Account showing amounts due.

When I filed the returns and other returns simultaneously for the years 1991 through 2002, I showed in my calculations amounts due and refunds due. It was anticipated that, since the refunds due were considerably greater than the taxes due, there would be an offset, with the balance refunded to me.

I am unable to pay the amnesty payments without the credits due for refunds owed to me.

Will you kindly advise how this can be reconciled?

According to your letter, all amnesty payments are due from me by May 14, 2003. I have just received your letter today (May 7, 2003). Therefore, will you kindly reply to me promptly so my amnesty application will not be in jeopardy?

CONCLUSIONS OF LAW

A. The legislation establishing the 2002 Tax Amnesty program provided, in relevant part that:

[U]pon application, including applicable returns, which application and returns shall be in such form and submitted in such manner as prescribed by the commissioner of taxation and finance, by an eligible taxpayer, and upon payment in such form and in such manner as prescribed by such commissioner, which payment shall either accompany such application or be made within the time stated on a bill issued by such commissioner to such taxpayer, of the amount of a tax liability under one or more of the designated taxes with respect to which amnesty is sought, plus related interest, such commissioner shall waive any

applicable penalties . . . and shall reduce by two percent the applicable rate of interest associated with such liability *Failure to pay all such taxes, plus related interest by the later of March 15, 2003, or the date prescribed therefor on a bill issued by such commissioner, shall invalidate any amnesty granted pursuant to the amnesty program established under this act.* (L 2002, ch 85, § 1[d]; emphasis added.)

B. Here, the record is clear that petitioners did not remit any payments of tax or interest for the years 1994 or 1995. Accordingly, their application for amnesty for those years was properly denied. With respect to 1992, the application of a portion of the 2000 refund did not fully satisfy the tax and interest due for this year as of May 14, 2003, the due date for payment as prescribed by the Statement of Amnesty Account (*see*, Finding of Fact “9”). Since full payment of tax and interest is a prerequisite to the granting of an amnesty application, petitioners’ application for 1992 was also properly denied.¹

C. Petitioners’ assertion that the Division should have used the overpayments for the years 1993, 1996, 1997 and 1998 as an offset to the years for which there was a tax liability is rejected. The payment of refunds for the those years is time-barred by Tax Law § 687(a), which requires that a claim for credit or refund of an overpayment of personal income tax be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever expires later. Here, the refund claims were filed as part of the returns on January 31, 2003. The withholding taxes which were the subject of the refund claims were deemed paid as of April 15 following the close of the respective tax years at issue (*see*, Tax Law § 687[i]). Accordingly, the three-year limitations period is applicable herein. The amount of refund payable under such circumstances, however, is limited to the amount of tax paid within the three

¹ It is noted that even if the 2001 refund of \$6,144.77 had been applied to petitioners’ 1992 liability as of March 15, 2003, such payment would not have been sufficient to fully satisfy such liability and thereby permit the granting of amnesty for that year. The Division’s audit file indicates that petitioners’ total liability under amnesty for 1992 was \$12,630.86. Petitioners’ payments for 1992, including the 2001 refund, total \$10,678.78.

years immediately preceding the filing of the claim (*see*, Tax Law § 687[a]). Here, no part of the tax for any of the refund claims was paid within three years of the filing of the returns. For example, pursuant to Tax Law § 687(i), petitioners' 1998 withholding tax was deemed paid as of April 15, 1999. The refund claim was filed on January 31, 2003, about nine months beyond the three-year period. Obviously, the refund claims for 1997, 1996 and 1993 fall even further beyond this three-year period. Accordingly, the Division properly denied petitioners' claims for refund for the years 1993, 1996, 1997 and 1998.

D. Additionally, it is noted that the legislation establishing the 2002 Tax Amnesty program contains no provision which would extend or toll the limitations provisions under Tax Law § 687(a) for the filing of refund claims. Indeed, as the Division correctly notes in its brief, such legislation provides that the amnesty program applies to "all eligible taxpayers . . . owing any tax" and that the program "shall apply to tax liability for the taxes set forth [therein]" (*see*, L 2002, ch 85, § 1[a], [b]). Thus the 2002 amnesty program does not apply to overpayments.

E. Although petitioners did not raise the issue, it should be noted that the doctrine of equitable recoupment does not provide a basis to offset the 1992, 1994 and 1995 deficiencies using the overpayments for the years 1993, 1996, 1997 or 1998. This doctrine permits recoupment of an overpayment of taxes as an offset to a tax deficiency notwithstanding the fact that an independent demand for recovery of an overpayment may be barred by the statute of limitations (*see, Bull v. United States*, 295 US 247, 79 L Ed 1421). Considering that the overpayments and deficiencies in the present matter involve different years and that the overpayments were not made during the period of the deficiencies, the doctrine does not apply (*see, Matter of Corin*, Tax Appeals Tribunal, November 26, 2003).

F. Petitioners also complain that the Division failed to advise them that the offsets would not be allowed and also failed to advise them that if they failed to pay by the deadline they would not be granted amnesty. Mr. Myerberg's May 7, 2003 letter (*see*, Finding of Fact "14") makes clear, however, that the Division expressly notified petitioners that all amnesty payments were due by May 14, 2003. Further, although the Statement of Amnesty Account referred to in the letter is not in the record, the May 14th letter makes clear that Mr. Myerberg understood that his amnesty application would be in jeopardy if petitioners failed to make the payments as instructed by the Division. This complaint is thus without merit.

G. Finally, although the petition refers to erroneous advice given by an accountant as a reason for their failure to file New York returns, petitioners offered no evidence at hearing regarding such advice and thus did not establish reasonable cause or an absence of willful neglect to justify an abatement of the penalties imposed herein for the years 1992, 1994 or 1995.

H. The petition of Neal and Aletha Myerberg is denied and the notices and demands dated November 10, 2003 are sustained, together with such interest as may be lawfully due.

DATED: Troy, New York
January 25, 2007

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE