STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROBERT AND MARGALIT PASHAYAN	:	DETERMINATION DTA NO. 821270
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1995 through 2000.	:	

Petitioners, Robert and Margalit Pashayan, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1995 through 2000.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on April 24, 2007 at 10:30 A.M., with all briefs to be submitted by August 31, 2007, which date began the six-month period for the issuance of this determination. Petitioners appeared by Irving Kaufman & Co., CPA, P.C. (H. Sheldon Kaufman, CPA). The Division of Taxation appeared by Daniel Smirlock, Esq. (Kevin R. Law, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly denied petitioners' claims for refund of New York State personal income tax for the years at issue.

FINDINGS OF FACT

1. On December 5, 2005, the Division of Taxation (Division) received from Robert and Margalit Pashayan (petitioners), forms IT-201-X, amended resident income tax returns for the

years 1999 and 2000 which claimed refunds of New York State personal income tax in the amounts of $2,906.00 and $1,826.00, respectively. The amended returns indicated that the taxpayers had erroneously reported income from a federal S corporation, Yard Goods, Inc., which had not elected to be taxed as an S corporation for New York State. Accordingly, the amended returns for 1999 and 2000 eliminated income in the amounts of $37,123.00 and $26,662.00, respectively.

2. On May 5, 2005, the Division issued a Notice of Disallowance which advised petitioners that their claims had been disallowed, in full, because:

> The Tax Law provides for the granting of a refund or credit if it is applied for within three years from the time the return was required to be filed or within two years from the time the tax was paid, whichever is later.

Since the refund claims were received on December 5, 2005 for the tax years 1999 and 2000, the claims were not timely filed and, accordingly, were denied.

3. On June 15, 2006, the Division received from petitioners, forms IT-201-X, amended resident income tax returns for the years 1995, 1996, 1997 and 1998 which claimed refunds of New York State personal income tax in the amounts of $5,622.00, $4,706.00, $8,137.00 and $5,128.00, respectively.

4. On July 14, 2006, the Division, acknowledging that petitioners' refund claims for 1995 through 1998 were received on June 15, 2006 and that their refund claims for 1999 and 2000 were received on December 5, 2005, denied, in full, all of such claims for refund for the reasons previously set forth (***see*** Finding of Fact "2").

5. For the years 2001 and 2002, which are not at issue in this proceeding, petitioners, on their 2001 and 2002 New York State personal income tax returns, reported an S corporation loss flowing through from the same entity, Yard Goods, Inc. In response, the Division disallowed the

loss for each year and assessed tax based upon such disallowances. Petitioners agreed with the Division's disallowances of these losses and paid the tax due thereon.

6. While petitioners did not appear in person at the hearing held in this matter, a concession was made by their representative that the amended returns filed for the years 1995 through 2000 were filed after the expiration of the statute of limitations as set forth in Tax Law § 687(a).

SUMMARY OF PETITIONERS' POSITION

7. Petitioners contend that their claims for refund should be granted pursuant to the special refund authority provided in Tax Law § 697(d) since they maintain that in the present matter, there is no question of law or facts involved. Petitioners state that they mistakenly thought that there was a New York State S election in place when, in fact, no such election had been made. This, petitioners assert, was a mistake of fact which qualifies for the special refund authority.

8. In the alternative, petitioners contend that the doctrine of equitable recoupment is applicable to this matter due to the inequity resulting from the Division's denial of their refund claims.

CONCLUSIONS OF LAW

A. In general, Tax Law § 687(a) provides that a claim for refund of New York State personal income tax must be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever period expires later. As previously noted, in the present matter, it is undisputed that petitioners' claims for refund were filed after the expiration of the time periods set forth in Tax Law § 687(a). However, petitioners assert that their claims should nevertheless be granted based upon the special refund authority in Tax Law § 697(d) or, in the alternative, the doctrine of equitable recoupment. Each shall be considered separately.

B. Tax Law § 697(d) provides as follows:

> Special refund authority. – Where no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts, pursuant to the provisions of this article, the tax commission at any time, without regard to any period of limitations, shall have the power, upon making a record of its reasons therefor in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certificate to the comptroller.

C. To invoke the special refund authority, it must be determined whether the moneys paid by petitioners were paid under a mistake of fact or a mistake of law. In ***Matter of Wallace*** (Tax Appeals Tribunal, October 11, 2001), the Tribunal opined:

> A mistake of fact has been defined as an understanding of the facts in a manner different than they actually are (54 Am Jur 2d Mistake, Accident or Surprise § 4; ***see also***, ***Wendel Foundation v. Moredall Realty Corp.***, 176 Misc 1006, 29 NYS2d 451). A mistake of law, on the other hand, has been defined as acquaintance with the existence or nonexistence of facts, but ignorance of the legal consequences following from the facts (54 Am Jur 2d Mistake, Accident or Surprise § 8; ***see also***, ***Wendel Foundation v. Moredall Realty Corp., supra***).

D. Tax Law § 660(a) provides that shareholders of an S corporation for federal purposes may elect to have the S corporation's income and losses included on the shareholder's State personal income tax returns. Tax Law § 660(b) sets forth the requirements for making this election and the time periods relevant thereto.

As correctly noted by the Division in its brief, "it appears that Petitioners were unaware that for New York to recognize S corporation status a separate election is required." While, as previously noted (***see*** Finding of Fact "6"), petitioners did not appear at the hearing and offer testimony as to why they had originally included income from the federal S corporation, Yard Goods, Inc., on their New York State personal income tax returns for the years at issue, it can

reasonably be inferred that they mistakenly believed that since an S corporation election had been made for federal income tax purposes, such election was also effective for New York State. Their mistake was, therefore, a mistake of law, not a mistake of fact. Accordingly, the special refund authority, as provided in Tax Law § 697(d) is inapplicable to this proceeding.

E. In the alternative, since statutes of limitation are not a bar thereto, petitioners contend that the doctrine of equitable recoupment should be applied to remedy the "inequity" suffered by petitioners. In support of their assertion of "inequity," petitioners point to the fact that for the years 2001 and 2002, they reported an S corporation loss flowing through from Yard Goods, Inc., whereupon the Division promptly disallowed the losses and asserted tax deficiencies for these years. Petitioners maintain that since the Division disallowed losses flowing through from the corporation, it had an obligation to question petitioners' inclusion of income from the same entity in prior years when there was no New York State S corporation election.

In ***Matter of Turbodyne Corp.*** (Tax Appeals Tribunal, July 3 ,1996, ***confirmed*** 245 AD2d 976, 667 NYS2d 105 [1997], ***lv denied*** 91 NY2d 812, 671 NYS2d 715 [1998]), the Tribunal set forth the criteria for the application of the doctrine of equitable recoupment, stating:

> [t]he doctrine of equitable recoupment allows a taxpayer against whom a deficiency is asserted to offset against that deficiency overpayments which are time barred for claiming a refund and (1) involve the same type of tax as the deficiency; (2) were paid during the period that comprises the deficiency; and (3) involve the same transaction as is the subject of the deficiency.

F. In ***Matter of Lipner*** (Tax Appeals Tribunal, May 13, 2004), the Tribunal affirmed a determination of an Administrative Law Judge who rejected that petitioner's equitable recoupment claim on the basis that there was no deficiency asserted against petitioner to offset his time-barred refund claim. In ***Lipner***, while the record indicated that there were deficiencies

against petitioner for years other than the year for which he filed a claim for refund, the record also disclosed that he had not filed a petition in respect to those deficiencies and, accordingly, the Division of Tax Appeals had no jurisdiction over such years. The facts in the present matter are very similar.

For the years 2001 and 2002, the Division disallowed petitioners' claimed losses from Yard Goods, Inc., and asserted personal income tax deficiencies resulting from such disallowance. Those deficiencies were subsequently paid by petitioners without the filing of a petition with the Division of Tax Appeals which, therefore, has no jurisdiction over those years.

As noted by the Division in its brief, petitioners are seeking to use the doctrine of equitable recoupment to avoid the expired statute of limitations and open these otherwise time-barred refund claims. Their overpayments related to the years 1995 through 2000 while the deficiencies asserted by the Division were for the years 2001 and 2002. Accordingly, as noted by the Tribunal in ***Turbodyne*** (***supra***), since the overpayments and deficiencies were for different years, the doctrine of equitable recoupment is inapplicable to this proceeding.

G. The petition of Robert and Margalit Pashayan is denied and the notices of disallowance dated May 5, 2005 and July 14, 2006 are hereby sustained.

DATED: Troy, New York
February 28, 2008

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE