

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MICHAEL A. GOLDSTEIN AND :
JANICE L. GOLDSTEIN : DETERMINATION
: DTA NO. 822632
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 1994,1995, 1996, 1997 :
and 2004. :

Petitioners, Michael A. Goldstein and Janice L. Goldstein, 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 1994, 1995, 1996, 1997 and 2004.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on September 21, 2009, at 10:30 A.M., with all briefs to be submitted by February 26, 2010, which date began the six-month period for the issuance of this determination. Petitioners appeared by Samson Management LLC (Ray Cruz, Esq.). The Division of Taxation appeared by Daniel Smirlock, Esq. (Robert Tompkins, Esq., of counsel).

ISSUES

I. Whether interest on petitioner’s refund for 1994 should accrue from the date of the amended return claiming the refund or the date the original return was filed.

II. Whether the refund for 1994 is available for application to the 1995, 1996 and 1997 deficiencies at the time of the due dates for the 1995, 1996 and 1997 original returns.

III. Whether Tax Law § 606(f)(3)(B) precludes payment of interest on refund claims for the special mortgage recording tax credit.

FINDINGS OF FACT

1. On or about October 3, 2006, Michael A. and Janice L. Goldstein (petitioners) executed an IRS form 870-AD, Offer to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment, thereby accepting certain deficiencies, overstatements of tax and additions to tax. For the year ended December 31, 1994, there was an overassessment of \$103,117.00. For the year ended December 31, 1995, there was a deficiency of \$265,784.00. For the year ended December 31, 1996, there was no change. For the year ended December 31, 1997 there was a deficiency of \$359,377.00.

2. As a result of the final federal changes, petitioners, on or about January 2, 2007, timely filed amended New York State resident income tax returns that claimed a refund in the amount of \$39,067.00 for the year 1994 and reported amounts owed for 1995, 1996 and 1997 in the amounts of \$37,055.00, \$34,099.00 and \$104,306.00, respectively.

3. On or about May 21, 2007, the Division of Taxation (Division) issued a Notice and Demand for Payment of Tax Due for the year 1995, seeking tax due in the sum of \$37,055.00 and interest of \$42,798.16. The notice stated that the amount due was based on petitioners' amended return.

4. Petitioners responded to the notice with a letter, dated May 29, 2007, in which they reminded the Division that petitioners had made a payment of \$32,087.00 for the net tax due for the years 1994, 1995 and 1996. In addition, petitioners requested an explanation of why the

interest assessment on the notice, \$42,798.16, was so much higher than the interest of only \$4,095.60 on petitioners' refund claims for the years 1995, 1996 and 1997.

5. The Division approved the refund of \$39,067.00 for the year 1994 with interest of \$2,218.16, which accrued only from the date the amended return was filed in January 2007. The total amount of \$41,285.16 was applied to petitioners' deficiency for the year 1995.

6. The additional tax due for the year 1995, as reported on the amended income tax return filed on January 2, 2007, was \$37,055.00 plus the interest the Division added, accrued from the due date of the original return until payment was made. The Division applied the entire 1994 refund plus interest earned due to petitioner, \$41,285.16, to the 1995 assessment on January 3, 2007, stopping the interest from accruing from that date. In addition, a refund claimed on an amended return for 2004, unrelated to the federal audit adjustments referenced in Finding of Fact 1, resulting from a Special Mortgage Recording Tax Credit (SMRTC) of \$37,858.89, was applied against the 1995 assessment on August 9, 2007. A partial refund for 2004 in the sum of \$54,230.00 was approved on August 9, 2007 with the submission of substantiating documentation.

7. Petitioners' amended return for 1996 was filed on January 2, 2007, setting forth additional tax due of \$34,099.00. The Division had accrued interest from the due date of the original return until the approved payment date. The \$32,087.00 payment was received with the amended return on January 2, 2007. In addition, \$16,371.11 of the \$54,230.00 SMRTC refund from 2004 was applied as a payment on August 9, 2007. An additional \$7,190.69, derived from an additional SMRTC refund for 2004 was applied, when approved, on January 31, 2008. Two additional payments were applied to the 1996 assessment as well: \$411.81 from a 2001 refund was applied on June 26, 2008 and \$14,627.31 was paid by petitioners on November 12, 2008.

8. Petitioners' 1997 amended return stated an additional tax due of \$104,306.00. Interest was accrued by the Division on the 1997 deficiency from the due date of the original return until payment. Petitioner paid the total additional tax due with the amended return on January 2, 2007. In addition to the tax paid by petitioners, there was a payment made on January 31, 2008 in the sum of \$13,191.31 from the application of the 2004 refund of the SMRTC; a June 5, 2008 payment of \$1,276.71 from the application of a 2002 refund; and a payment of \$72,091.21 on June 26, 2008 from a 1998 refund of \$25,108.75, a 1999 refund of \$3,290.59 and a 2000 refund of \$43,691.87.¹

9. The amended income tax return filed by petitioners for the year 2004 on March 9, 2007, claimed the SMRTC and requested a refund of \$74,612.00. Although documentary support for the refund was requested by letter, dated June 6, 2007, petitioners were able to provide justification for only \$54,230.00 of the \$74,612.00 refund claimed. This refund was approved on August 9, 2007. The remaining \$20,382.00 was approved on January 31, 2008 after petitioners submitted additional documentation. No interest accrued on the refund based on the SMRTC.

10. Petitioners filed refund claims for the years 1994, 1995, 1996 and 2004 on May 15, 2008 in which they claimed that additional interest was owed for the 1994 and 2004 refunds and that they were overcharged on interest accrued for the years 1995, 1996 and 1997.

11. The Division took no action on the claims in writing until a formal Notice of Disallowance was issued on July 17, 2009. That notice stated, in pertinent part, as follows:

We have reviewed all the refund claims for the above noted tax years [1994-2002, 2004] and we have determined that the proper interest rates and dates were applied.

¹The refund claims for 1998, 1999 and 2002 were filed on February 26, 2008 and are not, in and of themselves, the subject of this determination.

Under section 688 of the NYS tax law, for tax years 1994 thru 1998, interest on an overpayment of tax was payable from the date the amended return was filed to the date the refund was issued. No interest was allowed prior to the filing date of the amended return.

Beginning in tax year 1999, interest on an overpayment of tax is payable from the due date (if the original return was timely, considering extensions), or the filing date (if the original return was late, considering extensions) of the original return, to the date the refund is issued.

However, if the refund is issued within 45 days after the amended return is filed, no interest is due beyond the filing date of the amended return.

For tax year 2004, the refund was a Special Mortgage Recording Tax credit. Per section 606(f)(B) of the NYS tax law, no interest shall be paid on such overpayment.

12. The Division submitted the affidavit of Mary C. Murphy, Tax Technician II, dated October 19, 2009, which explained the interest calculations for the years in issue.

SUMMARY OF PETITIONERS' POSITION

13. Petitioners assert the following:

a. The Division should have paid interest on the overpayments of tax made by petitioners from the date of the filing of the original returns for the years at issue, not from the date of the filing of the amended returns that were filed as a result of the federal changes;

b. As a result of the federal changes and the reduction of taxable income of the trusts, the taxable income of petitioners, the trust's beneficiaries, increased due to the decrease in interest expense. Petitioners were required to pay interest of well over \$150,000.00 from the dates of the filing of their original returns. However, petitioners received interest on their 1994 refund only from the date the federal changes were filed, causing what petitioners characterize as the state being unjustly enriched;

c. Petitioners argue that the Division incorrectly applied Tax Law § 688(a)(3) to the amended returns filed pursuant to Tax Law § 659 and § 687(c), since the latter section clearly

addresses interest to be paid when a taxpayer files the required report of federal changes within the prescribed 90-day period and Tax Law § 688(a)(3) clearly conflicts with this.

d. Petitioners contend that the Division's interpretation of the statutes in issue was in error, unconstitutional, in violation of the New York Civil Rights Act and led to an inequitable result vis-a-vis the proper interest credited and charged on overpayments and underpayments of tax which result from the report of federal changes.

CONCLUSIONS OF LAW

A. In the present matter, four of the tax years at issue are 1994, 1995, 1996 and 1997.

During those years, Tax Law § 688(a)(former [3]) provided as follows:

Late and amended returns and claims for credit or refund.
Notwithstanding the provisions of paragraph one or two of this subsection, in the case of an overpayment claimed on a return of tax which is filed after the last date prescribed for filing such return (determined with regard to extensions), or claimed on an amended return of tax or claimed on a claim for credit or refund, no interest shall be allowed or paid for any day before the date on which such return or claim is filed.

In addition, during the years at issue, Tax Law § 688(former [c]) stated:

Income tax refund within forty-five days of claim for overpayment.--If any overpayment of tax imposed by this article is credited or refunded within forty-five days after the last date prescribed (or permitted by extension of time) for filing the return of such tax on which such overpayment was claimed or within forty-five days after such return was filed, whichever is later, or within forty-five days after an amended return was filed claiming such overpayment or within forty-five days after a claim for credit or refund was filed on which such overpayment was claimed, or within six months after a demand is filed pursuant to paragraph six of subsection (b) of section six hundred fifty-one of this chapter, no interest shall be allowed under this section on any such overpayment. For purposes of this subsection, any amended return or claim for credit or refund filed before the last day prescribed (or permitted by extension of time) for the filing of the return of tax for such year shall be considered as filed on such last day.

B. For taxable years beginning January 1, 1999, chapter 377 of the Laws of 1999 amended the above provisions of the Tax Law by deleting all references to amended returns and claims for credit or refund in Tax Law § 688(a)(3). Accordingly, Tax Law § 688(a)(3) now provides as follows:

Late returns. Notwithstanding the provisions of paragraph one or two of this subsection, in the case of a return of tax which is filed after the last date prescribed for filing such return (determined with regard to extensions), no interest shall be allowed or paid for any day before the date on which the return is filed.

In addition, Tax Law § 688(c) was also amended by chapter 377 of the Laws of 1999 to read as follows:

Income tax refund within forty-five days of claim for overpayment.--If any overpayment of tax imposed by this article is credited or refunded within forty-five days after the last date prescribed (or permitted by extension of time) for filing the return of such tax on which such overpayment was claimed or within forty-five days after such return was filed, whichever is later, or within six months after a demand is filed pursuant to paragraph six of subsection (b) of section six hundred fifty-one of this chapter, no interest shall be allowed under this section on any such overpayment. In regard to an amended return claiming such overpayment or a claim for credit or refund on which such overpayment was claimed, if such overpayment is refunded within forty-five days of filing such return or such claim, no interest shall be allowed from the date such return or such claim is filed until the day the refund is made. For purposes of this subsection, any amended return or claim for credit or refund filed before the last day prescribed (or permitted by extension of time) for the filing of the return of tax for such year shall be considered as filed on such last day.

C. The Senate Memorandum in Support for chapter 377 of the Laws of 1999 stated its purpose as follows: “This bill provides that the state shall pay any interest earned on a tax overpayment from the date an original tax return was filed, rather than the date the same tax return was amended.”

The Memorandum in Support set forth the following as the justification for chapter 377:

Currently, the tax law provides that no interest shall be paid on any tax overpayment for any date before a late or amended return is filed. An amended tax return is not the same as a tax return filed late and this difference should be realized in regard to the payment of interest on any tax overpayment. Responsible taxpayers filing on time, but for whatever reason need to amend their original tax return, should not be deprived of the interest earned on their overpayment from the date the original tax return was filed to the date it was amended. This legislation, if enacted, would change the current law by authorizing the payment of all interest accrued on a tax overpayment from the date the original tax return was filed, and in so doing, give taxpayers filing an amended return the full benefit of all the interest earned on their tax overpayment.

D. The Division's own Technical Services Bureau Memorandum, TSB-M-99(7)I, issued November 19, 1999, explained these amendments as follows:

For tax years beginning on or after January 1, 1999, section 688(a)(3) of the Tax Law is amended relating to the payment of interest on an overpayment of personal income tax as a result of the filing of an amended return or a claim for credit or refund. Under the new law, interest on an overpayment of tax claimed on an amended return or a claim for credit or refund will be payable from the due date of the original return to the date the refund is issued. However, section 688(c) of the Tax Law is also amended to provide that if the Department refunds the overpayment within forty-five days after the amended return or a claim for credit or refund is filed, no additional interest will be paid from the date the amended return or a claim for credit or refund is filed until the date the refund is issued.

E. Clearly, if the taxable years at issue were not years prior to 1999, petitioners would be entitled to the relief sought, and interest would be due and payable on the overpayments from the due date of the original returns filed. However, the amendments made to the Tax Law by chapter 377 of the Laws of 1999 were made prospectively, i.e., for tax years beginning January 1, 1999. There is no ambiguity with respect to the effective date of the amendments made to Tax Law § 688(a)(3) and (c).

For tax years 1994, 1995, 1996 and 1997, Tax Law § 688(a)(former [3]) provided that in the case of an overpayment claimed on an amended return or on a claim for credit or refund which

is filed after the last date prescribed for filing the return for the years at issue (petitioners filed amended returns on or about January 2, 2007 for the years 1994, 1995, 1996 and 1997, a date that was within 90 days of the final determination of the federal change as required by Tax Law § 659, no interest would be allowed or paid for any day before the date on which the return or claim was filed.

F. Petitioners, in their brief, assert that “[t]he Law is simple - Tax Law 687(c) states that interest is payable for Federal Changes when filed within the 90 day period of the report.”

Therefore, petitioners contend that since they filed within the 90-day period, they should get interest from the due date of the original return. This position is wholly without merit.

Tax Law § 687(c) provides, in pertinent part, that:

[i]f the report or amended return required by section six hundred fifty-nine is not filed within the ninety day period therein specified, no interest shall be payable on any claim for credit or refund of the overpayment attributable to the federal change or correction.

Since petitioners did comply with the provisions of Tax Law § 659 by reporting the federal changes to the Division within the 90-day period, they are entitled to interest on the overpayments and Tax Law § 687(c) is relevant only to the extent that it provides the authority for the payment of interest to petitioners from the date of the filing of the amended returns reflecting the federal changes. (Tax Law § 688[a][former (3)].)

Relevant provisions of the Tax Law were amended to address the seminal issues in this matter: the failure of the Division to refund interest from the date of filing of the original returns (while requiring petitioners to pay interest on their additional taxable income resulting from the federal changes from the date of filing of the original returns for the years at issue). That the applicable sections of the Tax Law in effect during the years in issue were not wholly equitable,

was likely the reason the Legislature amended the relevant sections of the Tax Law. However, that amendment did not apply to the years in issue.

Petitioner urges the Division of Tax Appeals to correct the inequity that existed under the prior law. This it cannot do for the simple reason that the relevant sections of the law did not apply to the years in issue.

An amendment will have prospective application only and no retroactive effect unless the language of the statute clearly indicates that it shall receive a contrary interpretation. In the present matter, section 3 of chapter 377 of the Laws of 1999, which amended Tax Law § 688(a)(3) and (c), states: “This act shall take effect immediately and shall apply to taxable years beginning January 1, 1999.”

Accordingly, the Division applied the provisions of Tax Law § 688(a)(former [3]) and Tax Law § 688(former [c]), which were applicable to the tax years at issue herein.

G. Although only mentioned vaguely in their brief, petitioners have attempted to claim a violation of the United States and New York State constitutions without citing specific provisions that have been violated by the applicable Tax Law sections.

The essence of petitioners’ constitutional argument is contained in the following statement from their brief:

Whether it is a violation of U.S. Constitution, N.Y.S. Constitution and/or Civil Rights Acts of the State of New York when the “department” assesses a taxpayer from the original due date on “Federal Changes” while only allowing a taxpayer on the reciprocal “Federal Change” adjustment to receive interest from a date that the “Federal Changes” were filed and at a lower interest rate, at best.

It is well settled that the Division of Tax Appeals lacks jurisdiction to consider claims alleging that a statute is unconstitutional on its face (*see Matter of A&A Service Station, Inc.*,

Tax Appeals Tribunal, October 15, 2009; *Matter of RAF General Partnership*, Tax Appeals Tribunal, November 9, 1995) and at the administrative level, statutes are presumed to be constitutional (*see Matter of Lunding*, 218 AD2d 268, 639 NYS2d 519 [1996], *revd* 89 NY2d 283, 653 NYS2d 62 [1996], *cert granted* 520 US 1227 [1997], *revd* 522 US 287 [1998]).

The Division of Tax Appeals may, however, determine whether tax law statutes are constitutional as applied (*Matter of Eisenstein*, Tax Appeals Tribunal, March 27, 2003, citing *Matter of David Hazan, Inc.*, Tax Appeals Tribunal, April 21, 1988, *confirmed* 152 AD2d 765, 543 NYS2d 545 [1989], *affd* 75 NY2d 989, 557 NYS2d 306 [1990]). The taxpayers bear the burden of proving that a statute, as applied, is unconstitutional (*Matter of Brussel*, Tax Appeals Tribunal, June 25, 1992).

In the present matter, petitioners have offered no evidence that they were treated any differently than other taxpayers, similarly situated, in the application of Tax Law § 688(a)(3) and they have failed to meet their burden of proof.

H. At the very end of their constitutional argument (“while only allowing a taxpayer on the reciprocal “Federal Change” adjustment to receive interest from a date that the “Federal Changes” were filed and *at a lower interest rate, at best*), petitioners appear to argue that there is an inequity in the rates of interest charged to taxpayers who have underpaid and overpaid their taxes.

Tax Law § 697(j) gives the Commissioner of Taxation and Finance the authority to set the overpayment and underpayment rates of interest to be paid pursuant to Tax Law §§ 684, 685 and 688. More specifically, Tax Law § 697(2)(A) and (former [B]), in effect at the time the amended returns were filed, provided that the overpayment rate was the sum of the federal short term plus two percentage points while the underpayment rate was the sum of the federal short term

rate plus four percentage points. Clearly, therefore, there is statutory authority for the disparity in the overpayment and underpayment interest, and since the Tax Law grants to the Commissioner of Taxation and Finance the exclusive authority to set these interest rates, the Division of Tax Appeals is without jurisdiction herein.

I. Tax Law § 606(f)(3)(B) explicitly precludes interest accrual on refunds of the Special Additional Mortgage Recording Tax. Therefore, petitioners' claim that their interpretation of Tax Law §§ 688(a)(3) and (c) provides for interest on the SMRTC is without merit.

J. Both parties submitted documents with their post hearing briefs. The Division submitted calculations that applied audit guidelines that concerned the netting of overpayments and underpayments of tax. Petitioners responded to this submission with additional factual claims of their own with regard to the application of payments and interest calculation. In addition, petitioner submitted a document that was labeled "Exhibit 29."

The Tax Appeals Tribunal has held that in order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record (*Matter of Emerson*, Tax Appeals Tribunal, May 10, 2001).

The parties' submissions with their briefs in this matter opened factual issues that were not initially raised at hearing and did not present clearly justiciable issues for this forum. Therefore, all post hearing submissions, except the Mary C. Murphy affidavit of October 19, 2009, for which the record was held open, must be rejected.

K. The petition of Michael A. Goldstein and Janice L. Goldstein is denied and the Notice of Disallowance, dated July 17, 2009, is sustained.

DATED: Troy, New York
August 19, 2010

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