

NEW YORK STATE

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	DETERMINATION
JAMES MCNULTY (DECEASED)	:	DTA NOS. 822715,
AND SHARI MCNULTY¹	:	822951, 822952
	:	822953, 822954
	:	822955, 822956
for Redetermination of Deficiencies or for Refunds of	:	823085
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 1995 through 1998	:	
and 2004.	:	

Petitioners, James McNulty (deceased) and Shari McNulty, et al., filed petitions for redetermination of deficiencies or for refunds 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 1995 through 1998 and 2004.

On December 29, 2009, petitioners, appearing by Samson Management LLC (Ray W. Cruz, Esq., of counsel) and the Division of Taxation, appearing by Daniel Smirlock, Esq. (Robert Tompkins, Esq., of counsel), waived a hearing and agreed to submit the matter for a determination based on documents and briefs to be submitted by May 24, 2010, which commenced the six-month period for the issuance of this determination. By letter dated November 17, 2010 the Administrative Law Judge extended the time for issuance of this determination for three months pursuant to Tax Law § 2010(3). After due consideration of the

¹ This matter involves eight petitions, which have been consolidated for one determination. For a list of the petitions and petitioners, see the appendix.

documents and arguments submitted, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation (Division) erred in determining that interest began to accrue on refunds arising from the individual petitioners' filing of amended fiduciary income tax returns, from the date that the amended returns were filed rather than the date that the original returns were due.

II. Whether the individual petitioners have established that interest on their 1995 deficiency from reporting federal audit changes should not begin accruing until the date that a tax overpayment on the original return was refunded.

III. Whether the payment of interest on refund claims based upon the special mortgage recording tax credit are precluded by Tax Law § 606 (f)(3)(B).

FINDINGS OF FACT

The petitions in this matter concern personal income tax and fiduciary income tax. This determination will initially address the facts regarding the personal income tax claims and then the facts pertinent to the fiduciary income tax returns.

Personal Income Tax

1. Petitioners James and Shari L. McNulty filed a 1994 New York State Resident Income Tax Return. The return claimed a refund in the amount of \$25,223.00. Thereafter, on the basis of federal audit changes, petitioners filed a 1994 Amended New York State Resident Income Tax Return stating that taxes were due in the amount of \$5,101.00.

2. James and Shari McNulty filed a 1995 New York State Resident Income Tax Return which claimed a refund in the amount of \$58,292.00. Thereafter, they filed a 1995 Amended

New York State Resident Income Tax Return which, on the basis of federal audit changes, reported that tax was due in the amount of \$37,720.00.

3. James and Shari McNulty filed a 1996 New York State Resident Income Tax Return, which reported that a refund was due in the amount of \$8,874.00. Subsequently, petitioners filed an Amended New York State Resident Income Tax Return for 1996 which reported federal audit changes and claimed a refund in the amount of \$8,874.00.

4. James and Shari McNulty filed a New York State Resident Income Tax for the year 1997, which claimed a refund in the amount of \$5,622.00. Thereafter, they filed an Amended New York State Resident Income Tax Return for 1977, which reported federal audit changes and claimed a refund in the amount of \$5,622.00.

5. The refunds resulting from the reported federal audit changes for the years 1996 and 1997 were applied against the 1995 tax deficiency of \$37,720.00 as of the due dates of the original 1996 return, April 15, 1997, and the 1997 original return, April 15, 1998.

6. On November 22, 1996, the Division paid petitioners \$69,216.00, which constituted a refund from an overpayment on the original income tax return for 1995.²

7. Shari McNulty filed an Amended New York State Resident Income Tax Return for 2004, form IT-201-X, bearing a signature dated March 8, 2007. The return included a form IT-256, Claim for Special Additional Mortgage Recording Tax Credit, which claimed a credit in the amount of \$38,767.00. This claim was satisfied in the amount of \$20,833.00 through a payment

² Setting forth the procedural context of this refund claim is difficult because the record does not include the original form IT-201 for 1995. It also does not include a refund claim or a notice of disallowance concerning additional interest for 1995. As pointed out by the Division, the only jurisdictional document that concerns 1995 is a notice of disallowance for 1996 and 1997, which states that refunds for those years were applied against the 1995 deficiency and that, pursuant to Tax Law § 688, interest on an overpayment was payable from the date the amended return was filed to the date the refund was issued.

on or about August 31, 2007. In a letter dated June 6, 2007, the Division requested additional information regarding the claim for the mortgage recording tax credit. This information was supplied and, on February 6, 2008, the Division paid an additional \$17,934.00, satisfying the balance of the outstanding claim.

8. Ms. Shari McNulty filed an IT-113X for the year 2004 requesting a refund of interest that was not included with the refund computed on the IT-201-X submitted for 2004. The refund was based upon the IT-256, Claim for Special Recording Tax Credit, that was filed with the IT-201X amended return.

9. In a letter dated June 5, 2009, the claim for a refund was denied on the basis that the Tax Law does not provide for interest on an overpayment.

Fiduciary Income Tax³

10(a) The petition of Shari Goldstein "L" SL#4 Trust.

Petitioner filed amended fiduciary income tax returns for the years 1995, 1996, 1997 and 1998, respectively, dated May 23, 2006,⁴ which reported federal audit changes. The Division issued a Statement of Tax Refund, dated November 13, 2006, which, after making certain adjustments,⁵ calculated refunds for each of the years. For each claim, interest was accrued from the date of the refund claim until the date the payment was approved, that is, November 1, 2006 for 1995 and November 2, 2006 for 1996 through 1998. The amount of interest computed for the

³ As set forth above, the only issue presented with respect to the trusts is whether interest on the refunds arising from the filing of amended fiduciary tax returns reporting federal audit changes should accrue from the time of the filing of the amended return or the due date of the original returns. Setting forth the procedural history of these claims is difficult because the refund claims requesting the additional interest do not appear in the record.

⁴ The signature on the return for 1998 was dated May 22, 2008.

⁵ The adjustment to the amount of the refund of tax is not in issue in this proceeding or the other related proceedings..

years 1995 through 1998 was \$282.00, \$388.92, \$355.92 and \$159.16, respectively. Tax and interest were refunded.

(b) Petition of Shari Goldstein "A" SL #6 Trust for the years 1995 through 1998.

Petitioner filed amended fiduciary income tax returns on May 23, 2006. The Division issued adjusted refunds for the years 1995 through 1998 and, in the process, accrued interest from the date of the refund claim, May 23, 2006, until the date approved for payment, November 1, 2006 for 1995 and 1998 and October 24, 2006 for 1996 and 1997. The amount of interest accrued for the years 1995 through 1998 is as follows: \$427.94, \$542.28, \$506.50 and \$233.71. Tax and interest were refunded.

(c) Petition of Shari Goldstein "I" SL #7 Trust for the years 1995 through 1998.

Petitioner filed amended fiduciary income tax returns for the years 1995 through 1998 reporting federal audit changes. The signature on each of the returns was dated May 23, 2006. The statements of refund adjustment show that for each claim, interest was accrued from the date of the refund claim, May 23, 2006, until the date approved for payment of the claim, November 1, 2006 for 1995, October 31, 2006 for 1996 and 1997 and October 25, 2006 for 1998. The interest computed for the years 1995 through 1998 was as follows: \$277.37, \$367.23, \$346.52 and \$45.97, respectively. Tax and interest were refunded.

(d) Petition of Scott D. Goldstein Trust #4 for the years 1995 through 1998.

Petitioner reported federal audit changes on amended fiduciary income tax returns on May 23, 2006. After adjustments, interest was accrued from the date of the refund claim, May 23, 2006, to the date approved for payment, November 1, 1996 for 1996 and October 26, 2006 for 1997 and 1998, respectively. The interest computed for the years 1995 through 1998

was as follows: \$161.60, \$170.38, \$166.74 and \$13.30, respectively. Tax and interest were refunded.

(e) Petition of Scott D. Goldstein Trust #6 for the years 1995 through 1998.

On or about May 23, 2006, petitioner filed amended fiduciary income tax returns, which reported federal audit changes. For each claim, interest was accrued from May 23, 2006, the date of the refund claim, until the date approved for payment, October 26, 2006. The interest computed for the years 1995 through 1998 was as follows: \$79.86, \$82.67, \$80.94 and \$50.95, respectively. Tax and interest were refunded.

(f) Petition of Scott D. Goldstein Trust #7 for the years 1995 through 1997.

On or about July 17, 2006 petitioner filed amended fiduciary income tax returns, which reported federal audit changes. After making adjustments to the claims for refund, the Division accrued interest from July 18, 2006, the approximate date the returns were filed, until the date approved for payment, which was November 1, 2006 for 1995 and 1997 and October 31, 2006 for 1996. The interest computed for the years 1995 through 1997 was as follows: \$174.98, \$130.62 and \$128.18, respectively. Tax and interest were refunded.

SUMMARY OF THE PARTIES' POSITIONS

11. Many aspects of this case have been resolved between the parties and are no longer in dispute. Despite the fact that the issues have become academic they were addressed by petitioners in their brief. In order to bring closure to these concerns, they will be briefly outlined. However, they will not be addressed beyond this acknowledgment that the matters were raised.

(a) Initially, a portion of this matter concerned the Amended New York State Resident Income Tax Return of James McNulty (deceased) and Shari McNulty for 1995, 1996 and 1997, which reported federal income tax audit changes by the Internal Revenue Service and the

Amended New York State Resident Income Tax Return for 2004 requesting a refund of special mortgage recording tax. The federal changes for 1995 increased income resulting in a deficiency while the federal changes for 1996 and 1997 reduced income resulting in overpayments. The Division allowed the overpayments for 1996 and 1997 to reduce the deficiency for 1995 as of the due date for the overpayment years, which, in turn, minimized interest of the deficiency for 1995. Since this is what petitioners sought, their contention that this should be allowed was withdrawn in their brief.

(b) In their brief, petitioners ask that interest on the deficiency for 1995 not begin accruing until November 22, 1996, which is the date of a refund payment made on the original 1995 return. The Division has agreed to this request but only to the extent that petitioners can substantiate the amount of the refund.

(c) In its brief, the Division noted that petitioners' representative inquired about whether petitioners paid interest and penalties on the late payment of tax on the original fiduciary income tax returns. In response, the Division has agreed to recalculate interest and penalties for the reduction in income for all applicable tax years and to refund any resulting reductions in interest and penalties accruing from the refund application date, which is also the amended fiduciary income tax return filing date.

(d) In their brief, the petitioners that are trusts request that penalties and interest charged for late payments on the original returns be refunded to the extent that a recalculation based upon the federal recalculation of income causes a reduction in the interest and penalties originally calculated. The Division has agreed to this request.

(e) Petitioners' brief states that James and Shari McNulty will not continue their dispute for 1994. In a different paragraph of their brief, petitioners' representative explained that

petitioners had requested application of the refunds for 1996 and 1997 as of the original due date of the returns rather than the date of the amended returns. Petitioners' brief also states that they have discontinued their dispute regarding the years 1996 and 1997. Therefore, further attention to these years will not be pursued.

(f) Paragraph 2 of the facts in petitioners' brief contends that refunds from an overpayment on the original return filed for 1995 were paid on November 22, 1996 in the amount of \$69,216.00 and on December 17, 2002 in the amount of \$24,331.62. In its brief, the Division acknowledged the refund in the amount of \$69,216.00 but stated that there was no evidence to support the finding that there was a refund of \$24,331.62. This point was not pursued in the reply brief.

On page 8 of their brief, petitioners request that in computing interest on the deficiency in tax for 1995, the accrual of interest should not begin on the portion of the deficiency equal to the 1995 refund payments until the date that the refund was issued, relying upon *Matter of Unicorp American Corporation* (Tax Appeals Tribunal, December 28, 1995). In its brief, the Division agreed to apply *Unicorp* by not accruing interest on the first \$69,216.00 of the 1995 deficiency (the amount of the 1995 refund payment, which has been established) until the date that this amount was refunded. Since the deficiency for 1995 was less than \$69,216.00, the entire deficiency will not accrue interest until November 22, 1996.

(g) In the course of this litigation, petitioners requested that the Division search its records for documents indicating whether they paid interest and penalties on the late payment of tax on the fiduciary income tax returns that were initially filed. In response, the Division has agreed to recalculate interest and penalties for the reductions in income for all applicable tax years and refund any resulting reductions in interest and penalties accruing from the date of the filing of the

Amended New York State Fiduciary Income Tax Return, which is viewed as the refund application date.

CONCLUSIONS OF LAW

A. A proceeding before the Division of Tax Appeals is commenced by the filing of a petition protesting a written notice of the Division of Taxation (Tax Law § 2008). In petitioners' brief, there is a discussion of federal audit changes for the years 1998 through 2002. However, since there are no petitions concerning these years in the record, there is no jurisdiction to address these concerns.

B. During the years in issue, the payment of interest on a return that was late filed was governed by Tax Law former § 688(3), which states:

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.

C. The forgoing provision was enacted as part of chapter 61 of the Laws of 1989, effective April 1, 1989, and applicable to tax years commencing on or after January 1, 1989. As pointed out by the Division in its brief, the effect of the foregoing provision on the refund claims in this matter is to preclude the payment of interest "before the date on which such return or claim is filed."⁶ In view of the clear language of the section quoted, it is concluded that the Division properly declined to compute interest before the amended returns were filed.

D. Relying upon Tax Law § 687(c), petitioners contend that interest is payable on federal audit changes when the changes are reported within the 90-day period. Thus, petitioners maintain that since they reported the federal changes within the 90-day period, they should

⁶ Although it does not provide any assistance to petitioners, it is noted that this restriction was removed by chapter 377 of the Laws of 1999, applicable to tax years beginning January 1, 1999.

receive interest from the due date of the original return. Petitioners' argument relies upon the portion of Tax Law § 687(c) that states:

if 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.

Petitioners submit that since petitioners reported the federal changes within the 90-day period in accordance with Tax Law § 687(c), they are entitled to interest from the date of the original return.

E. Petitioners' proposed interpretation of Tax Law § 687(c) violates a basic principle of statutory construction. Since Tax Law § 688(3) and Tax Law § 687(c) both concern refunds, the sections should be considered in *parti materia* and read harmoniously (McKinney's Cons Laws of NY, Book 1, Statutes § 21[b]). As set forth above, Tax Law § 687(c) precludes the payment of interest if the amended return reporting the federal audit changes is not filed within 90 days of the final federal determination. The effect of Tax Law 687(c) is that the taxpayer will not receive any interest if the reporting of the federal audit changes takes place after the 90-day period. If the reporting of the federal audit changes occurs within the 90-day period, then Tax Law § 688(3) becomes controlling and directs that interest is computed from the date of the amended return until the date of payment. There is no basis to infer, as petitioner argues, an interpretation that is contrary to the clear language of the relevant provisions of the Tax Law.

F. Although petitioners do not mention a specific provision of the federal constitution, it appears that they are challenging the constitutionality of denying interest on refunds prior to the refund claim date pursuant to Tax Law § 688(a)(3). This argument may not be addressed because there is no jurisdiction to address the constitutionality of a statute on its face (*Matter of*

Karlsberg, Tax Appeals Tribunal, March 1, 2010; ***Matter of Unger***, Tax Appeals Tribunal, March 24, 1994).

G. Petitioners have challenged the denial of interest on refunds granted pursuant to the special mortgage recording tax credit (SMRTC). The SMRTC is set forth in Tax Law § 606(f). Paragraph 3(B) of this section provides as follows:

If the amount of the credit allowable under this paragraph for any taxable year exceeds the taxpayer's tax for such year, any amount of credit exceeding such tax may be carried over to the following year or years and may be deducted from the taxpayer's tax for such year or years. Provided further, such taxpayer may elect to treat such unused amount of credit as an overpayment of tax to be credited or refunded in accordance with the provisions of section six hundred eighty-six of this article except that *no interest may be paid on such overpayment*. (Emphasis added.)

H. As set forth above, a taxpayer may elect to carry over the unused credit or may treat the unused credit as an overpayment to be refunded without interest. Here, the taxpayers elected to apply for a refund, which was granted by the Division. In view of the clear language of the statute, the Division properly declined to pay interest on the refund.

I. In their brief, petitioners requested that the 2004 refund for the SMRTC be offset against other deficiencies. This request is denied. Unless the refunds and the deficiencies are part of the same audit, there is no authority for offsetting one against the other. In this matter, the refunds were paid as described in the findings of fact.

J. The petitions of James McNulty (Deceased) and Shari McNulty, Shari L. Goldstein "L" SL#4, Shari L. Goldstein "A" SL#6, Shari L. Goldstein "I" SL#7, Scott D. Goldstein No.4,

Scott D. Goldstein “A” SD#6, Scott D. Goldstein “I” No. 7 and Shari McNulty are denied and the notices of disallowance issued to petitioners on July 16, 2008, June 5, 2009, July 17, 2009 and December 15, 2006 are sustained.

DATED: Troy, New York
February 24, 2011

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE

APPENDIX

Petitioner	DTA#
James McNulty (Deceased) and Shari McNulty	822715
Shari L. Goldstein “L” SL #4	822951
Shari L. Goldstein “A” SL#6	822952
Shari L. Goldstein “I” SL#7	822953
Scott D. Goldstein No.4	822954
Scott D. Goldstein “A” SD #6	822955
Scott D. Goldstein “I” No. 7	822956
Shari McNulty	823085