STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SHLOMO CASSOS	:	DETERMINATION DTA NO. 823077
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 1996.	:	

Petitioner, Shlomo Cassos, 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 year 1996.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on December 1, 2009 at 1:30 P.M., with all briefs to be submitted by January 19, 2010, which date commenced the six-month period for the issuance of this determination. Shlomo Cassos appeared pro se. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michelle Helm, Esq., and Marie DiCostanzo, Esq., of counsel).

ISSUE

Whether petitioner's refund claim should be granted pursuant to Tax Law § 697(d).

FINDINGS OF FACT

1. Petitioner, Shlomo Cassos, filed federal and New York State resident income tax returns for the year 1996. The returns reported capital gains from the sale of a home in New York City. Petitioner paid taxes on the reported capital gain to the Internal Revenue Service and the Division of Taxation (Division).

2. At the time the original returns for 1996 were prepared, petitioner was involved in a very difficult divorce, which distracted him from thinking about his tax returns. Several years after filing his returns for 1996, a conversation with his accountant led petitioner to realize that he had not reduced his capital gain by certain expenses.

3. Petitioner's accountant filed a claim for a refund with the Internal Revenue Service (IRS). In a notice dated December 30, 2002, petitioner was advised that, as a result of an examination of his tax return for the year 1996, there was a decrease in his tax in the amount of $53,545.00. He was also told that a late payment penalty that was previously charged was reduced by $5,684.86 and that there was a decrease in interest previously charged in the amount of $5,119.53. These adjustments resulted in a refund check in the amount of $64,599.82.[1]

4. At the time of the refund, petitioner assumed that the IRS would notify the Division and that, thereafter, New York would proceed to issue a refund without further action on his part. After waiting approximately five and one-half years, petitioner spoke to an employee of the Division who advised him that he would have to prove that he owed no money to the IRS.

5. On August 29, 2008, on the basis of the federal changes, petitioner filed an amended 1996 New York State personal income tax return requesting a refund in the amount of $22,798.00. The amended return was the first notification that the Division received of the federal audit changes.

6. On December 12, 2008, the Division issued a Notice of Disallowance stating that the claim for refund was denied because the amended return was filed beyond the two year and 90 day statute of limitations.

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[1] The foregoing adjustments plus a reduction of a federal tax lien resulted in a total refund of $91,286.47.

7. Petitioner requested a conciliation conference which was held on March 5, 2009. In an order dated April 3, 2009, the denial of the refund was sustained. This proceeding followed.

8. At the time the original returns for 1996 were filed, petitioner realized that he had additional expenses but he did not know that they were supposed to be subtracted. Petitioner cannot locate a copy of his original return for 1996 and does not recall what expenses were claimed on the original return for the year in issue.

9. Prior to the hearing, the Division made a motion for summary determination on the basis that petitioner's claim for a refund was barred by the statute of limitations provided for in Tax Law § 687(c). Upon review of the motion papers, it was decided: that the claim for refund was filed beyond the expiration of the statute of limitations, that the statute of limitations may not be tolled for equitable considerations and that it was not possible to determine whether petitioner was entitled to a refund under Tax Law § 697(d), because it was unclear whether the monies paid by petitioner were paid under a mistake of law or a mistake of fact.

SUMMARY OF THE PARTIES' POSITIONS

10. In his brief, petitioner argues that he is entitled to relief under Tax Law § 697(d) because there are no questions of law or fact and that the records show that monies were erroneously collected from him. In this regard, petitioner notes that the claim for a refund was based on an audit change by the IRS, which concluded that there had not been a capital gain upon which payment was due. Petitioner also respectfully submits that the prior order was erroneous insofar as it concluded that there had not been an erroneous collection under Tax Law § 697(d) because the payment was voluntarily. According to petitioner, an erroneous collection occurs when the payment is held or retained by the state. In the alternative, petitioner argues that he is entitled to a refund under Tax Law § 697(d) because the overpayment of tax was due to a mistake

of fact arising from neglect or forgetting to include certain expenses that were relevant to the calculation of a capital gain.

11. The Division contends that the fact that petitioner did not know or forgot that he had expenses that could be deducted from a capital gain from the sale of an existing home constitutes a mistake of law and not fact, and therefore, he is not entitled to a refund under Tax Law § 697(d).

12. In a reply brief, petitioner acknowledges that the subsequent claim for refund was not filed within the applicable statute of limitations. He then reiterates his explanation that substantial turmoil in his life caused confusion and his forgetting expenses at the time the original return for 1996 was prepared. Petitioner's reply brief reiterates the arguments set forth in his opening brief.

CONCLUSIONS OF LAW

A. On the prior motion for summary judgment in this matter, it was decided that the claim for refund was barred by the statute of limitations. Since petitioner does not challenge this conclusion, further attention to this point is unnecessary.

B. The question which remains is whether petitioner's claim for refund may be granted under Tax Law § 697(d). This section 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.

As set forth above, petitioner argues that moneys were erroneously or illegally collected because they are being held and not paid back. This argument is rejected because it is contrary to the conclusion reached on the prior motion for summary judgment. As such, the prior conclusion is the law of the case and the argument will not be entertained a second time (***see generally Matter of Kasparaitis***, Tax Appeals Tribunal, July 21, 2005).[2]

C. Petitioner also contends that the payment was made under a mistake of fact. In ***Matter of Wallace*** (Tax Appeals Tribunal, October 11, 2001) the Tax Appeals Tribunal adopted the following definitions in order to distinguish a mistake of law from a mistake of fact:

> 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. In his brief, petitioner argues that he made a mistake of fact because his failure to include certain expenses in the calculation of capital gain was due to his forgetfulness and confusion with respect to the existence of those expenses and not because of a failure to understand the legal consequences of the facts. The Division, on the other hand, maintains that petitioner knew that he had expenses and that his failure to include the expenses constituted a mistake of law and not a mistake of fact.

E. Under the definition adopted by the Tribunal in ***Matter of Wallace***, it is concluded that petitioner made a mistake of law. It is clear from the record that petitioner knew that he had

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[2] If this argument were accepted, there would, as a practical matter, not be a statute of limitations on claims for a refund because the essence of a meritorious claim for a refund of tax is that monies are being erroneously or illegally held. Such a holding would be contrary to the public policy considerations for enacting a statute of limitations which were articulated by the Tribunal in ***Matter of Nierenstein*** (Tax Appeals Tribunal, April 21, 1988).

expenses but did not realize that they should have been deducted in determining whether there was a gain on the sale of the home. There has not been any showing that the failure to properly report the expenses from the sale was due to an understanding of the facts which were different from what they actually were. It follows from the foregoing that the Division properly denied petitioner's claim for a refund as untimely.[3]

F. The petition of Shlomo Cassos is denied.

DATED: Troy, New York
February 25, 2010

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE

[3] Petitioner's reliance upon an advisory opinion is misplaced. First, the advisory opinion cited does not support petitioner's position. Second, Tax Law § 171(24) provides that advisory opinions are not binding on the Division except with respect to the person to whom the opinion is rendered. Therefore, the advisory opinion may not be cited as precedent.