

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MICHAEL GOLDSTEIN AND :
JANICE GOLDSTEIN : DETERMINATION
: DTA NO. 823088
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 1997 through 2002. :

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 1997 through 2002.

On February 24, 2010 and March 1, 2010, respectively, 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 submitted the matter for determination based on documents and briefs to be submitted by June 21, 2010, which date began the six-month period for issuance of this determination. By letter to the parties, dated November 12, 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 documents and arguments submitted, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly applied refunds for the years 1998, 1999, 2000, 2001 and 2002 against tax due for the year 1997.

II. Whether the interest accrued on the refunds for the years 1998, 1999, 2000, 2001 and 2002 was properly calculated by the Division of Taxation.

III. Whether the Division of Taxation properly calculated the interest owed by petitioners on the 1997 deficiency.

IV. Whether the Division of Taxation may utilize different rates of interest on underpayments and overpayments.

FINDINGS OF FACT

1. This case is an extension of the ***Matter of Michael A. and Janice L. Goldstein*** (Division of Tax Appeals, ALJ Unit, August 19, 2010) and shares one year in issue (1997) by virtue of the application of overpayments from the years 1998, 1999, 2000 and 2002 to 1997. Where appropriate, official notice will be taken of the facts in that matter.¹

2. 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 1994, there was an overassessment of \$103,117.00. For

¹Official notice may be taken of the record of another matter before the Division of Tax Appeals pursuant to State Administrative Procedure Act § 306(4), which provides that "official notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency." Courts of the State of New York may take judicial notice of their own record of the proceeding of the case before them, the records of cases involving one or more of the same parties or the records of cases involving totally different parties (***Berger v. Dynamic Imports, Inc.***, 51 Misc 2d 988, 274 NYS2d 537; 57 NY Jur 2d, Evidence and Witnesses, § 47). The record of the proceeding before the Division of Tax Appeals of which official notice may be taken is ***Matter of Michael A. Goldstein and Janice L. Goldstein*** (Division of Tax Appeals, ALJ Unit, August 19, 2010), a copy of which was duly served on petitioner. (***Matter of Kolovinas***, Tax Appeals Tribunal, December 28, 1990.)

the year 1995, there was a deficiency of \$265,784.00. For the year 1996, there was no change. For the year 1997 there was a deficiency of \$359,377.00.²

3. As a result of the federal changes, petitioners timely filed amended New York State resident income tax returns. The amended return for 1997 was filed on or about January 2, 2007 and stated additional tax due of \$104,306.00. Interest was accrued by the Division of Taxation (Division) on the 1997 deficiency from the due date of the original return until payment. Petitioners 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 Special Mortgage Recording Tax Credit (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 \$43,691.87.³

4. On or about January 3, 2008, petitioners consented to income tax examination changes by executing IRS form 4549, which indicated refunds due for each of the years 1998, 1999 and 2000 in the respective amounts of \$157,445.00, \$58,356.00 and \$23,034.00.

5. On or about January 3, 2008, petitioners consented to income tax examination changes by executing IRS form 4549, which indicated refunds due for each of the years 2001 and 2002 in the respective amounts of \$940.00 and \$4,328.00.

6. On or about February 26, 2008, petitioners filed amended New York resident personal income tax returns, forms IT-201-X, for the years 1998, 1999, 2000, 2001 and 2002 consistent with the federal changes reported. Each of the returns indicated a refund due as follows:

² *Matter of Goldstein* (Division of Tax Appeals, ALJ Unit, August 19, 2010), Finding of Fact 1.

³ *Matter of Goldstein* (Division of Tax Appeals, ALJ Unit, August 19, 2010), Finding of Fact 8.

\$16,524.00 for 1998; \$2,233.00 for 1999; \$33,293.00 for 2000; \$322.00 for 2001; and \$1,060.00 for 2002.

7. On November 18, 2008, petitioners filed claims for credit or refund of personal income tax on forms IT-113-X, seeking the following refunds: \$80,000.00 for 1997; \$25,000.00 for 1998; \$6,000.00 for 1999; \$40,000.00 for 2000; \$1,000.00 for 2001; and \$2,500.00 for 2002.

8. 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.

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.⁴

9. Consistent with the law in effect during the year 1998, the Division computed interest on the refund from the date of the amended return, or February 26, 2008. For the years 1999, 2000, 2001 and 2002, the Division computed interest from the filing date of the original income tax return, consistent with the statute then in effect.

⁴ *Matter of Goldstein* (Division of Tax Appeals, ALJ Unit, August 19, 2010), Finding of Fact 11.

10. 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. As part of her duties, Ms. Murphy reviewed the computerized records of taxpayer accounts, allowing her to determine the accrual of interest and the application of payments and overpayments to deficiencies.

11. For the year 1997, Ms. Murphy noted the Division's records indicate an assessment, L-028637778, setting forth tax due of \$104,306.00 and a payment in that sum dated January 3, 2007, made with an amended return. The records also reflected a payment on January 31, 2008 of \$13,191.31, applying the refund from 2004; a payment of \$1,276.71, dated June 5, 2008, applying the refund from 2002; a payment of \$72,091.21, dated June 26, 2008, applying refunds from 1998, 1999 and 2000 in the sums of \$25,108.75, \$3,290.59 and \$43,691.87, respectively.

In an electronic mail from Ms. Murphy to the Division's representative, Mr. Tompkins, dated January 11, 2010, Ms. Murphy reported the specific application of funds to the interest on the tax due as follows:

\$104,306.00	Tax Due
25,343.88	Interest from 4/15/1998 to 4/15/01
129,649.88	Balance
11,731.19	Balance of 2000 refund
117,918.69	Balance
7,527.81	Interest from 4/16/01 to 4/15/02
125,446.50	Balance
322.00	Less 2001 refund
125,124.50	Balance
7,714.60	Interest from 4/16/02 to 4/15/03
132,839.10	Balance
1,060.00	Less 2002 refund
131,779.10	Balance
38,852.50	Interest from 4/16/03 to 1/3/07
170,631.00	Balance
136,393.00	Less payment made on amended return as of 1/3/07
34,238.60	Balance

1,881.62	Interest from 1/4/07 to 8/9/07
36,120.22	Balance
54,230.00	Less 2004 refund credit
\$ 18,109.78	Overpayment after applying 2004 refund

12. In its response, the Division of Taxation agreed to compute the interest accrued for the year 1998 from the file date of the original return rather than the file date of the amended return. In addition, the Division agreed that the refunds for the years 1998, 1999, 2000, 2001 and 2002 should have offset the deficiencies from prior years as of the original due dates of the refund years, thus applying the Income Tax Audit Guidelines Part III General, Interest Calculations When Netting Overpayments and Underpayments.

CONCLUSIONS OF LAW

A. In the present matter, two of the tax years at issue are 1997 and 1998. 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(former [c]) was 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. For the taxable years at issue prior to 1999, petitioners were not entitled to the relief sought, and interest was not 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 1997 and 1998, 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 1997 and February 26, 2008 for 1998, dates which were within 90 days of the final determination of the federal changes 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. Therefore, the Division's calculation of interest for 1997, set forth in detail in Finding of Fact 11, is deemed proper, both quantitatively and in its application of the Tax Law in effect at the time. The auditor, Ms. Murphy, carefully explained the payments received, applications of refunds made and balances due. In accordance with the law in effect at the time, interest was calculated for the year 1997 from the due date of the original return, April 15, 1998, to the date of assessment, June 4, 2007. Petitioners have introduced no evidence to demonstrate that the calculations were in error and have also failed to cite any legal authority to challenge the Division's methodology.

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 1997 and 1998 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 1997 and 1998.

An amendment will have only prospective application 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 1997 and 1998.

Notwithstanding the Division’s proper application of the Tax Law sections mentioned, the Division has agreed to compute the interest accrued for the year 1998 from the file date of the

original return rather than the file date of the amended return. In addition, the Division agreed that the refunds for the years 1998, 1999, 2000, 2001 and 2002 should have offset the deficiencies from prior years as of the original due dates of the refund years, thus applying the Income Tax Audit Guidelines Part III General, Interest Calculations When Netting Overpayments and Underpayments.

G. Petitioners have raised the specter of a constitutional issue in 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 v. Tax Appeals Tribunal*, 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 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. Petitioners also argued that there was an inequity in the rates of interest charged to taxpayers who have underpaid and overpaid their taxes, noting that “[s]tarting in October 2003 there was at least a 3% differential on the interest on overpayments and underpayments.” Petitioners believe that such a differential is not present at the federal level and violates the federal rule of symmetry and the New York State Constitution.

Although petitioners believe the disparity in interest rates is unfair and without a rational basis, 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 rate plus two percentage points, while the underpayment rate was the sum of the federal short term rate plus four percentage points. 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 to modify their proper application.

I. The petition of Michael Goldstein and Janice Goldstein is granted to the extent provided for in Conclusion of Law F, but in all other respects the petition is denied and the Notice of Disallowance, dated July 17, 2009, is sustained.

DATED: Troy, New York
December 30, 2010

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