STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JANET YOELL-MIREL	:	DECISION DTA NO. 825058
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 2003.	:	

Petitioner, Janet Yoell-Mirel, filed an exception to the determination of the Administrative Law Judge issued on October 2, 2014. Petitioner appeared by Paul Caccia, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel).

Petitioner did not file a brief in support of her exception, but rather relied on her briefs filed with the Administrative Law Judge. The Division of Taxation filed a letter brief in opposition, specifically stating that it was also relying upon its letter brief submitted to the Administrative Law Judge. Petitioner filed a letter brief in reply. Oral argument, at petitioner's request, was heard on March 19, 2015 in New York, New York, which date commenced the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner filed a timely request for a conciliation conference following the denial of either of petitioner's claims for refund of personal income tax.

II. Whether the Division of Taxation properly denied petitioner's claim for refund of personal income tax for the year 2003 on the basis that the claim was filed after the expiration of the applicable statute of limitations.

III. Whether the Division of Taxation properly denied petitioner's claim for refund of personal income tax based on the special refund authority of Tax Law § 697 (d).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact 10, which has been modified to more accurately reflect the record. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

1. During 2003, petitioner, Janet Yoell-Mirel, was a resident of the State of New York. On September 29, 2003, she sold real property located in Neptune Township, Monmouth, New Jersey (the property).[1] The sale of the property resulted in petitioner receiving a capital gain of $189,385.00.

2. At the time of the sale, no income tax was withheld by the State of New Jersey. Additionally, petitioner's then-attorney advised her that, as to her tax responsibilities, she need not file anything with the State of New Jersey and to "file as you always do."

3. Petitioner timely filed a New York State resident income tax return for the year 2003 on or about March 24, 2004. On her return, she reported New York adjusted gross income of $255,863.00, which included the $189,385.00 capital gain from the sale of the property. Petitioner did not claim a resident tax credit on this return. Overall, she calculated New York State tax due in the amount of $18,240.00 and New York State tax withholdings of $6,406.00,

[1] The property was jointly owned and sold by petitioner and her then-husband, Glenn Mirel. Petitioner filed individually with New York State as head of household, however, and alone reported the capital gain during the year at issue. Consequently, she is the sole petitioner in this matter.

resulting in remaining tax owed in the amount of $11,834.00. The tax was paid by petitioner on or before April 15, 2004.

4. In late-October 2007, petitioner received a letter from the New Jersey Division of Taxation informing her of the need to file a gross income tax return with that state for the year 2003 and to pay the appropriate tax as a result of the sale of the property. In January 2008, petitioner received another letter from New Jersey stating that "capital gains or losses derived from the disposition of real or tangible property located within New Jersey are NJ source income and must be reported to NJ on a nonresident Gross Income Tax return."

5. After several failed attempts to have her New York filing and payment accepted by New Jersey in satisfaction of its audit demand, petitioner filed a New Jersey nonresident income tax return for the year 2003 in March 2008. Petitioner reported the capital gain of $189,385.00 from the sale of the property on the New Jersey return, and paid tax in the amount of $9,311.00 to that state.

6. On March 21, 2008, petitioner filed an amended 2003 New York State resident income tax return (First Amended Return). On the First Amended Return, petitioner claimed a resident credit for income taxes subsequently paid to the State of New Jersey on the gain from the 2003 sale of the property and requested a refund of $9,311.00. Petitioner did not file an amended return or other refund claim for 2003 prior to March 21, 2008.

7. On May 23, 2008, the Division issued a Notice of Disallowance to petitioner denying her refund claim (initial notice of disallowance). The subject notice stated, in pertinent part: "[y]our 2003 Amended Tax Return has been filed out of statute. Therefore, the refund you requested has been denied." Petitioner does not dispute receipt of the subject notice. There is a

discrepancy as to the date of receipt, however, with October 2008 being the date stated by petitioner in her petition, rather than the May 23, 2008 date espoused by the Division.

8. As a result of certain audit adjustments involving the basis of the property made by the State of New Jersey in 2011, petitioner's 2003 tax liability to that state arising from the sale was reduced from $9,311.00 to $8,882.00.

9. On July 19, 2011, petitioner filed another amended 2003 New York State resident income tax return (Second Amended Return). On the Second Amended Return, petitioner revised her claim for a resident credit for income taxes to the amount of $8,882.00 that was eventually paid to the State of New Jersey on the gain from the 2003 sale of the property. Thus, she claimed a refund of $8,882.00 from the State of New York. The Division did not provide the refund or issue a notice of disallowance in response to the refund claim in the Second Amended Return. Instead, it was deemed denied by operation of Tax Law § 689 (c) (3) on January 19, 2012 (deemed notice of disallowance).

10. Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) on February 27, 2012. On this form, she identified the year at issue as 2003. She also stated that her claim for refund of $8,882.00, the amount of the refund requested in the Second Amended Return, was filed on July 21, 2010[2] and that New York had denied her claim, but that a notice of disallowance was not received from the Division.

[2] The date identified by petitioner as that on which she filed her refund claim (July 21, 2010) appears to have been an error. The State of New Jersey did not make its adjustment that served as the basis for the new amended claim until 2011. Further, petitioner attached the Second Amended Return to her request for conciliation conference. That return is dated July 2011.

11. On March 16, 2012, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the May 23, 2008 notice of disallowance was untimely and stated, in part:

> The Tax Law requires that a request be filed within 2 years from the mailing date of the statutory notice. Since the notice(s) was issued on May 20, 2008 [sic], but the request was not mailed until February 27, 2012, or in excess of 2 years, the request is late filed.

12. To show proof of proper mailing of the subject notice, the Division provided the following: (i) an affidavit, dated August 21, 2013, of Cheryl Conover, a Tax Technician III in the Division's Administration and Controls Unit of the Income/Franchise Desk Audit Bureau; (ii) an affidavit, dated August 29, 2013, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; and (iii) PS Form 3877, the certified mail record (CMR) postmarked May 23, 2008.

13. Ms. Conover's affidavit sets forth the Division's general practice and procedure for the certified mailing of notices of disallowance. Ms. Conover states that the tax technicians prepare the notices of disallowance themselves and then place them in a disallowance basket. Each notice is dated for the subsequent Friday and then inserted into an envelope. At that point, a clerk prepares the CMR, and enters upon it that Friday's date for postmark and date of receipt. The clerk also enters on the CMR the name of and address of the addressee, along with the article number (or certified mail number) for each envelope. The clerk adds the total number of pieces listed by the sender and affixes the certified mail number sticker to each envelope. Two copies of the CMR are wrapped around the envelopes and the packet placed in a wired bin designated "Certified Mail" for pickup by a mailroom employee. A copy of the relevant notice of disallowance and CMR are returned to the tax technician who prepared the notice.

14. In the instant case, the CMR consists of one page, contains the date May 23, 2008 in the upper right corner, and lists 15 articles that were mailed on that date. Each article has an article, or certified mail, number. Article number 7006 0810 0000 1104 9908 was sent to petitioner at "12 White Rock Rd., Putnam Valley, NY 10579." The CMR does not identify what that article contained.

15. The subject notice of disallowance itself does not contain a certified mailing number nor does it have a mailing cover sheet.

16. Ms. Conover avers that based upon her knowledge regarding the procedures for mailing notices of disallowance, as well as her review of the CMR, she can determine that the proper procedures were followed in mailing the subject notice.

17. Mr. Peltier, a supervisor in the Mail Room since 1999 and currently a mail and supply supervisor in the Division's Mail Processing Center (Center), describes in his affidavit the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. A CMR is received by the Center for each batch of statutory notices. Staff members then weigh, seal and place postage on each envelope. The envelopes are counted and the names and certified control numbers verified against the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature on the CMR, indicating receipt by the post office. The Center further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR.

18. In this case, the CMR contains a postmark dated May 23, 2008, the handwritten entry "15" under total number of pieces received at post office, and a signature of the postal employee receiving the CMR.

19. Mr. Peltier states that based on his review of Ms. Conover's affidavit, as well as his personal knowledge of the Center's mail processing procedures, that on May 23, 2008, those procedures were followed and an employee of the Center delivered one piece of certified mail addressed to petitioner to the USPS in Albany, New York.

20. In its answer to the petition, the Division affirmatively states that both of petitioner's amended returns for 2003 are barred by the statute of limitations in Tax Law § 687 (a).

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first explained that in order to file a petition with the Division of Tax Appeals, petitioner was required to file a claim for refund within three years from the date the return was filed, or two years from the date the tax was paid, whichever is later. The Administrative Law Judge noted that petitioner did not dispute that both of her amended returns were filed more than three years from the date she filed and paid the tax on her 2003 personal income tax return and that, therefore, relying upon Tax Law §§ 687 (a) and 689 (c) (1) and ***Matter of Leecy***, Tax Appeals Tribunal (September 3, 1998), the petition in this case is time barred.

The Administrative Law Judge went on to find that the petition was also time barred because petitioner had failed to timely file a request for conciliation conference or petition within two years from the date of issuance of the initial notice of disallowance. The Administrative Law Judge explained that it was the Division's burden of demonstrating both the standard procedure for the issuance of notices of disallowance and that the standard procedure was

followed with regard to the mailing of the initial notice of disallowance. The Administrative Law Judge concluded that the Division had demonstrated its standard procedure for the issuance of notices of disallowance, but did not address whether the Division had met its burden in proving that the standard procedure was followed with regard to the initial notice of disallowance. Rather, the Administrative Law Judge noted that there were questions on this point, but that any such questions were overcome by petitioner's acknowledgment, in the petition filed herein, of receipt of the initial notice of disallowance in October of 2008, relying on ***Matter of Agosto v Tax Commn. of the State of N.Y.***, 68 NY2d 891 (1986), ***revg*** 118 AD2d 894 (1986) and ***Matter of Hyatt Equities, LLC***, Tax Appeals Tribunal (May 22, 2008). Deeming such admitted receipt of the initial notice of disallowance to be on the last day of the month, October 31, 2008, the Administrative Law Judge determined that the filing of a request for conciliation conference on February 27, 2012 was not within the two-year time limit required pursuant to Tax Law § 170 and § 689.[3] Therefore, the Administrative Law Judge concluded that the Division of Tax Appeals was without jurisdiction to address the merits of petitioner's protest with regard to the initial notice of disallowance.

The Administrative Law Judge addressed the timeliness of the request for conciliation conference in relation to the deemed notice of disallowance in a footnote. In footnote 4, the Administrative Law Judge explained that, although the request for conciliation conference appeared to be timely filed with regard to the deemed notice of disallowance, the Second Amended Return, upon which the deemed notice of disallowance was based, was admitted by

[3] In conclusion of law C, the Administrative Law Judge incorrectly refers to a 90-day required statutory period. This appears to be a mistake, as conclusion of law A explains correctly that in refund cases, the required statutory period for filing a request for conciliation conference or petition is two years.

petitioner to be untimely and, therefore, the petition raising it was barred by Tax Law § 689 (c) (1).

Finally, the Administrative Law Judge concluded that while the Division of Tax Appeals and Tax Appeals Tribunal have the jurisdiction to review the actions taken by the Division under the special refund authority of Tax Law § 697 (d), petitioner herein has not proven that she is entitled to relief under such provision, since the payment of the taxes at issue was made by petitioner under a mistake of law and not a mistake of fact (***see Matter of Goodspeed***, Tax Appeals Tribunal, January 29, 2009).

ARGUMENTS ON EXCEPTION

On the issue of subject matter jurisdiction, petitioner continues to assert on exception that her request for conciliation conference filed in connection with the deemed notice of disallowance and her Second Amended Return, was a timely request and that she is entitled to a conciliation conference.

On the substantive issues, petitioner does not contest that she did not file a timely claim for refund for the year 2003. Rather, petitioner asserts that she was unable to file a timely claim for refund with the Division because she was unaware of the need to file a 2003 New Jersey income tax return or pay additional income tax to that state on the same income that is at issue in the present matter, until after the required time period for filing a refund claim had passed. Furthermore, petitioner asserts that the present circumstances can be distinguished from those involved in the ***Matter of Goodspeed*** case relied upon by the Administrative Law Judge. Therefore, petitioner contends that her situation is an appropriate one for the exercise of discretion to allow her refund pursuant to the special refund authority under Tax Law § 697 (d).

On the issue of subject matter jurisdiction, the Division asserts that petitioner did not file an exception on this issue and, therefore, as a matter of law, this Tribunal has no jurisdiction to address the substantive issue and the exception should be denied. In the alternative, the Division argues that petitioner's request for conciliation conference was properly dismissed. The Division also continues to assert that both the First Amended Return and the Second Amended Return were untimely, prohibiting this Tribunal from granting petitioner any substantive relief.

Alternatively, the Division argues that petitioner is not entitled to relief under the special refund authority of Tax Law § 697 (d) as the monies paid to the Division were made under a mistake of law and not a mistake of fact.

OPINION

The first question to be addressed is whether petitioner timely filed a request for conciliation conference with BCMS.[4] One of petitioner's assertions throughout these proceedings is that she is entitled to a conciliation conference, and we agree.

The conciliation order specifically provided as follows:

> The Tax Law requires that a request be filed within 2 years from the mailing date of the statutory notice. Since the notice(s) was issued on May 20, 2008 [sic], but the request was not mailed until February 27, 2012, or in excess of 2 years, the request is late filed.

There is no doubt that if the request for conciliation conference filed by petitioner is determined to be in response to the initial notice of disallowance issued in response to the First Amended Return, then that request was untimely. However, we cannot follow the logic of the

[4] Contrary to the Division's assertion, the Division of Tax Appeals and this Tribunal are never precluded from addressing the issue of subject matter jurisdiction (***see*** Tax Law § 2006 [5]).

BCMS order, or the determination of the Administrative Law Judge, in reaching the conclusion that the request was in response to the initial notice of disallowance.

Rather, we find that the request for conciliation conference filed by petitioner was in response to the deemed notice of disallowance. The Administrative Law Judge specifically found that the refund claimed in the Second Amended Return was deemed disallowed by operation of Tax Law § 689 (c) (3) on January 19, 2012. Petitioner thus had two years from January 19, 2012 to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals (Tax Law § 687). Petitioner's request for conciliation conference was filed on February 27, 2012, well within the required two-year period. In the request, petitioner set forth as the amount at issue the $8,882.00 requested as a refund in the Second Amended Return and stated that she had not received a notice of disallowance from the Division, both of which indicate that petitioner was filing a request with regard to the deemed notice of disallowance. However, the conciliation order dismissing request is not only explicitly based upon the initial notice of disallowance, it makes no mention at all of the deemed notice of disallowance. Adding to petitioner's confusion, the proceedings before the Administrative Law Judge focused on the mailing of the initial notice of disallowance when petitioner had filed the request for conciliation conference with regard to the deemed notice of disallowance.

Tax Law § 170 3-a (a) specifically provides that a conciliation conference "shall be provided, at the option of any taxpayer . . . where such taxpayer . . . has received . . . a denial of a refund . . . or any other notice which gives rise to a right to a hearing . . . if the time to petition for such a hearing has not elapsed." While we understand that petitioner has other procedural hurdles to address, including the legal effect of failing to timely file a request for refund, the process as established in the Tax Law entitles her to have those issues first addressed during a

conciliation conference. We see nothing in the record in this matter compelling us to decide otherwise (***see e.g. Matter of Nathel v Commissioner of Taxation & Fin. of State of N.Y.***, 232 AD2d 836 [1986], ***Matter of Guffin***, Tax Appeals Tribunal, September 18, 2014; ***Matter of Goodspeed***, Tax Appeals Tribunal, January 29, 2009; ***Matter of Wallace***, Tax Appeals Tribunal, October 11, 2001 [all cases where the Division of Tax Appeals and this Tribunal reviewed various petitioners' entitlement to relief under the provisions of the special refund authority contained in Tax Law § 697 [d], even though the petitioners had not timely filed refund claims with the Division]).

As such, the proper remedy is to remand this matter to the Division for a conciliation conference in BCMS. Having so determined, we deem it inappropriate to address the remainder of the issues presented herein, and, therefore, decline to do so at this time.

Accordingly, the exception and petition of Janet Yoell-Mirell are granted to the extent that this matter is remanded to the Division of Taxation for a conciliation conference in the Bureau of Conciliation and Mediation Services.

DATED: Albany, New York
September 21, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner