

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JANET YOELL-MIREL** : DETERMINATION  
for Redetermination of a Deficiency or for Refund of New : DTA NO. 825058  
York State Personal Income Tax under Article 22 of the :  
Tax Law for the Year 2003. :

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Petitioner, Janet Yoell-Mirel, 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 2003.

On November 5, 2013, petitioner, appearing by Paul Caccia, CPA, and the Division of Taxation, appearing by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel), waived a hearing and submitted this matter for determination based on documents and briefs to be submitted, upon extension, by April 30, 2014, which date commenced the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

***ISSUES***

I. 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.

II. Whether petitioner filed a timely request for a conciliation conference following the issuance of a Notice of Disallowance.

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

***FINDINGS OF FACT***

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).<sup>1</sup> 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, resulting in remaining tax owed in the amount of \$11,834.00. The tax was paid by petitioner on or before April 15, 2004.

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<sup>1</sup> 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.

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 for the year 2003 with that state and 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. 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.

10. Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) dated February 27, 2012 and stamped as received on March 1, 2012. In this form, she identified the year at issue as 2003. She also stated that her claim for refund of \$8,882.00 was filed on July 21, 2010<sup>2</sup> and that New York had denied her claim. However, she additionally claimed that a notice was not received from the Division. It is clear from the face of the request that petitioner sought a refund from her 2003 New York State resident personal income tax return.

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:

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<sup>2</sup> 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.

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 that 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).

### ***SUMMARY OF THE PARTIES' POSITIONS***

21. Petitioner acknowledges that she did not file a claim for refund for the year 2003 until March of 2008, or more than three years after filing her return and payment of the tax. She contends, however, that she was unaware of the need to file a 2003 New Jersey income tax return or pay additional income tax to that state until October 2007. Thus, petitioner argues that it was impossible for her to file an amended New York return by the April 15, 2007 deadline insisted on by the Division. She adds that the Division erred by failing to respond to her second amended 2003 New York return, filed in July 2011. Finally, petitioner contends that her refund should be allowed pursuant to the special refund authority under Tax Law § 697(d).

22. At the outset, the Division maintains that petitioner did not file a timely request for conciliation conference or petition in response to the subject notice and, thus, the Division of Tax Appeals lacks jurisdiction over this matter. Alternatively, the Division asserts that it properly denied petitioner's refund claim as she failed to file it within the time period required by Tax Law § 687. The Division also argues that petitioner is not entitled to relief under the special refund authority of Tax Law § 697(d).

### ***CONCLUSIONS OF LAW***

A. Section 689(c)(1) of the Tax Law provides that, in order for a taxpayer to file a petition with the Division of Tax Appeals for the amount asserted in an application for refund, the taxpayer must have filed a timely claim for refund with the Division. Section 687(a) of the Tax

Law provides that a claim for credit or refund of an overpayment of income tax must be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever is later. Petitioner does not dispute that both of her amended returns were filed more than three years from the time she filed and paid the tax on her 2003 New York state tax return and, thus, beyond the time limitations set forth in Tax Law § 687(a).

Consequently, the petition in this case is barred pursuant to Tax Law §§ 687(a) and 689(c)(1) (*see Matter of Leecy*, Tax Appeals Tribunal, September 3, 1998).

B. The Division correctly notes that the petition is also barred as petitioner failed to file a request for conciliation conference or petition in a timely manner, which in refund cases, is two years from the date of issuance of a notice of disallowance (*see* Tax Law §§ 170, 689). The initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified or registered mail to petitioner's last known address (Tax Law § 681[a]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and the date of mailing of the subject notice, the Division must show proof of a standard procedure used for the issuance of the statutory notice by one with knowledge of the relevant procedures, and that the standard procedure was followed in the particular instance in question (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

Here, the Division, through the affidavits of Ms. Conover and Mr. Peltier, has demonstrated its standard procedure for issuance of notices of disallowance. Any question as to whether that procedure was followed in this particular case,<sup>3</sup> however, is overcome by other

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<sup>3</sup> The affidavits and the CMR indicate that an article with certified number 7006 0810 0000 1104 9908 was sent to petitioner at "12 White Rock Rd., Putnam Valley, NY 10579." The subject notice, however, does not bear that number, nor is there a mailing cover sheet with that number. In sum, based on the record presented, it is not

evidence of mailing in the record (*see Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008). The record contains evidence of actual receipt of the statutory notice no later than October 2008. Specifically, in both her request for conciliation conference and petition, petitioner acknowledges that her refund claim in the First Amended Return was denied, with a date of October 2008 used in the petition. These two admissions clearly and convincingly show that a copy of the notice at issue, addressed to petitioner, which was also listed on the CMR, was received by her no later than October 31, 2008.

C. Therefore, the period within which to challenge the notice commenced to run on the date of such actual receipt of the notice by petitioner, i.e., October 31, 2008 at the latest, and petitioner was required to file either a Request for Conciliation Conference with BCMS, or a petition with the Division of Tax Appeals, within 90 days thereafter (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Agosto v. Tax Commission of the State of New York*, 68 NY2d 891[1986], *revg* 118 AD2d 894 [1986]). Petitioner's request for conciliation conference was not filed until February 27, 2012, however, a date which falls beyond the required statutory period. As a matter of law, there is no jurisdiction to address the merits of petitioner's protest with regard to the notice of disallowance of the refund sought in the First Amended Return (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).<sup>4</sup>

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clear that what was in the envelope of article number 7006 0810 0000 1104 9908 was petitioner's notice of disallowance. This concern is overcome with petitioner's acknowledgment of receipt.

<sup>4</sup> To the extent that the Division did not issue a formal notice of disallowance to the Second Amended Return, such inaction is deemed a denial by operation of law six months from the date of filing of the refund claim (*see* Tax Law § 689[c][3]). Thus, although a petition challenging that denial appears timely, the Second Amended Return, by petitioner's own admission, is untimely pursuant to Tax Law § 687(a), and the petition raising it is barred by Tax Law § 689(c)(1) (*see* Conclusion of Law A).

D. Finally, petitioner contends that her claim for refund should be granted based upon the special refund authority in Tax Law § 697(d), which 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.

To invoke the special refund authority, it must be determined whether the money paid by petitioner was paid under a mistake of fact or a mistake of law. When presented with this question in the past, the Tax Appeals Tribunal has utilized the following standard:

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*). (*Matter of Wallace*, Tax Appeals Tribunal, October 11, 2001.)

The Division of Tax Appeals and the Tax Appeals Tribunal have jurisdiction to review the Division's actions under Tax Law § 697(d) (*Matter of Wallace*, Tax Appeals Tribunal, October 5, 1989). Indeed, the Tribunal addressed a situation almost identical to the case at bar in *Matter of Goodspeed*, Tax Appeals Tribunal, January 29, 2009. In that case, the Tribunal sustained a refund denial arising from a tardy New York amended return that arose from another state's taxation of a gain from the sale of out-of-state property. In doing so, the Tribunal held that situation involved a mistake of law, not fact, and reemphasized the necessity of compliance with the time requirements of section 687(a) (*see also Matter of Insalaco*, Tax Appeals Tribunal, November 13, 2003). Based upon the foregoing standard, it is clear that petitioner is not entitled

to a refund under Tax Law § 697(d). Petitioner was aware in 2003 of all facts surrounding the sale of the property but was mistaken as to which jurisdiction was entitled to tax her recognized gain. This failure, and accompanying tardy filing, was based on her (or her then-counsel's) erroneous interpretation of the law, and not on any fact underlying the transaction (*see Matter of Goodspeed*). She simply did not realize that the law dictated that her sale of the property gave rise to a tax liability with the State of New Jersey. Accordingly, the special refund authority, as provided in Tax Law § 697(d), is inapplicable to this matter.

E. The petition of Janet Yoell-Mirel is denied, and the Notice of Disallowance, dated May 23, 2008, disallowing petitioner's refund claim for the year 2003 is hereby sustained.

DATED: Albany, New York  
October 2, 2014

/s/ Herbert M. Friedman, Jr.  
ADMINISTRATIVE LAW JUDGE