

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition  
of  
**YEVGENIY VARSHAVSKIY**

DETERMINATION  
DTA NO. 828292

for Redetermination of a Deficiency or for Refund of  
New York Personal Income Tax under Article 22 of  
the Tax Law for the year 2012.

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Petitioner, Yevgeniy Varshavskiy, 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 2012.

On April 27, 2019 and May 1, 2019, respectively, petitioner, appearing pro se, and the Division of Taxation, appearing by Amanda Hiller, Esq. (Stephanie M. Lane, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based upon documents and briefs to be submitted by October 10, 2019, which date began the six-month period for issuance of this determination. The period for issuing this determination was extended until July 10, 2020 for good cause pursuant to Tax Law § 2010 (3). After review of the evidence and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

***ISSUES***

I. Whether the Division of Taxation properly denied petitioner's claim for credit or refund of personal income tax for the year 2012, intended to be applied to tax year 2013, where the

claim was timely filed but limited to zero because of the look back period pursuant to Tax Law § 687.

II. Whether petitioner's claim for refund or credit of personal income tax for tax year 2012 should be granted pursuant to the special refund authority set forth in Tax Law § 697 (d).

***FINDINGS OF FACT***

Pursuant to section 3000.15 (d) (6) of the Rules of Practice and Procedure of the Tax Appeals Tribunal and section 307 (1) of the State Administrative Procedure Act, the Division of Taxation submitted seven proposed findings of fact. The proposed findings of fact have been substantially incorporated into this determination with the exceptions noted in the final finding of fact.

1. On or about April 15, 2013, petitioner, Yevgeniy Varshavskiy, filed a New York State application for automatic six-month extension of time to file for individuals (form IT-370) for the year 2012, and remitted \$7,000.00 with his request for an extension. On this form IT-370, petitioner indicated that he was subject to New York State and New York City personal income taxes.

2. Petitioner's filing of form IT-370 extended the due date for filing his New York State resident income tax return for tax year 2012 to on or before October 15, 2013.

3. On January 6, 2017, the Division of Taxation (Division), Income/Franchise Desk Audit AG-15, issued correspondence, form AU-222, to petitioner informing him that the Division had no record of a personal income tax return on file for tax year 2012 and tax year 2013. The correspondence requested that petitioner either file a return for tax year 2012 and tax year 2013 within 30 days or provide an explanation as to why a filing was not necessary.

4. On January 30, 2017, petitioner filed his New York State resident income tax return, form IT-201, for the year 2012. On his 2012 tax return, petitioner reported total New York State and New York City taxes due in the amount of \$8,672.00, total payments made in the amount of \$14,790.00,<sup>1</sup> and requested a refund/overpayment in the amount of \$6,118.00 to be applied to his estimated tax account for tax year 2013. Petitioner's signature and the printed date "09-01-2013" appear on page four of this return. Petitioner's tax return was mailed to the Division by United States Postal Service (USPS) Click-N-Ship Priority Mail 2-Day on January 30, 2017.

5. The Division's OPS-Liability Correspondence Section-Income issued an "Account Adjustment Notice – Personal Income Tax" for the year 2012 (notice of account adjustment), dated February 22, 2017, to petitioner disallowing the claimed refund/overpayment of tax requested to be applied to the next period (tax year 2013) in the amount of \$6,118.00, in full.

The "Explanation" section of the notice of account adjustment contained, in pertinent part, the following paragraph:

"We denied your claim for refund or credit because it was filed too late. The tax law allows a refund or credit if the taxpayer makes the claim within three tax years from the time the return was required to be filed or within two years from the time the tax was paid, whichever is later."

6. On March 5, 2017, petitioner responded to the notice of account adjustment by informally protesting to the Division the disallowance of the claimed credit or refund of tax in the amount of \$6,118.00 requested to be applied to tax year 2013.<sup>2</sup>

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<sup>1</sup> The total payments made consisted of New York State and New York City taxes withheld from petitioner's wages in the total amount of \$7,790.00 plus \$7,000.00 paid with the extension of time to file.

<sup>2</sup> Petitioner used the Division's "Respond to Department Notice" online service to submit his response to the notice of account adjustment. A copy of petitioner's submitted online response was attached to the petition filed in this matter.

7. On July 29, 2019, petitioner filed a petition challenging the notice of account adjustment and seeking a refund in the amount of \$6,118.00. In his petition, petitioner asserted, among other things, that:

(a) He “is seeking relief under the special refund authority provided by Tax Law § 697(d), which authorizes personal income tax refunds for claims made after the general statute of limitations has expired if the tax was originally paid ‘under a mistake of facts.’”

(b) Total New York State and New York City taxes in the amount of \$7,790.00 were withheld for tax year 2012.

(c) The \$7,000.00 paid with the extension to file the 2012 tax return “was made under the mistaken believe [sic] that such payment was due in addition to the tax payments withheld in 2012.”

(d) On or about January 30, 2017, he filed his 2012 tax return requesting that \$6,118.00 be credited towards the 2013 tax year.

(e) On or about February 22, 2017, the Division “denied such claim because said claim was out of statute.”

(f) The Division has not responded to his March 5, 2017 response disagreeing with the Division’s February 22, 2017 determination.

8. On July 31, 2017, the credit or refund of \$6,118.00 requested on petitioner’s January 30, 2017 personal income tax filing for tax year 2012 was deemed denied, in full, pursuant to Tax Law § 689 (c).

9. The Division conducted a search of its records for tax year 2012 and certified that petitioner did not file a New York State personal income tax return for tax year 2012 requesting

a credit or refund of tax to be applied to tax year 2013 of \$6,118.00 prior to the January 30, 2017 filing of petitioner's 2012 New York State personal income tax return.

10. The Division submitted proposed findings of fact numbered 1 through 7. Proposed findings of fact 3 through 4 have been modified to more accurately reflect the record. Proposed findings of fact 1 through 2 are rejected as unsupported by the record. In ruling on the Division's proposed findings of fact, if any part of a proposed finding of fact is unsupported by the record the proposed finding of fact has been rejected in its entirety.

### *CONCLUSIONS OF LAW*

A. As noted in finding of fact 8, the credit or refund claimed on petitioner's 2012 personal income tax return was deemed denied on July 31, 2017 pursuant to Tax Law § 689 (c) (3). Petitioner bears the burden of establishing, by clear and convincing evidence, that the deemed denial of his claimed refund is erroneous (*see* Tax Law § 689 [e]).

B. Tax Law § 687 provides, in pertinent part, as follows:

“(a) General.—Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within (i) three years from the time the return was filed, (ii) two years from the time the tax was paid . . . whichever of such periods expires the latest, or if no return was filed, within two years from the time the tax was paid. If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return . . . . Except as otherwise provided in this section, if no claim is filed, the amount of a credit or refund shall not exceed the amount which would be allowable if a claim had been filed on the date the credit or refund is allowed.

\* \* \*

(e) Failure to file claim within prescribed period. — No credit or refund shall be allowed or made . . . after the expiration of the applicable period of limitation specified in this article, unless a claim for credit or refund is filed by the taxpayer within such period. Any later credit shall be void and any later refund erroneous. No period of limitations specified in any other law shall apply to the recovery by a taxpayer of moneys paid in respect of taxes under this article.

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(i) Prepaid income tax.—For purposes of this section, any tax paid by the taxpayer before the last day prescribed for its payment, any income tax withheld from the taxpayer during any calendar year, and any amount paid by the taxpayer as estimated income tax for a taxable year shall be deemed to have been paid by him on the fifteenth day of the fourth month following the close of his taxable year with respect to which such amount constitutes a credit or payment.”

C. Tax Law § 687 (a) required petitioner to file his claim for refund within the later of three years from the time his return was filed or two years from the time the tax was paid. For tax year 2012, petitioner’s payments of taxes were accomplished through amounts withheld from his wages and the payment made with petitioner’s request for an extension of time to file. Under Tax Law § 687 (i), both the amounts withheld from petitioner’s wages and the payment made with the request for an extension of time to file were deemed paid on April 15, 2013.

Petitioner’s filing of an extension of time to file for tax year 2012, extended the due date for the filing of petitioner’s income tax return for tax year 2012 until October 15, 2013. It is undisputed, and petitioner admitted such in his petition, that petitioner’s income tax return for tax year 2012 was filed on January 30, 2017. Petitioner’s income tax return for tax year 2012, as filed on January 30, 2017, included a refund claim and a request that an overpayment of tax be applied to tax year 2013. Thus, while petitioner’s claim for credit or refund was not filed within two years after the tax was paid, it was filed within three years after the return was filed. Accordingly, petitioner’s claim for credit or refund was timely filed pursuant to Tax Law § 687 (a).

D. Where, as here, the refund claim is made within three years from the filing of the return, Tax Law § 687 (a) limits the amount of any refund to the amount of tax paid within the three years immediately preceding the filing of the claim plus any period of extension (look back period). In this case, the look back period is July 30, 2013 through January 30, 2017. It is

undisputed that petitioner did not make any tax payments for tax year 2012 after April 15, 2013. Both the amounts withheld from petitioner's wages and the payment made with the request for an extension of time to file were deemed to have been paid on April 15, 2013 (*see* conclusion of law C). Since petitioner's tax payments were deemed to have been paid on April 15, 2013, and no portion of petitioner's claimed overpayment of tax was paid within the look back period, the amount of the credit or refund is limited to zero. Accordingly, the Division's deemed denial of petitioner's claim for credit or refund for tax year 2012 pursuant to Tax Law § 689 (c) (3) was proper (*see* Tax Law § 687 [a], [e], [i]; *see also Matter of Oliver Petrovich*, Tax Appeals Tribunal, January 20, 2000).

E. Petitioner contends that his 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 question 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 the 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.”

F. 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).

G. Based upon the foregoing standard, it is clear that petitioner's contention is without merit and that petitioner is not entitled to a refund under Tax Law § 697 (d). Petitioner asserted, in his petition, that the \$7,000.00 paid with his extension of time to file a return for tax year 2012 was paid under a mistake of fact. However, the only mistake asserted was "a mistaken believe [sic] that such amount was due in addition to the tax payments withheld in 2012." Petitioner was mistaken in his calculation of tax due for tax year 2012. However, petitioner was not mistaken as to the need to file a return and pay tax based upon the income that he knew he earned in tax year 2012. Thus, petitioner's ignorance or misapprehension of the legal consequences following from the known facts is clearly a mistake of law. As such, petitioner is not entitled to relief under the special refund authority of Tax Law § 697 (d) (*see Nathel v Commissioner of Taxation & Fin. of State of N.Y.*, 232 AD2d 836, 837 [3rd Dept 1996] [not entitled to a refund under the special refund authority where the taxpayer knew the facts but failed to take an authorized deduction]; *Matter of Goodspeed*, Tax Appeals Tribunal, January 29, 2009 [not entitled to a refund under the special refund authority where the taxpayer knew the facts but was mistaken as to whether New York or Maine was entitled to tax income from the gain of the sale of real property in Maine]).

H. The petition of Yevgeniy Varshavskiy is denied and the July 31, 2017 deemed denial of petitioner's claim for credit or refund is sustained.

DATED: Albany, New York  
July 09, 2020

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE