

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-04(8)I
Income Tax
November 22, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I040830B

On August 30, 2004, a Petition for Advisory Opinion was received from Michael P. Marotta, 528 W46th Street, Apt 2E, New York, New York 10036.

The issue raised by Petitioner, Michael P. Marotta, is whether Petitioner timely filed a claim for refund on an amended 1999 New York State personal income tax return.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner filed and paid the balance due on his 1999 New York State personal income tax return on August 21, 2001. This late filing was due to the fact that Petitioner is a shareholder in a Virginia S corporation, which did not furnish him tax information before this time. There was an error on Petitioner's Virginia return. Petitioner owed additional tax, and has subsequently filed and paid the appropriate taxes, to the commonwealth of Virginia.

Consequently, Petitioner believes that he has overpaid his New York income tax liability for 1999. In 2003, Petitioner filed an amended New York tax return for tax year 1999 to reflect this overpayment.

Applicable law

Section 651 of the Tax Law provides, in part:

(a) General. On or before the fifteenth day of the fourth month following the close of the taxable year, an income tax return under this article shall be made and filed by or for:

(1) every resident individual (A) required to file a federal income tax return for the taxable year,...

Section 686(a) of the Tax Law provides:

General. – The commissioner of taxation and finance, within the applicable period of limitations, may credit an overpayment of income tax and interest on such overpayment against any liability in respect of any tax imposed by this chapter on the person who made the overpayment, against any liability in respect of any tax imposed pursuant to the authority of this chapter or any other law on such person if such tax is administered by the commissioner of taxation and finance and ... against past-due support, a past-due legally enforceable debt, and

against the amount of a default in repayment of a guaranteed student, state university or city university loan. The balance shall be refunded by the comptroller out of the proceeds of the tax retained by him for such general purpose. Any refund under this section shall be made only upon the filing of a return and upon a certificate of the commissioner of taxation and finance approved by the comptroller. The comptroller, as a condition precedent to the approval of such a certificate, may examine into the facts as disclosed by the return of the person who made the overpayment and other information and data available in the files of the commissioner of taxation and finance.

Section 687 of the Tax Law provides, in part:

(a) General. – Claim for credit or refund of an overpayment of income tax shall 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 of such periods expires the later, 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 unless such claim is for a credit or a portion thereof provided pursuant to paragraph two or four of subsection (c), paragraph two or four of subsection (d) or subsection (e) of section six hundred six of this chapter. If the claim is not filed within the three year period, but is filed within the two year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim unless such claim is for a credit or a portion thereof provided pursuant to paragraph two or four of subsection (c), paragraph two or four of subsection (d) or subsection (e) of section six hundred six of this chapter....

* * *

(e) Failure to file claim within prescribed period. – No credit or refund shall be allowed or made, except as provided in subsection (f) of this section or subsection (d) of section six hundred ninety, 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....

* * *

(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 [the taxpayer] on the fifteenth day of the fourth month following the close of [the taxpayer's] taxable year with respect to which such amount constitutes a credit or payment.

Opinion

Pursuant to section 651(a)(1) of the Tax Law, the due date of Petitioner's 1999 New York personal income tax return was April 17, 2000, (or April 18, 2000, if Petitioner's federal income tax return was required to be filed at the IRS Service Center in Andover, Massachusetts) since April 15, 2000, was a Saturday. However, Petitioner did not file his return and pay the tax due until August 21, 2001. Subsequent to the filing of Petitioner's 1999 New York income tax return, Petitioner discovered that an error was made in computing income tax due to the Commonwealth of Virginia for tax year 1999 and Petitioner paid additional tax to Virginia for tax year 1999.

Petitioner believes that as a result of this increase in the Virginia tax liability for 1999, Petitioner's 1999 New York income tax liability was overpaid. Pursuant to section 686(a) of the Tax Law, within the applicable period of limitations, an overpayment of income tax and interest on such overpayment may be credited by the Commissioner of Taxation and Finance against any of the following liabilities, if any, of Petitioner: a liability in respect of any tax imposed by the Tax Law, a liability in respect of any tax imposed pursuant to the authority of the Tax Law or any other law if such tax is administered by the Commissioner of Taxation and Finance, and a liability for past-due support, a past-due legally enforceable debt and the amount of a default in repayment of a guaranteed student, State university or city university loan. The balance of any overpayment shall then be refunded to Petitioner.

Pursuant to section 687(a) of the Tax Law, a taxpayer may file a claim for credit or refund of an overpayment of income tax for tax year 1999 within three years from the time the return was filed. Since the return was filed August 21, 2001, Petitioner may file a claim for credit or refund on or before August 21, 2004. However, the amount of credit or refund allowed may 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. In this case, Petitioner filed his 1999 return on August 21, 2001, and, in 2003, he filed a claim for credit or refund of an overpayment of income tax for tax year 1999.

Accordingly, Petitioner filed his claim within three years from the time his return was filed. However, if it is determined that Petitioner has overpaid his income tax for tax year 1999, section 687(a) of the Tax Law limits the amount of any credit or refund of such overpayment to the portion of the tax Petitioner paid within the three years immediately preceding the date Petitioner filed the claim plus the period of any extension of time, if any, for filing the return.

Note that this Advisory Opinion does not address the question of whether Petitioner has actually overpaid his New York income tax liability for tax year 1999, and it does not address the

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issue of whether penalties and interest are owed for late filing Petitioner's 1999 tax return and for late payment of Petitioner's tax liability for tax year 1999.

DATED: November 22, 2004

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.