

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-93 (10) I
Income Tax
July 15, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I930416B

On April 16, 1993, a Petition for Advisory Opinion was received from Robert J. Hanrahan and Barbara Hanrahan, R.D. 2, East Gotham Road, Watertown, New York 13601.

The issue raised by Petitioners, Robert J. Hanrahan and Barbara Hanrahan, is whether for taxable year 1988 the pensions paid to them could be excluded from New York personal income tax under Article 22 of the Tax Law pursuant to section 687(a) or section 697(d).

Petitioners filed their 1988 New York resident income tax return on or about August 1, 1989. They were granted an extension of time to file until August 15, 1989. The return showed a refund due of \$224.74, which Petitioners received. On April 14, 1990, Petitioners filed an amended 1988 income tax return making an adjustment for a deduction for a Keogh Retirement Plan payment of \$11,018.35, which had been mistakenly left off the original return. Based on such amended return, Petitioners received an additional refund of \$922.79.

In both Petitioners' original and amended returns for 1988, Petitioners failed to list any pension income exclusion on line 27 of the return. On Petitioners' Federal income tax return for 1988, Petitioners showed, at line 17a of the return, total pensions amounting to \$39,321.11. Petitioners contend that this sum could have been properly excluded on their New York income tax return but that tax was erroneously paid on such amount due to a mistake on their part.

Petitioner, Barbara Hanrahan, was a member of the New York State Teacher's Retirement System and retired in 1988. As a result of her retirement, she received a taxable refund from the system upon retirement in an amount of \$9,531.71 and also received payments from the pension plan totaling \$26,189.64. Petitioner, Robert J. Hanrahan, was sixty-five on April 22, 1988 and received \$3,599.76 as a pension from Marine Midland Bank, a former employer. The pensions of Petitioners totaled \$39,321.11 and 1988 was the first year in which both Petitioners received pension payments.

Petitioners were unaware of the fact that the pensions paid to them in 1988 could be excluded from the New York income tax return. Because they were required to report the pension income on their Federal income tax return, they assumed that it had to be reported on their New York resident income tax return.

Petitioners continued to make the same mistakes on their 1989, 1990, 1991 and 1992 New York income tax returns by reporting the pension income, not claiming the exclusion for such pensions and paying income tax on such pension income.

Recently, Petitioners became aware of the fact that all of the pension income of the New York State Teacher's Retirement System and private pension income up to \$20,000 a year was excludable for each taxable year on their New York income tax return. As a result, on April 12, 1993, Petitioners filed amended returns for taxable years 1989, 1990, 1991 and 1992 requesting refunds based on this adjustment. Petitioners have attached an amended return for taxable year 1988 to their Petition for Advisory Opinion.

Section 687(a) of the Tax Law provides that a 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 later. 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.

Herein, the time period for Petitioners to file a claim for credit or refund of an overpayment of income tax for taxable year 1988, is three years from the time the original return was filed, that is from, on or about August 1, 1989 to on or about July 31, 1992. The fact that Petitioners filed an amended return for taxable year 1988 on April 14, 1990 and received a refund therefrom, does not extend the statute for the time period for which a claim for credit or refund may be filed under section 687(a) of the Tax Law for such taxable year.

Accordingly, Petitioners' claim for a refund of taxes paid for taxable year 1988 with respect to tax exempt pension income that was submitted April 16, 1993 with Petitioners' Petition for Advisory Opinion must be denied pursuant to section 687(a) of the Tax Law because the statute of limitations for the filing of such refund claim expired on or about July 31, 1992. Therefore, Petitioners' amended return for taxable year 1988 has not been processed.

Petitioners also request that a refund of taxes paid on the tax exempt pension income for taxable year 1988 be issued under the special refund authority pursuant to section 697(d) of the Tax Law. Such section 697(d) of the Tax Law, states that:

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.

Accordingly, before the special refund authority under section 697(d) of the Tax Law can be implemented, the following two requirements must be met:

1. There are no questions of fact or law involved.
2. A determination can be made from the records of the Commissioner of Taxation and Finance that moneys have been
 - (a) erroneously or illegally collected from a taxpayer or other person, or
 - (b) paid by a taxpayer or other person under a mistake of fact.

A mistake of fact exists where a person understands the facts to be other than they actually are, as where some fact which really exists is unknown, or some fact is supposed to exist which really does not or did not exist. (54 Am Jur 2d Mistake, Accident or Surprise §4; Wendell Foundation v Moredall Realty Corp., 176 Misc 1006, 1009). A mistake of fact includes such things as where an arithmetical or other error of computation is made on the return, where the tax liability has been overpaid in error, and where two or more returns are erroneously filed for the same year and tax paid on each. But a situation which has resulted from ignorance of the law will not be recognized as a mistake of fact. A mistake of law has been defined as a mistaken opinion or inference arising from an imperfect or incorrect exercise of the judgment upon the facts as they really are. Such a mistake has been said to occur where a party, having knowledge of the facts, is ignorant of the legal consequences of his conduct or reaches an erroneous conclusion as the effect thereof. (54 Am Jur 2d Mistake, Accident or Surprise §8; Wendell Foundation v Moredall Realty Corp., supra, at 1009). There can be no recovery of taxes voluntarily paid, without protest, under a mistake of law (Mercury Mach. Importing Corp. v City of New York, 3 NY2d 418, 429).

Therefore, where a taxpayer includes in taxable income which he or she knows to be pension income from the New York State Employees' Retirement System, which income is exempt from New York State income tax, there is a mistake of law, not a mistake of fact. It should be noted that in the past, the State Tax Commission allowed refunds under section 697(d) of the Tax Law for taxes paid with respect to New York State pensions. For instance, taxes paid on a New York State pension that was incorrectly identified on the return as an "annuity" was held to be a mistake of fact not a question of fact or law. (Isaac and Lilyan Zimmet, Dec St Tax Comm, October 14, 1968; see also, Herbert F. Tompkins, Dec St Tax Comm, May 26, 1987, TSB-H-87(125)I). Under the analysis set forth above these cases would now be decided differently if they were now to come before the Commissioner of Taxation and Finance for consideration.

In the instant case, Petitioners were unaware of the fact that the pensions paid to them in 1988 could be excluded from New York taxable income. Petitioners' inclusion of the New York State Teachers's Retirement System pension and the Marine Midland Bank pension income in their New York taxable income, for taxable year 1988, was not a mistake of fact since ignorance of the law is a mistake of law not a mistake of fact. Therefore, the Commissioner of Taxation and Finance on the facts presented may not exercise his discretionary authority, under section 697(d) of the Tax Law, to issue a refund to Petitioners for taxable year 1988.

DATED: July 15, 1993

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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