

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

TSB-A-93 (9) I  
Income Tax  
July 15, 1993

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. 1921228B

On December 28, 1992, a Petition for Advisory Opinion was received from Alvin Nathel, 27 Craig Street, Jericho, New York 11753.

The issue raised by Petitioner, Alvin Nathel, is whether a refund of the overpayment of New York State personal income tax for taxable years 1981 through 1987 should be allowed pursuant to section 697(d) of the Tax Law.

Petitioner, for all taxable years at issue, was a shareholder of Wishnatzki & Nathel, Inc. (hereinafter "Wishnatzki") a New York corporation with its principal place of business at 305 New York City Terminal Market, Hunts Point, Bronx, New York. Wishnatzki, for all taxable years at issue, elected to be taxed as an S corporation for Federal income tax purposes. Wishnatzki did not make a New York S corporation election for the taxable years at issue. All tax returns were timely filed.

For Federal income tax purposes for taxable years 1981 through 1990, Wishnatzki's items of income and deduction passed through Wishnatzki and were included on a pro rata basis in Petitioner's Federal adjusted gross income. On Petitioner's New York State personal income tax returns for all years at issue, Petitioner did not make any modifications to take out Wishnatzki's items of income and deduction. Therefore, these items were included in Petitioner's New York taxable income. In addition, Wishnatzki paid New York franchise tax on its income pursuant to Article 9-A of the Tax Law.

Petitioner timely filed amended New York State personal income tax returns for taxable years 1988, 1989 and 1990. On these returns, Petitioner adjusted his New York taxable income by making a subtraction modification for the net income of Wishnatzki. Such amended returns reflected an overpayment of New York taxes and Petitioner has received refunds for these years.

For taxable years beginning on or after January 1, 1981 and on or before December 31, 1982, section 612(c)(22) of the Tax Law provided that a shareholder of an S corporation that has not made the election pursuant to section 660 of the Tax Law, to be treated as a New York S corporation, must subtract from the shareholder's Federal adjusted gross income any amount included in the shareholder's Federal gross income pursuant to section 1373 of the Internal Revenue Code.

For taxable years beginning on or after December 31, 1982, section 612(b)(19) of the Tax Law provides that a shareholder of an S corporation that has not made the election pursuant to section 660 of the Tax Law, to be treated as a New York S corporation, must add to the shareholder's Federal adjusted gross income any item of loss or deduction of the corporation included in the shareholder's Federal gross income pursuant to section 1366 of the Internal Revenue Code.

For taxable years beginning on or after December 31, 1982, section 612(c)(22) of the Tax Law provides that a shareholder of an S corporation that has not made the election pursuant to section 660 of the Tax Law, to be treated as a New York S corporation, must subtract from the shareholder's Federal adjusted gross income any item of income of the corporation included in the shareholder's Federal gross income pursuant to section 1366 of the Internal Revenue Code.

For taxable years beginning after December 31, 1982, section 615(c)(6) of the Tax Law provides that a shareholder of an S corporation that has not made the election pursuant to section 660 of the Tax Law, to be treated as a New York S corporation, must subtract from the shareholder's Federal itemized deductions, an amount equal to any S corporation items of deduction included in the shareholder's Federal itemized deductions to arrive at the shareholder's New York itemized deductions.

Section 687(a) of the Tax Law provides that a claim for credit or refund of an overpayment of income tax shall be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever period expires later.

Section 697(d) of the Tax Law 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.

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

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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 Math. Importing Corp. v City of New York, 3 NY2d 418, 429).

Herein, for taxable years 1981 through 1987, Petitioner's Federal adjusted gross income included Wishnatzki's income. When Petitioner computed his New York taxable income for such years, he didnot know that he was entitled to a deduction pursuant to section 612(c)(22) ofthe Tax Law because Wishnatzki was not a New York S corporation. Ignoranceof the law is a mistake of law not a mistake of fact. Therefore, the Commissioner of Taxation and Finance may not exercise his discretionary authority, under section 697(d) of the Tax Law, to issue refunds to Petitioner for taxable years 1981 through 1987.

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.