STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LEON F. AND ISABELLA O. BURKHARDT	:	DECISION DTA No. 808432
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1978 through 1988.	:	

Petitioners Leon F. and Isabella O. Burkhardt, Route 1, Box 87, Moneta, Virginia 24121-9205, filed an exception to the determination of the Administrative Law Judge issued on May 9, 1996. Petitioners appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter which was received on July 9, 1996 informing the Tax Appeals Tribunal that it would not be filing a brief in opposition, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the Division of Taxation properly denied petitioners' claim for refund of personal income taxes paid on Federal pension income because such claim was filed more than three years after the filing of their State personal income tax returns on which such tax was assessed.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "2" and "4" which have been deleted in their entirety[1] and finding of fact "3" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Leon F. and Isabella O. Burkhardt (hereinafter "petitioners") were the recipients of a Federal pension during each of the years 1978 through 1988, inclusive. On their New York returns for the aforesaid years they reported the pension income as taxable for New York State purposes. Petitioners' personal income tax returns for the years at issue were all timely filed; that is, they were all filed on or before April 15 of the following year.

We modify finding of fact "3" of the Administrative Law Judge's determination to read as follows:

> In March 1990, petitioners filed a formal claim for refund for the years 1978 through 1988. Petitioners made no claim for credit or refund for the years at issue prior to March 1990.[2]

On June 14, 1990, the Division of Taxation (hereinafter the "Division") issued to petitioners a Notice of Disallowance in full for the years 1978 through 1988. The basis for such disallowance was that, in response to the Davis case, the New York Tax Law was changed and Federal pension benefits received in taxable years beginning on or after January 1, 1989 were not taxable. However, New York State was not issuing refunds for taxes paid on Federal pension benefits for years prior to 1989.

Following the United States Supreme Court's decision in Harper v. Virginia Dept. of Taxation, (509 US 86, 125 L Ed 2d 74), petitioners were paid refunds for the years 1986

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[1]Finding of fact "2" was deleted since the record contains no evidence upon which such a finding could be based. Finding of fact "4" was deleted since reference to TSB-M-89(9)I is unnecessary to this decision.

[2]We modified finding of fact "3" of the Administrative Law Judge's determination by adding the last sentence in order to more fully reflect the record.

through 1988. The Division paid the refunds because petitioners' claim for refund was timely filed for these years and the Harper decision dictated that the Davis decision be applied retroactively. The refunds for these three years were paid on September 30, 1994. Therefore, these three years are no longer at issue.

OPINION

In the determination below, the Administrative Law Judge granted the Division's motion for summary determination in that there were no material issues of fact. The Administrative Law Judge held that although Davis v. Michigan Dept. of Treasury (489 US 803, 103 L Ed 2d 891) was to be applied retroactively in light of Harper v. Virginia Dept. of Taxation (supra), the Division properly denied petitioners' refund claim as falling outside the limitations period for claiming a refund pursuant to Tax Law § 687. The Administrative Law Judge held that the refund provisions of Tax Law § 687 satisfy the minimum requirements of due process as set forth by the Supreme Court in McKesson Corp. v. Division of Alcoholic Beverages & Tobacco (496 US 18, 110 L Ed 2d 17).

On exception, petitioners assert that the limitations period in Tax Law § 687 does not apply. Petitioners assert that, pursuant to Reich v. Collins (513 US 106, 130 L Ed 2d 454), state statutes of limitations for claiming refunds do not apply.

We affirm the determination of the Administrative Law Judge. After a thorough review of the Administrative Law Judge's determination and the cases cited therein, we see no reason to alter his analysis or ultimate conclusion. Further, we find petitioners' reliance on Reich v. Collins (supra) misplaced since that case did not hold that state statute of limitations periods did not apply with regard to the remedies available to Federal pension recipients illegally taxed in contravention of Davis v. Michigan Dept. of Treasury (supra). In the Reich case, a Federal pension recipient sought a refund of state income tax paid on his pension pursuant to Georgia's tax refund statute. The State of Georgia, denying the refund, took the position that said refund statute was not applicable in the situation where the law upon which the taxes were assessed

and collected was found to be unconstitutional. The Georgia Supreme Court then proceeded to deny the claim holding that Georgia's predeprivation procedures satisfied due process (Reich v. Collins, 437 SE2d 320, 322). The Supreme Court disagreed and held that the refund statute was applicable to Federal pension recipients seeking refunds holding that Georgia could not "hold out what plainly appears to be a 'clear and certain' postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists" (Reich v. Collins, supra, 130 L Ed 2d 454, 457). In contrast, New York has not held out what appears to be a clear and certain postdeprivation remedy and then declared that such remedy does not apply. Petitioners' claim has been denied because they did not make such claim within three years of filing returns on which such tax was assessed pursuant to Tax Law § 687. We agree with the Administrative Law Judge that the refund provisions of Tax Law § 687 meet the minimum requirements of due process as enunciated in McKesson Corp. v. Division of Alcoholic Beverages & Tobacco (supra).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Leon F. and Isabella O. Burkhardt is denied;
2. The determination of the Administrative Law is affirmed;
3. The petition of Leon F. and Isabella O. Burkhardt is denied; and

4. The Notice of Disallowance dated June 14, 1990 is sustained except for the years 1986, 1987 and 1988.

DATED: Troy, New York
January 9, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner