

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
MAX AND SHIRLEY A. SILVERMAN : DECISION
for Redetermination of a Deficiency or for Refund of : DTA No. 808936
Personal Income Tax under Article 22 of the Tax Law for :
the Years 1985 through 1988. :

Petitioners Max and Shirley A. Silverman, 3850 Sedgwick Avenue, Bronx, New York 10463, 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 did not file a brief on exception. The Division of Taxation submitted a letter stating it would not be filing a brief in opposition which was received on July 10, 1996 and began the six-month period for the issuance of this decision. Petitioners' request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioners' refund claim for taxes paid on Federal pension income is barred by the three-year limitation period set forth in Tax Law § 687(a).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Sometime after April 15, 1989, petitioners filed a refund claim for personal income taxes paid on Federal pension benefits for the years 1985 through 1988.

By letter dated May 18, 1990, the Division of Taxation ("Division") denied the refund claim for taxes paid on Federal pension benefits for the years prior to 1989. In that letter, the Division stated that although the U.S. Supreme Court in Davis v. Michigan Dept. of Treasury (489 US 803, 103 L Ed 2d 891 [1989]) addressed the issue of similar tax treatment of Federal and State pensions of retirees, it did not address the issue of retroactive application. The Division noted that the New York law was changed and that Federal pension benefits received in taxable years beginning on or after January 1, 1989 are no longer taxable.

Petitioners filed a petition, dated November 19, 1990, alleging that the Division's disallowance of their refund request for the years 1985 through 1988 was contrary to the Supreme Court holding in Davis v. Michigan.

On February 23, 1996, the Division filed a motion for summary determination pursuant to 20 NYCRR 3000.9(b). In support of the motion, the Division submitted an affidavit by Charles Bellamy, an employee of the Audit Division who reviews refund claims made by Federal pension recipients. Mr. Bellamy stated that based on his review of petitioners' file, petitioners filed their 1985 New York State personal income tax return on or before April 15, 1986; that petitioners were issued a refund denial letter for the year 1985 because they did not file a claim for refund within three years of filing their original return for that year; and that in October of 1994, petitioners were issued 80 percent refunds for the years 1986 through 1988 but that the remaining 20 percent of the refunds for the years 1986 through 1988 were paid to their attorneys as fees in the State Supreme Court case of Alderman v. Wetzler pursuant to the order of Justice Alan Levine dated September 29, 1995.

The Division argued in its motion that because the refunds for 1986 through 1988 have been paid to petitioners, their claim for those years is now moot. With respect to the year 1985, the Division argued that petitioners' claim is barred by the three-year statute of limitations of Tax Law § 687(a).

Petitioners have not filed any responding papers opposing the motion for summary determination.

OPINION

In her determination below, the Administrative Law Judge concluded that the refund provision of Tax Law § 687(a) was applied to grant petitioners relief for the taxes that they paid for the years 1986 through 1988. With respect to the tax year 1985, the Administrative Law Judge sustained the Division's denial of petitioners' claim for refund based upon the fact that such claim is barred by the three-year statute of limitations contained in Tax Law § 687(a) and such denial is consistent with the United States Supreme Court decision in Davis v. Michigan Dept. of Treasury (*supra*).

In their exception, petitioners state, in pertinent part, as follows:

"[n]othing in the Findings of Fact and Conclusions of Law of the Administrative Law Judge addresses the circumstances, hitherto submitted, as reasons for the tardy filing (May 15, 1995) of my claim for refund, form IT-113X, of taxes paid for 1985. I believe I am entitled to consideration in the findings and conclusions of the circumstances as mitigating factors" (Petitioners' exception, p. 1).

We affirm the determination of the Administrative Law Judge. The only issue before us is whether petitioners timely filed their claim for refund for the 1985 tax year. Since they admittedly failed to do so, their claim for refund must be denied.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Max and Shirley A. Silverman is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Max and Shirley A. Silverman is denied; and

4. The Notice of Disallowance is sustained.

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