

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
DOUGLAS J. AND MARIAN O. HINDS : DECISION
for Redetermination of a Deficiency or for Refund of : DTA No. 810147
New York State Personal Income Tax under Article 22 of :
the Tax Law for the Years 1980 through 1988. :

Petitioners Douglas J. and Marian O. Hinds, 840 Oakwood Street, Fayetteville, New York 13066, filed an exception to the determination of the Administrative Law Judge issued on April 4, 1996. Petitioners appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq. of counsel).

Petitioners submitted a brief in support of their exception. The Division of Taxation submitted a letter in lieu of a formal brief in opposition. Petitioners filed a letter in reply. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the Division of Taxation may assert the limitations period of Tax Law § 687(a) to bar petitioners' refund claim for taxes paid on Federal pension income for the years 1980 through 1985.

II. Whether petitioners were entitled to a hearing in this matter.

FINDINGS OF FACT

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

The affidavit of Charles Bellamy, Tax Technician II, indicates that petitioners, Douglas J. and Marian O. Hinds, timely filed their New York State personal income tax returns for each of

the years at issue. Specifically, their 1980 return was filed on or before April 15, 1981; their 1981 return on or before April 15, 1982; their 1982 return on or before April 15, 1983; their 1983 return on or before April 15, 1984; their 1984 return on or before April 15, 1985; their 1985 return on or before April 15, 1986; their 1986 return on or before April 15, 1987; their 1987 return on or before April 15, 1988; and their 1988 return on or before April 15, 1989. On each of these returns, petitioners reported and paid tax on Federal pension income.

By letter dated January 2, 1990 addressed to then Commissioner of Taxation and Finance, James W. Wetzler, petitioners sought a refund of New York State personal income tax, plus appropriate interest, paid on petitioner Douglas J. Hinds' Federal pension income derived from his U.S. military service. Attached to this letter was a recomputation of what petitioners contend their tax liability should have been if the Federal pension income had been excluded. Pursuant to the recomputation, petitioners maintained that they overpaid New York State personal income tax as follows:

<u>Tax Year</u>	<u>Amount Overpaid</u>
1980	\$430.29
1981	\$2,211.81
1982	\$2,132.94
1983	\$1,860.30
1984	\$1,742.63
1985	\$2,168.22
1986	\$1,454.96
1987	\$2,013.00
1988	<u>\$2,022.00</u>
	\$16,036.15 Total

Petitioners did not file amended returns or claims for refund for the years 1980 through 1988 prior to their letter of January 2, 1990.

By letter to petitioners dated January 23, 1990, the Division of Taxation's Deputy Commissioner for Operations, John B. Langer, stated, in pertinent part, as follows:

"As a result of the U.S. Supreme Court Decision in Paul S. Davis v. Michigan Department of Revenue, the New York State Tax Law must exclude pensions of retired federal employees in the same manner that it excludes pensions of state and local government retirees.

"State legislation to implement this decision in New York was enacted on July 21, 1989. The legislation takes effect immediately and exempts federal pension benefits received in taxable years beginning on or after January 1, 1989, from State taxation.

"Currently, New York State does not intend to issue retroactive refunds for open tax years. Whether New York State will have to refund taxes already paid may be decided by two pending New York State Supreme Court cases.

"Your letter has been accepted as a claim for refund for tax years 1980 through 1988.

"Within the next few months you will receive a Notice of Disallowance which will be sent to you by certified mail. Included will be a Notice of Taxpayer Rights fully explaining your right to protest."

On February 5, 1990, the Division of Taxation (hereinafter "Division") issued a Notice of Disallowance, in full, of petitioners' claim for refund.

In June 1994, then Governor Mario M. Cuomo authorized the payment of refunds to all taxpayers who had paid New York State personal income tax on their Federal pension income and who had timely filed refund claims pursuant to section 687 of the Tax Law.

On September 30, 1994, the Division of Taxation issued three checks to petitioners as and for refunds, plus interest, for the years 1986, 1987 and 1988. Accordingly, the only years remaining at issue are the years 1980 through 1985 and the amount of the refund claim is, therefore, \$10,546.19, plus applicable interest.

OPINION

In his determination below, the Administrative Law Judge discussed the Supreme Court case of Davis v. Michigan Dept. of Treasury (489 US 803, 103 L Ed 2d 891) which held that the state income tax schemes which provide for inconsistent treatment of state and Federal retirement benefits violate 4 USC § 111 which protects Federal employees from discriminatory state taxation and, further, that such schemes are unconstitutional under the doctrine of intergovernmental tax immunity. The Administrative Law Judge noted that, as a result of Davis, the Legislature amended the Tax Law, effective January 1, 1989, to exclude Federal pensions from New York income tax (see, L 1989, ch 664; Tax Law § 612[c][3][ii]) to align with Tax Law former § 612(c)(3), which provided that pensions to officers and employees of

New York State were excluded from New York State income tax. This amendment resulted in similar tax treatment of pension income received by both Federal and State retirees.

The Administrative Law Judge then emphasized that the statutory amendment to Tax Law § 612 was prospective only and that the Davis decision was silent on the issue of retroactive application. However, in the matter of Harper v. Virginia Dept. of Taxation (509 US 86, 125 L Ed 2d 74), the Supreme Court held that the rule announced in Davis was to be given full retroactive effect. The Court, citing to McKesson Corp. v. Division of Alcoholic Beverages & Tobacco (496 US 18, 110 L Ed 2d 17), noted that a state was free to choose the form of remedy it would provide to rectify any unconstitutional deprivation, but that such a remedy must satisfy the demands of Federal due process (McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, *supra*, 110 L Ed 2d at 45).

Therefore, citing to McKesson, the Administrative Law Judge concluded that the three-year statute of limitations set forth in Tax Law § 687(a) met the standards of permissible procedural protections. Accordingly, the Administrative Law Judge determined that since petitioners' claim for refund for the years 1980 through 1985 was not timely filed, the Division properly disallowed the refund claim for those years.

On exception, petitioners argue that the cases cited above, Davis, Harper and McKesson, require that New York State return to petitioners the income taxes paid on Mr. Hinds' Federal pension income for the years 1980 through 1985. However, as set forth fully in the determination below, the Administrative Law Judge correctly analyzed each of the cases mentioned by petitioners in their brief. We affirm his reasoning and conclusion that petitioners are not entitled to a refund for the years 1980 through 1985 since they failed to timely file claims for refund for said years (*see*, Matter of Jones, Tax Appeals Tribunal, January 9, 1997; Matter of Silverman, Tax Appeals Tribunal, January 9, 1997).

Petitioners also assert that a determination in this matter should not have been issued prior to a hearing before an Administrative Law Judge. Petitioners argue that in correspondence from the Division's attorney, they were led to believe that they would be afforded an opportunity

for a hearing. As stated in our regulations at 20 NYCRR 3000.9(b)(1), any party may move for summary determination after issue has been joined. Issue was joined on December 26, 1995, when the Division served its answer on petitioners. The cover letter that accompanied the Division's answer contains language which explains to petitioners that once an answer is filed, the Division of Tax Appeals would place the matter on a calendar call notice which petitioners could expect to receive in the near future. This language certainly does not prohibit the Division from filing a motion for summary determination within the parameters set forth in the regulations. Accordingly, if petitioners felt that a hearing was necessary, it was incumbent upon them to demonstrate why the Division's motion for summary determination should be denied. However, petitioners failed to respond to the Division's motion. Therefore, based upon the papers submitted by the Division, we agree with the Administrative Law Judge that no material issues of fact had been raised and that the Division was entitled to summary determination in its favor.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Douglas J. and Marian O. Hinds is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Douglas J. and Marian O. Hinds is denied; and

4. The Notice of Disallowance pertaining to the years 1980 through 1985 is sustained.

DATED: Troy, New York
February 13, 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