STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LORENZA JONES	:	DECISION DTA No. 813466
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1987 through 1989.	:	

Petitioner Lorenza Jones, 345 Park Boulevard, Marion, Ohio 43302, filed an exception to the determination of the Administrative Law Judge issued on May 9, 1996. Petitioner appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

Petitioner 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 9, 1996 and began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for refund of personal income tax paid on his Federal pension for the years 1987, 1988 and 1989 on the basis that said claim was filed beyond the statute of limitations for refund.

FINDINGS OF FACT

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

In support of its motion for summary determination, the Division of Taxation ("Division") submitted an affidavit of its representative along with attached documents. The

Division asserts in its affidavit that since petitioner: 1) filed his New York State income tax return for 1987 on or before April 15, 1988; 2) failed to file a State personal income tax return for 1988; 3) filed his 1989 State personal income tax return on December 6, 1993; and 4) did not file any refund claims until September 22, 1993, or after the three-year statute of limitations had expired, then his claim is barred pursuant to Tax Law § 687.

Attached to the Division's affidavit as Exhibit "1" is an affidavit of Charles Bellamy, Tax Technician II for the Division of Taxation, sworn to on February 12, 1996, attesting to the fact that petitioner: 1) filed his 1987 State personal income tax return on or before April 15, 1988; 2) failed to file a State personal income tax return for 1988; 3) filed his 1989 State personal income tax return on December 6, 1993, and 4) did not file an amended return or refund claim before September 22, 1993.

Also attached to the Division's motion papers is a copy of petitioner's petition, dated December 31, 1994, contesting tax in the amount of $700.00. In the petition, petitioner, while generally referring to the Supreme Court's 1989 decision in Davis v. Michigan Dept. of Treasury (489 US 803), alleged that he "wasn't given a chance to challenge New York Law 687 in the courts."

Attached to the petition is the Division's Notice of Disallowance, dated March 31, 1994, which denied petitioner's refund on the grounds that:

> "Your refund claims for 1987 through 1989 were not timely filed. Subsection (A) of Section 687 of the New York Tax Law provides, in pertinent part, as follows: 'Claim for Credit or Refund of an overpayment of income tax shall be filed by the taxpayer within three (3) years from the time the tax was paid whichever of such periods expires the later, or if no return was filed within two (2) years from the time the tax was paid.[']"

Also attached to the petition is an undated letter from petitioner to the Division which was apparently written in response to the Notice of Disallowance. In this letter, petitioner stated the following:

> "If there is no way you can allow my claim for the year 1987-1989 [sic], I want to Legally challenge the New York State decisions of Subsection (A) of Section 687 in the U.S. Supreme Court. I do not think the New York State Law gives me a fair

treatment of my refund on my Federal Pension. Supreme Court Rule 7-2 vote said its' [sic] 1989 Decision declaring such taxes as unconstitutional must be applied retroactively. Also, U.S. Supreme Court declared in its' [sic] 1989 Decision, that state tax on federal pension in 16 states, including New York, is illegal because state pensions are exempt. I was not notified of this matter until July 1993, at that time I filed an amendment for years 1987-1992. You disallowed years 1987 - 1989, which I disagree with your timely filed decision."

The Division's answer, dated April 6, 1995, denied the allegations made by petitioner in his petition, and further stated that its disallowance of the refund claims was "proper and correct" because they were untimely.

OPINION

In the determination below, the Assistant Chief Administrative Law Judge granted the Division's motion for summary determination holding that the Division had properly denied petitioner's claim for refund as falling outside the statute of limitations for refund. The Assistant Chief Administrative Law Judge determined that Tax Law § 687, which provides for refunds of overpayments of income tax if the taxpayer files a claim within the prescribed time periods, meets the minimum requirements of Due Process under the Fourteenth Amendment of the United States Constitution as enunciated in McKesson Corp. v. Division of Alcoholic Beverages & Tobacco (496 US 18). The Assistant Chief Administrative Law Judge determined that since petitioner voluntarily paid tax on his military pension without protest or under duress, he was subject to the time limitations for refund contained in Tax Law § 687.

On exception, petitioner asserts that the determination of the Assistant Chief Administrative Law Judge is unfair. Petitioner apparently concedes that his claim for refund is time barred under Tax Law § 687, but asserts that had the Division notified him that he could apply for a refund in light of Harper v. Virginia Dept. of Taxation (509 US 86) he would have timely filed a refund claim. Implicit in petitioner's assertions is that the Division was obligated to inform Federal pensioners of their right to obtain refunds. Petitioner also disagrees with the Assistant Chief Administrative Law Judge's finding that petitioner failed to file a 1988 State income tax return. Petitioner alleges that he filed his 1988 return in 1988.

We affirm the determination of the Assistant Chief Administrative Law Judge. After a thorough review of the Assistant Chief Administrative Law Judge's determination and the cases cited therein, we see no reason to alter his analysis or ultimate conclusion. Further, we refuse to impose on the Division the duty of personally advising every taxpayer who is potentially subject to a refund of his or her right to such a refund because of a change in the law given the State's constitutionally sound scheme which "rectified any unconstitutional deprivation" (Harper v. Virginia Dept. of Taxation, supra) while simultaneously respecting the State's fisc (McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, supra).

In addition, we note that on November 6, 1989, the Division did issue a Technical Services Bureau memorandum to the public which informed taxpayers of their right to file protective refund claims during the pendency of two cases dealing with the issue of whether Davis v. Michigan Dept. of Treasury (supra) was to apply retroactively (see, TSB-M-89[9]I). Hence, although petitioner was placed on notice of his right to file protective refund claims, he chose not to exercise said right.

With regard to petitioner's claim that he filed his 1988 State income tax return in 1988, petitioner did not respond to the Division's motion for summary determination. Therefore, it was proper for the Assistant Chief Administrative Law Judge to accept the facts as alleged in the Division's moving papers (Kuehne & Nagel v. Baiden, 36 NY2d 539, 369 NYS2d 667, 671). Although the statute of limitations for refunds of 1988 income tax expires on the later of three years after the filing of petitioner's return for that year or two years after payment of tax for that year (Tax Law § 687[a]), the amount of refund allowed may not exceed the amount of tax paid within the three-year period immediately preceding the filing of the claim. Here, the Assistant Chief Administrative Law Judge was entitled to rely on the affidavit of Herbert M. Friedman, Jr. in support of the motion that petitioner did not pay any tax to New York within the three-year period immediately preceding the filing of either of his claims for refund. Further, even if we were to accept petitioner's claim that his 1988 return was filed in 1988, his

claim for refund of income tax attributable to his military pension for 1988 would still be untimely.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Lorenza Jones is denied;

2. The determination of the Assistant Chief Administrative Law Judge is affirmed;

3. The petition of Lorenza Jones is denied; and

4. The Division of Taxation's denial of petitioner's claim for refund 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