

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PRISCILLA C. MOSTACHETTI	:	DECISION
	:	DTA No. 813915
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1987 and 1988.	:	

Petitioner Priscilla C. Mostachetti, P.O. Box 205, Wingdale, New York 12594-0205, filed an exception to the determination of the Administrative Law Judge issued on May 16, 1996. Petitioner appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

Neither party submitted a brief on exception. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioner is entitled to a refund of personal income taxes paid for the years 1987 and 1988 on income from her Federal pension even though the claim for refund was not filed within three years of her filing her tax returns for 1987 and 1988.

FINDINGS OF FACT

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

In the years 1987 and 1988, petitioner received income from a Federal pension in the amounts of \$20,803.00 and \$23,573.00, respectively. Petitioner timely filed New York State income tax returns for 1987 and 1988 on which she reported such amounts as taxable to New York State.

It was not until 1994 that petitioner filed forms IT-113-X, Claim for Credit or Refund of Personal Income Tax, for each of the years at issue. These forms, which were marked into evidence as the Division of Taxation's (hereinafter "Division") Exhibits "D" and "E", respectively, are each dated March 10, 1994 and include similar explanations. The explanation provided by the petitioner in her refund claim for 1987, which was typewritten and easier to decipher, was as follows:

"State Tax Refund- Retirees who retired from 1985 to 1989 (retired 12/31/86) are entitled to a refund on state taxes paid during this time. New York State deducted state taxes and it was declared unconstitutional by the Supreme Court in 1989. The issue of retroactivity was not addressed in the original court case. In 1993 the Supreme Court declared that its earlier decision would be retroactive and referred it back to the States and their laws on time limits."

Included in the record as the Division's Exhibit "H" is a photocopy of a letter dated May 30, 1990 from New York State Senator Jay P. Rolison, Jr., to petitioner in response to her "inquiry regarding the recent federal court decision relating to state taxation of federal pension benefits." Senator Rolison advised petitioner:

"After looking into this matter, I have been informed by officials at the state Department of Taxation and Finance that individuals wishing to seek a refund must file a form, IT-113X, for each year (up to the 3 year statute of limitations). Although the state is not issuing refunds at the present time, several court cases are pending which may result in the state being required to issue these refunds.

"The IT-113X allows for a taxpayer to file for a protective claim in the event refunds are made in the future."

Although Senator Rolison's letter was dated May 30, 1990, as noted above, petitioner's refund claims filed on forms IT-113X were dated March 10, 1994. Further, according to the affidavit of Charles Bellamy, a Tax Technician II for the Audit Division whose "responsibilities include the review and processing of refund claims made by federal pension recipients who were taxed on that income prior to 1989", dated November 29, 1995, which is included in the Division's motion papers for summary determination,¹ petitioner's refund claims for 1987 and

¹The Division brought a motion dated November 29, 1995 for summary determination in this matter. In response, Daniel J. Ranalli, Assistant Chief Administrative Law Judge, in a letter dated December 4, 1995 to the Division's representative, advised that the hearing in this matter which had been scheduled for January 17, 1996, prior to the Division's motion, would nonetheless go forward, and that the Division's motion "may be argued at the hearing."

1988 were filed in May 1994 and "she did not file refund claims or amended returns for those years before that date."

The Division issued a Notice of Disallowance dated July 25, 1994, in response to petitioner's claims for refund for 1987 and 1988, on the basis that her claims were not timely filed pursuant to Tax Law § 687(a).

OPINION

In his determination below, the Administrative Law Judge sustained the Division's denial of petitioner's claim for refund based upon the fact that such claim was 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 decisions in McKesson Corp. v. Division of Alcoholic Beverages & Tobacco (496 US 18, 110 L Ed 2d 17) and Harper v. Virginia Dept. of Taxation (509 US 86, 125 L Ed 2d 74).

Moreover, the Administrative Law Judge determined that there exists no basis in law to keep this matter open pending possible legislative action that would authorize the refund of taxes paid on Federal pension income in such cases where there was a failure to timely file refund claims.

On exception, petitioner has raised the same arguments made before the Administrative Law Judge. Because the Administrative Law Judge adequately addressed these arguments, we affirm the determination of the Administrative Law Judge for the reasons set forth therein and on the basis of our recent decisions in Matter of Burkhardt (Tax Appeals Tribunal, January 9, 1997), Matter of Jones (Tax Appeals Tribunal, January 9, 1997) and Matter of Silverman (Tax Appeals Tribunal, January 9, 1997).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Priscilla C. Mostachetti is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Priscilla C. Mostachetti is denied; and

4. The Notice of Disallowance dated July 25, 1994 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