

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| FREDERICK J. AND MONA S. LONERGAN | : | DECISION |
| | : | DTA No. 814247 |
| for Redetermination of a Deficiency or for | : | |
| Refund of Personal Income Taxes under | : | |
| Article 22 of the Tax Law for the Years 1977 | : | |
| through 1985. | : | |

Petitioners Frederick J. and Mona S. Lonergan, 609 Washington Court, Guilderland, New York 12084, filed an exception to the determination of the Administrative Law Judge issued on May 2, 1996. Petitioners appeared by Segel, Goldman & Mazzotta, P.C. (Robert J. Koshgarian, Esq., of counsel). 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 brief in opposition. Petitioners filed a reply brief. 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.
- II. Whether the special refund authority of Tax Law § 697(d) applies herein.

FINDINGS OF FACT

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

On April 14, 1989, petitioners filed a claim for refund for the tax years 1982 through 1988. The Division of Taxation ("Division") paid refunds to petitioners for the years 1985

through 1988 by check dated September 9, 1994. However, the Division issued a refund denial letter, dated July 25, 1994, for the years 1982 through 1984 on the ground that the three-year limitations period in Tax Law § 687 had expired.

After a conciliation conference, the conferee issued a conciliation order, dated July 21, 1995, sustaining the refund denial.

Petitioners filed a petition, dated August 17, 1995, alleging that they are seeking refunds for the years 1977 through 1985 in the sum of \$11,512.00 for taxes they paid on petitioner Frederick Lonergan's Federal pension. Petitioners argued that the Supreme Court decision in Davis v. Michigan (489 US 803, 103 L Ed 2d 891 [1989]) exempted Federal pensions from state tax in those states that did not impose an income tax on state retirement benefits and that the rule in Davis was to be applied retroactively.

The Division filed an answer, dated November 8, 1995, alleging that "Governor Cuomo's 1994 decision to approve refund claims for those who paid New York State income tax on their federal pension income was solely limited to those who had timely refund claims under the Tax Law" and that petitioners failed to file a claim for refund within the three-year period required under section 687 of the Tax Law.

On December 21, 1995, the Division filed a motion for summary determination pursuant to 20 NYCRR 3000.9(b)(1). The Division argued that petitioners failed to file any refund claim for the years 1977 through 1981 and failed to file a refund claim for the years 1982 through 1984 within the three-year limitations period of section 687 of the Tax Law. The Division also noted that it paid petitioners their refund claim for the year 1985. The Division concluded that, as a matter of law, New York State law provided petitioners with an adequate predeprivation or postdeprivation remedy consistent with the guidelines enunciated by the United States Supreme Court in Reich v. Collins (513 US 106, 130 L Ed 2d 454 [1994]).

In their responding papers, petitioners do not contest the Division's allegation that it refunded the amount claimed for the year 1985. Petitioners alleged that the Division has not

provided meaningful backward-looking relief to them in order to rectify New York State's unconstitutional taxation of the Federal pension, as required in the U.S. Supreme Court's decision in Harper v. Virginia Department of Taxation (509 US 86, 125 L Ed 2d 74 [1993]) and subsequently in Reich v. Collins (*supra*). Petitioners contended that the Division's application of the short limitations period of section 687 is inconsistent with these Supreme Court decisions regarding the discriminatory nature of New York's prior tax scheme. Petitioners claimed that Tax Law § 697(d), which allows the Division to refund personal income taxes at any time without regard to any period of limitations, is applicable in this matter.

OPINION

In her determination below, the Administrative Law Judge sustained the Division's denial of petitioners' claim for refund for the years 1982 through 1984 based upon the fact that such claim was barred by the three-year statute of limitations contained in Tax Law § 687(a). Furthermore, the Administrative Law Judge also denied petitioners' claim for refund for the tax years 1977 through 1981 since no formal claim for refund was made for those years and, as such, necessarily falls outside the three-year statute of limitations pursuant to Tax Law § 687(a).

The Administrative Law Judge also rejected petitioners' argument that the refund provision of Tax Law § 687 did not provide them with "meaningful backward-looking relief" to the extent that such relief is limited by the three-year limitations period. Petitioners urged that, instead, Tax Law § 697 should be invoked to permit refunds for the tax years prior to 1985. However, the Administrative Law Judge found that the special refund authority outlined in Tax Law § 697 did not apply in this instance.

On exception, petitioners argue that the Administrative Law Judge incorrectly interpreted Tax Law § 697(d). Petitioners argue that there is no requirement that there be a mistake of fact in order for petitioners to avail themselves of the special refund authority. Petitioners argue that, in this case, since petitioners' taxes were illegally or erroneously collected by the Tax Department, that it follows that they are allowed to receive a refund of these collected taxes pursuant to Tax Law § 697.

Tax Law § 697(d) states as follows:

"Special refund authority.--Where no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts, pursuant to the provisions of this article, the tax commission at any time, without regard to any period of limitations, shall have the power, upon making a record of its reasons therefor in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certificate to the comptroller."

Although the erroneous or illegal collection of moneys is sufficient to invoke the special refund authority, there has been no demonstration by petitioners that money was collected from them illegally or erroneously. In fact, petitioners paid income tax on Mr. Lonergan's Federal pension income as was required by law at the time when his individual income tax returns were filed for the years in question. Although the statute has been rendered unconstitutional, this does not alter the fact that at the time of payment by petitioners, the payments were made pursuant to law (see, Fiduciary Trust Co. v. State Tax Commn., 120 AD2d 848, 502 NYS2d 119). Accordingly, Tax Law § 697(d) does not apply to petitioners.

Lastly, petitioners argue that the Administrative Law Judge erred in finding that the limitations period of Tax Law § 687(a) did not deprive them of meaningful backward-looking relief in that it does not satisfy minimum due process requirements. We reject this argument. As we held in Matter of Burkhardt (Tax Appeals Tribunal, January 9, 1997), 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 (496 US 18, 110 L Ed 2d 17). Therefore, since petitioners failed to file timely claims for refund, their claims must be denied.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Frederick J. and Mona S. Lonergan is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Frederick J. and Mona S. Lonergan 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