

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>JOSEPH F. AND ANNA M. INCANTALUPO</b>	:	DECISION
	:	DTA No. 814253
for Revision of a Determination or for Refund of New York:	:	
State and New York City Personal Income Taxes under	:	
Article 22 of the Tax Law and the Administrative Code of	:	
the City of New York for the Year 1986.	:	

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Petitioners Joseph F. and Anna M. Incantalupo, 10-27 51st Avenue, Long Island City, New York 11101-5828, filed an exception to the determination of the Administrative Law Judge issued on February 29, 1996. Petitioners appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

Petitioners filed a brief on exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Petitioners' request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

***ISSUE***

Whether the Division of Taxation properly denied petitioners' claim for refund of tax paid on Federal pension income on the basis that said claim was not timely filed pursuant to Tax Law § 687(a).

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for finding of fact "6" which has been deleted in its entirety since reference to a Technical Services Bureau memorandum dated November 6, 1989 is unnecessary to this decision. The Administrative Law Judge's findings of fact 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 petitioners filed their New York State income tax return for 1986 on or before April 15, 1987, and did not file their refund claim or amended return until March 1991, or after the three-year statute of limitations had expired, then their 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 December 20, 1995, attesting to the fact that petitioners filed their 1986 State personal income tax return on or before April 15, 1987 and did not file an amended return or refund claim before March 1991.

Also attached to the Division's motion papers is a copy of petitioners' petition, dated August 24, 1995, contesting tax in the amount of \$532.71. In the petition, petitioners allege, inter alia, the following:

"(6)(a) No errors made by Commissioner of Taxation [and] Finance. (b) Petitioner(s) was not aware of the time limit for submission."

Attached to the petition are the following documents: (1) a copy of the Conciliation Order (CMS No. 141241),<sup>1</sup> dated July 28, 1995, wherein the conciliation conferee denied the request "[a]fter giving due consideration to the evidence presented"; and (2) a copy of a letter, dated May 22, 1995, addressed to petitioner from the conciliation conferee (Ralph Liporace), informing petitioners that the scheduled conciliation conference had been adjourned and that the matter would be handled on a correspondence basis.

Finally, attached to the Division's motion papers is a copy of the Division's answer, dated November 8, 1995, which states, inter alia, that petitioners<sup>2</sup> paid New York State tax on Federal pension income for 1986 and failed to file a claim for refund within three years. The Division

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<sup>1</sup>Although it is not indicated elsewhere in the record, the heading of the Conciliation Order notes that the date of the Notice of Disallowance was August 29, 1994.

<sup>2</sup>In the answer, the Division indicates that it was Joseph Incantalupo who earned the Federal pension income at issue wherein it states: "Petitioner is a former federal employee who paid New York State tax on his federal pension income." However, the record is devoid of any other evidence which would indicate which of the petitioners (Joseph or Anna), or if both of them, were former Federal employees and thus earned the pension income at issue.

further states that petitioners' claim for refund was properly denied pursuant to Tax Law § 687.

### ***OPINION***

In the determination below, the Administrative Law Judge concluded that it was proper to decide the matter through summary determination since there were no material and triable issues of fact presented. The Administrative Law Judge, based on his review of 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), held that the refund provisions of Tax Law § 687(a) provided meaningful backward-looking relief such that any unconstitutional deprivation could be rectified and that these provisions satisfied the Due Process Clause of the 14th Amendment. The Administrative Law Judge, therefore, found that the Division properly denied petitioners' refund claim on the basis that it was not timely filed.

On exception, petitioners assert that they did not timely file the claim for refund as the result of the Division's neglect in notifying many retirees, including themselves, that a claim should be filed for the taxes paid on Federal pension income. Petitioners also assert that there were irregularities in the manner in which the Conciliation Conferee handled this matter which prevented them from having an opportunity to present the evidence and arguments to prove their case.

After careful review of the Administrative Law Judge's determination and the cases cited therein, we see no reason to disturb his conclusions. The Administrative Law Judge properly decided all issues and he correctly applied the Tax Law and relevant case law to the facts of this case. Accordingly, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

We also find that petitioners' allegation of irregularities during the conciliation conference procedure has no bearing on our decision. Pursuant to Tax Law § 170(3-a)(f), a conciliation order is not considered precedent nor is it given any force and effect in a subsequent administrative hearing with respect to the petitioners. A conciliation order ceases to be binding on a person once such person petitions for a hearing with the Division of Tax Appeals (Matter

of Sandrich, Inc., Tax Appeals Tribunal, April 15, 1993). The facts in this matter are not in dispute. Simply stated, petitioners did not timely file their claim for refund for the year in question and, thus, Tax Law § 687(a) prohibits the issuance of any refund. What may or may not have occurred during the conciliation conference procedure does not alter the facts or the application of the law to these facts.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Joseph F. and Anna M. Incantalupo is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Joseph F. Anna M. Incantalupo is denied; and
4. The Notice of Disallowance is sustained.

DATED: Troy, New York  
April 3, 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