STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| SAUL AND SYLVIA PURVIN | : | DECISION<br>DTA No. 814540 |
| for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 1983 through 1994. | : | |

Petitioners Saul and Sylvia Purvin, 1901 84th Street, Brooklyn, New York 11214-3062, filed an exception to the determination of the Administrative Law Judge issued on February 20, 1997. Petitioners appeared ***pro se***. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

Neither party filed a brief. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

## *ISSUE*

Whether the Division of Taxation properly denied petitioners' claims for refund for the years 1983 through 1994.

## *FINDINGS OF FACT*

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

On or about December 31, 1982, petitioner Saul Purvin[1] retired from employment with the Federal government. Mr. Purvin received a total of $107,315.00 as his gross Federal pension for the years 1983 through 1994 inclusive.[2] According to a statement from the United States Office of Personnel Management, Retirement Programs, petitioner received the following gross amounts in each year:

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| 1983 | $ 7,193.00 |
| 1984 | 7,860.00 |
| 1985 | 8,124.00 |
| 1986 | 8,124.00 |
| 1987 | 8,220.00 |
| 1988 | 8,556.00 |
| 1989 | 8,892.00 |
| 1990 | 9,300.00 |
| 1991 | 9,792.00 |
| 1992 | 10,152.00 |
| 1993 | 10,452.00 |
| 1994 | 10,650.00 |

According to the affidavit of Charles Bellamy, Tax Technician II with the Division of Taxation and Finance since 1967, whose responsibilities include the review and processing of refund claims made by Federal pension recipients who were taxed on that income prior to 1989, petitioners "filed their New York State personal income tax returns in a timely manner (on or before April 15 of the following year) for all years at issue except for 1994." He also stated that petitioners filed an informal claim for refund for all open years on May 10, 1989; however, they

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[1]Mrs. Sylvia Purvin is also a petitioner in this matter due to the fact that she and Mr. Purvin filed joint New York State resident personal income tax returns for the periods in issue. However, only petitioner Saul Purvin had Federal pension income. Hereinafter, petitioner will refer to Mr. Purvin, while petitioners will refer to Mr. and Mrs. Purvin collectively.

[2]Mr. Purvin's original Retirement Fund contributions totaled $18,982.00.

did not file an amended return or claim for refund before that date. Petitioners' refund claims for the years 1983 through 1985 were denied because the claims were not filed within three years of the filing of returns for those years. For the years 1986 through 1993, petitioners' refund claims were denied either because they paid no tax on their Federal pension income or they had no New York tax liability. No return was filed for 1994.

On August 29, 1994, the Division of Taxation (the "Division") issued a Notice of Disallowance to petitioners in which they were informed that their refund claim in the amount of $355.04 was disallowed in full for tax year 1985 because it was not timely filed pursuant to Tax Law § 687(a).

Petitioners requested a conference in the Bureau of Conciliation and Mediation Services and, on June 13, 1995, shortly before the issuance of a conciliation order, the conciliation conferee issued a consent form to petitioners along with a detailed explanation of his decision. The conferee wrote, in pertinent part:

> "I have reviewed, thoroughly, your refund claims for the above years and all of the information contained in the case file. Although you have been receiving Federal pension since 1983, my review discloses that you did not pay any New York taxes on that pension for the years at issue, and therefore no refund can be issued.
>
> "According to the Federal Retirement System statement submitted by you, the pension benefits paid to you in 1983 ($7193.00), 1984 (&7860.00) [sic] and part of 1985 ($3929.00) represented a return of your contributions which totaled $18982.00. These amounts would not have been reported on either your Federal or New York State returns. Also, in reviewing the electronic files for the years 1985 through 1990, I found that you and your spouse had a New York tax liability for 1985 only. For that year, your tax totaled $355.04, but you subtracted your pension before computing the tax due. Beginning in 1982, the New York return allowed a subtraction for all pensions, up to $20,000.00, if the recipient was 59 1/2 years of age. A review of the files disclosed that you claimed that subtraction and, in fact, had no New York tax liability for the years 1986, 1987, 1988, 1989 and 1990.
>
> "In summary, the Federal pension that you are receiving was not reportable until approximately the middle of 1985 and the amount reported was subtracted before computing the tax liability for that year. Your returns for 1986 through 1990 reported no tax liability, whatsoever.

> "Based on the above, your refund claims for 1983 through 1990 are denied and the Notices of Disallowance that were issued, are sustained."[3]

It is noted that the Consent references tax years 1983 through 1990; however 1994 was in parentheses and the amount of the claim was listed as "$107,315.00 NY taxes on Federal pension".[4]

The conciliation conferee issued a Conciliation Order (CMS No. 141522), dated June 30, 1995, which denied the refund claims for the years 1983 through 1990 and dismissed petitioners' request.

The Bellamy affidavit and petitioner's May 10, 1989 informal claim for refund clearly establish a claim for refund for years 1983 through 1988. Additionally, review of correspondence from BCMS to petitioner, as well as the conferee's June 13, 1995 letter indicate that additional informal claims for refund for 1989 and 1990 were filed while the conciliation proceeding was pending. There is an indication that petitioner filed an informal refund claim with BCMS for years 1991 through 1994. At any rate, he included those years in his petition (***see***, finding of fact above).

Petitioners, then filed a petition seeking a refund of all taxes for tax years 1983 through 1994 in the total amount of $107,315.00. This amount is equal to the entire amount of the Federal pension income received by Mr. Purvin in the years 1983 through 1994.

In its answer, dated February 7, 1996, the Division denied the allegations in the petition, and stated ***inter alia*** that: (1) petitioner Saul Purvin was a former Federal employee who paid New York State tax on his Federal pension income for the years in issue, shown on the caption as 1983 through 1990; (2) petitioners failed to file a claim for refund within three years of the filing of the returns for the years in issue; and (3) petitioners' claim for refund was properly

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[3] The record is silent as to when these Notices of Disallowance were issued.

[4] The typeface is different for the year 1994 and the monetary figure.

denied as untimely pursuant to Tax Law § 687. In addition, the Division asserted that petitioners bear the burden of proving the disallowance was erroneous and/or improper.

On March 12, 1996, the Division requested permission to amend its answer pursuant to 20 NYCRR 3000(4)(d)(1), and its request was granted on May 14, 1996. The amendment was as follows: (1) the years in the caption were changed to 1983 through 1994; and (2) the following paragraph was added: "[the DIVISION] STATES that the Petitioners did not pay New York State income tax on their Federal pension income for the years 1991-1994." The remainder of the answer remained unchanged.

To prove that no tax was paid on Federal pension income, the Division submitted microfilm records of petitioners' filing history for the years 1983 through 1990. In order to explain the microfilm records, it submitted the affidavit of James Miller, the Assistant Director in the Division's Personal Income Tax Returns Processing Bureau since 1993, whose duties include overseeing "the analysis and testing of computer systems which process tax return information." The computer systems store information from various sources and "generate printed documents which are sent to taxpayers as well as microfilm of purged information."

According to Mr. Miller, the personal income tax returns database ("returns database") stores information from a taxpayer by header information which includes the taxpayer's name, address and social security number. When the information from a taxpayer's document is inputted onto the returns database, the system verifies that the address on file is current and when necessary updates the address. Mr. Miller points out that after the information is keyed from a taxpayer's return or request for extension onto the returns database, it is stored in a record format. Records from the returns database are extracted and copied to tape. The tape information is transferred to microfilm once that year is taken off the "on-line" database.

Mr. Miller affirmed that the microfilm copies of the resident income tax returns contain the same information which was shown on the hard copies of petitioners' resident income tax returns for the years 1983 through 1990.

Review of the microfilm records reveals that petitioners filed (1) their 1983 resident income tax return under a valid extension on August 14, 1984; and (2) their 1984 through 1990 resident income tax returns in a timely manner (on or before April 15 of the following year). The records also reveal petitioners' tax liability and payment history as follows:

1983 -- petitioners paid tax;

1984 -- petitioners paid tax; however they received a refund of a portion of the tax which they had paid;

1985 -- petitioners paid tax; however, they received a refund of a portion of the tax which they had paid;

1986 -- petitioners received a refund of all tax which they had paid;

1987 -- petitioners neither paid nor owed any taxes;

1988 -- petitioners paid a total of $59.00 in tax, of which $14.00 was attributable to Mr. Purvin's New York gross income;

1989 -- petitioners neither owed nor paid any tax;

1990 -- petitioners neither owed nor paid any tax.[5]

The Division also submitted a computer printout of the financial data taken from petitioners' 1991 Form IT-201. According to this printout, petitioners reported $9,739.00 as both their Federal gross and New York adjusted gross income. They claimed and were allowed a standard deduction of $9,500.00. Although petitioners' New York taxable income was reported as $239.00, they did not owe any taxes because of their New York State and City household credits. Further review of this printout reveals that no tax had been withheld nor had petitioners made any estimated payments for tax year 1991.

Review of petitioners' 1992 resident income tax return Form IT-201 ("IT-201") reveals that Mr. Purvin's Federal pension was reported as part of petitioners' Federal adjusted gross income, but was excluded from their New York adjusted gross income. Furthermore, on this return petitioners reported that zero tax was owed.

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[5] See, finding of fact above concerning a Deferred Payment Agreement entered into by petitioners and the Division.

In the same manner, review of petitioners' 1993 IT-201 reveals that petitioners excluded "FED. RETIREMENT PAY" of $10,452.00 from their Federal adjusted gross income to arrive at their New York State adjusted gross income. Furthermore, petitioners reported that zero tax was owed.

On or about December 6, 1993, petitioners and the Division entered into a Deferred Payment Agreement ("DPA") for personal income taxes due for tax year 1990 as a result of an assessment (Number L-008093266-3) previously issued by the Division. According to the DPA, petitioners were to make a total of 12 monthly payments of $96.66 each.

As part of their documentary evidence, petitioners submitted copies of two checks paid under the DPA. It is noted that petitioners claim that three additional payments of $96.66 were made under the DPA; however, copies of checks as substantiation of such payments are not part of the record.

It is noted that petitioners did not submit copies of any of their tax returns, either original or amended, for the years in issue.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge sustained the Division's denial of petitioners' refund claims. With respect to the years 1983, 1984 and 1985, the Administrative Law Judge found that petitioners filed their refund claims more than three years from the filing of their returns for those years. The Administrative Law Judge noted that Tax Law § 687(a) required petitioners to file their claims within three years from the date of filing their returns and that the Supreme Court in ***McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*** (496 US 18, 110 L Ed 2d 17) endorsed the validity of the statutory provision by holding that a state was free to choose the form of remedy it would provide to rectify any unconstitutional deprivation as long as it satisfied the demands of Federal due process in accordance with ***Harper v. Virginia Dept. of Taxation*** (509 US 86, 125 L Ed 2d 74). The Administrative Law Judge concluded that the three-year statute of limitations met the Supreme Court's due process requirements, citing the ***McKesson*** decision and ***Matter of Burkhardt*** (Tax Appeals Tribunal, January 9, 1997).

With respect to the years 1986 through 1994, the Administrative Law Judge determined the following:

In 1986, petitioners received a full refund of taxes paid, and for 1987 and 1989 petitioners neither paid nor owed taxes;

In 1988, petitioners paid tax but did not prove it was on Federal pension income;

In 1990, petitioners made payments pursuant to a deferred payment agreement, but once again did not prove that the tax was paid on the Federal pension income; in addition, the Division's records indicated that petitioners received a refund of all taxes paid for the year 1990, including the amount paid pursuant to the deferred payment agreement;

For the years 1991, 1992 and 1993, petitioners neither owed nor paid any taxes; and

For the year 1994, there was no evidence that petitioners filed a return.

***ARGUMENTS ON EXCEPTION***

Petitioners argue that the Supreme Court case of ***Harper v. Virginia Dept. of Taxation*** (***supra***) is controlling and justifies granting their refund requests, contrary to the Administrative Law Judge's discussion of that case in her determination.

In addition, petitioners have submitted additional evidence with their exception in support of their refund applications.

***OPINION***

We affirm the determination of the Administrative Law Judge. We have consistently denied a claim for refund of personal income tax paid on Federal pension income where the claim was not filed within the three-year statute of limitations set forth in Tax Law § 687(a) (***see, Matter of Walter***, Tax Appeals Tribunal, May 15, 1997; ***Matter of Reiter***, Tax Appeals Tribunal, February 27, 1997; ***Matter of Mostachetti***, Tax Appeals Tribunal, February 13, 1997). Given the evidence presented in this case and our previous holdings in similar cases, we find that Tax Law § 687(a) is consistent with the Supreme Court's decision in ***Harper***, and affirm the Administrative Law Judge's determination with respect to the years 1983, 1984 and 1985.

Regarding the remaining years in issue, 1986 through 1994, we affirm the determination of the Administrative Law Judge, finding that she completely and adequately addressed the issues before her and we see no reason to analyze these issues further.

However, we do find it necessary to address petitioners' attempt to introduce additional evidence as part of their exception which was not part of the record below, namely the Chase bank statement. We must reject this attempt to introduce evidence at this late date after the record has been closed. We have held on many occasions that a fair and efficient hearing process must be defined and final, and allowing the submission of evidence after the record is closed is not helpful towards that end and does not permit the adversary to question the evidence on the record (***Matter of Metro Grocery & Deli***, Tax Appeals Tribunal, January 12, 1995; ***Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Saul and Sylvia Purvin is denied;

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

3. The petition of Saul and Sylvia Purvin is denied; and

4. The Division's disallowance of petitioners' refund claims is sustained.

DATED: Troy, New York
October 9, 1997

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Donald C. DeWitt
President

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Carroll R. Jenkins
Commissioner

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Joseph W. Pinto, Jr.
Commissioner