STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
THEODORE D. HOTALING	:	DECISION DTA No. 814768
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 1983 through 1987.	:	

Petitioner Theodore D. Hotaling, 6 Kings Court, Loudonville, New York 12211, filed an exception to the determination of the Administrative Law Judge issued on August 8, 1996. Petitioner appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel).

Petitioner submitted a brief in support of his exception. The Division of Taxation filed a brief in opposition to the exception. 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 taxes paid on Federal pension income as untimely pursuant to the three-year statute of limitations period of Tax Law § 687(a).

FINDINGS OF FACT

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

The affidavit of Charles Bellamy, Tax Technician II, indicates that petitioner, Theodore D. Hotaling, filed his 1983 New York State personal income tax return on or before May 4, 1985; his 1984 return was filed on or before April 15, 1985; his 1985 return was filed on or before April 15, 1986; his 1986 return was filed on or before April 15, 1987; and his 1987

return was filed on or before August 1, 1988. Allegedly, on each of the returns filed, petitioner reported and paid tax on Federal pension income.

On November 15, 1994, petitioner filed claims for refund of personal income tax for the years 1983 through 1987.

On January 30, 1995, the Division of Taxation (hereinafter "Division") issued a Notice of Disallowance, in full, of petitioner's claim for refund.

Petitioner did not file amended returns or claims for refund for any of the years at issue prior to his refund claim of November 15, 1994.

In June 1994, then Governor Cuomo authorized the payment of refunds to all taxpayers who had paid New York State personal income tax on their Federal pension income and who had timely filed refund claims pursuant to section 687 of the Tax Law.

OPINION

In his determination below, the Administrative Law Judge sustained the Division's denial of petitioner's claim for refund for the years 1983 through 1987 based upon the fact that such claim was barred by the three-year statute of limitations contained in Tax Law § 687(a). Accordingly, since there were no material or triable issues of fact, the Administrative Law Judge granted the Division's motion for summary determination in its favor.

The Administrative Law Judge noted that the United States Supreme Court in Davis v. Michigan Dept. of Treasury (489 US 803, 103 L Ed 2d 891) held that state income tax schemes which provide for inconsistent treatment of state and Federal retirement benefits violate 4 USC § 111, which protects Federal employees from discriminatory state taxation and, further, held that such schemes are unconstitutional under the doctrine of intergovernmental tax immunity. The Administrative Law Judge correctly pointed out that at the time the Supreme Court issued Davis, the Tax Law provided for similarly discriminatory treatment of Federal and state retirement benefits. Tax Law former § 612(c)(3) provided that pensions to officers and employees of New York State and its political subdivisions were excluded from New York

State income tax. At the same time, the Tax Law contained no similar provision for pensions to Federal retirees which were subject to New York State income tax. In an attempt to remedy this discriminatory treatment, the Legislature amended the Tax Law, effective January 1, 1989, to exclude Federal pensions from New York income tax (see, L 1989, ch 664; Tax Law § 612[c][3][ii]) and thereby similarly treat both State and Federal retirees. However, this amendment was prospective only.

In citing to Harper v. Virginia Dept. of Taxation (509 US 86, 125 L Ed 2d 74), the Administrative Law Judge noted that while the Court held that the rule announced in Davis was to be given retroactive effect, it did not provide relief to the petitioner therein. Rather, citing McKesson Corp. v. Division of Alcoholic Beverages & Tobacco (496 US 18, 110 L Ed 2d 17), the Court held that each state was free to choose the form of remedy it would provide to rectify any unconstitutional deprivation, but that such a remedy must satisfy the demands of Federal due process. The Court further stated that Federal due process requires that where taxes are paid pursuant to a scheme ultimately found to be unconstitutional, the state must provide taxpayers with meaningful backward-looking relief to rectify any unconstitutional deprivation (Harper v. Virginia Dept. of Taxation, supra, 125 L Ed 2d, at 89, citing McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, supra).

In analyzing the above-cited cases, the Administrative Law Judge determined 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.

On exception, petitioner argues that on April 17, 1996, he received a calendar call notice from the Division of Tax Appeals which stated that he would be notified of a hearing date in the near future. Petitioner argues that he never had a hearing or received any further response from the Division of Tax Appeals. Furthermore, he restates his arguments made in his petition submitted to the Division of Tax Appeals.

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 (see, Matter of Incantalupo, Tax Appeals Tribunal, April 3, 1997; Matter of Hicks, Tax Appeals Tribunal, March 20, 1997 and Matter of Mostachetti, Tax Appeals Tribunal, February 13, 1997). Accordingly, we affirm the determination for the reasoning set forth therein.

However, we wish to respond to petitioner's argument that he did not receive a hearing in this matter. As set forth in the facts, the Division properly made a motion for summary determination and provided sufficient evidence in support of its assertion that no refund claims or amended returns for the years 1983 through 1987 were filed by petitioner within three years of the filing of the original returns for those years. Petitioner failed to respond to the Division's motion papers and did not raise any issues of fact in his petition. Therefore, since there were no material issues of fact and only an issue involving a question of law, summary determination was warranted in this case (20 NYCRR 3000.5[c]). Thus, there was no need for a formal hearing.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Theodore D. Hotaling is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Theodore D. Hotaling is denied; and

4. The Notice of Disallowance dated January 30, 1995 is sustained.

DATED: Troy, New York
June 19, 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