

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
DAVID A. HICKS AND JOAN V. HICKS : DECISION
for Redetermination of a Deficiency or for Refund of : DTA No. 814786
Personal Income Tax under Article 22 of the Tax Law for :
the Years 1987 and 1988. :

Petitioners David A. Hicks and Joan V. Hicks, 345 Middle Line Road, Ballston Spa, New York 12020, filed an exception to the determination of the Administrative Law Judge issued on August 29, 1996. Petitioners appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation submitted a letter stating it would not be filing a brief in opposition. 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' claims for refund of tax paid on Federal pension income as untimely pursuant to Tax Law § 687(a) where such claims were filed beyond the statutory period of limitations but where New York's taxation of Federal pension income was ultimately determined unconstitutional under the rule of Davis v. Michigan Dept. of Treasury (489 US 803, 103 L Ed 2d 891).

FINDINGS OF FACT

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

Petitioners, David A. Hicks and Joan V. Hicks, filed their joint 1987 New York State

personal income tax return on or before April 15, 1988. Petitioners also timely filed their joint 1988 New York State personal income tax return on or before April 15, 1989. On each such return petitioners included Federal pension income as part of their total New York adjusted gross income.

Pursuant to separate claims dated October 11, 1994 and filed with the Division of Taxation ("Division"), petitioners sought refunds of New York State income tax paid on their Federal pension income for the years 1987 and 1988.

By a Notice of Disallowance dated December 27, 1994, the Division denied petitioners' refund claims as untimely filed.

Neither of the refund claims filed by petitioners in respect of the years at issue was filed within three years of the date of filing of petitioners' New York returns for those years.

Previously, in 1989, petitioners filed a claim for refund of New York income tax paid on Federal pension income for the year 1985. This claim was denied pursuant to a Notice of Disallowance dated November 20, 1989, which referred to the decision of the Supreme Court in Davis v. Michigan Dept. of Treasury (*supra*), and noted that said decision did not address the issue of the retroactive application of its holding. The Notice of Disallowance further noted that New York law regarding the taxation of Federal pension benefits had been changed effective January 1, 1989 and also stated that petitioners' 1985 claim had been disallowed because "New York State will not issue refunds for taxes paid on federal pension benefits for years prior to 1989." The Notice of Disallowance concluded by advising petitioners of their appeal rights and stated that "[i]f pending court action during the two year [appeal] period changes this decision your claim(s) will be automatically reconsidered."

OPINION

In the determination below, the Administrative Law Judge granted the Division's motion for summary determination in that there were no material issues of fact. The Administrative Law Judge held that although Davis v. Michigan Dept. of Treasury (*supra*) was to be applied

retroactively in light of Harper v. Virginia Dept. of Taxation (509 US 86, 125 L Ed 2d 74), the Division properly denied petitioners' refund claims as falling outside the limitations period for claiming a refund pursuant to Tax Law § 687. The Administrative Law Judge held that the refund provisions of Tax Law § 687 satisfy the minimum requirements of due process as set forth by the Supreme Court in McKesson Corp. v. Division of Alcoholic Beverages & Tobacco (496 US 18, 110 L Ed 2d 17).

On exception, petitioners assert that the Division should be estopped from asserting the statute of limitations as a basis for the denial of their refund claims. Petitioners maintain that the refund claims for 1987 and 1988 were not timely filed because they were misled and improperly influenced by the Notice of Disallowance dated November 20, 1989.

We affirm the determination of the Administrative Law Judge. After a thorough review of the Administrative Law Judge's determination and the cases cited therein, we see no reason to alter his analysis or ultimate conclusion. Furthermore, petitioners' claim that they were misled by the Notice of Disallowance dated November 20, 1989 is inconsistent with the evidence before us. We note that petitioners state in their petition that they filed a claim for refund of 1986 taxes paid on Federal pension benefits on April 16, 1990. Apparently petitioners were not misled by the Notice of Disallowance dated November 20, 1989 with respect to the 1986 tax year since they filed a claim for refund for 1986 on April 16, 1990, some five months after the Notice of Disallowance was issued. Petitioners cannot now claim that they were misled and unduly influenced by the Notice of Disallowance dated November 20, 1989 with respect to the 1987 and 1988 tax years when it is clear from their previous actions with respect to the 1986 tax year that no confusion existed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of David A. Hicks and Joan V. Hicks is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of David A. Hicks and Joan V. Hicks is denied; and

4. The Notice of Disallowance dated December 27, 1994 is sustained.

DATED: Troy, New York
March 20, 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