

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CATHERINE R. MANNY	:	DECISION
	:	DTA No. 814957
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1986, 1987 and	:	
1988.	:	

Petitioner Catherine R. Manny, 1550 7th Avenue, Watervliet, New York 12189, filed an exception to the determination of the Administrative Law Judge issued on January 16, 1997. Petitioner appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel).

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

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

ISSUE

Whether petitioner is entitled to a refund of personal income taxes paid on Federal pension income when her refund claims were not filed within three years of the filing of tax returns for the years at issue.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "1" and "2" which have been modified. We also have made additional findings of fact. The Administrative Law Judge's finding of fact, the modified findings of fact and the additional findings of fact are set forth below.

We modify finding of fact "1" of the Administrative Law Judge's determination to read as follows:

During 1986, 1987 and 1988, petitioner, who was widowed in 1975, received income from her deceased husband's Federal pension from his employment at the Watervliet Arsenal. According to the motion papers, petitioner timely filed New York State income tax returns for each of these years on which she reported the Federal pension income as taxable to New York State.¹

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

According to the affidavit of Charles Bellamy, which was dated September 30, 1996 and was attached to the motion papers, petitioner "failed to file refund claims or amended returns within three years of the filing of the original return [sic]." Mr. Bellamy is a Tax Technician II for the Audit Division of the Division of Taxation. According to Mr. Bellamy, petitioner filed claims for refund of taxes paid on Federal pension income for the 1986, 1987 and 1988 tax years on October 15, 1994. Consequently, petitioner was issued a notice of disallowance.²

The notice of disallowance, dated January 30, 1995, issued by the Division of Taxation to petitioner, which is included in the motion record, explained:

"Unfortunately, the refund claim(s) you have filed cannot be paid either because no tax was paid on your pension income or the claim(s) was not timely filed."

In light of Mr. Bellamy's affidavit, it would appear that tax was paid on the pension income at issue, and petitioner's refund claims were, in fact, denied because they were not timely filed.

We also make the following findings of fact:

Petitioner filed a petition with the Division of Tax Appeals, dated April 26, 1996, challenging the notice of disallowance. In her petition, petitioner requested that the Division of Taxation waive the three-year statute of limitation for filing amended returns for the years 1986, 1987 and 1988. Petitioner stated that she was a widow of a Watervliet Arsenal employee who died in 1975 and that since 1989, she had been calling the New York State Tax Department about a refund.

1

We modified this finding to more accurately reflect the record that only petitioner, and not her husband, received and timely reported the Federal pension income for the years in question.

2

We modified this finding to describe the source of the affidavit in the record.

The Division of Tax Appeals sent to petitioner and the Division of Taxation a calendar call notice, dated September 17, 1996, informing the parties that the Division of Tax Appeals anticipates scheduling a hearing on the petition during the months of January or February of 1997; that the parties should contact each other and set a mutually convenient date for the hearing during those months; and that if neither party responds, the Division of Tax Appeals will select the date of the hearing.

The Division of Taxation filed a motion for summary determination, dated October 1, 1996, on the ground that there were no material and triable issues of fact in dispute and that, as a matter of law, the petition should be denied because petitioner failed to file timely amended returns or refund claims for the relevant years. On the Notice of Motion, the Division of Taxation stated that any answering papers to the motion must be filed within 30 days after the date of service of the motion. Thereafter, the Division of Taxation sent a letter, dated October 17, 1996, to the Calendar Clerk of the Division of Tax Appeals responding to the September 17, 1996 calendar call notice. In that letter, the Division of Taxation stated that a hearing will not be necessary at that time because a motion for summary determination was pending before the Division of Tax Appeals. The Division of Taxation sent a copy of that letter to petitioner.

OPINION

In the determination below, the Administrative Law Judge granted the motion for summary determination concluding that there were no material or triable issues of fact; that petitioner failed to respond to the Division of Taxation's motion and had not shown facts sufficient to require a hearing on whether she filed refund claims for 1986, 1987 and 1988 within three years of filing tax returns for those years; and that, based on the case law, petitioner's failure to file refund claims within three years of filing the tax returns warranted denial of the petition.

On exception, petitioner states that she did not respond to the Division of Taxation's motion for summary determination because the letter, dated October 17, 1996, indicated that if neither party responded, the Division of Tax Appeals would select a hearing date in January or February of 1997. She also notes that she received the letter, dated October 17, 1996, which stated that a "hearing will not be necessary because summary determination pending before Div [sic] of Tax Appeals."

We affirm the determination of the Administrative Law Judge. The regulations provide that a motion for summary determination may be granted if the movant has sufficiently established that no material and triable issue of fact is present requiring a hearing, and based on the established facts, the movant is entitled to a determination in his or her favor as a matter of law (20 NYCRR 3000.9[b]). The motion may be denied "if any party shows facts sufficient to require a hearing of any material and triable issue of fact" (*Kuehne & Nagel v. Baiden*, 36 NY2d 539, 369 NYS2d 667, 671). "Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted" (*Kuehne & Nagel v. Baiden, supra*).

In this case, the Administrative Law Judge stated that "[p]etitioner, who did not respond to the Division's motion, has not shown facts sufficient to require a hearing on whether she filed refund claims for 1986, 1987 and 1988 within three years of the filing of tax returns for such years" (Determination, conclusion of law "A"). On exception, petitioner does not controvert the facts established in the movant's papers; that is, the statements in Charles Bellamy's affidavit that petitioner timely filed her income tax returns for 1986, 1987 and 1988 and did not file her refund claims with respect to the Federal pension until October 15, 1994, more than three years from the time she filed her tax returns for the years in question. Petitioner contends that she did not respond to the motion because she believed that, based on the September 17, 1996 calendar call notice, if she did not respond, a hearing would be scheduled. Presumably, petitioner believed that a hearing would be scheduled regardless of the motion for summary determination.

Petitioner's reliance on the September 17, 1996 calendar call notice as an excuse for not responding to the motion for summary determination is unfounded. The Division of Taxation clearly stated on the Notice of Motion that petitioner had 30 days to respond to the motion. Moreover, the October 17, 1996 letter, which petitioner admits to receiving, alerted petitioner to the fact that a hearing would not be scheduled until resolution of the motion for summary determination. In any event, petitioner does not controvert the facts established by the motion papers; that is, that petitioner timely filed her income taxes for the years in question and did not

file a refund claim for those years within the three-year limitation period required under Tax Law § 687(a). As noted above, the effect of petitioner's failure to respond to the motion papers was to deem those facts admitted. Petitioner's request in her petition to waive the limitations period was preserved. Therefore, because there were no material or triable issues of fact, and only a question of law to decide, a hearing was not required and the legal issue could be decided on the Division's motion for summary determination (*see, Matter of Hotaling*, Tax Appeals Tribunal, June 19, 1997).

With respect to the legal issue, the Administrative Law Judge properly interpreted the case law in determining that petitioner was not entitled to a refund for the years 1986, 1987 and 1988. As a result of the United States Supreme Court decision in *Davis v. Michigan Dept. of Treasury* (489 US 803, 103 L Ed 2d 891), the New York 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]). However, taxpayers seeking refunds of taxes collected on Federal pensions must nonetheless do so within the limitations period provided under refund statutes such as Tax Law § 687(a) (*see, Matter of Jones*, Tax Appeals Tribunal, January 9, 1997). Section 687(a) requires that refunds be filed within three years from the time the return is filed or two years from the time the tax was paid, whichever of such periods expires the later. Inasmuch as petitioner did not file her refund claims within the three-year limitations period and there is no basis to waive this statutory limitation period, she is not entitled to a refund for the years of 1986, 1987 and 1988.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Catherine R. Manny is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Catherine R. Manny is denied; and

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

DATED: Troy, New York
August 7, 1997

Donald C. DeWitt
President

Carroll R. Jenkins
Commissioner

Joseph W. Pinto, Jr.
Commissioner