STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WILLIAM L., JR., AND CATHLEEN J. REESE	:	DECISION DTA NO. 815178
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 1987, 1988 and 1989.	:	

Petitioners William L., Jr., and Cathleen J. Reese, 33 Old Locust Avenue, Peekskill, New York 10566, filed an exception to the determination of the Administrative Law Judge issued on June 26, 1997. Petitioners appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter in lieu of a formal brief in opposition. 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' claim for refund of tax paid on Federal pension income as untimely pursuant to Tax Law § 687(a).

FINDINGS OF FACT

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

On December 7, 1994 petitioners, William L. Reese and Cathleen J. Reese, filed a claim for refund of taxes paid on Federal pension income for the years 1987, 1988 and 1989. On May 26, 1995, the Division of Taxation ("Division") issued a Notice of Disallowance to petitioners denying their claim for refund on the basis that such claim had not been filed within three years of the filing of petitioners' tax returns for the years at issue.[1]

Petitioners challenged the Division's Notice of Disallowance by requesting a conciliation conference. A conciliation conference was held on February 27, 1996 and, by a Conciliation Order (CMS No. 148488) dated April 19, 1996, petitioners' request was denied and the Notice of Disallowance was sustained. In turn, petitioners continued their challenge by filing a petition, dated June 27, 1996, and received by the Division of Tax Appeals on July 1, 1996.

In their petition, petitioners set forth the following argument:

> Refused to pay taxes due to taxpayer for 87, 88 & 89. Based on 1989 United States Supreme Court ruling whereas the Court found that Federal Retirees were discriminated upon due to unfair taxation. The Court further stated the State must fix the problem by either refunding taxes in question or by finding another suitable solution to the taxpayer. New York State and the commissioner is, in my case hiding behind the Statue [sic] of Limitations law in N.Y. My understanding is your Statue [sic] Laws no longer apply since discrimination is the issue. Some retirees were paid while others are not. This is also further discrimination. I'm prepared to go to the Supreme Court again, it's going to cost more in interest if you keep delaying.

The Division served an answer to the petition on September 18, 1996. The Division denied the allegations contained in the petition and affirmatively stated that petitioner William L. Reese was a Federal employee who paid tax on his Federal pension income for the years in issue, that petitioners' claim for refund for such years was denied as untimely, and that any instances

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[1]Neither the claim for refund nor the Notice of Disallowance were introduced into the record. However, the existence and the date of the claim, and the existence and date of the Notice have been established (see, below).

where refunds were approved for those who paid New York State income tax on Federal pension income were limited to instances where timely refund claims had been filed.

On March 20, 1997, the Division filed its motion for summary determination. In support of its motion, the Division submitted an affidavit sworn to by Charles Bellamy on March 20, 1997. This affidavit attests that petitioners: 1) timely filed their 1987, 1988 and 1989 personal income tax returns (i.e., filed their returns for such years on or before April 15, 1988, 1989 and 1990, respectively); 2) filed claims for refund of taxes paid on Federal pension income for the years 1987, 1988 and 1989 on December 7, 1994; and 3) failed to file any claims for refund or amended returns for the years 1987, 1988 and 1989 at any time prior to December 7, 1994. Mr. Bellamy is employed by the Division as a Tax Technician II in its Audit Division. His responsibilities include reviewing and processing refund claims filed by taxpayers who paid tax on Federal pension income.

The Division's representative also included with the motion an affirmation explaining the legal background concerning state taxation of Federal pension income, and requesting that the motion for summary determination be granted since there is no dispute that petitioners' claim for refund was not filed within three years of the filing of the returns for the years at issue thus leaving no material or triable issue of fact and requiring judgment in the Division's favor as a matter of law.

In response to the Division's motion, petitioners submitted a letter dated April 17, 1997 and received by the Division of Tax Appeals on April 21, 1997. In this letter, petitioners set forth their claim that the United States Supreme Court ruled New York State (and other states) discriminated against Federal retirees by subjecting Federal pension income to tax, and that the statute of limitations does not apply because the State is fraudulently withholding the tax paid by

petitioners on their Federal pension income for the subject years. Petitioners also argue that the State's payment of refunds to those Federal pensioners who were "lucky" and had an accountant file a "correction" (presumably a timely refund claim or amended return), amounts to further discrimination against those who did not file a timely refund claim or amended return. Finally, petitioners repeat their request for a hearing on the merits of their refund claim.

Petitioners have raised no challenge and submitted no evidence to counter the Division's position that the earliest request for refund of tax paid on Mr. Reese's Federal pension income for the years 1987, 1988 and 1989 was the refund claim filed on December 7, 1994.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge concluded that the matter was properly decided through summary determination since there were no material and triable issues of fact presented. The Administrative Law Judge, in reviewing ***Davis v. Michigan Dept. of Treasury*** (489 US 803, 103 L Ed 2d 891), noted that the United States Supreme Court held that state taxation of Federal pension income while exempting from taxation pensions from state or local government employees was unconstitutional. In light of the ***Davis*** decision, New York State was required to amend Tax Law § 612(c)(former [3]) to conform with the ***Davis*** decision by providing the exemption from income tax to include Federal pension income beginning with the tax year 1989 (***see***, L 1989, ch 664, eff July 21, 1989). As noted by the Administrative Law Judge, this relief was prospective only.

The issue of retroactivity was decided by the Court in ***Harper v. Virginia Dept. of Taxation*** (509 US 86, 125 L Ed 2d 74). The Court held that, in fact, ***Davis*** did apply retroactively, however, it did not determine that a refund was owed in the particular case therein.

Rather, the Court remanded the matter for a determination on whether state law provided an adequate remedy that complied with the due process requirements of the constitution (***Harper v. Virginia Dept. of Taxation***, ***supra***, 125 L Ed 2d, at 89, ***citing McKesson Corp. v. Division of Alcoholic Beverages & Tobacco***, 496 US 18, 110 L Ed 2d 17). In relying on the language of ***McKesson***, the Administrative Law Judge 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 met the Federal requirements of due process as set forth in the above-mentioned line of cases. Therefore, since there was no dispute that petitioners failed to timely file their refund claims for the years 1987, 1988 and 1989, such claims were properly denied by the Division (***see***, ***Matter of Epstein***, Tax Appeals Tribunal, March 27, 1997; ***Matter of Hicks***, Tax Appeals Tribunal, March 20, 1997). Thus, the Administrative Law Judge granted the Division's motion for summary determination in its favor.

ARGUMENTS ON EXCEPTION

Petitioners assert that the Administrative Law Judge addressed most of their concerns in his determination except for one. Petitioners argue that the State of New York should be able to identify the retirees who are entitled to refunds and automatically pay the retirees their refunds without their having to file claims for refund with the State. Petitioners assert that the State has all of the retirees' W-2 forms on file and, thus, the State could easily ascertain who would be due refunds and in what amounts.

In opposition, the Division argues that the Tribunal has consistently held that Federal retirees who failed to file a timely claim for refund within the three-year statute of limitations set forth in Tax Law § 687(a) were not entitled to a refund of income tax paid on their pension income (***Matter of Burkhardt***, Tax Appeals Tribunal, January 9, 1997). Furthermore, the

Division notes that the Tribunal has held that New York's income tax refund procedures are constitutionally sound and rectify any unconstitutional deprivation (***see***, ***Matter of Jones***, Tax Appeals Tribunal, January 9, 1997). Therefore, the Division requests that the determination of the Administrative Law Judge be sustained.

OPINION

Petitioners' argument on exception is that the Division knows who the affected Federal retirees are and, therefore, the Division should automatically refund the money to Federal retirees who paid income tax on their Federal pension income rather than keeping the money due to the statute of limitations "three-year loophole" (Petitioners' brief).

Petitioners' assertion that the Division failed in its responsibility to notify all affected taxpayers is rejected. This argument was addressed in ***Matter of Jones*** (***supra***) wherein we stated that:

> we refuse to impose on the Division the duty of personally advising every taxpayer who is potentially subject to a refund of his or her right to such a refund because of a change in the law given the State's constitutionally sound scheme which "rectified any unconstitutional deprivation" (***Harper v. Virginia Dept. of Taxation***, ***supra***) while simultaneously respecting the State's fisc (***McKesson Corp. v. Division of Alcoholic Beverages & Tobacco***, ***supra***).

Thus, we affirm the determination of the Administrative Law Judge for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of William L., Jr. and Cathleen J. Reese is denied;

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

3. The petition of William L., Jr. and Cathleen J. Reese is denied; and

4. The Notice of Disallowance is sustained.

DATED: Troy, New York
April 2, 1998

/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