

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
LAWRENCE L. BARRELL : DECISION
for Redetermination of a Deficiency or for Refund of New : DTA NO. 821571
York State Personal Income Tax under Article 22 of the :
Tax Law for the Years 1994 through 2005. :

Petitioner, Lawrence L. Barrell, filed an exception to the determination of the Administrative Law Judge issued on January 3, 2008. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (Margaret T. Neri, Esq., of counsel).

Petitioner did not file a brief in support or a reply brief. The Division of Taxation filed a letter brief 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 summary determination should be granted in favor of the Division of Taxation because there are no facts in dispute and, as a matter of law, the facts mandate a determination in favor of the Division of Taxation.

FINDINGS OF FACT

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

Petitioner, Lawrence L. Barrell, is a retired State of Connecticut civil servant who receives a pension because of his service in the Connecticut Technical College system. Since he retired, petitioner has reported his State of Connecticut pension income on each year's federal income tax return as taxable income. Sometime after his 1992 retirement, petitioner, a widower, returned to New York State to live with one of his children. Petitioner attained the age of 59 ½ prior to the years at issue.

In the year 1994, petitioner received \$29,105.00 in pension income from the State of Connecticut. Petitioner timely filed his New York State resident income tax return for the year 1994 on or before April 15, 1995. On this return, petitioner reported New York adjusted gross income of \$13,830.00, and computed and paid New York State personal income tax due in the amount of \$13.00.

Petitioner received pension income for the year 1995 in the amount of \$29,979.00 from the State of Connecticut. He timely filed his New York State resident income tax return for the year 1995 on or before April 15, 1996. After claiming the full amount of the pension income received from the State of Connecticut as a pension income exclusion on line 27 and other New York subtractions of \$1,513.00 on line 28 of this return, petitioner reported New York adjusted gross income of \$6,188.00, and computed no tax due. The Division of Taxation ("Division") issued a Statement of Proposed Audit Changes for the year 1995 on December 17, 1998 that only allowed a \$20,000.00 pension income exclusion and disallowed the other New York subtractions. The statement asserted tax due in the amount of \$559.00 plus interest for the year 1995. Petitioner paid the tax due on December 18, 1998.

In the year 1996, petitioner received pension income in the amount of \$38,024.00 from the State of Connecticut. Petitioner timely filed his New York State resident income tax return for

the year 1996 on or before April 15, 1997. After claiming the full amount of the pension income received from the State of Connecticut as a pension income exclusion on line 27 and other New York subtractions of \$1,513.00 on line 28 of this return, petitioner reported New York adjusted gross income of \$6,910.00, and computed no tax due. The Division issued a Statement of Proposed Audit Changes for the year 1996 on August 16, 1999 that only allowed a \$20,000.00 pension income exclusion and disallowed the other New York subtractions. The statement asserted tax due in the amount of \$1,094.00 plus interest for the year 1996. Petitioner paid \$1,297.63 on August 18, 1999.

During the year 1997, petitioner received \$33,620.00 in pension income from the State of Connecticut. Petitioner timely filed his New York State resident income tax return for the year 1997 on or before April 15, 1998. After claiming the full amount of the pension income received from the State of Connecticut as a New York State, local and federal government pension exclusion on line 24, and a pension and annuity exclusion of \$1,609.00 on line 27 of this return, petitioner reported New York adjusted gross income of \$6,849.00, and computed no tax due. The Division issued a Statement of Proposed Audit Changes for the year 1997 on September 21, 2000 that allowed a \$20,000.00 pension income exclusion. The statement asserted tax due in the amount of \$653.00 plus interest for the year 1997. Petitioner paid \$776.16 on October 2, 2000.

Petitioner received pension income for the year 1998 in the amount of \$34,628.00 from the State of Connecticut. Petitioner timely filed his New York State resident income tax return for the year 1998 on or before April 15, 1999. After claiming an exclusion for \$20,000.00 of his Connecticut pension income and a subtraction for \$14,828.00 in taxable Social Security benefits on this return, petitioner reported New York adjusted gross income of \$23,952.00, computed and paid New York State personal income tax due in the amount of \$765.00 for the year 1998.

In the year 1999, petitioner received \$35,667.00 in pension income from the State of Connecticut. Petitioner timely filed his New York State resident income tax return for the year 1999 on or before April 15, 2000. After claiming a subtraction for \$15,019.00 in taxable Social Security benefits on line 25 and an exclusion for \$20,000.00 of his Connecticut pension on line 27 of this return, petitioner reported New York adjusted gross income of \$25,153.00, and computed and paid New York State personal income tax due in the amount of \$836.00 for the year 1999. On December 3, 2001, the Division issued a Notice and Demand for Payment of Tax Due (Notice and Demand) to petitioner which imposed a penalty of \$35.10 pursuant to Tax Law § 685 (c). Petitioner paid the penalty asserted due in the Notice and Demand on or about December 13, 2001.

During the year 2000, petitioner received \$36,737.00 in pension income from the State of Connecticut. Petitioner timely filed his New York State resident income tax return for the year 2000 on or before April 14, 2001. After claiming a subtraction for \$15,377.00 in taxable Social Security benefits on line 25 and an exclusion for \$20,000.00 of his Connecticut pension on line 27 of this return, petitioner reported New York adjusted gross income of \$28,373.00, and computed and paid New York State personal income tax in the amount of \$1,033.00 for the year 2000.

In the year 2001, petitioner received \$37,839.00 in pension income from the State of Connecticut. Petitioner timely filed his New York State resident income tax return for the year 2001 on or before April 15, 2002. On this return, petitioner reported New York adjusted gross income of \$27,595.00, and computed and paid New York State personal income tax due in the amount of \$978.00.

During the year 2002, petitioner received \$38,975.00 in pension income from the State of Connecticut. Petitioner timely filed his New York State resident income tax return for the year 2002 on or before April 15, 2003. On this return, petitioner reported New York adjusted gross income of \$25,161.00, and computed and paid New York State personal income tax in the amount of \$836.00.

In the year 2003, petitioner received \$40,144.00 in pension income from the State of Connecticut. Petitioner timely filed his New York State resident income tax return for the year 2003 on or before April 15, 2004. After claiming a subtraction for \$16,581.00 in taxable Social Security benefits on line 26 and an exclusion for \$20,000.00 of his Connecticut pension on line 28 of this return, petitioner reported New York adjusted gross income of \$23,889.00, and computed and paid New York State personal income tax in the amount of \$759.00 for the year 2003.

Petitioner filed amended resident income tax returns for tax years 2001, 2002 and 2003 on March 31, 2005. On each of these amended returns, petitioner claimed that the full amount of his Connecticut pension was exempt from tax and requested a refund of tax paid on the pension income in excess of \$20,000.00. Specifically, petitioner requested refunds of tax paid in the amount of \$969.00 for the year 2001, \$836.00 for the year 2002 and \$759.00 for the year 2003.

On May 20, 2005, the Division, without auditing the basis of the amended returns, issued to petitioner income tax refunds in the amount of \$905.47 for the year 2002 and \$786.69 for the year 2003. On August 5, 2005, the Division, without auditing the basis of the amended return, issued to petitioner an income tax refund in the amount of \$1,131.58 for the year 2001.

For the year 2004, petitioner received \$41,348.00 in pension income from the State of Connecticut. Petitioner timely filed his New York State resident income tax return for the year

2004 on or before April 15, 2005. After claiming an exclusion for the full amount of the pension income received from the State of Connecticut as a New York State, local and federal government pension on line 25 and a subtraction for \$16,927.00 in taxable Social Security benefits on line 26 of this return, petitioner reported New York adjusted gross income of \$5,456.00, and computed no tax due.

For the year 2005, petitioner received \$40,518.00 in pension income from the State of Connecticut. Petitioner timely filed his New York State resident income tax return for the year 2005 on or before April 15, 2006. After claiming an exclusion for the full amount of the pension income received from the State of Connecticut as a New York State, local and federal government pension on line 16, a subtraction for \$17,383.00 in taxable Social Security benefits on line 17 and a pension and annuity income exclusion in the amount of \$2,282.00 on line 18 of this return, petitioner reported New York adjusted gross income of \$8,795.00, and computed and paid New York State personal income tax in the amount of \$37.00.

On March 13, 2006, petitioner filed amended resident income tax returns for the years 1994 through 2000. On each of these amended returns, petitioner claimed that the full amount of his Connecticut pension was exempt from tax and requested a refund of tax paid on the pension income in excess of \$20,000.00. Specifically, petitioner requested refunds in the amount of \$13.00 for the year 1994, \$559.00 for the year 1995, \$1,094.00 for the year 1996, and \$653.00 for the year 1997. Petitioner also requested refunds of unspecified amounts of tax paid on his Connecticut pension income in excess of \$20,000.00 on his amended returns filed for years 1998, 1999 and 2000.

Sometime in September 2006, the Division commenced an audit of petitioner's amended income tax returns for the years 1994 through 2003 and the New York State personal income tax

returns that he filed for tax years 2004 and 2005. During its audit, the Division sent a letter dated September 25, 2006 to petitioner advising him that a pension from the State of Connecticut does not qualify as a fully excluded New York State and local government or federal government pension. This letter also explained what was meant by the wording in the Division's instructions for the 2005 New York State income tax returns with respect to the subtraction for pensions of New York State and local governments and the federal government: "the United States, its territories, possessions (or political subdivisions thereof)." This letter further stated that notices of deficiency would be forthcoming for tax years 2003, 2004 and 2005. With respect to the amended returns filed by petitioner for tax years 1994 through 2000, this letter stated that it was the Division's position that he was not entitled to the subtraction claimed for the full amount of his Connecticut pension income, and in addition, the refund claims were filed beyond the applicable statute of limitations for refund.

By letter dated October 16, 2006, the Division advised petitioner that his request to fully exclude his State of Connecticut pension and annuity income from income for the years 1994 through 2005 was denied because his State of Connecticut pension and annuity income was not a New York State and local government or federal pension. This letter further advised petitioner that the refunds requested on his New York State amended income tax returns for tax years 1994 through 2000, additionally, were disallowed because the claims for refund were filed after the three-year statute of limitations for refund had expired. With respect to tax years 2001, 2002 and 2003, this letter advised petitioner that the refunds previously given to him should have been denied. The letter further stated that assessments would not be issued for tax years 2001 and 2002 because the three-year statute of limitations to conduct an audit of the amended New York State income tax returns filed for these years had expired. However, the Division, in this letter,

informed petitioner that an assessment would be issued to disallow the refund claimed on petitioner's New York State amended income tax return for 2003 and to recover the refund (overpayment) previously issued for that year. In this letter, the Division also advised petitioner that audit adjustments for tax years 2004 and 2005, disallowing the full amount of petitioner's Connecticut pension and annuity income and allowing a pension and annuity income exclusion of \$20,000.00, would result in the issuance of notices of deficiency.

On February 5, 2007, the Division issued a Notice of Deficiency (Notice No. L-028180241-6) asserting personal income taxes due in the amount of \$786.69, i.e., the amount of the disallowed overpayment, plus interest of \$120.96, for the year 2003. The computation section of the notice contains the following explanation of the assessment:

This assessment is based on your 2003 amended return, file number 22146103.

A recomputation of your return results in a balance due.

Your pension from THE STATE OF CONNECTICUT does not qualify for the total exemption as a New York State, local or municipal pension.

However, you have been allowed the appropriate pension and annuity income exclusion of up to \$20,000.00.

You have been allowed credit for the payment of \$759.00 dated 04/15/04.

Interest is due for late payment or underpayment at the applicable rate. Interest is required under New York State Tax Law.

On February 8, 2007, the Division issued a Statement of Proposed Audit Changes asserting tax due in the amount of \$933.00 plus interest for the year 2004. On the same date, the Division issued a Statement of Proposed Audit Changes asserting additional tax due in the amount of \$1,047.00 plus interest for the year 2005. The computation section of each of these statements indicates that the following adjustments were made to petitioner's New York State resident

income tax return: the disallowance of petitioner's claimed total exemption of his State of Connecticut pension as a New York State, local government or federal pension and the allowance of a \$20,000.00 pension income exclusion. On February 17, 2007, petitioner made payments of tax in the amount of \$933.00 and \$1,124.75 for years 2004 and 2005, respectively.

On February 17, 2007, petitioner filed a petition challenging the denial of his claims for refund for tax years 1994 through 2003, the notice of deficiency issued for tax year 2003 and the statements of proposed audit changes issued for tax years 2004 and 2005. In this petition, petitioner asserts that the pension income he received from the State of Connecticut is fully exempt from New York State income tax and seeks a refund of the tax paid on his Connecticut pension for the years 1994 through 2005.

On March 8, 2007, the Division issued a Notice of Disallowance of petitioner's claim for refund for tax years 2004 and 2005. The notice stated, in pertinent part:

The pension income paid by the State of Connecticut and included in your federal adjusted gross income cannot be fully excluded on your New York State tax return. New York State only allows the full exclusion of pension income paid by the State of New York, local governments within New York State or the federal government.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In her determination, the Administrative Law Judge noted that 20 NYCRR 3000.9(b)(1) provides that, in order to obtain summary determination, the moving party must submit an affidavit, made by a person having knowledge of the facts, which demonstrates that there is no material issue of fact and that the facts mandate a determination in the moving party's favor. The Administrative Law Judge also noted that if material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion. The Administrative Law Judge concluded that there was

no material and triable issue of fact presented and that the Division was entitled to summary determination in its favor.

The Administrative Law Judge noted that petitioner contends that Tax Law § 612(c)(3)(i) and (ii) unfairly discriminates against resident taxpayers, such as himself, who receive pension income from states other than New York. The Administrative Law Judge further noted that petitioner challenged the constitutionality of Tax Law § 612(c)(3)(i) and (ii) on its face. The Administrative Law Judge determined that the Division of Tax Appeals lacks jurisdiction over constitutional challenges to statutes presumed be constitutional on their face. (This is the only issue on which petitioner took an exception.)

The Administrative Law Judge also noted that petitioner filed amended resident income tax returns on March 13, 2006, seeking refunds for the years 1994 through 2000, based on his claim that the full amount of his State of Connecticut pension income should be excluded from his New York adjusted gross income. The Administrative Law Judge pointed out that Tax Law § 687(a) provides that a claim for credit or refund must be filed within three years from the time the return was filed or within two years of the time the tax was paid, whichever period expires later. The Administrative Law Judge concluded that the statute of limitations for filing a refund request for the years 1994 through 2000 had expired prior to petitioner's filing of the amended returns for these years.

ARGUMENTS ON EXCEPTION

The only issue on which petitioner took an exception is that New York State Tax Law is unconstitutional on its face to the extent that it discriminates against New York residents who receive pensions from other states.

The Division, in opposition, agreed with the findings in the Administrative Law Judge's determination. The Division noted that it will rely on the facts and theories of law asserted in its affidavit of support of the Motion for Summary Determination dated August 28, 2007. Finally, the Division argued that the Administrative Law Judge correctly held that the Division of Tax Appeals lacks jurisdiction over constitutional challenges to statutes presumed to be constitutional on their face.

OPINION

Tax Law § 612(c) provides, in relevant part as follows:

(c) Modifications reducing federal adjusted income. There shall be subtracted from federal adjusted gross income: . . .

3(i) Pensions to officers and employees of this state, its subdivision and agencies, to the extent includible in gross income for federal income tax purposes;

(ii) Pensions to officers and employees of the United States of America, any territory or possession or political subdivision of such territory or possession, the District of Columbia, or any agency or instrumentality of any one of the foregoing, to the extent includible in gross income for federal income tax purposes;

Petitioner claims that section 612(c)(3)(i) and (ii) of the Tax Law has been applied in a manner that is unconstitutional on its face. We reject petitioner's claim. The Division of Tax Appeals lacks jurisdiction over constitutional challenges to statutes presumed to be constitutional on their face (*see, Matter of Eisenstein*, Tax Appeals Tribunal, March 27, 2003; *see also, Matter of Geneva Pennysaver*, Tax Appeals Tribunal, September 11, 1989; *Matter of Fourth Day Enters.*, Tax Appeals Tribunal, October 27, 1988). Accordingly, while we have jurisdiction to consider constitutional challenges ("as applied") to the actions of the Division of Taxation, we do not have jurisdiction to consider the argument advanced by petitioner. Petitioner will not be denied a resolution of his constitutional claims however if he brings and Article 78 proceeding to

review this decision before the Appellate Division Third Department. It seems likely that the court would, as it has in the past, convert the matter in whole or in part to an action for declaratory judgment pursuant to CPLR § 103(c) in order to consider petitioner's constitutional arguments (*see, e.g., Matter of Daimlerchrysler Co., LLC v. Billet*, 51 AD3d 1284, 1286 at n. 1 [3d Dept May 22, 2008]).

Based on the foregoing, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Lawrence L. Barrell is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Lawrence L. Barrell is denied; and
4. The Notice of Disallowance dated March 8, 2007, is sustained.

DATED: Troy, New York
September 11, 2008

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner