STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DOUGLAS J. AND MARIAN O. HINDS	:	DETERMINATION DTA NO. 810147
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 1980 through 1988.	:	

Petitioners, Douglas J. and Marian O. Hinds, 840 Oakwood Street, Fayetteville, New York 13066, filed a petition 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 1980 through 1988.

The Division of Taxation, by its representative, Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel), brought a motion dated December 28, 1995 and returnable on January 29, 1996, for an order of summary determination in the above-referenced matter. Pursuant to section 3000.5(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, petitioners had 30 days to file a response to the motion. Petitioners, appearing pro se, did not file a response. Accordingly, the 90-day period for the issuance of this determination under section 3000.5(d) of the Rules of Practice and Procedure began on January 29, 1996. Based upon the motion papers, the affidavits submitted therewith and all pleadings and documents submitted, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioners' claim for refund of personal income tax paid on Federal pension income asuntimely pursuant to Tax Law § 687(a) where such claims were filed beyond the statutory period of limitations.

FINDINGS OF FACT

1. The affidavit of Charles Bellamy, Tax Technician II, indicates that petitioners, Douglas J. and Marian O. Hinds, timely filed their New York State personal income tax returns for each of the years at issue. Specifically, their 1980 return was filed on or before April 15, 1981; their 1981 return on or before April 15, 1982; their 1982 return on or before April 15, 1983; their 1983 return on or before April 15, 1984; their 1984 return on or before April 15, 1985; their 1985 return on or before April 15, 1986; their 1986 return on or before April 15, 1987; their 1987 return on or before April 15, 1988; and their 1988 return on or before April 15, 1989. On each of these returns, petitioners reported and paid tax on Federal pension income.

2. By letter dated January 2, 1990 addressed to then Commissioner of Taxation and Finance, James W. Wetzler, petitioners sought a refund of New York State personal income tax, plus appropriate interest, paid on petitioner Douglas J. Hinds' Federal pension income derived from his U.S. military service. Attached to this letter was a recomputation of what petitioners contend their tax liability should have been if the Federal pension income had been excluded. Pursuant to the recomputation, petitioners maintained that they overpaid New York State personal income tax as follows:

Tax Year	Amount Overpaid
1980	$430.29
1981	$2,211.81
1982	$2,132.94
1983	$1,860.30
1984	$1,742.63
1985	$2,168.22
1986	$1,454.96
1987	$2,013.00
1988	$2,022.00
	$16,036.15 Total

3. Petitioners did not file amended returns or claims for refund for the years 1980 through 1988 prior to their letter of January 2, 1990.

4. By letter to petitioners dated January 23, 1990, the Division of Taxation's Deputy Commissioner for Operations, John B. Langer, stated, in pertinent part, as follows:

"As a result of the U.S. Supreme Court Decision in Paul S. Davis v. Michigan Department of Revenue, the New York State Tax Law must exclude pensions of retired federal employees in the same manner that it excludes pensions of state and local government retirees.

"State legislation to implement this decision in New York was enacted on July 21, 1989. The legislation takes effect immediately and exempts federal pension benefits received in taxable years beginning on or after January 1, 1989, from State taxation.

"Currently, New York State does not intend to issue retroactive refunds for open tax years. Whether New York State will have to refund taxes already paid may be decided by two pending New York State Supreme Court cases.

"Your letter has been accepted as a claim for refund for tax years 1980 through 1988.

"Within the next few months you will receive a Notice of Disallowance which will be sent to you by certified mail. Included will be a Notice of Taxpayer Rights fully explaining your right to protest."

5. On February 5, 1990, the Division of Taxation issued a Notice of Disallowance, in full, of petitioners' claim for refund.

6. In June 1994, then Governor Mario M. 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.

7. On September 30, 1994, the Division of Taxation issued three checks to petitioners as and for refunds, plus interest, for the years 1986, 1987 and 1988. Accordingly, the only years remaining at issue are the years 1980 through 1985 and the amount of the refund claim is, therefore, $10,546.19, plus applicable interest.

CONCLUSIONS OF LAW

A. On March 28, 1989, the United States Supreme Court issued Davis v. Michigan Dept. of Treasury (489 US 803, 103 L Ed 2d 891). Davis 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.

B. At the time of the issuance of Davis, the Tax Law provided for similarly discriminatory treatment of Federal and State retirement benefits. Specifically, 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; such pensions were therefore subject to tax. In an apparent effort to remedy this situation, 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 place both State and Federal retirees on equal footing. This remedy, however, was explicitly prospective and the Davis decision did not address the issue of retroactive application of its holding. At the time, the Division of Taxation took the position that Davis applied prospectively only and therefore denied refunds of tax on Federal pensions for years prior to 1989 even where timely refund claims were filed. Not surprisingly, Federal pensioners disagreed and commenced litigation in New York and throughout the country (see, e.g., Duffy v. Wetzler 148 Misc 2d 459, 555 NYS2d 543, mod 174 AD2d 253, 579 NYS2d 684, appeal dismissed 80 NY2d 890, 587 NYS2d 900, revd ___US___, 125 L Ed 2d 716, on remand 207 AD2d 375, 616 NYS2d 48, lv denied 84 NY2d 838, 617 NYS2d 129, cert denied ___US___, 130 L Ed 2d 673).

C. The issue of the retroactive application of the Davis holding was resolved in the affirmative in Harper v. Virginia Dept. of Taxation (509 US___, 125 L Ed 2d 74). In that case, while the Court held that the rule announced in Davis was to be given full retroactive effect, it did not provide relief to the petitioners therein. Rather, citing McKesson Corp. v. Division of Alcohol Beverages & Tobacco (496 US 18, 110 L Ed 2d 17), the Court held that a 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 (id., 125 L Ed 2d at 88, 89). In this context, Federal due process requires that where taxes are paid pursuant to a scheme ultimately found unconstitutional, the state must provide taxpayers with "meaningful retrospective relief" from taxes, meaning that in refund actions the state must afford taxpayers a "fair" opportunity to challenge the accuracy and legal validity of the tax and a clear and certain

remedy for any erroneous or unlawful tax collection (see, McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, supra, at 39, 110 L Ed 2d at 37, 38).

D. Harper thus requires that Davis be given retroactive application. Accordingly, applying Davis to the instant matter, it is clear that petitioners "overpaid" their income taxes during the years at issue within the meaning of Tax Law § 687(a) (see, Fiduciary Trust Co. v.State Tax Commn., 120 AD2d 848, 502 NYS2d 119, 120).

E. Tax Law § 687(a) controls refunds of overpayments of income tax in New York and provides, in relevant part, as follows:

> "Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later."

F. The dispute in the instant matter involves the time limitations portion of Tax Law § 687(a). Pursuant to this section, petitioners were required to file a refund claim within three years from the date of filing of their returns for the years at issue. Petitioners have not raised any issues regarding any other part of section 687(a). Accordingly, the question presented becomes whether the limitations period set forth in Tax Law § 687(a), as applied in this instance, complies with Federal due process requirements under the standard enunciated in McKesson.

G. In McKesson, the Court discussed various constitutionally permissible procedural requirements available to a state to protect its interest in maintaining fiscal stability:

> "The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint; execute any refunds on a reasonable installment basis; enforce relatively short statutes of limitations applicable to such actions, refrain from collecting taxes pursuant to a scheme that has been declared invalid by a court or other competent tribunal pending further review of such declaration on appeal; and/or place challenged tax payments into an escrow account or employ other accounting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds. The State's ability in the future to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax." (McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, supra, at 45, 110 L Ed 2d at 41; emphasis supplied.)

H. Clearly, the three-year statute of limitations at issue herein falls well within the range of permissible procedural protections discussed in McKesson. Accordingly, petitioners' assertion that the relevant limitations period should not be applied is rejected.

I. Apart from the due process analysis utilized in the McKesson and Davis line of cases, the Appellate Division has indicated that the limitations provisions of Tax Law § 687(a) operate to bar refund claims filed beyond the statutory period even where, as here, the tax in question is subsequently determined to be unconstitutional (see, Fiduciary Trust Co. v. State Tax Commn., supra, 120 AD2d 848, 502 NYS2d 119). The Court in Fiduciary Trust Co. relied on the principle that there can be no recovery of taxes voluntarily paid, without protest, under a mistake of law (id., 502 NYS2d at 120). Fiduciary Trust Co. thus provides additional authority against petitioners' position herein.

J. A successful motion for summary determination must show that there are no material issues of fact and that the only issues involve questions of law (see, 20 NYCRR 3000.5[c]). Such showing can be made by "tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York University, 64 NY2d 851, 853, 487 NYS2d 316, 318, citing Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595). Inasmuch as summary determination is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (Glick & Dolleck v. Tri-Pac Export Corp., 22 NY2d 439, 293 NYS2d 93, 94; Museums at Stony Brook v. Village of Patchogue Fire Dept., 146 AD2d 572, 536 NYS2d 177, 179).

Here, the Division provided sufficient evidence in support of its assertion that no refund claims or amended returns for the years 1980 through 1985 were filed by petitioners within three years of the filing of the original returns for those years. Petitioners have not responded to the Division's motion papers nor has any issue of fact been raised in the petition other than an allegation that they are entitled to a refund for the years remaining at issue.

Having elected not to respond to the Division's motion, petitioners are deemed to have conceded that no question of fact requiring a hearing exists (see, Kuehne & Nagel v. Baiden, 36 NY2d 539, 544, 369 NYS2d 667; John William Costello Associates v. Standard Metals, 99 AD2d 227, 472 NYS2d 325, lv denied 62 NY2d 942).

K. Summary determination is granted in favor of the Division of Taxation and the petition of Douglas J. and Marian O. Hinds is denied.

DATED: Troy, New York
April 4, 1996

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE