STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LORENZA JONES	:	DETERMINATION DTA NO. 813466
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 through 1989.	:	

Petitioner, Lorenza Jones, 345 Park Boulevard, Marion, Ohio 43302, 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 1987 through 1989.

The Division of Taxation, by its representative, Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel), brought a motion dated February 13, 1996, for an order directing the entry of summary determination pursuant to 20 NYCRR 3000.9(b) on the ground that petitioner failed to timely request a refund for taxes paid in tax years 1987 through 1989. Petitioner failed to respond to the Division's motion within the 30-day time period prescribed in 20 NYCRR 3000.5.

Upon review of all of the papers filed in connection with this motion, Daniel J. Ranalli, Assistant Chief Administrative Law Judge, renders the following determination.

FINDINGS OF FACT

1. In support of its motion for summary determination, the Division of Taxation ("Division") submitted an affidavit of its representative along with attached documents. The Division asserts in its affidavit that since petitioner: 1) filed his New York State income tax return for 1987 onor before April 15, 1988; 2) failed to file a State personal income tax return for 1988; 3) filed his 1989 State personal income tax return on December 6, 1993; and 4) did not file any refund claims until September 22, 1993, or after the three-year statute of limitations had expired, then his claim is barred pursuant to Tax Law § 687.

2. Attached to the Division's affidavit as Exhibit "1" is an affidavit of Charles Bellamy, Tax Technician II for the Division of Taxation, sworn to on February 12, 1996, attesting to the fact that petitioner: 1) filed his 1987 State personal income tax return on or before April 15, 1988; 2) failed to file a State personal income tax return for 1988; 3) filed his 1989 State personal income tax return on December 6, 1993, and 4) did not file an amended return or refund claim before September 22, 1993.

3. Also attached to the Division's motion papers is a copy of petitioner's petition, dated December 31, 1994, contesting tax in the amount of $700.00. In the petition, petitioner, while generally referring to the Supreme Court's 1989 decision in Davis v. Michigan Department of Treasury (489 US 803), alleged that he "wasn't given a chance to challenge New York Law 687 in the courts."

4. Attached to the petition is the Division's Notice of Disallowance, dated March 31, 1994, which denied petitioner's refund on the grounds that:

> "Your refund claims for 1987 through 1989 were not timely filed. Subsection (A) of Section 687 of the New York Tax Law provides, in pertinent part, as follows: 'Claim for Credit or Refund of an overpayment of income tax shall be filed by the taxpayer within three (3) years from the time the tax was paid whichever of such periods expires the later, or if no return was filed within two (2) years from the time the tax was paid.[']"

5. Also attached to the petition is an undated letter from petitioner to the Division which was apparently written in response to the Notice of Disallowance. In this letter, petitioner stated the following:

> "If there is no way you can allow my claim for the year 1987-1989 [sic], I want to Legally challenge the New York State decisions of Subsection (A) of Section 687 in the U.S. Supreme Court. I do not think the New York State Law gives me a fair treatment of my refund on my Federal Pension. Supreme Court Rule 7-2 vote said its' [sic] 1989 Decision declaring such taxes as unconstitutional must be applied retroactively. Also, U.S. Supreme Court declared in its' [sic] 1989 Decision, that state tax on federal pension in 16 states, including New York, is illegal because state pensions are exempt. I was not notified of this matter until July 1993, at that time I filed an amendment for years 1987-1992. You dissallowed years 1987 - 1989, which I disagree with your timely filed decision."

6. The Division's answer, dated April 6, 1995, denied the allegations made by petitioner in his petition, and further stated that its disallowance of the refund claims was "proper and correct" because they were untimely.

CONCLUSIONS OF LAW

A. The United States Supreme Court, in Davis v. Michigan Dept. of Treasury (489 US 803, 103 L Ed 2d 891), held that Michigan's Income Tax Act which subjected to tax Federal pensions while excluding state and local pensions violated principles of intergovernmental tax immunity by favoring retired state and local government employees over retired Federal employees. The Supreme Court reached the same conclusion regarding the taxation of the pensions of Federal military retirees where the pensions of state and local retirees were not so taxed (Barker v. Kansas, 503 US 594, 118 L Ed 2d 243).

The Supreme Court addressed the issue of the retroactivity of its rulings concerning the tax treatment of Federal versus state and local pensions when it stated in Harper v. Virginia Dept. of Taxation (509 US ___, 125 L Ed 2d 74), that:

> "When the United States Supreme Court applies a rule of federal law before it, such rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate the Supreme Court's announcement of the rule."

The Court went on to state that the states were free to choose which form of relief to provide, so long as such relief satisfied the minimum requirements under the Due Process Clause of the Federal Constitution's 14th Amendment (US Const, 14th Amend, § 1).

B. When a state places a taxpayer under duress to promptly pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the 14th Amendment obligates the state to provide meaningful backward-looking relief to rectify any unconstitutional deprivation. However, to oblige a state to provide funds for what later turns out to be an unconstitutional tax could undermine the state's ability to engage in sound fiscal planning. Thus, a state's freedom to impose various procedural requirements on actions for post deprivation relief can sufficiently meet this concern with respect to future cases. 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 or enforce relatively short statutes of limitations applicable to such actions. Such procedural measures would sufficently protect a state's fiscal security when weighed against its obligation to provide meaningful relief for its unconstitutional taxation (McKesson v. Division of Alcoholic Beverages and Tobacco, 496 US 18, 110 L Ed 2d 17).

C. Soon after the Davis decision, on July 21, 1989, the Legislature amended Tax Law § 612(c)(3) and Administrative Code of the City of New York § 11-1712 to place pensions paid to Federal retirees in the same position as pensions paid to State and local retirees. The Legislature declared that the amendment was to take effect "immediately and shall apply to federal pension benefits received in taxable years beginning on or after January 1, 1989" (L 1989, ch 664, § 3; L 1989, ch 664, §§ 1,2). And following the Supreme Court decision in Harper v. Virginia Dept. of Taxation (supra), the State of New York decided to pay full refunds plus interest to the approximately 10,000 Federal retirees who paid State income taxes on their Federal pensions prior to 1989 pursuant to tax provisions that were later held to be unconstitutional under Davis v. Michigan Dept. of Treasury (supra), and who had filed timely administrative claims for refunds for those taxes with the Department of Taxation and Finance. The City of New York acquiesced in this decision (Duffy v. Wetzler, 207 AD2d 375, 616 NYS2d 48, lv denied 84 NY2d 838, 617 NYS2d 129, cert denied ___ US ___, 130 L Ed 2d 673). Thus, in response to the Davis and Harper decisions, the State amended the statute to conform to the rulings and granted refunds to those Federal retirees who had filed timely refund claims.

D. Tax Law § 687 provides, in pertinent part, that:

> "(a) General. -- 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 . . . .
>
> * * *
>
> "(e) Failure to file claim within prescribed period. -- No credit or refund shall be allowed or made . . . after the expiration of the applicable period of limitation specified in this article, unless a claim for credit or refund is filed by the taxpayer

> within such period. Any later credit shall be void and any later refund erroneous. No period of limitations specified in any other law shall apply to the recovery by a taxpayer of moneys paid in respect of taxes under this article."

There can be no recovery of taxes voluntarily paid, without protest, under a mistake of law (Mercury Mach. Importing Corp. v. City of New York, 3 NY2d 418, 165 NYS2d 517). In the present matter, a question existed as to the constitutionality of taxing the pensions of Federal retirees while exempting the pensions of State and local retirees. This issue was settled by the United States Supreme Court in 1989 in Davis v. Michigan Dept. of Treasury (supra). However, petitioner waited more than three years until after the return was filed and the taxes were paid before he sought a tax refund. Thus, petitioner chose not to file any claim for refund during the time when a valid claim for a refund could have been filed under Tax Law § 687(a) and a question existed as to his ability to obtain a refund (Fiduciary Trust Co. of New York v. State Tax Commn., 120 AD2d 848, 502 NYS2d 119).

The scheme presented by the State satisfies the Due Process Clause of the 14th Amendment by providing "meaningful backward-looking relief to rectify any unconstitutional deprivation" (Harper v. Virginia Dept. of Taxation, 509 US __, 125 L Ed 2d 74, 89 citing McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, supra at 31, 51-52, 10 L Ed 2d at 32, 45). Tax Law § 687(a) adequately meets the requirements set out in McKesson which provides that a state "might provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint. . ." (McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, supra, at 45, 110 L Ed 2d at 41). These procedural requirements address both the State's obligation to refund the unconstitutionally collected funds while at the same time satisfying the State's need for sound fiscal planning.

E. A party may move for summary determination pursuant to 20 NYCRR 3000.9(b) after issue has been joined. The regulation provides, in pertinent part, that:

> "Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. The

> motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact" (emphasis added).

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York University Medical Center, 64 NY2d 851, 487 NYS2d 316, 317, citing Zuckerman v. City of New York, 49 NY2d 557, 562, 427 NYS2d 595). Inasmuch as summary judgment 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, Inc. v. Tri-Pac Export Corp., 22 NY2d 439, 293 NYS2d 93, 94; Museums of Stony Brook v. Village of Patchogue Fire Dept., 146 AD2d 572, 536 NYS2d 177, 179). If material facts are in dispute, or if contrary inferences may reasonably be drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (see, Gerard v. Inglese, 11 AD2d 381, 206 NYS2d 879, 881). Moreover, summary determination should not be granted where the facts asserted are within the exclusive knowledge of the movant, even though supported by documentation, because the nonmoving party is entitled to cross-examine the evidence (see, White v. First National Bank of Scotia, 22 AD2d 973, 254 NYS2d 651).

In this case, the Division, through the affidavit of Charles Bellamy, has established that petitioner's refund claims for tax years 1987 and 1988 were filed on September 22, 1993, and that no other refund claim or tax return was filed prior to that date. Likewise, the Bellamy affidavit established that petitioner's 1989 State personal income tax return was filed on December 6, 1993, and that no tax return or refund claim for tax year 1989 was filed prior to that date. In each instance, the refund claims were filed outside of the three-year period prescribed in Tax Law § 687(a). Therefore, each of petitioner's claims for refund were filed late pursuant to Tax Law § 687(a) and were properly denied.

F. Accordingly, the motion for summary determination is granted and the petition of Lorenza Jones is denied.

DATED: Troy, New York
May 9, 1996

/s/ Daniel J. Ranalli
ASSISTANT CHIEF
ADMINISTRATIVE LAW JUDGE