STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PRISCILLA C. MOSTACHETTI	:	DETERMINATION DTA NO. 813915
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1987 and 1988.	:	

Petitioner, Priscilla C. Mostachetti, P.O Box 205, Wingdale, New York 12594-0205, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1987 and 1988.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on January 17, 1996 at 1:15 P.M., which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

ISSUE

Whether petitioner is entitled to a refund of personal income tax for the years 1987 and 1988, which she paid on income from her Federal pension, when her refund claim was not filed within three years of her filing tax returns for 1987 and 1988.

FINDINGS OF FACT

1. In the years 1987 and 1988, petitioner received income from a Federal pension in the amounts of $20,803.00 and $23,573.00, respectively. Petitioner timely filed New York State income tax returns for 1987 and 1988 on which she reported such amounts as taxable to New York State.

2. It was not until 1994 that petitioner filed forms IT-113-X, Claim for Credit or Refund of Personal Income Tax, for each of the years at issue. These forms, which were marked into

evidence as the Division's Exhibits "D" and "E", respectively, are each dated March 10, 1994 and include similar explanations. The explanation provided by the petitioner in her refund claim for 1987, which was typewritten and easier to decipher, was as follows:

> "State Tax Refund- Retirees who retired from 1985 to 1989 (retired 12/31/86) are entitled to a refund on state taxes paid during this time. New York State deducted state taxes and it was declared unconstitutional by the Supreme Court in 1989. The issue of retroactivity was not addressed in the original court case. In 1993 the Supreme Court declared that its earlier decision would be retroactive and referred it back to the States and their laws on time limits."

3. Included in the record as the Division's Exhibit "H" is a photocopy of a letter dated May 30, 1990 from New York State Senator Jay P. Rolison, Jr., to petitioner in response to her "inquiry regarding the recent federal court decision relating to state taxation of federal pension benefits." Senator Rolison advised petitioner:

> "After looking into this matter, I have been informed by officials at the state Department of Taxation and Finance that individuals wishing to seek a refund must file a form, IT-113X, for each year (up to the 3 year statute of limitations). Although the state is not issuing refunds at the present time, several court cases are pending which may result in the state being required to issue these refunds.
>
> The IT-113X allows for a taxpayer to file for a protective claim in the event refunds are made in the future."

Although Senator Rolison's letter was dated May 30, 1990, as noted in Finding of Fact "2", petitioner's refund claims filed on forms IT-113X were dated March 10, 1994. Further, according to the affidavit of Charles Bellamy, a Tax Technician II for the Audit Division whose "responsibilities include the review and processing of refund claims made by federal pension recipients who were taxed on that income prior to 1989", dated November 29, 1995, which is included in the Division's motion papers for summary determination,[1] petitioner's refund claims for 1987 and 1988 were filed in May 1994 and "she did not file refund claims or amended returns for those years before that date."

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[1]The Division brought a motion dated November 29, 1995 for summary determination in this matter. In response, Daniel J. Ranalli, Assistant Chief Administrative Law Judge, in a letter dated December 4, 1995 to the Division's representative, advised that the hearing in this matter which had been scheduled for January 17, 1996, prior to the Division's motion, would nonetheless go forward, and that the Division's motion "may be argued at the hearing."

4. The Division issued a Notice of Disallowance dated July 25, 1994, in response to petitioner's claims for refund for 1987 and 1988, on the basis that her claims were not timely filed pursuant to Tax Law § 687(a).

CONCLUSIONS OF LAW

A. It is first observed that pursuant to the Tax Appeals Tribunal Rules of Practice and Procedure at 20 NYCRR 3000.9(b), a party may seek to obtain an accelerated determination by bringing a motion for summary determination. However, as noted in footnote "1", the Division's motion for summary determination did not result in the postponement of the hearing in this matter (see, 20 NYCRR 3000.5[e]). Consequently, the Division's motion will be resolved by this determination in the normal course.

B. The issue whether the statute of limitations for maintaining a refund claim bars a taxpayer from seeking a refund of New York income tax paid on Federal pension income has been addressed in a number of recent determinations by administrative law judges. Under Tax Law § 2010, determinations issued by administrative law judges are not precedential for other proceedings in the Division of Tax Appeals (see, Matter of Kornblum, Tax Appeals Tribunal, January 16, 1992, confirmed 194 AD2d 882, 599 NYS2d 158). Nonetheless, it is noted that the reasoning below is similar to what has been articulated by other administrative law judges (see, e.g., Matter of Banco, Division of Tax Appeals, January 18, 1996). It is observed that the Banco matter is currently on exception by the taxpayers to the Tax Appeals Tribunal.

C. In Davis v. Michigan Dept. of Treasury (489 US 803, 103 L Ed 2d 891), the United States Supreme Court held that a Michigan tax statute that exempted state retirement pensions from taxation but taxed Federal pensions was unconstitutional. At the time of the Davis decision, at least 19 states, including New York, had tax or pension statutes that discriminated between state and Federal pensions. Tax Law § 612(c)(former [3]) stated that in computing New York adjusted gross income a subtraction from Federal gross income was required for "[p]ensions to officers and employees of this state, its subdivisions and agencies, to the extent includible in gross income for federal income tax purposes . . . ."

D. Following Davis, pensioners in several states sought refunds of taxes or the cancellation of assessments basing their claims on the Supreme Court's opinion. The state courts were then called upon to determine whether the holding in Davis should be given retroactive application to tax years prior to the date of the decision. The retroactivity issue was addressed by the United States Supreme Court in Harper v. Virginia Dept. of Taxation (509 US __, 125 L Ed 2d 74), where the Supreme Court, reversing a decision of the Virginia Supreme Court, held that the ruling in Davis is to be applied retroactively. However, the Court did not award a refund to the Harper taxpayers "because Federal law does not necessarily entitle them to a refund." Rather, the Court stated, "the Constitution requires Virginia 'to provide relief consistent with due process principles'" (Harper v. Virginia Dept. of Taxation, supra, 125 L Ed 2d at 88, quoting American Trucking Assns. v. Smith, 496 US 167, 110 L Ed 2d 148). It remanded to the Virginia Supreme Court to determine whether, under Virginia law, the taxpayers were afforded a remedy which satisfied the minimum Federal requirements outlined by the Court in its decision (id., 125 L Ed 2d at 90).

E. Following the Davis decision, the New York State Legislature amended Tax Law § 612(c)(3) to afford the same exemption from taxation to Federal pensions as had been afforded previously to State pensions; however, the amendment did not apply retroactively to tax years before the Davis decision was issued (L 1989, ch 664, §§ 1, 2, effective July 21, 1989 and applicable to Federal pension benefits received in taxable years beginning on or after January 1, 1989).

F. The issue of retroactive application of the Davis holding was addressed in the New York courts in the case of Duffy v. Wetzler (174 AD2d 253, 579 NYS2d 684, appeal dismissed 79 NY2d 976, 583 NYS2d 190, appeal dismissed 80 NY2d 890, 587 NYS2d 900, revd 509 US __ , 125 L Ed 2d 716). The state court decision that Davis applied prospectively only and did not require a refund of tax for years before the issuance of the Davis decision was reversed by the United States Supreme Court which granted certiorari and vacated that judgment for further consideration in light of its opinion in Harper (Duffy v. Wetzler, 509 US __, 125 L Ed 2d 716).

G. The Division's current position is that it will pay refunds to all taxpayers who (1) paid personal income tax on their Federal pension income and (2) filed timely refund claims pursuant to Tax Law § 687. According to the Division, petitioners' refund claims for 1987 and 1988 are barred by the three-year statute of limitations for refund claims set forth in Tax Law § 687(a).

H. The Supreme Court decided Davis and its progeny based on the Due Process Clause of the Fourteenth Amendment,[2] which requires "a fair opportunity to challenge the accuracy and legal validity of [one's] tax obligation, [and] also a 'clear and certain remedy,' for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one" (McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 US 18, 39, 110 L Ed 2d 17, 37; footnote and citation omitted). The Court made it clear that while due process requires each state to provide procedural safeguards against the unlawful exaction of taxes (id., at 36, 110 L Ed 2d at 35-36), states do retain a degree of flexibility in the type of safeguards they must provide (Harper v. Virginia Dept. of Taxation, 509 US __, 125 L Ed 2d 74). In its 1993 Harper decision, the Court held that the selection of a remedy to be afforded is an issue of state law, yet it must satisfy the "minimum federal requirements" of the due process clause which "obligates the State to provide meaningful backward-looking relief to rectify an unconstitutional deprivation" (id., 125 L Ed 2d at 89, citing, McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, supra, at 31, 51-52, 110 L Ed 2d at 32, 45). Three years prior to Harper, in McKesson, the Supreme Court had suggested that "meaningful, backward-looking relief" could include, inter alia, a refund (McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, supra, at 40, 110 L Ed 2d at 38). It is noted that the Supreme Court held in McKesson that a relatively short statute of limitations is sufficient for due process requirements, citing the example of a Florida refund statute which imposes a three-year statute of limitations (McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, supra, at 24, 110 L Ed 2d at 28, note 4, citing Fla Stat § 215.26[2]. The Supreme Court recognized a State's

[2]The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law" (US Const, 14th Amend, § 1).

concern that its "obligation to provide refunds for what later turns out to be an unconstitutional tax" might undermine its ability to engage in sound financial planning (McKesson v. Division of Alcoholic Beverages, supra at 45, 110 L Ed 2d at 41). It theorized that the State might protect its interest in financial stability while fulfilling its "constitutional obligation to provide relief for an unlawful tax" by imposing "relatively short statutes of limitations applicable to such actions" (id.). In 1994, the Supreme Court in Reich v. Collins (513 US __, 130 L Ed 2d 454) discussed the "post-deprivation" remedy of a refund, and declared it to be sufficient for due process requirements, so long as the "scheme" of remedy is not "reconfigure[d] . . . unfairly, in midcourse" (id., 130 L Ed 2d at 459; emphasis in original).

I. In sum, New York State's interest in financial stability justifies its enforcement of the three-year statute of limitations under Tax Law § 687(a).

J. Petitioner has requested that this determination be delayed so that she can await possible legislative action that would authorize the refund of taxes paid on Federal pension income for which timely refund claims had not been filed.

According to petitioner, "[T]here have been some bills introduced to the State Senate and Assembly to pay the refund for those who have not filed timely [refund claims]" (tr., pp. 11-12).

However, there is no basis in law or in the regulations to continue this matter pending possible legislative action that would authorize the refund of taxes paid on Federal pension income for which timely refund claims were not filed. It would seem reasonable to assume that if such legislative action is taken, the terms of such legislative relief would permit petitioner to process her claim for refund for the years at issue at such time. Of course, it would be petitioner's responsibility to comply with any requirements set forth in any such legislation.

K. The petition of Patricia C. Mostachetti is denied, and the Notice of Disallowance dated July 25, 1994 of petitioner's claims for refund for 1987 and 1988 is sustained.

DATED: Troy, New York
May 16, 1996

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE