STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH A. AND SUSAN E. BANCO	:	DETERMINATION DTA NO. 813926
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1986, 1987 and 1988.	:	
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Petitioners, Joseph A. and Susan E. Banco, 798 Langley Road, Amsterdam, New York 12010, 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 1986, 1987 and 1988.

The Division of Taxation (the "Division"), by its representative, Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel), brought a motion dated October 20, 1995, returnable November 20, 1995, for an order directing the entry of summary determination in favor of the Division on the ground that petitioners failed to file a refund claim on their 1986, 1987 and 1988 personal income taxes within the three-year statute of limitations prescribed by Tax Law § 687. Petitioners, appearing pro se, did not respond to the motion.

Upon review of all 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 submitted an affidavit of its representative in which the Division asserts that, since petitioners did not file a refund claim on their 1986, 1987 and1988 personal income taxes within three years from the time the returns were filed or two years from the time the taxes were paid, whichever was later, as directed by Tax Law § 687, petitioners' refund claim should be barred as untimely, the petition before the Division of Tax Appeals denied with prejudice and the motion for summary determination granted. The Division notes in its affidavit that while in June of 1994, former

Governor Mario Cuomo authorized the payment of refunds to all taxpayers who (1) paid personal income tax on their Federal pension income and (2) had filed timely refund claims pursuant to Tax Law § 687, petitioners here failed to meet the second requirement. The Division argues that state statutory law concerning refunds controls in the instant case as the United States Supreme Court's decisions in Davis v. Michigan Department of Treasury (489 US 803, 103 L Ed 2d 891) and its progeny "refused to require the retroactive application of the Davis holding regarding the violation of the constitutional doctrine of intergovernmental tax immunities."

2. Attached to the Division's affidavit is the affidavit of Charles Bellamy, an auditor at the 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. Having reviewed petitioners' file, Mr. Bellamy states that, while petitioners filed their 1986 New York State personal income tax return on or before April 15, 1987, their 1987 New York State personal income tax return on or before April 15, 1988 and their 1988 New York State personal income tax return on or before April 15, 1989, petitioners did not file any refund claims for these tax years until July 1, 1994. Mr. Bellamy points out that, as a result, petitioners were issued a refund denial letter for the years in question.

3. Petitioners' petition was received by the Division of Tax Appeals on June 12, 1995. In this petition, petitioners state that petitioner Joseph A. Banco retired from the United States Air Force on September 1, 1986, and paid New York State income tax on his pension income for 1986, 1987 and 1988. While petitioners have correctly grasped that "the time constraints involved with a ruling on this matter [are] directly related to Subsection (A) of Section 687 of the New York Tax Law," petitioners argue that they were "not notified by the Taxation Department or any other source that [they] had to submit an IT-113-X Form for each of the . . . tax years [in question], within three (3) years from the time the tax was paid, to be eligible for a tax refund." Petitioners maintain that they do not believe that they overpaid their state income tax, since, at the time they paid the tax on the pension income, it was proper and due.

Petitioners claim that if they had been informed that they needed to submit an IT-113-X Form to keep their claims active to be eligible for a possible refund for the years in question, they certainly would have done so. Petitioners contend that they do not think that by not submitting the IT-113-X Form to keep their claims active, they should be automatically disqualified from the appropriate refund. Petitioners aver: "[t]his was not [our] problem, [we] did [our] part . . . [we] paid [our] state taxes when they were due. If [we] [were] erroneously taxed for three years in accordance with [Tax Law § 687], then [we] think that a refund is due to [us]." Finally, petitioners urge that the State:

> "knew in accordance with [Tax Law § 687] that: (1) the refund would have to be allowed to those personnel who knew about and submitted a [sic] IT-113-X in a timely manner to keep their claim active, and . . . (2) for those personnel who did not know about the IT-113-X, a refund would be disallowed in accordance with the New York Tax Law."

4. Attached to petitioners' petition are the following documents: (1) a copy of the Conciliation Order (CMS No. 141395), dated May 19, 1995, which denied petitioners' request and sustained the refund denial; (2) a copy of the refund denial letter issued by the Division to petitioners on or about August 29, 1994 in which petitioners were informed that their refund claim in the amount of $317.50 was denied in full as the claims for refund for the years 1986, 1987 and 1988 were not timely filed pursuant to Tax Law § 687;[1] (3) a copy of a letter dated May 1, 1995 from Representative Michael R. McNulty from the 21st District in New York, to petitioner Joseph A. Banco, acknowledging receipt of a letter from petitioner to Mr. McNulty's Schenectady, New York office and informing petitioner that in an effort to be helpful, he had contacted the Division on petitioner's behalf, and would keep petitioner informed of any response he received; (4) a copy of a page from an unknown publication on which petitioners have marked "FOR YOUR INFO" atop an article regarding new legislation signed by Governor George Allen of Virginia "to allow some additional federal retirees to participate in a supplemental settlement program to resolve the ongoing dispute over the state taxation of

[1]While this refund denial letter cites the contested amount as $317.50, petitioners, in their petition, claim that the amount of tax contested is approximately $3,000.00. However, in view of the pleadings in this matter, the amount of the refund sought is apparently not at issue.

federal retirement benefits", with the program applying "to those retirees who were excluded from the original settlement plan because they failed to meet the filing deadlines . . . "; and (5) a letter dated May 4, 1995 from a Ms. Linsley of the Problem Resolution Office of the Division to petitioner Joseph A. Banco informing Mr. Banco that the Problem Resolution Office could not accept the matter as a Problem Resolution case, since the Problem Resolution Program is set up to resolve "intractable problems that somehow fail to be resolved through normal channels" and that to avail oneself of the Program, "a taxpayer must have previously tried to resolve the problem through routine means." In this letter, Ms. Linsley informed petitioner that she had forwarded his inquiry to the "proper division" for review.

5. The Division, in its Answer, dated August 21, 1995, denies the allegations made in the petition and states that petitioners failed to file a claim for refund within three years of the filing of the return for the years in question; and therefore, that petitioners' claim for refund was properly denied as untimely pursuant to Tax Law § 687. The Division's other statements are, for the most part, identical to those made in its motion for summary determination, discussed above. In addition, the Division asserts that petitioners bear the burden of proving that the disallowance was erroneous and/or improper.

CONCLUSIONS OF LAW

A. A party may move for summary determination pursuant to 20 NYCRR 3000.5(c)(1) 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 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, on remand 111 AD2d 138, 489 NYS2d 970, 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 at 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 be drawn reasonably 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).

B. Tax Law § 687(a) provides, in pertinent part:

> "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, or if no return was filed, within two years from the time the tax was paid."

C. Petitioners do not dispute the Division's assertion that the refund applications for 1986, 1987 and 1988 were not filed until July of 1994. However, petitioners argue that it would not be fair to penalize them for an "administrative oversight" -- namely, the failure to timely submit the IT-113-X forms to keep the claims active -- since they were not aware of the need to submit said forms within three years from the time the tax was paid. The Division, on the other hand, stresses that former Governor Cuomo's June 1994 program to grant refunds to all taxpayers who had paid income tax on their Federal pension income applies only to those taxpayers who filed timely refund claims under Tax Law § 687, and that petitioners are therefore ineligible for such a refund.

D. The issue of refunding state taxes paid on Federal pension income has been discussed in a long line of cases by the United States Supreme Court, commencing with Davis v. Michigan Department of Treasury (supra), mentioned by the Division in its motion papers. In the Davis case, the Supreme Court held that Michigan's tax scheme -- which akin to New York's former scheme, exempted from taxation all retirement benefits paid by the State or its political subdivisions, but levied an income tax on retirement benefits paid by all other employers,

including the Federal government -- violated Federal law. The Court determined that the Michigan statute was contrary to the tenets of intergovernmental tax immunity since it favored retired State and local governmental employees over retired Federal employees. In the Davis case, Michigan acknowledged that in view of the circumstances, a tax refund was proper, although the Court did not determine whether its decision should be given retroactive effect and whether the State must provide retrospective relief, such as a tax refund.

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, but 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 has 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 any 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). 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

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[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).

original). In Reich, the Supreme Court reversed the Georgia Supreme Court's decision that Georgia could refuse to allow the payment of refunds to taxpayers who had paid State tax on their Federal pension income, since the law requiring that they pay the tax was later found to be unconstitutional, and was therefore invalidated. The Supreme Court held that:

> "while a state may maintain a remedial scheme which is exclusively predeprivation, or exclusively postdeprivation, or both, and is free to reconfigure its scheme as its needs change, it may not reconfigure its scheme unfairly in midcourse, which, Georgia had done by having held out what appeared to be a clear and certain postdeprivation remedy in the form of its tax refund statute and then declaring, after the retiree had paid the disputed taxes, that no such remedy existed" (Reich v. Collins, supra, 130 L Ed 2d at 455).

E. Following Davis, section 612(c)(3) of New York's Tax Law was amended to exempt from taxation the pensions of Federal employees (Tax Law § 612[c][3][i],[ii]). This amendment, effective July 21, 1989, applied to Federal pension benefits received in taxable years beginning January 1, 1989 and was prospective only, providing no retrospective relief for income taxes paid on Federal pension benefits received prior to January 1, 1989. However, following the Supreme Court's 1993 ruling in Harper v. Virginia Dept. of Taxation (supra) in which, contrary to the Division's assertion, the Court ruled that its 1989 determination in Davis must be applied retroactively as a matter of Federal law, the State of New York, in June of 1994, 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 [and] * * * Harper * * * and who have filed timely administrative claims for refunds for those taxes with the Department of Taxation and Finance'" (Duffy v. Wetzler, 207 AD2d 375, 616 NYS2d 48, 50, lv denied 84 NY2d 838, 617 NYS2d 129, cert denied __ US __, 130 L Ed 2d 673, quoting letter dated June 29, 1994 from New York State to the Appellate Division, Second Department).

Thus, the Division's incorrect analysis of Davis notwithstanding (see, Finding of Fact "1"), the policy in New York is to grant, retroactively, a refund to taxpayers similarly situated to petitioners, if the claim was filed within the statutory time limits imposed by Tax Law § 687. It should be 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]; City of Miami v. Florida Retail Federation, Inc., 423 So 2d 991, 993). Thus, it appears that New York's three-year statute of limitations meets the Supreme Court's due process requirements.

F. Petitioners' argument that they were not aware of the statute of limitations of section 687 of the Tax Law and of the form required to preserve their claim is meritless for several reasons. First, it is not the particular form of the refund claim itself that matters (e.g., the IT-113-X cited by petitioners), but rather that the taxpayers in question apply for a refund in some format within the applicable time period. Petitioners had the responsibility of ascertaining from the Division how to go about filing a refund claim. Second, the time to apply for a refund is statutory, and no exceptions or exemptions from the time limits imposed have been provided for in the statute. Therefore, no excuses for not complying with the statute may be considered (cf., Tax Law § 1145[a][1][iii] [permits remittal of penalty for "reasonable cause and not due to willful neglect"]). Contrary to petitioners' assertion, it is not the Division's affirmative obligation to help taxpayers to preserve their claims by notifying them of due dates for the filing of pertinent forms.

G. In sum, notwithstanding the Division's incorrect and insufficient analysis of the Supreme Court's position in Davis, the Division has, in fact, introduced evidence in support of its motion for summary determination -- namely, that petitioners' refund claims were not filed until July of 1994, when petitioners' returns for the years 1986, 1987 and 1988 had all been filed by April 15, 1989 (i.e., four years past the statute of limitations for tax year 1986, three years past the statute of limitations for 1987 and two years past the statute of limitations for 1988). Petitioners, however, have not responded to the Division's motion, making only the assertion in their petition that they did not file the refunds within the three-year statute of limitations because they were not aware of the proper form to file to preserve their claims (the IT-113-X), or of the three-year time limit within which petitioners had to file. As discussed above, this is not a sufficient defense. As petitioners did not respond to the Division's motion, it must be presumed that the

Division's assertion that there is no material issue of fact in dispute in this case is correct, and, in fact, petitioner is deemed to have conceded this (see, Kuehne & Nagel v. Baiden, 36 NY2d 539, 544, 369 NYS2d 667, citing Laye v. Shepard, 48 Misc 2d 478, 265 NYS2d 142, affd 25 AD2d 498, 267 NYS2d 477; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3212:16, at 437; John William Costello Assoc. v. Standard Metals Corp., 99 AD2d 227, 472 NYS2d 325, appeal dismissed 62 NY2d 942). Thus, the Division, as the proponent of this motion for summary determination, has succeeded in carrying its burden of showing that it is entitled to judgment as a matter of law.

H. Accordingly, the Division's motion for summary determination is granted and the petition of Joseph A. and Susan E. Banco is denied.

DATED: Troy, New York
January 18, 1996

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