STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LEON F. BURKHARDT	:	DETERMINATION DTA NO. 813928
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1978 through 1985.	:	

Petitioner, Leon F. Burkhardt, Route 1, Box 87, Moneta, Virginia 24121-9205, 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 1978 through 1985.

The Division of Taxation, by its representative, Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Esq., of counsel) brought a motion dated October 25, 1995 and returnable November 27, 1995 for an order directing the entry of summary determination in favor of the Division of Taxation on the ground that no material and triable issue of fact is presented and the Division of Taxation is entitled to a determination in its favor as a matter of law. Petitioner responded by letter dated November 9, 1995.

Upon review of all the papers filed in connection with this motion, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

FINDINGS OF FACT

1. Leon F. Burkhardt (hereinafter "petitioner") was the recipient of a Federal pension during each of the years 1978 through 1985, inclusive. On his New York returns for the aforesaid years he reported the pension income as taxable for New York State purposes. Petitioner's personal incometax returns for the years at issue were all timely filed; that is, they were all filed on or before April 15 of the following year.

2. In April 1989, the Division of Taxation ("Division") issued statements in various newspaper articles throughout New York State suggesting that taxpayers might wish to file

timely protective refund claims for years where the statute of limitations had yet to expire while litigation of the issue of the taxability of Federal pensions was pending. For the most part, the year 1985 was addressed in these articles since the statute of limitations for filing refund claims for 1985 was about to expire.

3. In March 1990, petitioner filed a formal claim for refund for the years 1978 through 1985.

4. On November 6, 1989, the Division issued a Technical Services Bureau memorandum to the public which also informed taxpayers of their rights to file protective refund claims during this period. This memorandum states as follows:

> "Taxation of Federal Pensions
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> "Chapter 664 of the Laws of 1989 amended the Tax Law and the Administrative Code of the City of New York to exempt federal pensions from New York State personal income tax, New York City personal income tax and the Yonkers income tax surcharge. This legislation was enacted in response to the United States Supreme Court decision in Paul S. Davis v. Michigan Department of Treasury, which held that states such as New York that exempt pensions of their own employees from income taxes must provide a similar exemption to employees of the federal government. The new exemption also applies to the New York State and New York City separate taxes on lump sum distributions.
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> "Chapter 664 amended sections 612(c)(3) of the Tax Law and 11-1712(c)(3) of the Administrative Code to allow a new subtraction from federal adjusted gross income to arrive at New York adjusted gross income. The subtraction is for the amount of pensions paid to officers or employees, or their beneficiaries, of the United States, any territory or possession or political subdivision of such territory or possession, the District of Columbia, or any agency or instrumentality of any of the foregoing (including the military), to the extent the pension payments were included in gross income for federal income tax purposes.
>
> "The new law applies to federal pension payments received on or after January 1, 1989. Therefore, New York State will not issue refunds for prior years even where the statute of limitations has not expired.
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> "However, two pending New York Supreme Court cases may result in the state being required to issue refunds for prior years. Pending the outcome of this litigation, taxpayers have the right to file protective claims for refund for all open years on Form IT-113X. If a taxpayer's refund claim is denied, the taxpayer must file a petition with the Commissioner of Taxation and Finance in order to preserve his or her refund rights" (emphasis added).

5. The Division of Taxation issued to petitioner a Notice of Disallowance in full for the years 1978 through 1985. The basis for such disallowance was that petitioner did not file a claim for refund within three years of the filing of his original returns for those years.

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 promptly to 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 a relatively short statute of limitations applicable to such actions. Such procedural measures would sufficently protect a state's fiscal security when weighed against their obligation to provide meaningful relief for their 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). 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 determined to be unconstitutional in 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 NY 2d 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 . . . .
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> * * *
>
> "(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, there was a question of 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 last return was filed and the taxes were paid and after the Davis decision was rendered before he sought his tax refunds. Thus, petitioner chose not to file any claims for refunds 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 Company 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 the unconstitutional deprivation" (McKesson Corp. v. Division of Alcoholic Beverage and Tobacco, supra). 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. . . ." 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 of Taxation has established the date that petitioner's returns were filed and that petitioner's claims for refunds were filed more than three years later. Therefore, the claims for refunds 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 Leon F. Burkhardt is denied.

DATED: Troy, New York
February 1, 1996

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE