

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>LEONARD W. and JANICE M. BRAULT</b>	:	<b>DETERMINATION</b>
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 814088
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 1986 through 1988.	:	

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Petitioners, Leonard W. and Janice M. Brault, 9057 Main Street, Box 174, Westernville, New York 13486, 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 through 1988.<sup>1</sup>

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 5, 1997 at 9:15 A.M., with all briefs to be submitted by July 30, 1997, which date began the six-month period for the issuance of this determination. Petitioner Leonard W. Brault appeared *pro se* and on behalf of his wife, petitioner Janice M. Brault. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Esq., of counsel).

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<sup>1</sup> The petition in this matter as filed with the Division of Tax Appeals also included the years 1983 and 1984. However, pursuant to a Notice of Withdrawal of Petition and Discontinuance of Proceeding dated November 19, 1996, petitioners withdrew their claims with respect to 1983 and 1984.

***ISSUE***

Whether the Division of Taxation properly denied petitioners' claims for refund of taxes paid on Federal pension income as untimely pursuant to the three-year statute of limitations period of Tax Law § 687(a).

***FINDINGS OF FACT***

1. Petitioners, Leonard W. and Janice M. Brault, timely filed joint New York State personal income tax returns for each of the years at issue. Specifically, petitioners filed 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 return petitioners reported and paid tax on Federal pension income paid to Leonard W. Brault.

2. On July 6, 1994, petitioners filed claims for refund of tax paid on Mr. Brault's Federal pension income for each of the years at issue. Petitioners did not file any refund claims for the years at issue before July 6, 1994.

3. By letter dated August 29, 1994, the Division of Taxation ("Division") denied petitioners' refund claims as untimely filed.

4. On April 15, 1989, petitioners filed a "protective" claim for refund of personal income tax on Form IT-113X for the year 1985 seeking a refund of tax paid on Mr. Brault's Federal pension income for that year. The form states the following reason for the refund claim: "According to a recent U.S. Supreme Court ruling, this [Federal pension] income should not have been included in total income."

5. On November 6, 1989, the Division issued a Technical Services Bureau memorandum to the public entitled *Taxation of Federal Pensions* (TSB-M-89-[9]I) which advised that Tax Law § 612(c)(3) had been amended in response to the Supreme Court's decision in *Davis v.*

*Michigan Dept. of Treasury* (489 US 803, 103 L Ed 2d 891) to exempt Federal pensions from state income taxation. The memorandum further advised that the amendment was effective with respect to pension payments received on or after January 1, 1989 and that the State would not issue refunds for prior years even where the statute of limitations had not yet expired. The memorandum also advised of pending court cases which “may result in the state being required to issue refunds” for years prior to 1989 and that, pending the outcome of such litigation, “taxpayers have the right to file protective claims for all open years.”

### ***CONCLUSIONS OF LAW***

A. The Tax Appeals Tribunal has consistently denied claims for refunds of personal income tax paid on Federal pension income where, as here, such claims were not filed within the three-year statute of limitations set forth in Tax Law § 687(a) (*see, e.g., Matter of Purvin*, Tax Appeals Tribunal, October 9, 1997; *Matter of Nuzzi*, Tax Appeals Tribunal, October 2, 1997; *Matter of Hotaling*, Tax Appeals Tribunal, June 1997; *Matter of Burkhardt*, Tax Appeals Tribunal, January 9, 1997; *Matter of Jones*, Tax Appeals Tribunal, January 9, 1997; ). The basis for the Tribunal’s conclusion in these cases has been that the backward-looking relief afforded by the three-year limitations period of section 687(a) is sufficiently “meaningful” under the rule of *Harper v. Virginia Dept. of Taxation* (509 US 86, 125 L Ed 2d 74, 89, citing *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 US 18, 110 L Ed 2d 17) to remedy the unconstitutional deprivation caused by the discriminatory treatment of Federal pensions prior to the enactment of Tax Law § 612(c)(3)(ii) (*see, L 1989, ch 664*). In other words, the Tribunal has held that, in this context, Tax Law § 687(a) satisfies the demands of Federal due process.

The identity of facts between this case and the cited Tribunal cases compels an identical conclusion; that is, that petitioners’ claims for refund for the years at issue were untimely filed.

B. Petitioners asserted that the Division failed to adequately notify them and many other Federal retirees of the need to file refund claims to preserve their right to a refund. In response to a similar argument advanced by the petitioner in *Matter of Jones (supra)* the Tribunal stated:

“[W]e refuse to impose on the Division the duty of personally advising every taxpayer who is potentially subject to a refund of his or her right to such a refund because of a change in the law given the State’s constitutionally sound scheme which ‘rectified any unconstitutional deprivation’ (*Harper v. Virginia Dept. of Taxation, supra*), while simultaneously respecting the State’s fisc (*McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, supra*).”

The Tribunal further noted in *Matter of Jones* that the issuance of the Technical Services Bureau memorandum on November 6, 1989 (*see*, Finding of Fact “5”) had placed the petitioner therein on notice of his right to file protective refund claims during the pendency of the litigation addressing the issue of whether the State would be required to issue refunds for years prior to 1989.

Petitioners’ argument regarding the adequacy of the Division’s notice must be rejected pursuant to *Matter of Jones*. Petitioners’ argument is further undermined by the fact that, on April 15, 1989, petitioners filed a timely claim for refund for the year 1985 (*see*, Finding of Fact “4”). Clearly, if petitioners knew in April 1989 that they needed to file a refund claim for 1985, they should have known of the need to file similar claims for 1986 through 1988.

C. Petitioners contended that Tax Law § 687(a) is not properly applicable where, as in this case, taxes are paid under a law later determined to be unconstitutional and that to apply section 687(a) in this case violates the intent of that section. This contention is rejected. The payment of a tax later determined to be unconstitutional is an “overpayment” of tax under Tax Law § 687(a) and a claim for refund of such an overpayment is subject to the three-year limitations period (*see, Fiduciary Trust Co. v. State Tax Commn.*, 120 AD2d 848, 502 NYS2d 119). Furthermore, in

*McKesson v. Division of Alcoholic Beverages & Tobacco (supra)* the Supreme Court acknowledged the State's interest in maintaining its fiscal stability and suggested various constitutionally permissible procedural requirements for refunds including "enforc[ing] relatively short statutes of limitations applicable to such [refund] actions" (496 US at 45, 46, 110 L Ed 2d at 41).

D. Petitioners also contended that the Division's action herein was inequitable and unfair and thus contrary to the Taxpayers' Bill of Rights (*see*, Tax Law § 3000 *et seq.*). Upon review of those provisions it is concluded that the application of the statute of limitations of Tax Law § 687(a) under the present circumstances in no way violated the spirit or intent of those provisions.

E. The petition of Leonard W. and Janice M. Brault is denied and the Division of Taxation's denial of petitioners' claim for refund, dated August 29, 1994, is sustained.

DATED: Troy, New York  
January 29, 1998

/s/ Timothy J. Alston  
ADMINISTRATIVE LAW JUDGE