STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH F. AND ANNA M. INCANTALUPO	:	DETERMINATION DTA NO. 814253
for Revision of a Determination or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 1986.	:	

Petitioners, Joseph F. and Anna M. Incantalupo, 10-27 51st Avenue, Long Island City, New York 11101-5828, filed a petition for revision of a determination or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 1986.

The Division of Taxation, by its representative, Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel), brought a motion dated December 20, 1995, for an order directing the entry of summary determination pursuant to 20 NYCRR 3000.9(b) on the ground that petitioners failed to timely request a refund for taxes paid in tax year 1986. Petitioners 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 petitioners filed their New York State income tax return for 1986 on or before April 15, 1987, and did not file their refund claim or amended

return until March 1991, or after the three-year statute of limitations had expired, then their 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 December 20, 1995, attesting to the fact that petitioners filed their 1986 State personal income tax return on or before April 15, 1987 and did not file an amended return or refund claim before March 1991.

3. Also attached to the Division's motion papers is a copy of petitioners' petition, dated August 24, 1995, contesting tax in the amount of $532.71. In the petition, petitioners allege, inter alia, the following:

> "(6)(a) No errors made by Commissioner of Taxation [and] Finance. (b) Petitioner(s) was not aware of the time limit for submission."

4. Attached to the petition are the following documents: (1) a copy of the Conciliation Order (CMS No. 141241)[1], dated July 28, 1995, wherein the conciliation conferee denied the request "[a]fter giving due consideration to the evidence presented"; and (2) a copy of a letter, dated May 22, 1995, addressed to petitioner from the conciliation conferee (Ralph Liporace), informing petitioners that the scheduled conciliation conference had been adjourned and that the matter would be handled on a correspondence basis.

5. Finally, attached to the Division's motion papers is a copy of the Division's answer, dated November 8, 1995, which states, inter alia, that petitioners[2] paid New York State tax on Federal pension income for 1986 and failed to file a claim for refund within three years. The Division further states that petitioners' claim for refund was properly denied pursuant to Tax Law § 687.

---

[1]Although it is not indicated elsewhere in the record, the heading of the Conciliation Order notes that the date of the Notice of Disallowance was August 29, 1994.

[2]In the answer the Division indicates that it was Joseph Incantalupo who earned the Federal pension income at issue wherein it states: "Petitioner is a former federal employee who paid New York State tax on his federal pension income." However, the record is void of any other evidence which would indicate which of the petitioners (Joseph or Anna), or if both of them, were former Federal employees and thus earned the pension income at issue.

6. 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 stated as follows:

> "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.
>
> "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.
>
> "However, two pending New York Supreme Court cases may result in the state being required to issue refunds for prior years. Pending the oucome 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).

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 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, petitioners waited more than three years until after the return was filed and the taxes were paid before they sought their tax refund. Thus, petitioners 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 their 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 of Taxation has established the date that petitioners' return was filed and that petitioners' claim for refund was filed more than three years later. Therefore, the claim for refund was filed late pursuant to Tax Law § 687(a) and was properly denied.

F. Accordingly, the motion for summary determination is granted and the petition of Joseph F. and Anna M. Incantapulo is denied.

DATED: Troy, New York
February 29, 1996

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