STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SAUL AND SYLVIA PURVIN	:	DETERMINATION DTA NO. 814540
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of City of New York for the Years 1983 through 1994.	:	

Petitioners, Saul and Sylvia Purvin, 1901 84th Street, Brooklyn, New York 11214-3062, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 1983 through 1994.

On April 7, 1996 and May 2, 1996, respectively, petitioners and the Division of Taxation, consented to have the controversy determined on submission without a hearing. All documents and briefs to be submitted by the parties were due by September 11, 1996. Petitioners submitted a letter in lieu of a reply brief on August 22, 1996 which date began the six-month period for the issuance of this determination.[1]

Petitioners appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

After due consideration of the record of this matter Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioners' claim for refund for the years 1983 through 1994.

[1]Petitioner submitted an additional letter on September 19, 1996. Since this letter was submitted after the due date for a reply, it was not taken into consideration.

FINDINGS OF FACT

1. On or about December 31, 1982, petitioner Saul Purvin[2] retired from employment with the Federal government. Mr. Purvin received a total of $107,315.00 as his gross Federal pension for the years 1983 through 1994 inclusive.[3] According to a statement from the United States Office of Personnel Management, Retirement Programs, petitioner received the following gross amounts in each year:

1983	$ 7,193.00
1984	7,860.00
1985	8,124.00
1986	8,124.00
1987	8,220.00
1988	8,556.00
1989	8,892.00
1990	9,300.00
1991	9,792.00
1992	10,152.00
1993	10,452.00
1994	10,650.00

2. According to the affidavit of Charles Bellamy, Tax Technician II with the Division of Taxation and Finance since 1967, whose responsibilities include the review and processing of refund claims made by Federal pension recipients who were taxed on that income prior to 1989, petitioners "filed their New York State personal income tax returns in a timely manner (on or before April 15 of the following year) for all years at issue except for 1994." He also stated that petitioners filed an informal claim for refund for all open years on May 10, 1989; however, they did not file an amended return or claim for refund before that date. Petitioners' refund claims for the years 1983 through 1985 were denied because the claims were not filed within three years of the filing of returns for those years. For the years 1986 through 1993, petitioners' refund claims were denied either because they paid no tax on their Federal pension income or they had no New York tax liability. No return was filed for 1994.

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[2]Mrs. Sylvia Purvin is also a petitioner in this matter due to the fact that she and Mr. Purvin filed joint New York State resident personal income tax returns for the periods in issue. However, only petitioner Saul Purvin had Federal pension income. Hereinafter, petitioner will refer to Mr. Purvin, while petitioners will refer to Mr. and Mrs. Purvin collectively.

[3]Mr. Purvin's original Retirement Fund contributions totaled $18,982.00.

3. On August 29, 1994, the Division of Taxation (the "Division") issued a Notice of Disallowance to petitioners in which they were informed that their refund claim in the amount of $355.04 was disallowed in full for tax year 1985 because it was not timely filed pursuant to Tax Law § 687(a).

4. Petitioners requested a conference in the Bureau of Conciliation and Mediation Services, and on June 13, 1995, shortly before the issuance of a conciliation order, the conciliation conferee issued a consent form to petitioners along with a detailed explanation of his decision. The conferee wrote, in pertinent part:

> "I have reviewed, thoroughly, your refund claims for the above years and all of the information contained in the case file. Although you have been receiving Federal pension since 1983, my review discloses that you did not pay any New York taxes on that pension for the years at issue, and therefore no refund can be issued.
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> "According to the Federal Retirement System statement submitted by you, the pension benefits paid to you in 1983 ($7193.00), 1984 (&7860.00) [sic] and part of 1985 ($3929.00) represented a return of your contributions which totaled $18982.00. These amounts would not have been reported on either your Federal or New York State returns. Also, in reviewing the electronic files for the years 1985 through 1990, I found that you and your spouse had a New York tax liability for 1985 only. For that year, your tax totaled $355.04, but you subtracted your pension before computing the tax due. Beginning in 1982, the New York return allowed a subtraction for all pensions, up to $20,000.00, if the recipient was 59 1/2 years of age. A review of the files disclosed that you claimed that subtraction and, in fact, had no New York tax liability for the years 1986, 1987, 1988, 1989 and 1990.
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> "In summary, the Federal pension that you are receiving was not reportable until approximately the middle of 1985 and the amount reported was subtracted before computing the tax liability for that year. Your returns for 1986 through 1990 reported no tax liability, whatsoever.
>
> "Based on the above, your refund claims for 1983 through 1990 are denied and the Notices of Disallowance that were issued, are sustained."[4]

It is noted that the Consent references tax years 1983 through 1990; however 1994 was in parentheses and the amount of the claim was listed as "$107,315.00 NY taxes on Federal pension".[5]

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[4] The record is silent as to when these Notices of Disallowance were issued.

[5] The typeface is different for the year 1994 and the monetary figure.

The conciliation conferee issued a Conciliation Order (CMS No. 141522), dated June 30, 1995, which denied the refund claims for the years 1983 through 1990 and dismissed petitioners' request.

5. The Bellamy affidavit and petitioner's May 10, 1989 informal claim for refund clearly establish a claim for refund for years 1983 through 1988. Additionally, review of correspondence from BCMS to petitioner, as well as the conferee's June 13, 1995 letter indicate that additional informal claims for refund for 1989 and 1990 were filed while the conciliation proceeding was pending. There is indication that petitioner filed an informal refund claim with BCMS for years 1991 through 1994. At any rate, he included those years in his petition (see, Finding of Fact "6").

6. Petitioners, then filed a petition seeking a refund of all taxes for tax years 1983 through 1994 in the total amount of $107,315.00. This amount is equal to the entire amount of the Federal pension income received by Mr. Purvin in the years 1983 through 1994.

7. In its answer, dated February 7, 1996, the Division denied the allegations in the petition, and stated inter alia that: (1) petitioner Saul Purvin was a former Federal employee who paid New York State tax on his Federal pension income for the years in issue, shown on the caption as 1983 through 1990; (2) petitioners failed to file a claim for refund within three years of the filing of the returns for the years in issue; and (3) petitioners' claim for refund was properly denied as untimely pursuant to Tax Law § 687. In addition, the Division asserted that petitioners bear the burden of proving the disallowance was erroneous and/or improper.

On March 12, 1996, the Division requested permission to amend its answer pursuant to 20 NYCRR 3000(4)(d)(1), and its request was granted on May 14, 1996. The amendment was as follows: (1) the years in the caption were changed to 1983 through 1994; and (2) the following paragraph was added: "[the DIVISION] STATES that the Petitioners did not pay New York State income tax on their Federal pension income for the years 1991-1994." The remainder of the answer remained unchanged.

8. To prove that no tax was paid on Federal pension income, the Division submitted microfilm records of petitioners' filing history for the years 1983 through 1990. In order to explain the microfilm records, it submitted the affidavit of James Miller, the Assistant Director in the Division's Personal Income Tax Returns Processing Bureau since 1993, whose duties include overseeing "the analysis and testing of computer systems which process tax return information." The computer systems store information from various sources and "generate printed documents which are sent to taxpayers as well as microfilm of purged information."

According to Mr. Miller, the personal income tax returns database ("returns database") stores information from a taxpayer by header information which includes the taxpayer's name, address and social security number. When the information from a taxpayer's document is inputted onto the returns database, the system verifies that the address on file is current and when necessary updates the address. Mr. Miller points out that after the information is keyed from a taxpayer's return or request for extension onto the returns database, it is stored in a record format. Records from the returns database are extracted and copied to tape. The tape information is transferred to microfilm once that year is taken off the "on-line" database.

Mr. Miller affirmed that the microfilm copies of the resident income tax returns contain the same information which was shown on the hard copies of petitioners' resident income tax returns for the years 1983 through 1990.

9. Review of the microfilm records reveals that petitioners filed (1) their 1983 resident income tax return under a valid extension on August 14, 1984; and (2) their 1984 through 1990 resident income tax returns in a timely manner (on or before April 15 of the following year). The records also reveal petitioners' tax liability and payment history as follows:

1983 -- petitioners paid tax;

1984 -- petitioners paid tax; however they received a refund of a portion of the tax which they had paid;

1985 -- petitioners paid tax; however, they received a refund of a portion of the tax which they had paid;

1986 -- petitioners received a refund of all tax which they had paid;

1987 -- petitioners neither paid nor owed any taxes;

1988 -- petitioners paid a total of $59.00 in tax, of which $14.00 was attributable to Mr. Purvin's New York gross income;

1989 -- petitioners neither owed nor paid any tax;

1990 -- petitioners neither owed nor paid any tax.[6]

The Division also submitted a computer printout of the financial data taken from petitioners' 1991 Form IT-201. According to this printout, petitioners reported $9,739.00 as both their Federal gross and New York adjusted gross income. They claimed and were allowed a standard deduction of $9,500.00. Although petitioners' New York taxable income was reported as $239.00, they did not owe any taxes because of their New York State and City household credits. Further review of this printout reveals that no tax had been withheld nor had petitioners made any estimated payments for tax year 1991.

10. Review of petitioners' 1992 resident income tax return Form IT-201 ("IT-201") reveals that Mr. Purvin's Federal pension was reported as part of petitioners' Federal adjusted gross income, but was excluded from their New York adjusted gross income. Furthermore, on this return petitioners reported that zero tax was owed.

In the same manner, review of petitioners' 1993 IT-201 reveals that petitioners excluded "FED. RETIREMENT PAY" of $10,452.00 from their Federal adjusted gross income to arrive at their New York State adjusted gross income. Furthermore, petitioners reported that zero tax was owed.

11. On or about December 6, 1993, petitioners and the Division entered into a Deferred Payment Agreement ("DPA") for personal income taxes due for tax year 1990 as a result of an assessment (Number L-008093266-3) previously issued by the Division. According to the DPA, petitioners were to make a total of 12 monthly payments of $96.66 each.

As part of their documentary evidence, petitioners submitted copies of two checks paid under the DPA. It is noted that petitioners claim that three additional payments of $96.66 were

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[6] See, Finding of Fact "11" concerning a Deferred Payment Agreement entered into by petitioners and the Division.

made under the DPA; however, copies of checks as substantiation of such payments are not part of the record.

12. It is noted that petitioners did not submit copies of any of their tax returns, either original or amended, for the years in issue.

CONCLUSIONS OF LAW

A. 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."

B. Petitioners contend that the Division improperly denied their refund claim. They maintain that they are entitled to a refund of taxes paid on Mr. Purvin's pension based on the Supreme Court decisions in Davis v. Michigan Dept. of Treasure (489 US 803, 103 Ed 2d 891) and Harper v. Virginia Dept. of Taxation (509 US 86, 125 L Ed 2d 74). They question the Division's assertions regarding amounts reported on their tax returns for the years in issue since the Division maintains that the returns are no longer available. They assert that they included Mr. Purvin's Federal pension in their New York adjusted gross income, did not claim the $20,000.00 pension subtraction modification allowed under Tax Law § 612(c)(3-a)[7] and that they paid taxes on that income each year since Mr. Purvin's retirement. Petitioners also argue that they did in fact file a tax return for 1994. Petitioners contend that the Division is taking advantage of Mr. Purvin who suffered a stroke and who consequently is unable to do research or look for old tax returns.

The Division contends that it properly denied petitioners' refund claim for the years in issue. The Division argues that petitioners are confusing Mr. Purvin's pension income with the right to a refund of taxes paid on that pension. It does not dispute that Mr. Purvin received Federal pension income from 1983 through 1994; however, it claims that petitioners did not file a timely claim for refund under Tax Law § 687 for tax years 1983 through 1985. It contends

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[7]Tax Law § 612(c)(3-a) allows a subtraction from Federal adjusted gross income of up to $20,000.00 of pension income if received by an individual age 59½ or older.

that petitioners first filed any type of refund claim for tax years 1983 through 1985 on May 10, 1989, more than three years after the filing of the last return (i.e., the 1985 return). The Division also contends that for the years 1986 through 1994, petitioners did not pay New York State tax on Mr. Purvin's pension income.

C. I will first address tax years 1983 through 1985. On March 28, 1989, the United States Supreme Court issued a decision in the case of Davis v. Michigan Dept. of Treasury (supra). The Davis decision held that a state violates the constitutional doctrine of intergovernmental tax immunity when the state taxes retirement benefits paid by the Federal government but exempts from taxation retirement benefits paid by the state or its political subdivisions. The Davis decision did not address the issue of retroactive application of its holding. As a result of the Davis decision, petitioners filed an informal refund claim on May 10, 1989.

At the time of the Davis decision, New York Tax Law § 612(c)(former [3]) exempted State and local pensions from taxation; however, there was no similar provision for Federal pensions. As a result of Davis, the New York State Legislature amended the Tax Law, effective January 1, 1989, to exclude Federal pensions from New York income tax (see, L 1989, ch 664; Tax Law § 612[c][3][ii]). This exemption was to apply beginning with tax year 1989. At that time, the Division of Taxation also took the position that the Davis decision applied prospectively only and denied all claims for refund of tax paid on Federal pensions for years prior to 1989 even where timely claims were filed. Litigation on the issue of whether the Davis holding should be applied retroactively ensued in New York and throughout the country (see, Duffy v. Wetzler, 148 Misc 2d 459, 555 NYS2d 543, mod 174 AD2d 253, 579 NYS2d 684, appeal dismissed 80 NY2d 890; 587 NYS2d 900, revd 509 US 917, 125 L Ed 2d 716, on remand 207 AD2d 375, 616 NYS2d 48, lv denied 84 NY2d 838, 617 NYS2d 129, cert denied ___ US ___, 130 L Ed 2d 673).

D. Subsequent to the Duffy v. Wetzler decision, the issue of how to apply the Davis holding was resolved in Harper v. Virginia Dept. of Taxation (supra). The Supreme Court in

Harper held that the rule announced in Davis was to be given full retroactive effect; however, it did not provide relief to the petitioners therein. Rather, citing to McKesson Corp. v. Division of Alcoholic Beverages & Tobacco (496 US 18, 100 L Ed 2d 17), the Supreme Court held that a state was free to choose the form of remedy it would provide to rectify any unconstitutional deprivation, but that such a remedy must satisfy the demands of Federal due process (Harper v. Virginia Dept. of Taxation, supra at 101, 125 L Ed 2d at 88-89). In this context, Federal due process requires that where taxes are paid pursuant to a scheme ultimately found unconstitutional, the state must provide taxpayers with "meaningful retrospective relief" from taxes, meaning that in refund actions the state must afford taxpayers a "fair" opportunity to challenge the accuracy and legal validity of the tax and a "clear and certain remedy" for any erroneous or unlawful tax collection (see, McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, supra at 39, 110 L Ed 2d at 37-38).

E. Pursuant to Tax Law § 687(a), petitioners were required to file a refund claim within three years from the date of filing of returns for a given year. The issue is whether this statute of limitations may be enforced where the statute imposing the tax is later found to be unconstitutional. 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). Clearly, New York's three-year statute of limitations meets the Supreme Court's due process requirements as set forth in McKesson. (Matter of Burkhardt, Tax Appeals Tribunal, January 9, 1997.)

F. In the instant matter, petitioners first filed an informal claim for refund on May 10, 1989 for years which included 1983 through 1985 (see, Findings of Fact "2" and "5"). Unfortunately, it is clear from the record in this matter that their refund claim for years 1983

through 1985 was untimely because they filed the refund claims more than three years from the filing of their returns on August 14, 1984, April 15, 1985 and April 15, 1986.

G. Petitioners are also seeking a refund of taxes which they contend were paid on Mr. Purvin's Federal pension income for tax years 1986 through 1994. Petitioners assert that they never claimed the $20,000.00 exemption on any of their tax returns for the years in issue, although they always included Mr. Purvin's Federal pension income on their returns. As noted in Finding of Fact "12", petitioners did not submit copies of any of their income tax returns for the years in issue. For tax years 1986 through 1990, the Division submitted copies of the microfilm records of petitioners' filing history which showed petitioners' New York gross income and any tax liability for each year.

It is clear from the record that petitioners received a refund of all tax which they had paid for tax year 1986 and that they neither owed nor paid any taxes for tax years 1987 and 1989. For tax year 1988, petitioners paid $59.00 in taxes, $14.00 of which was attributable to Mr. Purvin's income; however, petitioners have failed to prove that the $14.00 in tax paid by Mr. Purvin was paid on his Federal pension. For tax year 1990, petitioners contend that they made five payments under a deferred payment agreement (see, Finding of Fact "11"). In support of that contention, they submitted copies of two checks in the amount of $96.66 each. Petitioners have not submitted any proof that the tax payments which they made for tax year 1990 were attributable to the inclusion of Mr. Purvin's Federal pension in their New York gross income. In addition, the Division has submitted the affidavit of Mr. Bellamy which indicates that the Purvins received a refund of the taxes they paid for tax year 1990 including the amounts paid under the deferred payment agreement.

The record in this matter also reveals that petitioners neither owed nor paid any taxes for 1991, 1992 and 1993. Also, it is clear from the record, that, at least for tax years 1992 and 1993, they did exclude Mr. Purvin's Federal pension from their New York adjusted gross income (see, Finding of Fact "10"). As for tax year 1994, the Division claims that petitioners did not file a tax return for that year. Petitioners assert that they did in fact file a 1994 tax return

and that the Division has lost it. Petitioners have not submitted a copy of their 1994 return or any other evidence of filing; therefore they have failed to meet their burden of proof (Tax Law § 689[e]).

H. The petition of Saul and Sylvia Purvin is denied and the Division of Taxation's denial of petitioners' refund claim is sustained.

DATED: Troy, New York
February 20, 1997

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE