STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WILBUR I. and ELENORA M. COONS	:	DETERMINATION DTA NO. 814720
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1987 and 1988	:	
	:	

Petitioners, Wilbur I. and Elenora M. Coons, 506 Charles Street, Scotia, New York 12302, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1987 through 1988.

The Division of Taxation (the "Division"), by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel), brought a motion dated June 18, 1996, 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 years 1987 and 1988. Petitioners, appearing pro se, 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, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

FINDINGS OF FACT

1. The Division's motion for summary determination is supported by the affidavit of Herbert M. Friedman, Jr., sworn to the 17th day of June 1996 and the affidavit of Charles Bellamy, sworn to the 17th day of June 1996.

2. Mr. Friedman in his affidavit asserts that since petitioners did not file refund claims or amended returns for their personal income taxes for the years 1987 and 1988 within three years from the time the returns were filed or two years from the time the taxes were paid, whichever is later, pursuant to Tax Law § 687, petitioners' refund claims should be barred as

untimely, the petition before the Division of Tax Appeals should be denied with prejudice and the motion for summary determination should be granted. The Division's representative avers that:

> "In June 1994, then 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."

Furthermore, Mr. Friedman contends that the Division's policy of paying refunds to all taxpayers who had filed timely claims pursuant to Tax Law § 687 is consistent with the dictates of the United States Supreme Court decisions in McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 US 18, 110 L Ed 2d 17, Harper v. Virginia Dept. of Taxation, 509 US 86, 125 L Ed 2d 74 and Reich v. Collins, 513 US __, 130 L Ed 2d 454.

Mr. Friedman asserts that in the instant case petitioners failed to timely file refund claims or amended returns pursuant to Tax Law § 687.

3. Mr. Bellamy is a Tax Technician II with the Division of Taxation and has held this position since 1967. Mr. Bellamy's responsibilities include the review and processing of refund claims made by Federal pension recipients who were taxed on that income prior to 1989.

In his affidavit in support of the motion, Mr. Bellamy affirmed that he reviewed petitioners' file and their refund claims for 1987 and 1988. He states that petitioners filed 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; however, petitioners did not file claims for refund for those years before July 1994. He further notes that petitioners were issued a refund denial letter for the years 1987 and 1988 because petitioners did not file a claim for refund within three years of the filing of their original returns for those years.

4. Petitioners, Wilbur I. and Elenora M. Coons, filed their petition with the Division of Tax Appeals on February 1, 1996. Petitioners are requesting a refund of tax in the amount of $3,169.00 for tax years 1987 and 1988. Petitioners are protesting the disallowance of their refund claims for New York State taxes paid on Mr. Coons's Federal pension income for those years. Petitioners made the following assertions:

"According to the U.S. Supreme Court ruling of 1989, Sates [sic] cannot tax federal pensions if they do not tax state pensions. However, this was not resolved by NYS until July, 1994. In the pree [sic] release, it was stated that '6500 federal pensioners would be receiving their refund checks within two months. The remainder will be asked for additional information and should get their refunds within two months of submitting this information.'

"Pensioners who heard nothing from the state contacted NYS Dept. of Taxation and were informed to file the forms. They were sent packages containing IT-201X instead of IT-113X for the years in question. Upon filing these claims, they received a notice of disallowance. The letter stated 'As this three year limitation on refund claims is statutory, only a change in the law would permit this Department to pay refund claims filed after the three year limitation has expired.'

"It seems to us that all federal pensions qualify for these refunds whether or not the appropriate forms were filed. Why would the state discriminate against one taxpayer over another? Because of this apparent discriminatory action H & R Block contacted the State as to the standing of the federal pensioner refund. They were informed to continue filing IT-113X since there eas [sic] pending legislation opening the window of the three year rule for the federal pensioners. It appears that nothing has been acted upon and is still in committee."

5. Attached to petitioners' petition are the following documents: (1) a copy of the Notice of Disallowance letter, dated October 24, 1994, issued by the Division to petitioners in which petitioners were informed that their refund claim in the amount of $3,169.00 was disallowed in full for the years 1987 and 1988 because either no tax was paid on their pension income or the claims for refund for those years were not timely pursuant to Tax Law § 687; (2) a copy of a letter dated November 30, 1995, from Frank A. Landers of the Division of Tax Appeals, addressed to Lorraine Clute, District Manager of H & R Block, in which she was informed of the Division of Tax Appeals administrative hearing process and the necessity for petitioners to file a petition in order to protest the Notice of Disallowance which they had received; and (3) a copy of a letter, dated November 16, 1995, from Ms. Clute, addressed to the Division of Tax Appeals, in which she stated that H & R Block was assisting petitioner Wilbur Coons in appealing the Division's denial of Mr. Coons's "refund claim of tax paid on a federal pension" and also set forth H & R Block's position on this issue.[1]

[1]It is noted that the position set forth in the letter is identical to the assertions set forth in petitioners' petition (see, Finding of Fact "4").

6. The Division, in its answer, dated April 17, 1996, denied all but the first two sentences of the allegations and stated inter alia that: (1) petitioner was a former Federal employee who paid New York State tax on his Federal pension income for the years 1987 and 1988; (2) petitioners failed to file a claim for refund within three years of the filing of the return for the years in issue; and (3) therefore, petitioners' claims for refund were 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.

CONCLUSIONS OF LAW

A. A party may move for summary determination pursuant to 20 NYCRR 3000.9(b)(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 material and triable issue of fact." (Emphasis added.)

B. Summary judgment is a "drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (Moskowitz v. Garlock, 23 AD2d 943, 259 NYS2d 1003, 1004; see, Daliendo v. Johnson, 147 AD2d 312, 543 NYS2d 987, 990). A party moving for summary determination must show that there is no material issue of fact (20 NYCRR 3000.9[b][1]). Such a showing can be made by "tendering sufficient evidence to eliminate any material issue 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, 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 Department, 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).

C. 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."

D. The record in this matter is very sparse. Petitioners did not respond to the Division's motion. Therefore petitioners' arguments must be gleaned from the petition and the attachments which they filed in this matter. Petitioners do not dispute the Division's assertion that their refund claims for tax years 1987 and 1988 were filed in July of 1994. Rather, they argue that the Division is discriminating against them and all other federal pension recipients who failed to file the appropriate refund claims in a timely manner. They contend that the three-year statute of limitations should not apply in this case.

The Division argues that former Governor Cuomo's June 1994 decision to approve refund claims for those former Federal employees who paid New York State income tax on their Federal pension income applied only to those taxpayers who had filed timely claims for refund pursuant to Tax Law § 687. It asserts that "this policy was consistent with the dictates of McKesson, Harper and Reich (in which a three year statute of limitations, as in New York, was described as sufficiently lengthy)."

E. On March 28, 1989, the United States Supreme Court issued Davis v. Michigan Dept. of Treasury (489 US 803, 103 L Ed 2d 891). 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.

At the time of the Davis decision, New York Tax Law former § 612(c)(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 __, 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).

F. 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 McKesson Corp. v. Division of Alcoholic Beverages & Tobacco (supra), 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 98, 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).

G. Harper thus requires that Davis be given retroactive application. Following the Harper decision, 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).

H. The dispute in the instant matter involves the time limitations portion of Tax Law § 687(a) (see, Conclusion of Law "C"). Pursuant to this section, petitioners were required to file a refund claim within three years from the date of filing their returns for the years at issue. Petitioners have not raised any issues regarding any other part of section 687(a). Therefore, the pivotal question in this matter is whether the limitations period set forth in Tax Law § 687(a), as applied in this instance, complies with Federal due process requirements under the standard enunciated in McKesson.

In McKesson, the court discussed various constitutionally permissible procedural requirements available to a state to protect its interest in maintaining fiscal stability:

> "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; execute any refunds on a reasonable installment basis; enforce relatively short statutes of limitations applicable to such actions, refrain from collecting taxes pursuant to a scheme that has been declared invalid by a court or other competent tribunal pending further review of such declaration on appeal; and/or place challenged tax payments into an escrow account or employ other accounting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds. The State's ability in the future to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax." (McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, supra at 45, 110 L Ed 2d at 41; emphasis supplied.)

I. Clearly, the three-year statute of limitations at issue herein falls well within the range of permissible procedural protections discussed in McKesson. Accordingly, petitioners' contention that the relevant limitations period should not be applied is rejected.

J. Apart from the due process analysis utilized in the McKesson and Davis line of cases, the Appellate Division has indicated that the limitations provisions of Tax Law § 687(a) operate to bar refund claims filed beyond the statutory period even where, as here, the tax in question is subsequently determined to be unconstitutional (see, Fiduciary Trust Co. v. State Tax Commn., 120 AD2d 848, 502 NYS2d 119). The court in Fiduciary Trust Co. relied on the principle that there can be no recovery of taxes voluntarily paid, without protest, under a mistake of law (id. at 120). Fiduciary Trust Co. thus provides additional authority against petitioners' position herein.

K. The Division has introduced evidence in support of its motion for summary determination -- namely, that petitioners' refund claims were not filed until July of 1994, while petitioners' returns for the years 1987 and 1988 had all been filed by April 15, 1989 (i.e., three years past the statute of limitations for 1987, and two years past the statute of limitations for 1988). Petitioners did not respond to the Division's motion. Since petitioners did not respond to the Division's motion, it must be presumed that the Division's assertion that there are no material issues of fact in dispute in this case is correct, and, in fact, petitioners are 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.

L. The Division's motion for summary determination is granted; the petition of Wilbur I. and Elenora M. Coons is denied and the Division of Taxation's denial of petitioners' refund claims are sustained.

DATED: Troy, New York
October 3, 1996

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE