STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RUDOLFO PERNASILICE	:	DETERMINATION DTA NO. 814838
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 1985 and 1988.	:	
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Petitioner, Rudolfo Pernasilice, 120 Willowwood Lane, Camillus, New York 13031, filed a petition for refund of personal income tax under Article 22 of the Tax Law for the years 1985 and 1988.

The Division of Taxation (the "Division"), by Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel), brought a motion dated July 19, 1996, with a response due by August 19, 1996, seeking an order for summary determination in favor of the Division on the grounds that petitioner failed to file a refund claim for his 1985 and 1988 personal income taxes within the three-year statute of limitations prescribed by Tax Law § 687. Petitioner, appearing by Albert R. Denti, P.A., did not respond to the motion. The 90-day period for the issuance of this determination under section 3000.5(d) of the Rules of Practice and Procedure of the Tax Appeals Tribunal began on August 19, 1996.

Upon review of all 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 affirmation of Peter T. Gumaer, sworn to the 19th day of July 1996 and the affidavit of Charles Bellamy, sworn to the 19th day of July 1996.

2. Mr. Gumaer in his affirmation states that since petitioner did not file refund claims or amended returns for his personal income taxes for the years 1985 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, petitioner's 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. Gumaer 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. Gumaer asserts that in the instant case petitioner 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 petitioner's refund claims for 1985 and 1988. According to Mr. Bellamy, petitioner filed his 1985 New York State personal income tax return on or before April 15, 1986, and his 1988 New York State personal income tax return on or before April 15, 1989; however, petitioner did not file refund claims or amended returns for those years before January 1995.

4. Petitioner, Rudolfo Pernasilice, filed his petition with the Division of Tax Appeals on March 12, 1996. Petitioner is requesting a refund of tax in the amount of $1,657.37 for tax years 1985 and 1988. Petitioner is protesting the disallowance of his refund claims for New York State taxes paid on his Federal pension income for tax years 1985 and 1988. Petitioner asserted that:

> "DUE TO THE FACT THAT THERE IS A BILL IN THE SENATE AND ASSEMBLY (1532) TO REOPEN THE CASE FOR FEDERAL PENSION PAYMENTS CHAPTER 664 SUPREME COURT RULING. THE DAVIS VS. MICHIGAN SUPREME COURT RULING AND INADEQUACY AS ASSEMBLY BILL 8762 A REFUND WOULD BE DUE TAXPAYER OF $1657.37 PLUS INTEREST."

5. Attached to petitioner's petition are the following documents: (1) a copy of the Conciliation Order (CMS No. 147492), dated February 16, 1996, in which the conciliation conferee, after a conciliation conference, denied the request and sustained the statutory notice[1]; (2) a copy of the Power of Attorney appointing Albert R. Denti, a public accountant, as petitioner's and Susan Pernasilice's authorized representative; (3) a copy of the Notice of Disallowance letter, dated August 17, 1990, to petitioner and Susan Pernasilice in which they were informed that their refund claim in the amount of $1,339.74 was disallowed in full for tax year 1986 because New York State was not issuing refunds on Federal pension benefits for years prior to 1989 and (4) a copy of the cover letter, dated February 16, 1996, from conciliation conferee William J. Proefrock, addressed to petitioner and Mrs. Pernasilice, in which they were informed of their right to challenge the conciliation order by filing a petition with the Division of Tax Appeals.

6. The Division, in its answer, dated May 22, 1996, denied the allegations in the petition; 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 1985 and 1988; (2) petitioner failed to file a claim for refund within three years of the filing of the return for the years in issue; and (3) therefore, petitioner's claim for refund was properly denied as untimely pursuant to Tax Law

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[1]The record is silent as to when the statutory notice was issued.

§ 687. In addition, the Division asserted that petitioner bears 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, 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 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. Petitioner did not respond to the Division's motion. Therefore petitioner's arguments must be gleaned from the petition and the attachments which he filed in this matter. Petitioner contends that his untimely claims for refund for tax years 1985 and 1988 should be granted. In support of his position, he refers to pending legislation.

The Division argues that former Governor Cuomo's June 1994 decision to approve refund claims for the 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.

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 § 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 __, 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 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). In 1994, the Supreme Court in Reich v. Collins (supra) discussed the "post-deprivation" remedy of a refund, and declared it to be sufficient for due process requirements, so long as the "scheme" of remedy is not "reconfigure[d] . . . . unfairly, in midcourse" (id., 130 L Ed 2d at 459; emphasis in original).

G. 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).

The Division's current position is that it will pay refunds to all taxpayers who (1) paid personal income tax on their Federal pension income and (2) filed timely refund claims pursuant to Tax Law § 687. It is noted that 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.

H. In the instant case, although the record is rather sparse, it appears that petitioner filed a timely claim for refund for tax year 1986.[2] However, petitioner admits that he did not file timely refund claims for tax years 1985 and 1988. Rather, he argues that he should be granted a refund because of pending legislation. Petitioner's argument is without merit. Currently, all refund claims, including those pertaining to Federal pension income, must be filed within the statutory period set forth in Tax Law § 687(a).

I. The Division has introduced evidence in support of its motion for summary determination -- namely, that petitioner's refund claims were not filed until January 1995, while petitioner's returns for the years 1985 and 1988 had been filed by April 15, 1986 and April 15, 1989, respectively (i.e., almost six years past the statute of limitations for 1985 and almost three years past the statute of limitations for 1988). Petitioner did not respond to the Division's motion. Since petitioner 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, petitioner is 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.

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[2]The record is silent as to whether or not petitioner received his refund for that year.

J. The Division's motion for summary determination is granted; the petition of Rudolfo Pernasilice is denied and the Division of Taxation's denial of petitioner's refund claims is sustained.

DATED: Troy, New York
November 14, 1996

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE