STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WILLIAM L., JR., AND CATHLEEN J. REESE	:	DETERMINATION DTA NO. 815178
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, 1988 and 1989.	:	

Petitioners, William L., Jr., and Cathleen J. Reese, 33 Old Locust Avenue, Peekskill, New York 10566, 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, 1988 and 1989.

The Division of Taxation, by its representative Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel), brought a motion dated March 20, 1997 for an order of summary determination in the above-referenced matter. Pursuant to section 3000.5(d) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, petitioners had 30 days to file a response to the motion. In response to the motion petitioners, appearing pro se, submitted a letter dated April 21, 1997, which date commenced the 90-day period for the issuance of this determination. Based upon the motion papers, the affirmation and affidavit submitted therewith, petitioners' letter in response, and all pleadings and documents submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioners' claim for refund of tax paid on Federal pension income as untimely pursuant to Tax Law § 687(a).

FINDINGS OF FACT

1. On December 7, 1994 petitioners, William L. Reese and Cathleen J. Reese, filed a claim for refund of taxes paid on Federal pension income for the years 1987, 1988 and 1989. On May 26, 1995, the Division of Taxation ("Division") issued a Notice of Disallowance to

petitioners denying their claim for refund on the basis that such claim had not been filed within three years of the filing of petitioners' tax returns for the years at issue.[1]

2. Petitioners challenged the Division's Notice of Disallowance by requesting a conciliation conference. A conciliation conference was held on February 27, 1996 and, by a Conciliation Order (CMS No. 148488) dated April 19, 1996, petitioners' request was denied and the Notice of Disallowance was sustained. In turn, petitioners continued their challenge by filing a petition, dated June 27, 1996, and received by the Division of Tax Appeals on July 1, 1996.

3. In their petition, petitioners set forth the following argument:

> "Refused to pay taxes due to taxpayer for 87, 88 & 89. Based on 1989 United States Supreme Court ruling whereas the Court found that Federal Retirees were discriminated upon due to unfair taxation. The Court further stated the State must fix the problem by either refunding taxes in question or by finding another suitable solution to the taxpayer. New York State and the commissioner is, in my case hiding behind the Statue [sic] of Limitations law in N.Y. My understanding is your Statue [sic] Laws no longer apply since discrimination is the issue. Some retirees were paid while others are not. This is also further discrimination. I'm prepared to go to the Supreme Court again, it's going to cost more in interest if you keep delaying."

4. The Division served an answer to the petition on September 18, 1996. The Division denied the allegations contained in the petition and affirmatively stated that petitioner William L. Reese was a Federal employee who paid tax on his Federal pension income for the years in issue, that petitioners' claim for refund for such years was denied as untimely, and that any instances where refunds were approved for those who paid New York State income tax on Federal pension income were limited to instances where timely refund claims had been filed.

5. On March 20, 1997, the Division filed its motion for summary determination. In support of its motion, the Division submitted an affidavit sworn to by Charles Bellamy on March 20, 1997. This affidavit attests that petitioners: 1) timely filed their 1987, 1988 and 1989 personal income tax returns (i.e., filed their returns for such years on or before April 15,

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[1]Neither the claim for refund nor the Notice of Disallowance were introduced into the record. However, the existence and the date of the claim, and the existence and date of the Notice have been established (see, Findings of Fact "5" and "6"; Conclusion of Law "A").

1988, 1989 and 1990, respectively); 2) filed claims for refund of taxes paid on Federal pension income for the years 1987, 1988 and 1989 on December 7, 1994; and 3) failed to file any claims for refund or amended returns for the years 1987, 1988 and 1989 at any time prior to December 7, 1994. Mr. Bellamy is employed by the Division as a Tax Technician II in its Audit Division. His responsibilities include reviewing and processing refund claims filed by taxpayers who paid tax on Federal pension income.

The Division's representative also included with the motion an affirmation explaining the legal background concerning state taxation of Federal pension income, and requesting that the motion for summary determination be granted since there is no dispute that petitioners' claim for refund was not filed within three years of the filing of the returns for the years at issue thus leaving no material or triable issue of fact and requiring judgement in the Division's favor as a matter of law.

6. In response to the Division's motion, petitioners submitted a letter dated April 17, 1997 and received by the Division of Tax Appeals on April 21, 1997. In this letter, petitioners set forth their claim that the United States Supreme Court ruled New York State (and other states) discriminated against Federal retirees by subjecting Federal pension income to tax, and that the statute of limitations does not apply because the State is fraudulently withholding the tax paid by petitioners on their Federal pension income for the subject years. Petitioners also argue that the State's payment of refunds to those Federal pensioners who were "lucky" and had an accountant file a "correction" (presumably a timely refund claim or amended return), amounts to further discrimination against those who did not file a timely refund claim or amended return. Finally, petitioners repeat their request for a hearing on the merits of their refund claim.

7. Petitioners have raised no challenge and submitted no evidence to counter the Division's position that the earliest request for refund of tax paid on Mr. Reese's Federal pension income for the years 1987, 1988 and 1989 was the refund claim filed on December 7, 1994.

CONCLUSIONS OF LAW

A. To prevail on a motion for summary determination the moving party must show that there are no issues regarding the material facts, and that the facts presented compel a determination in his or her favor (20 NYCRR 3000.9[b]). In this particular case, petitioners have raised no challenge to the facts alleged by the Division, including the central fact that petitioners did not file timely claims for refund for any of the years at issue. Accordingly, the facts as set forth by the Division in its moving papers are deemed admitted (see, Kuehne & Nagel v. Baiden, 36 NY2d 539, 544, 369 NYS2d 667). In turn, with no material facts at issue, the question becomes whether the Division is entitled to summary determination on the law, to wit, whether petitioners' claim for refund for the years 1987, 1988 and 1989 was properly denied as untimely filed pursuant to Tax Law § 687.

B. As noted, the central fact set forth in the affidavit of Charles Bellamy, and deemed admitted by petitioners, is that petitioners did not file a timely claim for refund for the years 1987, 1988 or 1989. In Davis v. Michigan Dept. of Treasury (489 US 803, 103 L Ed 2d 891) the United States Supreme Court declared unconstitutional a state taxation scheme that subjected the pensions of Federal employees to income tax, but not the pensions of state or local government employees. At that time Tax Law § 612(c)(former [3]) required New York State and local retirees to subtract from their Federal adjusted gross income any part of that income that represented their State or local pension. The statute was amended to conform with the Davis decision by providing that beginning with tax year 1989 the exemption from income tax for State and local pension income would be extended to include Federal pension income (L 1989, ch 664, effective July 21, 1989). The relief provided by this statutory change was prospective only.

C. Subsequently, the United States Supreme Court addressed the issue of the retroactivity of Davis in Harper v. Virginia Dept. of Taxation (509 US 86, 125 L Ed 2d 74). The Court held that Davis applied retroactively, but instead of granting a refund, sent the case back to the state

courts to determine if state law provided an adequate remedy that complied with the due process requirements of the constitution. (Id., 125 L Ed 2d at 89, citing, McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 US 18, 110 L Ed 2d 17.)

D. In New York State, judicial intervention was sought by Federal retirees in Duffy v. Wetzler (148 Misc 2d 459, 555 NYS2d 543, affd as mod, 174 AD2d 253, 579 NYS2d 684, appeal dismissed 79 NY2d 976, 583 NYS2d 190, appeal dismissed 80 NY2d 890, 587 NYS2d 900, revd 509 US 917, 125 L Ed 2d 716). In this case, the Appellate Division, Second Department, agreed with the Division that granting refunds for prior years to Federal pensioners was not required because Davis should not be applied retroactively (Duffy v. Wetzler, 174 AD2d 253, 579 NYS2d 684, supra). The United States Supreme Court reversed and remanded the matter to the Appellate Division, Second Department, to reconsider in light of its decision in Harper (Duffy v. Wetzler, 509 US 917, 125 L Ed 2d 716, supra).

On remand the Appellate Division, Second Department, set forth the Division's position on allowing refunds for tax years prior to 1989 as follows:

> "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 [and]. . . Harper. . . and who have filed timely administrative claims for refunds for those taxes with the Department of Taxation and Finance', and notified this court of that decision in a letter dated June 29, 1994.
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> "Accordingly, the issues affected by the remittitur by the United States Supreme Court for further consideration in light of Harper, i.e., those relating to the remedy and the potential refunds, are academic." (Duffy v. Wetzler, 207 AD2d 375, 616 NYS2d 48, 50; emphasis added).

E. The United States Supreme Court continued to rely on McKesson in interpreting whether a given state remedy met due process requirements (see, Reich v. Collins, 513 US 106, 130 L Ed 2d 454). The basic requirements for a constitutional state remedy as set forth by the McKesson court are best summarized as follows:

> "And in the future, States may avail themselves of a variety of procedural protections against any disruptive effects of a tax scheme's invalidation, such as providing by statute that refunds will be available

> to only those taxpayers paying under protest, or enforcing relatively short statutes of limitation applicable to refund actions. Such procedural measures would sufficiently protect States' fiscal security when weighed against their obligation to provide meaningful relief for their unconstitutional taxation." (McKesson v. Division of Alcoholic Beverages and Tobacco, supra, 496 US 18, 110 L Ed 2d at 44; emphasis added.)

F. Based on the foregoing, petitioners' argument that the statute of limitations does not apply is rejected. In fact, the remedy that was available to petitioners in this case was to apply for a refund within three years from when the returns were filed, or within two years from when the tax was paid, whichever was later, pursuant to Tax Law § 687. This remedy meets the Federal requirements of Due Process as set forth in Davis and the line of cases interpreting the relief required under Davis. (See, Matter of Burkhardt, Tax Appeals Tribunal, January 9, 1997; Matter of Jones, Tax Appeals Tribunal, January 9, 1997; Matter of Silverman, Tax Appeals Tribunal, January 9, 1997.)

G. Petitioners did not avail themselves of this remedy. Rather, petitioners' refund claim, filed on December 7, 1994, clearly falls more than three years after the latest filing date for petitioners' tax returns for each of the three years at issue, and thus was not timely filed for any of such years. The Tax Appeals Tribunal has consistently held, in every case brought before it to date by Federal retirees, that refunds cannot be granted unless a timely claim has been filed (see, Matter of Epstein, Tax Appeals Tribunal, March 27, 1997; Matter of Hicks, Tax Appeals Tribunal, March 20, 1997). In turn, petitioners have advanced no additional arguments herein warranting the relief sought (see, e.g., Matter of Walter, Tax Appeals Tribunal, March 15, 1997). Accordingly, there being no material facts at issue, and the Division being entitled to summary determination on the law, petitioners' claim for refund of personal income tax for the years 1987, 1988 and 1989 is barred and was properly denied as untimely filed pursuant to Tax Law § 687.

H. The Division's Motion for Summary Determination is granted, the petition of William L., Jr., and Cathleen J. Reese is denied, and the Division's Notice of Disallowance of petitioners' refund claim for the years 1987, 1988 and 1989 is sustained.

DATED: Troy, New York
Jun 26, 2997

Dennis Galliher
ADMINISTRATIVE LAW JUDGE