STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DONALD WEEDEN	:	DETERMINATION DTA NO. 816209
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1987 and 1988.	:	

Petitioner, Donald Weeden, 359 West Sand Lake Road, Wynantskill, New York 12198, 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 and 1988.

The Division of Taxation appearing by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel), brought a motion dated April 24, 1998 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, petitioner had until May 26, 1998 to respond to the motion, which date commenced the 90-day period for issuance of this determination. Petitioner, appearing *pro se,* did not respond to the motion. Upon review of all papers filed in connection with this motion, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. In August 1994, petitioner, Donald Weeden, filed amended New York State personal income tax returns for the years 1987 and 1988 claiming refunds of taxes paid on Federal pension income. On November 8, 1996, the Division of Taxation ("Division") issued a Notice of Disallowance to petitioner denying his claims for refund on the basis that such claims had not been filed within three years of the filing of petitioner's tax returns for the years at issue.

2. Petitioner challenged the Division's Notice of Disallowance by requesting a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS"). BCMS issued a Conciliation Order (CMS No. 159836) dated October 17, 1997 denying petitioner's request and sustaining the Notice of Disallowance.

3. On November 18, 1997, petitioner filed a petition which challenged the Division's denial of his refund claims for the years 1987 and 1988. In his petition, petitioner states that he had paid New York State income tax on his U.S. Air Force pension. He asserts that he tried unsuccessfully to get information from the Division concerning what and how to file, as well as the years for which he could file claims for refund of income taxes paid on his Federal pension. Petitioner contends that he made inquiries and was told that once the New York State Income Tax office knew what to do, it would send him the necessary information. He argues that he never received the information and did not receive any help from the Division even though he made numerous telephone calls. He states that after one call, he did receive a form which he filled out and returned to the Division.[1] Petitioner contends that even though he tried to do everything correctly with the sparse information given to him by the State, he received a

[1]A copy of this form is not part of the record.

refund for the 1986 tax year only. He asserts that he cooperated with the Division and, when asked, supplied the Division with copies of his tax returns for the years 1977 through 1993. Lastly, petitioner argues that he should not be penalized because the Division erroneously required him to pay income tax on his Federal pension.

Attached to the petition are: 1) the October 17, 1997 Conciliation Order which denied petitioner's request and sustained the Notice of Disallowance and the October 17, 1997 cover letter from Thomas E. Drake, BCMS conciliation conferee, which accompanied the Conciliation Order; 2) a September 19, 1997 letter from Mr. Drake explaining why he must sustain the Notice of Disallowance; 3) a December 16, 1996 letter from Steven U. Teitelbaum, Deputy Commissioner and Counsel of Taxation and Finance, responding to petitioner's letter to Governor Pataki regarding the refund of previously taxed Federal pension income; and 4) the November 8, 1996 Notice of Disallowance for tax years 1987 and 1988.

4. The Division served an answer to the petition on January 22, 1998. The Division denied the allegations contained in the petition and affirmatively stated that Donald Weeden was a Federal employee who paid tax on his Federal pension income for the years at issue, that petitioner's 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. The Division's motion for summary determination is supported by the affirmation of Herbert M. Friedman, Jr., sworn to April 24, 1998, and the affidavit of Charles Bellamy, sworn to April 24, 1998.

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. Mr. Bellamy, in his affidavit, attests that petitioner: 1) timely filed his 1987 and 1988 personal income tax returns (i.e., filed his returns for such years on or before April 15, 1988 and 1989, respectively); 2) filed a claim for refund for taxes paid on Federal pension income for the years 1987 and 1988 in August 1994; and 3) failed to file any claims for refund or amended returns for the years 1987 and 1988 at any time prior to August 1994.

Mr. Friedman, in his affirmation, asserts that since petitioner did not file refund claims or amended returns for his 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 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.

6. Petitioner did not respond to the Division's motion for summary determination.

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, petitioner has raised no challenge to the facts alleged by the Division, including the central fact that petitioner did not file timely claims for refund for the years in 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). Therefore, with no material facts at issue, the question becomes whether the Division is entitled to summary determination on the law, to wit, whether petitioner's claims for refund for the years 1987 and 1988 were properly denied as untimely pursuant to Tax Law § 687.

B. As noted, the central fact set forth in the affidavit of Charles Bellamy, and deemed admitted by petitioner, is that petitioner did not file timely claims for refund for the years 1987 and 1988. On March 28, 1989, the United States Supreme Court issued a decision in the case of ***Davis v. 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]). 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*** 513 US 1103, 130 L Ed 2d 673).

C. 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*** (509 US 86, 125 L Ed 2d 74). 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).

D. Following the Supreme Court decision in ***Harper v. Virginia Dept. of Taxation*** (***supra***), the State of New York, in June 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 determined to be unconstitutional in ***Davis v. Michigan Dept. of Treasury*** (***supra***), and who had filed timely administrative claims for refunds of those taxes with the Department of Taxation and Finance (***Duffy v. Wetzler***, 207 AD2d 375, 616 NYS2d 48, ***supra***). 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.

E. Tax Law § 687(a) controls refunds of overpayments of income tax in New York and provides, in pertinent part, as follows:

> 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.

F. Petitioner does not dispute that his refund claims for the years at issue were not filed until August 1994. Rather, he asserts that his petition should not be denied based on a technicality. He argues that he was unaware of any time limitations for filing refund claims. He also contends that the Division failed to supply information to him in a timely manner. The issue is thus whether the Tax Law § 687 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 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 Foundation, 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***. (***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.) Accordingly, petitioner's contention that the relevant limitations period should not be applied is rejected.

G. Petitioner did not file any refund claims for the years at issue within the three-year limitations period. Rather, his refund claims for tax years 1987 and 1988 were filed in August 1994, after the statute of limitations for the years in issue had expired. 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 Hinds***, Tax Appeals Tribunal, February 13, 1997). Furthermore, petitioner's contention that the Division should have notified him that he was entitled to a refund of taxes paid on Federal pension income reported on his returns is without merit. The Division does not have an affirmative obligation to help taxpayers preserve their claims by notifying them of due dates for the filing of pertinent forms (***see***, ***Matter of Klauber***, Tax Appeals Tribunal, April 16, 1998; ***Matter of Banco***, Tax Appeals Tribunal, April 17, 1997; ***Matter of Jones***, ***supra***). It was petitioner's responsibility to ascertain from the Division how to go about filing a refund claim. It is noted that petitioner did file a timely claim for refund for the year 1986. At that time, petitioner could have filed refund claims for 1987 and 1988. He failed to do so. Moreover, petitioner provided no evidence that he was misled by any Division employees. There are no material facts at issue and the Division is entitled to summary determination on the law. Petitioner's claims for refund of personal income tax for the years 1987 and 1988 are barred and were properly denied as untimely filed pursuant to Tax Law § 687.

H. The Division's Motion for Summary Determination is granted, the petition of Donald Weeden is denied, and the Division's Notice of Disallowance of petitioner's refund claims for the years 1987 and 1988 is sustained.

DATED: Troy, New York
July 23, 1998

/s/ *Winifred M. Maloney*
ADMINISTRATIVE LAW JUDGE