STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JAMES V. BATTAGLIA	:	DETERMINATION DTA NO. 817477
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1986, 1987 and 1988.	:	

Petitioner, James V. Battaglia, 171 East 89th Street, Apt. 11A, New York, New York 10128, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 1986, 1987 and 1988.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on September 27, 2000 at 11:55 A.M., with all briefs to be submitted by January 5, 2001, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by Donald Rosenkrantz, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Herbert M. Friedman, Esq., and Peter B. Ostwald, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly denied petitioner's claim for refund of tax paid on Federal pension income for the years 1986, 1987 and 1988 on the basis that petitioner failed to file timely refund claims for any of such years.

II. Whether the Division should be estopped from asserting the statute of limitations as an affirmative defense to petitioner's claim for refund.

FINDINGS OF FACT

1. Petitioner, James V. Battaglia, filed timely New York State personal income tax returns for each of the years 1986, 1987 and 1988. On each of such returns, petitioner reported and paid tax on Federal pension income.

2. On or about April 10, 1989, petitioner filed Form IT-201-X (New York State Amended Resident Income Tax Return) for the year 1985. By this filing, petitioner sought a refund in the amount of $739.00, representing the tax paid on his Federal pension income for the year 1985, plus interest. This filing was made as the result of petitioner's becoming aware, earlier in 1989, of a pending challenge by a Michigan taxpayer concerning state taxation of Federal pension income. It is undisputed that petitioner did not, at this same time, file amended returns or refund claims for 1986, 1987 or 1988.

3. On or about May 1, 1989, petitioner telephoned the Division of Taxation ("Division") regarding the status of his amended return for 1985. Petitioner was advised that the issue regarding the taxability of Federal pension income remained undecided. Petitioner's handwritten notes concerning this telephone call reflect the following:

> Legal Dept. will decide in another 30 days, & if favorable, will simply announce a change in position (no legislation required). [off-the-record: "more likely they'll exempt Fed pensions than tax state pensions so *no need to file amended returns for 86 on until they decide* . . . they won't acknowledge your 85 201X until they decide on above policy. Around mid-July before amended returns can be acted upon (emphasis as in original).

In a second telephone call made either the same day or the day after, petitioner's handwritten notes reflect the following advice given by a different Division employee:

> No refunds will be made for years prior to '89; but as of 1/89 no more taxes due. Decision was made recently, but amended returns just began to be processed.[1]

4. By a letter dated March 2, 1990, the Division disallowed petitioner's refund claim for 1985. This letter, which specifically referenced the year 1985 and the refund amount of $739.00, explained the Division's then-current position to be that Federal pension benefits received in years beginning on or after January 1, 1989 would not be subject to tax, but that refunds would not be granted with respect to taxes paid on such benefits for years prior to 1989. Petitioner was further advised that if he did not accept the findings, he could file a petition with the Division of Tax Appeals or request a conciliation conference with the Bureau of Conciliation and Mediation Services. The letter also provided that if then-pending court action changed this decision, petitioner's claim would be automatically reconsidered.

5. By a letter dated December 27, 1991, the Division further advised petitioner, with respect to his pending refund claim for 1985, that the Division's previous letter was based on anticipation of a speedier judicial resolution of the controversy than had occurred. The Division's letter, which referenced audit case number X-184648180, further provided as follows:

> [s]ince it now appears that a final court resolution from which no appeal is taken will certainly require far more than two years from the date of our last letter, this is to let you know that a petition for a hearing regarding your entitlement to a refund *upon a timely and validly interposed claim will not be necessary*.

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[1] Petitioner also stated in testimony that he was advised the filing of refund claims for years other than 1985 "could hurt his chances" or "jeopardize his rights" to obtaining refunds. Petitioner's notes of his telephone calls to the Division do not reflect this claim or information (***see*** Finding of Fact "3"), nor do any of the letters issued to petitioner by the Division.

> In the interest of a uniform, just resolution of the issue, this letter constitutes the Department's assurance that when there is a final judicial determination regarding the rights of taxpayers to refunds of taxes paid on Federal pension benefits received prior to 1989, your refund *claim* will be automatically reconsidered without the necessity of further application on your part. You will not be required to petition for administrative adjudication unless you disagree with our determination on such reconsideration (emphasis supplied).

6. The record is clear that as of the dates of the foregoing letters, the only pending refund claim filed by petitioner was his claim for the year 1985.

7. By a letter dated August 23, 1993, again referencing audit case number X-184648180, the Division advised petitioner that there was some misunderstanding regarding the impact of the U.S. Supreme Court's decision in ***Harper v. Virginia Department of Revenue*** as it pertained to Federal retirees who had pending refund claims. The letter explained that, based upon its decision in ***Harper***, the Supreme Court referred the New York case of ***Duffy v. Wetzler*** to the Appellate Division of the State of New York for further review. According to the Division, there were outstanding issues which rendered the status of refund claims of New York's Federal retirees uncertain and that action on refund claims could not proceed until the Appellate Division rendered a decision. The letter further stated that:

> [w]hen the judicial process surrounding the ***Duffy*** case is complete, we will have a final legal decision concerning the entitlement of federal retirees, *who made timely claims*, to tax refunds. If New York State is directed to pay such refunds, they will be paid, with interest, as promptly as possible. After a judicial decision is issued, we well be in contact with you as soon as possible (emphasis supplied).

8. By a letter dated June 28, 1994, again referencing audit case number X-184648180, petitioner was advised that the Division had decided to approve refunds claimed on taxes paid on Federal pension income rather than await a judicial resolution of the issue. The letter further stated that if there was more than one refund claim, that is, for more than one tax year, a separate

check would be issued for each year "*for which a timely claim was submitted*" (emphasis supplied).

9. On or about September 13, 1994, petitioner received a refund check for the year 1985, including tax plus the interest due thereon.

10. On or about December 26, 1996, petitioner filed a separate Claim for Credit or Refund of Personal Income Tax (Form IT-113-X) for each of the years 1986, 1987 and 1988, seeking a refund for each of such years in the respective amounts of $682.00, $696.00 and $717.00, plus interest. Each form contained the identical statement in support of petitioner's claim, to wit, "I am (and was) entitled to a refund of all NYS & NYC taxes paid on my Federal pension due to (1) Davis vs. Mich. and (2) Duffy vs. Wetzler and (3) Harper vs. Virginia; also under the N.Y.S. constitution."

11. By a letter dated February 5, 1997, the Division notified petitioner that his refund claims for the years 1986, 1987 and 1988 were disallowed in full. The stated basis for the disallowance was that either no tax was paid on the Federal pension income or the claims were not timely filed.

12. Petitioner challenged the disallowance of his refund claims by filing a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services. A conference was held on December 10, 1998 and, by a subsequent Conciliation Order (CMS No. 164004) dated October 8, 1999, the request was denied and the Notice of Disallowance was sustained.

13. Petitioner continued his challenge to the disallowance by filing a petition which claimed the Division "violated a 1939 U.S. Supreme Court ruling requiring states to tax Federal

pensions no more harshly than state/local pensions."[2] Petitioner also reiterated his position that he had been told that he only needed to file a refund claim for 1985 and that subsequent years would be "automatically reconsidered without . . . further application."

14. The Division filed an answer to the petition, asserting that petitioner's claims for refund for the years 1986, 1987 and 1988 had not been filed within three years of the filing of the tax returns for such years and that therefore the refund claims were properly denied as untimely.

CONCLUSIONS OF LAW

A. In ***Davis v. Michigan Dept. of Treasury*** (489 US 803, 103 L Ed 2d 891), the United States Supreme Court held that a tax scheme that exempts from tax retirement benefits paid by the state but not retirement benefits paid by the Federal government is unconstitutionally discriminatory. In ***Harper v. Virginia Dept. of Taxation*** (509 US 86, 125 L Ed 2d 74), the U.S. Supreme Court further held that the ruling in ***Davis*** applied retroactively and that states which violated the tax immunity doctrine must provide "meaningful backward-looking relief to rectify any unconstitutional deprivation" (***id.*** at 101, 125 L Ed 2d at 89, quoting, ***McKesson Corp. v. Division of Alcoholic Beverages & Tobacco***, 496 US 18, 31, 110 L Ed 2d 17, 32). A state may provide such relief by awarding refunds to those illegally taxed or provide some other relief that "create[s] in hindsight a nondiscriminatory scheme" (***McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, supra*** at 40, 110 L Ed 2d at 38).

Soon after the ***Davis*** decision, on July 21, 1989, the Legislature amended Tax Law § 612(c)(3) to place pensions paid to Federal retirees in the same position as pensions paid to State and local retirees. The Legislature declared that the amendment was to take effect "immediately and shall apply to federal pension benefits received in taxable years beginning on

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[2] It was later made clear that petitioner was referring to the Public Salary Tax Act of 1939 (4 USC § 111).

or after January 1, 1989" (L 1989, ch 664, §§ 1-3). Thus, in response to the ***Davis*** and ***Harper*** decisions, the State amended the statute to conform to the rulings.

C. Tax Law § 687 provides, in pertinent part, that:

> (a) General. -- 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 . . . .
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> * * *
>
> (e) Failure to file claim within prescribed period. -- No credit or refund shall be allowed or made . . . after the expiration of the applicable period of limitation specified in this article, unless a claim for credit or refund is filed by the taxpayer within such period. Any later credit shall be void and any later refund erroneous. No period of limitations specified in any other law shall apply to the recovery by a taxpayer of moneys paid in respect of taxes under this article.

D. The scheme presented by the State satisfies the Due Process Clause of the 14th Amendment by providing "meaningful backward-looking relief to rectify any unconstitutional deprivation" (***McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, supra*** at 31, 110 L Ed 2d at 32). Tax Law § 687(a) adequately meets the requirements set out in ***McKesson*** which provides that a state "might provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint. . . ." (***McKesson v. Division of Alcoholic Beverages & Tobacco, supra***, at 45, 110 L Ed 2d at 41.) These procedural requirements address both the State's obligation to refund the unconstitutionally collected funds while at the same time satisfying the State's need for sound fiscal planning (***see***, ***Matter of Burkhardt***, Tax Appeals Tribunal, January 9, 1997).

E. Here, petitioner has not disputed the Division's assertion that he did not file the claims for refund in issue within three years of the filing of the respective tax returns or within two years of paying the tax. Therefore, the claims for refund for the years 1986, 1987, and 1988 are

untimely, and were properly disallowed by the Division. However, petitioner maintains that the Division should be estopped from raising the statute of limitations as a basis for denying the claims for refund, arguing that the content of the letters issued by the Division to petitioner and the alleged misstatements by employees of the Division caused petitioner's failure to file timely claims for refund of personal income tax.

F. Generally, the doctrine of estoppel does not apply to government acts unless there are exceptional facts which require the application of the doctrine in order to avoid a manifest injustice (***Matter of Harry's Exxon Service Station***, Tax Appeals Tribunal, December 6, 1988). When a taxing authority is involved, this rule is considered particularly applicable because public policy supports enforcement of the Tax Law (***Matter of Glover Bottled Gas Corp.***, Tax Appeals Tribunal, September 27, 1990).

As a general rule, estoppel is unavailable to prevent the government's correction of a mistake of law (***see, e.g., Southern Hardwood Traffic Assoc. v. United States***, 283 F Supp 1013 [WD Tenn 1968], ***affd*** 411 F2d 563 [6th Cir 1969]). This principle is premised on the recognition that a ruling to the contrary may result in the subordination of legislative power to the conduct of a wayward or unknowledgeable governmental official (***see, Schuster v. Commr.***, 312 F2d 311 [9th Cir 1962]). In order to determine whether there should be an estoppel, the Tax Appeals Tribunal has utilized a test which asks if there was a right to rely on the representation, whether there was such reliance and whether the reliance was to the detriment of the party who relied upon the representation (***see, Matter of Harry's Exxon Service Station***, ***supra***).

G. ***Matter of Glover Bottled Gas Corp***. **(*supra.)*** presented a similar issue to that involved here. In ***Glover***, the petitioners maintained that an employee of the Division had

erroneously advised them over the telephone what the last permissible date would be for filing a claim for refund. When petitioners filed a claim for refund by said date, they learned that their claim was untimely. Under these circumstances, the Tax Appeals Tribunal concluded that the Division was not estopped from asserting that the applications were untimely. The Tribunal explained that it was unreasonable for the petitioners to have relied on the purported advice since the advice was communicated over the telephone and since it contradicted the clear language of Tax Law § 1139(a)(ii).

H. Petitioner admits, with respect to the Division's letters in this case, that there is no unequivocal written message from the Division advising taxpayers (including specifically petitioner) not to file amended returns or refund claims. Rather, he asserts such message is implied in the correspondence. Petitioner's interpretation of the correspondence in this manner is simply not borne out upon review of such correspondence (***see*** Findings of Fact "3", "4", "6", "7"), and is rejected. Furthermore, and as in ***Glover***, petitioner received the purported advice not to file over the telephone. This advice is in direct contradiction to the explicit language of Tax Law § 687(a). The statute of limitations set forth in such section is clear and unequivocal. Accordingly, on the basis of ***Glover*** it is concluded that it was unreasonable for petitioner to have relied on the advice that he did not have to file refund claims for the years 1986 through 1988, and the Division is not estopped from asserting that the statute of limitations bars the claims for the years in issue (***see, Matter of Walsh v. Tax Appeals Tribunal***, 196 AD2d 367, 609 NYS2d 405 [where the Court noted that erroneous advice given by a governmental employee does not constitute an unusual circumstance which warrants an estoppel]; ***Brault v. Tax Appeals Tribunal*** , 265 AD2d 700, 696 NYS2d 579; ***Matter of Walter***, Tax Appeals Tribunal, May 15, 1997 [where the Tax Appeals Tribunal concluded that there was no basis to

invoke the doctrine of estoppel against the Division because the petitioners had failed to demonstrate that they were explicitly advised by a Division employee that a claim for the tax year 1985 would be considered a claim for tax years 1985 through 1988]). Petitioner, in abandoning the clear statutory requirements regarding refund claims, might have at least obtained confirmation from the Division by submitting a letter setting forth all facts and asking the Division for written confirmation following his telephone calls. In this way, petitioner would establish that he accurately relayed all pertinent facts and, in turn, establish exactly what advice was provided by the Division. Here, petitioner's own notes list the Division's employee's advice as "off the record," a circumstance not ordinarily inspiring the greatest level of confidence in embarking on a particular course of action (or here inaction). Finally, while petitioner claims he was advised that filing claims for years other than 1985 could jeopardize his right or hurt his chances of obtaining a refund, such advice is not reflected in petitioner's notes of his conversations with the Division's employees. Moreover, the Tribunal has rejected this type of claim as a basis for allowing the refund (***see, Matter of Walter, supra.***).

I. In addition to his estoppel argument, petitioner claims that his telephone inquiries represent timely oral claims for refund which should be recognized by the Division. In essence, petitioner maintains that his telephone conversations represent timely oral refund claims later perfected by the filing of the written claims on the forms IT-113-X. This assertion is rejected. The Tribunal has held that, as a threshold requirement, refund claims must be made in a timely written document which adequately apprises the taxing authority that a refund is sought and of the period in question, and that oral claims do not suffice to toll the statutory period of limitations for filing (***Matter of Rand***, Tax Appeals Tribunal, May 10, 1990; ***Matter of 43rd***

Street Development, Tax Appeals Tribunal, June 15, 1995). Accordingly, petitioner's claim that a timely oral request for refund suffices is rejected as a matter of law.

J. Lastly, petitioner asserts that the special refund authority of Tax Law § 697(d) should be invoked, in light of the Public Salary Tax Act of 1939 (4 USC § 111), so as to conclude that the tax in issue was illegally collected and grant petitioner's claims for refund. Tax Law § 697(d) provides:

> Special refund authority. -- Where no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts, pursuant to the provisions of this article, the tax commission at any time, without regard to any period of limitations, shall have the power, upon making a record of its reasons therefor in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certificate to the comptroller.

While the refund authority granted by Tax Law § 697(d) is discretionary, it must be shown that the moneys at issue have been erroneously or illegally collected or paid by the taxpayer under a mistake of facts (***Matter of Fiduciary Trust Co. v. State Tax Commn.***, 120 AD2d 848, 502 NYS2d 119). The decision of the Tax Appeals Tribunal in ***Matter of Mackey*** (Tax Appeals Tribunal, March 23, 1989) succinctly outlines the relevant standard.

> A mistake of fact has been defined as an understanding of the facts in a manner different than they actually are (54 Am Jur 2d Mistake, Accident or Surprise §4; ***Wendell Foundation v. Moredall Realty Corp.,*** 176 Misc 1006, 1009). A mistake of law, on the other hand, has been defined as acquaintance with the existence or nonexistence of facts, but ignorance of the legal consequences following from the facts (54 Am Jur 2d Mistake, Accident or Surprise §8; ***Wendell Foundation v. Moredall Realty Corp., supra***).

K. In the present case, no monies were paid by petitioner under a mistake of fact. Petitioner properly paid New York State personal income tax on Federal pension benefits received in the years 1985 through 1988. The issue of whether New York State could provide its

pensioners with a tax exclusion without providing the same exclusion to Federal pensioners, in general as well as in light of the Public Salary Tax Act of 1939, was a question of law which was resolved by the March 28, 1989 decision of the Supreme Court in ***Davis v. Michigan Dept. of Treasury*** (***supra***). Whether the holding in ***Davis*** must be applied retroactively to tax years before the decision was issued is also a legal question, and it was finally resolved in the case of ***Harper v. Virginia Dept. of Taxation*** (***supra***). Although the erroneous or illegal collection of moneys is sufficient to invoke the special refund authority, there has been no showing that money was collected from petitioner illegally or erroneously in this case. Petitioner paid income tax on his Federal pension income as was required by law at the time when his individual income tax returns were filed for the years in question. Although the statute has been rendered unconstitutional, this does not alter the fact that at the time of payment by petitioner, the payments were made pursuant to law (***Matter of Morgan***, Tax Appeals Tribunal, August 20, 1998). Petitioner, at all times, had the right and opportunity for meaningful backward looking relief to challenge the payment of tax on his Federal pension income in the form of the specific statutory right to file a claim for refund for the years in issue. He simply did not do so within the requisite time period, and his claims were properly disallowed on that basis as untimely.

L. The petition of James V. Battaglia is hereby denied and the Division's February 5, 1997 disallowance of petitioner's claims for refund is sustained.

DATED: Troy, New York
May 10, 2001

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE