

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LAWRENCE L. BARRELL	:	DETERMINATION
		DTA NO. 821571
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 1994 through 2005.	:	

Petitioner, Lawrence L. Barrell, 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 1994 through 2005.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (Margaret T. Neri, Esq., of counsel), filed a motion for an order pursuant to 20 NYCRR 3000.5 and 3000.9(b) granting summary determination to the Division of Taxation on the ground that there exist no material issues of fact and that the Division of Taxation's motion must be granted as a matter of law. The Division of Taxation submitted the affidavit of Mary Walsh, dated August 16, 2007, and the affirmation of Margaret T. Neri, Esq., dated August 28, 2007, with annexed exhibits in support of its motion. On October 5, 2007, petitioner, appearing pro se, filed a letter and documents in opposition to the motion of the Division of Taxation, beginning the 90-day period for issuance of this determination. After due consideration of the pleadings, documents and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether summary determination should be granted in favor of the Division of Taxation because there are no facts in dispute, and as a matter of law, the facts mandate a determination in favor of the Division of Taxation.

FINDINGS OF FACT

1. Petitioner, Lawrence L. Barrell, is a retired State of Connecticut civil servant who receives a pension because of his service in the Connecticut Technical College system. Since he retired, petitioner has reported his State of Connecticut pension income on each year's federal income tax return as taxable income. Sometime after his 1992 retirement, petitioner, a widower, returned to New York State to live with one of his children. Petitioner attained the age of 59 ½ prior to the years at issue.

2. In the year 1994, petitioner received \$29,105.00 in pension income from the State of Connecticut. Petitioner timely filed his New York State resident income tax return for the year 1994 on or before April 15, 1995. On this return, petitioner reported New York adjusted gross income of \$13,830.00, and computed and paid New York State personal income tax due in the amount of \$13.00.

3. Petitioner received pension income for the year 1995 in the amount of \$29,979.00 from the State of Connecticut. He timely filed his New York State resident income tax return for the year 1995 on or before April 15, 1996. After claiming the full amount of the pension income received from the State of Connecticut as a pension income exclusion on line 27 and other New York subtractions of \$1,513.00 on line 28 of this return, petitioner reported New York adjusted gross income of \$6,188.00, and computed no tax due. The Division of Taxation (Division) issued a Statement of Proposed Audit Changes for the year 1995 on December 17, 1998 that only

allowed a \$20,000.00 pension income exclusion and disallowed the other New York subtractions. The statement asserted tax due in the amount of \$559.00 plus interest for the year 1995. Petitioner paid the tax due on December 18, 1998.

4. In the year 1996, petitioner received pension income in the amount of \$38,024.00 from the State of Connecticut. Petitioner timely filed his New York State resident income tax return for the year 1996 on or before April 15, 1997. After claiming the full amount of the pension income received from the State of Connecticut as a pension income exclusion on line 27 and other New York subtractions of \$1,513.00 on line 28 of this return, petitioner reported New York adjusted gross income of \$6,910.00, and computed no tax due. The Division issued a Statement of Proposed Audit Changes for the year 1996 on August 16, 1999 that only allowed a \$20,000.00 pension income exclusion and disallowed the other New York subtractions. The statement asserted tax due in the amount of \$1,094.00 plus interest for the year 1996. Petitioner paid \$1,297.63 on August 18, 1999.

5. During the year 1997, petitioner received \$33,620.00 in pension income from the State of Connecticut. Petitioner timely filed his New York State resident income tax return for the year 1997 on or before April 15, 1998. After claiming the full amount of the pension income received from the State of Connecticut as a New York State, local and federal government pension exclusion on line 24, and a pension and annuity exclusion of \$1,609.00 on line 27 of this return, petitioner reported New York adjusted gross income of \$6,849.00, and computed no tax due. The Division issued a Statement of Proposed Audit Changes for the year 1997 on September 21, 2000 that allowed a \$20,000.00 pension income exclusion. The statement asserted tax due in the amount of \$653.00 plus interest for the year 1997. Petitioner paid \$776.16 on October 2, 2000.

6. Petitioner received pension income for the year 1998 in the amount of \$34,628.00 from the State of Connecticut. Petitioner timely filed his New York State resident income tax return for the year 1998 on or before April 15, 1999. After claiming an exclusion for \$20,000.00 of his Connecticut pension income and a subtraction for \$14,828.00 in taxable Social Security benefits on this return, petitioner reported New York adjusted gross income of \$23,952.00, computed and paid New York State personal income tax due in the amount of \$765.00 for the year 1998.

7. In the year 1999, petitioner received \$35,667.00 in pension income from the State of Connecticut. Petitioner timely filed his New York State resident income tax return for the year 1999 on or before April 15, 2000. After claiming a subtraction for \$15,019.00 in taxable Social Security benefits on line 25 and an exclusion for \$20,000.00 of his Connecticut pension on line 27 of this return, petitioner reported New York adjusted gross income of \$25,153.00, and computed and paid New York State personal income tax due in the amount of \$836.00 for the year 1999. On December 3, 2001, the Division issued a Notice and Demand for Payment of Tax Due (Notice and Demand) to petitioner which imposed a penalty of \$35.10 pursuant to Tax Law § 685 (c). Petitioner paid the penalty asserted due in the Notice and Demand on or about December 13, 2001.

8. During the year 2000, petitioner received \$36,737.00 in pension income from the State of Connecticut. Petitioner timely filed his New York State resident income tax return for the year 2000 on or before April 14, 2001. After claiming a subtraction for \$15,377.00 in taxable Social Security benefits on line 25 and an exclusion for \$20,000.00 of his Connecticut pension on line 27 of this return, petitioner reported New York adjusted gross income of \$28,373.00, and computed and paid New York State personal income tax in the amount of \$1,033.00 for the year 2000.

9. In the year 2001, petitioner received \$37,839.00 in pension income from the State of Connecticut. Petitioner timely filed his New York State resident income tax return for the year 2001 on or before April 15, 2002. On this return, petitioner reported New York adjusted gross income of \$27,595.00, and computed and paid New York State personal income tax due in the amount of \$978.00.

10. During the year 2002, petitioner received \$38,975.00 in pension income from the State of Connecticut. Petitioner timely filed his New York State resident income tax return for the year 2002 on or before April 15, 2003. On this return, petitioner reported New York adjusted gross income of \$25,161.00, and computed and paid New York State personal income tax in the amount of \$836.00.

11. In the year 2003, petitioner received \$40,144.00 in pension income from the State of Connecticut. Petitioner timely filed his New York State resident income tax return for the year 2003 on or before April 15, 2004. After claiming a subtraction for \$16,581.00 in taxable Social Security benefits on line 26 and an exclusion for \$20,000.00 of his Connecticut pension on line 28 of this return, petitioner reported New York adjusted gross income of \$23,889.00, and computed and paid New York State personal income tax in the amount of \$759.00 for the year 2003.

12. Petitioner filed amended resident income tax returns for tax years 2001, 2002 and 2003 on March 31, 2005. On each of these amended returns, petitioner claimed that the full amount of his Connecticut pension was exempt from tax and requested a refund of tax paid on the pension income in excess of \$20,000.00. Specifically, petitioner requested refunds of tax paid in the amount of \$969.00 for the year 2001, \$836.00 for the year 2002 and \$759.00 for the year 2003.

13. On May 20, 2005, the Division, without auditing the basis of the amended returns, issued to petitioner income tax refunds in the amount of \$905.47 for the year 2002 and \$786.69 for the year 2003. On August 5, 2005, the Division, without auditing the basis of the amended return, issued to petitioner an income tax refund in the amount of \$1,131.58 for the year 2001.

14. For the year 2004, petitioner received \$41,348.00 in pension income from the State of Connecticut. Petitioner timely filed his New York State resident income tax return for the year 2004 on or before April 15, 2005. After claiming an exclusion for the full amount of the pension income received from the State of Connecticut as a New York State, local and federal government pension on line 25 and a subtraction for \$16,927.00 in taxable Social Security benefits on line 26 of this return, petitioner reported New York adjusted gross income of \$5,456.00, and computed no tax due.

15. For the year 2005, petitioner received \$40,518.00 in pension income from the State of Connecticut. Petitioner timely filed his New York State resident income tax return for the year 2005 on or before April 15, 2006. After claiming an exclusion for the full amount of the pension income received from the State of Connecticut as a New York State, local and federal government pension on line 16, a subtraction for \$17,383.00 in taxable Social Security benefits on line 17 and a pension and annuity income exclusion in the amount of \$2,282.00 on line 18 of this return, petitioner reported New York adjusted gross income of \$8,795.00, and computed and paid New York State personal income tax in the amount of \$37.00.

16. On March 13, 2006, petitioner filed amended resident income tax returns for the years 1994 through 2000. On each of these amended returns, petitioner claimed that the full amount of his Connecticut pension was exempt from tax and requested a refund of tax paid on the pension income in excess of \$20,000.00. Specifically, petitioner requested refunds in the amount of

\$13.00 for the year 1994, \$559.00 for the year 1995, \$1,094.00 for the year 1996, and \$653.00 for the year 1997. Petitioner also requested refunds of unspecified amounts of tax paid on his Connecticut pension income in excess of \$20,000.00 on his amended returns filed for years 1998, 1999 and 2000.

17. Sometime in September 2006, the Division commenced an audit of petitioner's amended income tax returns for the years 1994 through 2003 and the New York State personal income tax returns that he filed for tax years 2004 and 2005. During its audit, the Division sent a letter dated September 25, 2006 to petitioner advising him that a pension from the State of Connecticut does not qualify as a fully excluded New York State and local government or federal government pension. This letter also explained what was meant by the wording in the Division's instructions for the 2005 New York State income tax returns with respect to the subtraction for pensions of New York State and local governments and the federal government: "the United States, its territories, possessions (or political subdivisions thereof)." This letter further stated that notices of deficiency would be forthcoming for tax years 2003, 2004 and 2005. With respect to the amended returns filed by petitioner for tax years 1994 through 2000, this letter stated that it was the Division's position that he was not entitled to the subtraction claimed for the full amount of his Connecticut pension income, and in addition, the refund claims were filed beyond the applicable statute of limitations for refund.

18. By letter dated October 16, 2006, the Division advised petitioner that his request to fully exclude his State of Connecticut pension and annuity income from income for the years 1994 through 2005 was denied because his State of Connecticut pension and annuity income was not a New York State and local government or federal pension. This letter further advised petitioner that the refunds requested on his New York State amended income tax returns for tax

years 1994 through 2000, additionally, were disallowed because the claims for refund were filed after the three-year statute of limitations for refund had expired. With respect to tax years 2001, 2002 and 2003, this letter advised petitioner that the refunds previously given to him should have been denied. The letter further stated that assessments would not be issued for tax years 2001 and 2002 because the three-year statute of limitations to conduct an audit of the amended New York State income tax returns filed for these years had expired. However, the Division, in this letter, informed petitioner that an assessment would be issued to disallow the refund claimed on petitioner's New York State amended income tax return for 2003 and to recover the refund (overpayment) previously issued for that year. In this letter, the Division also advised petitioner that audit adjustments for tax years 2004 and 2005, disallowing the full amount of petitioner's Connecticut pension and annuity income and allowing a pension and annuity income exclusion of \$20,000.00, would result in the issuance of notices of deficiency.

19. On February 5, 2007, the Division issued a Notice of Deficiency (Notice No. L-028180241-6) asserting personal income taxes due in the amount of \$786.69, i.e., the amount of the disallowed overpayment, plus interest of \$120.96, for the year 2003. The computation section of the notice contains the following explanation of the assessment:

This assessment is based on your 2003 amended return, file number 22146103.

A recomputation of your return results in a balance due.

Your pension from THE STATE OF CONNECTICUT does not qualify for the total exemption as a New York State, local or municipal pension.

However, you have been allowed the appropriate pension and annuity income exclusion of up to \$20,000.00.

You have been allowed credit for the payment of \$759.00 dated 04/15/04.

Interest is due for late payment or underpayment at the applicable rate. Interest is required under New York State Tax Law.

20. On February 8, 2007, the Division issued a Statement of Proposed Audit Changes asserting tax due in the amount of \$933.00 plus interest for the year 2004. On the same date, the Division issued a Statement of Proposed Audit Changes asserting additional tax due in the amount of \$1,047.00 plus interest for the year 2005. The computation section of each of these statements indicates that the following adjustments were made to petitioner's New York State resident income tax return: the disallowance of petitioner's claimed total exemption of his State of Connecticut pension as a New York State, local government or federal pension and the allowance of a \$20,000.00 pension income exclusion. On February 17, 2007, petitioner made payments of tax in the amount of \$933.00 and \$1,124.75 for years 2004 and 2005, respectively.

21. On February 17, 2007, petitioner filed a petition challenging the denial of his claims for refund for tax years 1994 through 2003, the notice of deficiency issued for tax year 2003 and the statements of proposed audit changes issued for tax years 2004 and 2005. In this petition, petitioner asserts that the pension income he received from the State of Connecticut is fully exempt from New York State income tax and seeks a refund of the tax paid on his Connecticut pension for the years 1994 through 2005.

22. On March 8, 2007, the Division issued a Notice of Disallowance of petitioner's claim for refund for tax years 2004 and 2005. The notice stated, in pertinent part:

The pension income paid by the State of Connecticut and included in your federal adjusted gross income cannot be fully excluded on your New York State tax return. New York State only allows the full exclusion of pension income paid by the State of New York, local governments within New York State or the federal government.

SUMMARY OF THE PARTIES' POSITIONS

23. The Division contends that there are no material issues of fact or law and the facts mandate a determination in its favor. It maintains that petitioner's claims for refund for tax years 1994 through 2000 are barred under the statute of limitations provided in Tax Law § 687. The Division also points out that it issued refunds for tax years 2001 and 2002 on August 5, 2005 and May 5, 2005, respectively. Therefore, it contends that petitioner's claims for refund for tax years 2001 and 2002 should be denied. The Division further contends that the pension income paid to petitioner by the State of Connecticut does not qualify for the full pension exclusion under either Tax Law § 612(c)(3)(i) or (ii) because it is not a pension paid by the State of New York or local governments within the State of New York or the federal government. As such, the Division claims that the Notice of Deficiency issued by it for tax year 2003 should be sustained in its entirety and the refund claims for tax years 2004 and 2005 should be denied in their entirety.

24. Petitioner does not claim that there are any material issues of fact in dispute. Rather, he challenges the validity of Tax Law § 612(c)(3)(i) and (ii) that exempts the pensions of New York State and local government, and federal civil service retirees from the calculation of New York adjusted gross income while taxing the pensions of resident taxpayers who receive civil service pensions from other states.

CONCLUSIONS OF LAW

A. To obtain summary determination, the moving party must submit an affidavit, made by a person having knowledge of the facts, a copy of the pleadings and other available proof. The documents must show that there is no material issue of fact and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9 [b][1]). Inasmuch as summary determination 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, 441, 293 NYS2d 93, 94 [1968]; *Museums at Stony Brook v. Village of Pathogue Fire Dept.*, 146 AD2d 572, 573, 536 NYS2d 177, 179 [1989]. 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, 382, 206 NYS2d 879, 881 [1960])).

Here, there are no facts in dispute. In each of the years 1994 through 2005, the State of Connecticut paid pension income to petitioner, who included such pension income in the federal adjusted gross income reported on his New York State resident income tax returns filed for the years 1994 through 2005. An exclusion for \$20,000.00 of petitioner’s State of Connecticut pension income was allowed in the computation of his New York adjusted gross income for the years 1994 through 2005 and tax was computed to be due in each of these years. Petitioner seeks a refund of the tax paid for the years 1994 through 2002, 2004 and 2005 and the cancellation of the assessment issued for tax year 2003 based upon his contention that the pension income which he received from the State of Connecticut is fully exempt from New York State income tax.

B. The question remaining is whether the Division has demonstrated that summary determination should be granted in its favor as a matter of law. New York adjusted gross income is computed using federal adjusted gross income with certain modifications both increasing and decreasing the federal amount (Tax Law § 612[a]). Tax Law § 612(c) provides, in relevant part as follows:

Modifications reducing federal adjusted gross income. There shall be subtracted from federal adjusted gross income:

* * *

(3)(i) Pensions to officers and employees of this state, its subdivisions and agencies, to the extent includible in gross income for federal income tax purposes;

(ii) Pensions to officers and employees of the United States of America, any territory or possession or political subdivision of such territory or possession, the District of Columbia, or any agency or instrumentality of one of the foregoing, to the extent includible in gross income for federal income tax purposes;

(3-a) Pensions and annuities received by an individual who has attained the age of fifty-nine and one-half, not otherwise excluded pursuant to paragraph three of this subsection, to the extent includible in gross income for federal income tax purposes, but not in excess of twenty thousand dollars, which are periodic payments attributable to personal services performed by such individual prior to his retirement from employment, which arise (i) from an employer-employee relationship or (ii) from contributions to a retirement plan which are deductible for federal income tax purposes. . . .

C. In the instant matter, there is no dispute that the pension income petitioner received from the State of Connecticut in the years 1994 through 2005 was properly included in his federal adjusted gross income for these years. Since the pension income paid to petitioner in the years 1994 through 2005 was not a pension paid by the State of New York, local governments within the State of New York or the federal government, it did not qualify for the full pension exclusion allowed pursuant to Tax Law § 612(c)(3)(i) and (ii). However, petitioner was eligible for an exclusion of \$20,000.00 of his pension income in each of the years 1994 through 2005 because he had attained the age of 59 ½ prior to the years in issue. In computing his New York adjusted gross income for the years 1994, 1998, 1999, 2000, 2001, 2002 and 2003, petitioner excluded \$20,000.00 of the pension income he received in each year, and computed tax due in each of these years. For the years 1995, 1996, 1997, 2004 and 2005, the Division properly disallowed petitioner's claimed exemption of his total State of Connecticut pension as a New York State and local government or federal pension. The Division also properly excluded

\$20,000.00 of petitioner's pension income in its recomputation of his New York adjusted gross income for the years 1995, 1996, 1997, 2004 and 2005.

As noted above, on March 31, 2005, petitioner filed an amended income tax return for the year 2003 on which he claimed that the full amount of his Connecticut pension was exempt from tax. On May 20, 2005, the Division, without auditing the basis of the amended return, issued to petitioner an income tax refund in the amount of \$786.69 for the year 2003. Subsequently, the Division audited petitioner's 2003 amended income tax return, disallowed the claimed full exemption of his State of Connecticut pension but allowed an exclusion of \$20,000.00 in pension income in its recomputation of this amended return, and issued a Notice of Deficiency dated February 5, 2007 (Notice No. L-028180241-6) asserting personal income taxes due in the amount of \$786.69, i.e., the amount of the disallowed overpayment plus interest. The Division's recomputation of petitioner's New York adjusted gross income for the year 2003 was proper (*see*, Tax Law § 612[a][c][3][i], [ii]; [3-a]).

D. Petitioner contends that Tax Law § 612(c)(3)(i) and (ii) unfairly discriminates against resident taxpayers, such as himself, who receive pension income from states other than New York. He challenges the constitutionality of Tax Law § 612(c)(3)(i) and (ii) on its face. The Division of Tax Appeals lacks jurisdiction over constitutional challenges to statutes presumed to be constitutional on their face (*see Matter of Eisenstein*, Tax Appeals Tribunal, March 27, 2003; *see also Matter of Geneva Pennysaver*, Tax Appeals Tribunal, September 11, 1989; *Matter of Fourth Day Enters.*, Tax Appeals Tribunal, October 27, 1988). Therefore, these arguments will not be addressed herein.

E. Finally, petitioner filed amended resident income tax returns on March 13, 2006 for the years 1994 through 2000 seeking a refund of \$13.00 for the year 1994, \$559.00 for the year 1995,

\$1,094.00 for the year 1996, and \$653.00 for the year 1997, and unspecified amounts for years 1998, 1999 and 2000, based on his claim that the full amount of his State of Connecticut of pension income should be excluded from his New York adjusted gross income for all of these years. The Division, in its letter of October 16, 2006, denied the requests for the years 1994 through 2000 on the additional ground that they were not timely filed.

Tax Law § 687(a) provides that a claim for credit or refund must be filed within three years from the time the return was filed or within two years of the time the tax was paid, whichever period expires later. Here, petitioner filed his amended returns in which he requested refunds on March 13, 2006. The original return for the year 1994 had been filed on April 15, 1995. The original return for the year 1995, which reported no tax due, had been filed on April 15, 1996. The Division issued a Statement of Proposed Audit Changes on December 17, 1998 asserting tax due in the amount of \$559.00 plus interest for the year 1995, which amount petitioner paid on December 18, 1998. The original return for the year 1996, which reported no tax due, had been filed on April 15, 1997. The Division issued a Statement of Proposed Audit Changes on August 16, 1999 asserting tax due in the amount of \$1,094.00 plus interest for the year 1996, which amount petitioner paid on August 18, 1999. The original return for the year 1997, which reported no tax due, had been filed on April 15, 1998. The Division issued a Statement of Proposed Audit Changes on September 21, 2000 asserting tax due in the amount of \$653.00 plus interest for the year 1997, which amount petitioner paid on October 2, 2000. The original return for the year 1998 had been filed on April 15, 1999. The original return for the year 1999 had been filed on April 15, 2000. On December 3, 2001, the Division issued a Notice and Demand to petitioner which imposed a penalty of \$35.10 pursuant to Tax Law § 685(c), which penalty petitioner paid on or about December 13, 2001. The original return for the year 2000 had been

filed on April 14, 2001. Therefore, the statute of limitations for filing a refund request for the years 1994 through 2000 had long expired prior to petitioner's filing of the amended returns for these years .

F. On March 31, 2005, petitioner filed amended income tax returns for the years 2001 and 2002 on which he claimed that the full amount of his Connecticut pension was exempt from tax. On May 20, 2005, the Division, without auditing the basis of the amended return, issued to petitioner an income tax refund in the amount of \$905.47 for the year 2002. On August 5, 2005, the Division, without auditing the basis of the amended return, issued to petitioner an income tax refund in the amount of \$1,131.58 for the year 2001. Since petitioner has already received refunds of tax for the years 2001 and 2002, his request for such refunds in his petition is moot.

G. There being no material and triable issues of fact, the Division's motion for summary determination is granted.

H. The Division of Taxation's Motion for Summary Determination is granted; the petition of Lawrence L. Barrell is denied, the Division's denial of petitioner's refund applications for the years 1994, 1995, 1996, 1997, 1998, 1999 and 2000 is sustained; the Notice of Deficiency dated February 5, 2007 is sustained, and the Division's Notice of Disallowance dated March 8, 2007 is sustained.

DATED: Troy, New York
January 3, 2008

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE