STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LEON F. BURKHARDT	:	DECISION DTA No. 813928
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1978 through 1985.	:	

Petitioner Leon F. Burkhardt, Route 1, Box 87, Moneta, Virginia 24121-9205, filed an exception to the determination of the Administrative Law Judge issued on February 1, 1996. Petitioner appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

Petitioner did not file a brief in support. The Division of Taxation filed a letter in which it declined to file a brief in opposition.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for a refund of the taxes he paid on his Federal pension on the basis that said claim was filed beyond the statute of limitations for refund.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "2" and "4" which have been deleted in their entirety[1] and finding of fact "3" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

[1]Finding of fact "2" was deleted since the record contains no evidence upon which such a finding could be based. Finding of fact "4" was deleted since reference to TSB-M-89(9)I is unnecessary to this decision.

Leon F. Burkhardt (hereinafter "petitioner") was the recipient of a Federal pension during each of the years 1978 through 1985, inclusive. On his New York returns for the aforesaid years he reported the pension income as taxable for New York State purposes. Petitioner's personal income tax returns for the years at issue were all timely filed; that is, they were all filed on or before April 15 of the following year.

We modify finding of fact "3" of the Administrative Law Judge's determination to read as follows:

> In March 1990, petitioner filed a formal claim for refund for the years 1978 through 1985. Petitioner made no claim for credit or refund for the years at issue prior to March 1990.[2]

The Division of Taxation issued to petitioner a Notice of Disallowance in full for the years 1978 through 1985. The basis for such disallowance was that petitioner did not file a claim for refund within three years of the filing of his original returns for those years.

OPINION

In his determination, the Administrative Law Judge concluded that the Division properly denied petitioner's claim for refund on the ground that said claim was filed beyond the statute of limitations for refund as provided for in Tax Law § 687. The Administrative Law Judge, relying on the United States Supreme Court decision in McKesson Corp. v. Division of Alcoholic Beverages & Tobacco (496 US 18, 110 L Ed 2d 17), found that the statutory scheme utilized by the State provided adequate backward-looking relief to remedy any unconstitutional deprivation and that said scheme satisfied the Due Process Clause of the Fourteenth Amendment. Finally, the Administrative Law Judge granted the Division's motion for summary determination finding that sufficient evidence was adduced to: (i) eliminate any doubt as to the

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[2] We modified finding of fact "3" of the Administrative Law Judge's determination by adding the last sentence in order to more fully reflect the record.

existence of a triable issue of fact; (ii) establish that material facts were not in dispute; and (iii) show that no contrary inferences could reasonably be drawn from the undisputed facts.

On exception, petitioner asserts as follows:

> "[t]he Notice of Determination of the Administrative Law Judge makes no mention of the United States Supreme Court's decision in the case of the State of Georgia.
>
> "On 6 December 1994 the United States Supreme Court rejected the State of Georgia's claim that statutes required the Federal retirees to protest the state tax before paying it, not after.
>
> "The above decision mandates that state statutes are not applicable in this claim" (Notice of Exception, p. 1).

After careful review of the Administrative Law Judge's determination and the cases cited therein, we see no reason to disturb his conclusions. The Administrative Law Judge properly decided all issues and he correctly applied the Tax Law and relevant case law to the facts of this case. Accordingly, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Furthermore, in order to provide a complete record on appeal we will address petitioner's assertion that the Administrative Law Judge's determination failed to consider "the United States Supreme Court's decision in the case of the State of Georgia . . ." (Notice of Exception, p. 1).

On December 6, 1994, the United States Supreme Court issued its decision in Reich v. Collins (513 US 106, 130 L Ed 2d 454). Analysis of the Reich decision reveals that Georgia maintained both a predeprivation and postdeprivation tax scheme to remedy any disputed taxes. The United States Supreme Court noted in its decision that:

> "[a] State is free as well to reconfigure its remedial scheme over time, to fit its changing needs. Such choices are generally a matter only of state law.
>
> "But what a State may not do, and what Georgia did here, is to reconfigure its scheme, unfairly, in mid-course -- to 'bait and switch,' as some have described it. Specifically, in the mid-1980's, Georgia held out what plainly appeared to be a 'clear and certain' postdeprivation remedy, in the form of its tax refund statute, and then declared, only after Reich and others had paid the disputed taxes, that no such remedy exists. In this regard, the Georgia Supreme Court's reliance on Georgia's predeprivation procedures was entirely beside the

> point (and thus error), because even assuming the constitutional adequacy of these procedures -- an issue on which we express no view -- no reasonable taxpayer would have thought that they represented, in light of the apparent applicability of the refund statute, the exclusive remedy for unlawful taxes" (Reich v. Collins, supra, 130 L Ed 2d 454, 459).

The Court concluded that "Reich was entitled to pursue what appeared to be a 'clear and certain' postdeprivation remedy, regardless of the State's predeprivation remedies" (Reich v. Collins, supra, 130 L Ed 2d 454, 460).

Petitioner's reliance on the Reich decision is misplaced since the facts in the instant matter are distinguishable. Although Georgia had enacted a tax refund statute, it took the position that said refund statute was not applicable in a situation where the law upon which the taxes were assessed and collected was itself found to be unconstitutional or otherwise invalid. As noted above, the United States Supreme Court disagreed with Georgia's position that the refund statute was not applicable to Reich.

New York, like Georgia, also has a tax refund statute (i.e., Tax Law § 687). In 1994, New York, unlike Georgia, conceded that the refundprovisions of Tax Law § 687 were applicable to Federal retirees. As noted by the Administrative Law Judge:

> "[f]ollowing the Supreme Court decision in Harper v. Virginia Dept. of Taxation [509 US 86], 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 determined to be unconstitutional in Davis v. Michigan Dept. of Treasury [489 US 803], and who had filed timely administrative claims for refunds for those taxes with the Department of Taxation and Finance. The City of New York acquiesced in this decision (Duffy v. Wetzler, 207 AD2d 375, 616 NYS2d 48 lv denied 84 NY 2d 838, 617 NYS2d 129, cert denied ___ US ___, 130 L Ed 2d 673)" (Determination, conclusion of law "C").

Thus, it can be seen that New York granted refunds pursuant to the refund provisions of Tax Law § 687 to all Federal retirees who had filed timely claims for refund. Georgia, on the other hand, attempted to deny refunds to its Federal retirees on the basis that its refund statute was not applicable to said retirees, even if their claim for refund had been timely filed. The

United States Supreme Court in Reich concluded that the Georgia refund statute was applicable to the Federal retirees, an issue which New York has conceded.

In the instant matter, petitioner's claim for refund was denied on the ground that said claim was filed beyond the statute of limitations for refund, not on the basis that the refund provisions of Tax Law § 687 were inapplicable to Federal retirees. Since the provisions of Tax Law § 687, which establish a statute of limitations for refund, date back to 1960 when Article 22 came into existence, it cannot be said that New York "reconfigure[d] its scheme, unfairly, in mid-course" (Reich v. Collins, supra).

We also note from our review of the various cases dealing with Federal retirees that in no instance has a court allowed a refund to a Federal retiree where said retiree failed to initiate the timely filing of a claim for refund within the applicable statute of limitations for refund. Finally, we observe that, absent special circumstances, Tax Law § 683 provides for a general three-year period for the Division to issue an assessment to a taxpayer. Accordingly, we see no inequity in the current statutory scheme which limits a taxpayer to the same three-year period for the filing of a claim for refund.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Leon F. Burkhardt is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Leon F. Burkhardt is denied; and

4. The Notice of Disallowance is sustained.

DATED: Troy, New York
January 9, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner