STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| **HARRY S. REITER** | : | DECISION<br>DTA No. 814255 |
| for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1983 through 1985. | : | |

Petitioner Harry S. Reiter, 37 Dalton Street, Long Beach, New York 11561, filed an exception to the determination of the Administrative Law Judge issued on April 4, 1996. Petitioner appeared by Gibney, Anthony & Flaherty, LLP (Robert J. Costello, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

Petitioner submitted a brief in support of his exception.[1] The Division of Taxation submitted a letter stating that it would not be filing a brief in opposition. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

## *ISSUE*

Whether petitioner is entitled to a refund of personal income taxes for the years 1983 through 1985.

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge except for finding of fact "8" which has been modified. The Administrative Law

[1]Contained in his exception, petitioner requested a stay in the proceedings pending a final resolution of Duffy v. Wetzler (174 AD2d 253, 579 NYS2d 684, appeal dismissed 79 NY2d 976, 583 NYS2d 190, appeal dismissed 80 NY2d 890, 587 NYS2d 900, cert granted 509 US 917, 125 L Ed 2d 716, on remand 207 AD2d 375, 616 NYS2d 48) and Alderman v. Wetzler (Sup Ct, New York County, July 22, 1991, Schlesinger, J., index No. 6193/91). His request was denied by letter dated September 20, 1996.

Judge's findings of fact and the modified finding of fact are set forth below.

Petitioner, Harry S. Reiter, filed a petition on August 24, 1995 seeking a refund of personal income taxes paid for the years 1983 through 1985 in the amount of $8,893.14. Petitioner is a retired Federal employee and a retired United States Army officer. He received pension payments from the Federal government in the years 1983 through 1985 and included the amount of the payments in his calculation of New York State taxable income.

At the time petitioner's returns were filed, New York State had a tax statute which excluded State pensions from taxation, but not Federal pensions (Tax Law § 612[c][former (3)], amended by L 1989, ch 664, § 1). The United States Supreme Court reviewed the constitutionality of a similar Michigan statute in Davis v. Michigan Dept. of Treasury (489 US 803, 103 L Ed 2d 891) and invalidated the Michigan statute on the ground that it violated the tenets of inter-governmental tax immunity because it favored State retired employees over Federal employees.

Following the Davis decision, the New York State Legislature amended Tax Law § 612(c)(3) to afford the same exemption from taxation to Federal pensions as had previously been afforded to State pensions; however, the amendment did not apply retroactively to tax years before the Davis decision was issued (L 1989, ch 664, §§ 1, 2, effective July 21, 1989 and applicable to Federal pension benefits received in taxable years beginning on or after January 1, 1989).

Petitioner filed amended personal income tax returns for the years 1983, 1984 and 1985 in January 1990, requesting a refund of the tax paid on his Federal pension payments. On or about February 15, 1991, the Division of Taxation ("Division") issued three separate but identical letters to petitioner denying his refund claims. In its letter, the Division stated that it would not "issue refunds on federal pension benefits for years prior to 1989." It was the Division's position at that time that the Davis decision did not apply retroactively.

Petitioner requested a Conciliation Conference to challenge the Division's determination. The Division issued a Conciliation Order, dated July 7, 1995, sustaining the denial of petitioner's request for a refund.

Petitioner filed a petition challenging the denial of his refund claims. In that petition, and in his answer to the instant motion, petitioner concedes that the refund claims were filed beyond the three-year period prescribed in Tax Law § 687(a).[2] Petitioner claimed that the denial of a refund of taxes exacted in violation of rights protected by the United States Constitution is in itself a denial of the due process rights guaranteed by the 14th Amendment to the Constitution and that he is entitled to a refund of all taxes collected under the authority of an unconstitutional taxing statute. Petitioner also stated that he is entitled to claim a six-year statute of limitations under 42 USC § 1983. Petitioner did not allege that his refund claims were timely under New York State law.

In an answer to the petition, the Division claimed that it correctly denied petitioner's refund claims because they were not filed within the three-year statute of limitations. The Division then brought this motion for summary determination.

We modify finding of fact "8" to read as follows:

> Included in the Division's motion papers is the affidavit of Charles Bellamy, an employee of the Division. Mr. Bellamy's duties include the review and processing of refund claims made by Federal pensioners claiming a refund based on the Davis decision. He avers that he has reviewed petitioner's file and determined that petitioner's 1983 personal income tax return was filed on or before April 15, 1984, his 1984 personal income tax return was filed on or before April 15, 1985 and his 1985 personal income tax return was filed on or before April 15, 1986. He also states that petitioner filed amended returns for 1983, 1984 and 1985 in January 1990. Mr. Bellamy states that

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[2]Tax Law § 687(a) provides that:

> "[a] claim for credit . . . of an overpayment of income tax shall be filed . . . within three years from the time the return was filed or two years from the time the tax was paid . . . or, if no return was filed, within two years from the time the tax was paid."

petitioner did not file a claim for refund of taxes or amended tax returns for 1983, 1984 and 1985 until January 1990.[3]

In his affidavit in opposition to the Division's motion, petitioner does not challenge the Division's factual assertions regarding the dates of filing of the 1983, 1984 and 1985 returns and amended returns.

***OPINION***

In her determination below, the Administrative Law Judge sustained the Division's denial of petitioner's claim for refund for the years 1983 through 1985 based upon the fact that such claim was barred by the three-year statute of limitations contained in Tax Law § 687(a).

The Administrative Law Judge also noted that the Division of Tax Appeals did not have jurisdiction to entertain petitioner's claim that the six-year statute of limitations should apply in cases where there is violation of 42 USC § 1983.

On exception, petitioner argues that the denial of his refund for 1985 was in error. Petitioner claims that the facts of record in Duffy v. Wetzler (supra) establish that all Federal retirees are entitled to refund relief for years 1985 and after under the informal claim doctrine. Petitioner misinterprets Duffy. That case did not address the informal claim doctrine. Moreover, there are no facts in the record or even an allegation made by petitioner that he filed an informal claim for refund prior to his filing amended returns in January 1990 requesting a refund. Accordingly, the informal claim doctrine is inapplicable herein.

The issue in Duffy v. Wetzler (supra) was whether the holding in Davis v. Michigan Dept. of Treasury (supra) should be given retroactive effect. The Appellate Division, Second Department, held that Davis applied prospectively only and did not require a refund of tax for years before the issuance of Davis. As noted by the Administrative Law Judge, the United State Supreme Court granted certiorari and vacated that judgment for further consideration in light of the opinion in Harper v. Virginia Dept. of Taxation (509 US 86, 125 L Ed 2d 74). However, the Division now concedes that the Davis decision has retroactive application.

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[3] We modified the third sentence to reflect that, according to Mr. Bellamy's affidavit, petitioner's 1983 personal income tax return was filed on or before April 15, 1984.

In Harper v. Virginia Dept. of Taxation (supra), the Supreme Court held that the ruling in Davis is to be applied retroactively. However, as noted by the Administrative Law Judge in her determination, the court did not award a refund to the petitioners in Harper under the premise that Federal law did not necessarily entitle the petitioners to a refund, but rather, the Constitution requires that any relief must meet due process requirements (Harper v. Virginia Dept. of Taxation, supra). As we have held in Matter of Lonergan (Tax Appeals Tribunal, February 13, 1997) and Matter of Jones (Tax Appeals Tribunal, January 9, 1997), the three-year statute of limitations set forth in Tax Law § 687(a) satisfies due process requirements (see, Matter of McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 US 18, 110 L Ed 2d 17).

Petitioner also argues that, irrespective of whether a refund claim was filed, the Division has a statutory obligation to refund all overpayments of Federal retirees for tax years 1985 and after, relying on Tax Law § 686(a).

Tax Law § 686(a) provides, in pertinent part, that:

> "[t]he commissioner of taxation and finance, within the applicable period of limitations, may credit an overpayment of income tax and interest on such overpayment against any liability in respect of any tax imposed by this chapter on the person who made the overpayment . . . ."

As stated above, the availability of a credit from an overpayment is subject to the applicable period of limitations, which in petitioner's instance, is set forth in Tax Law § 687(a). Therefore, since no credit was applied for within three years from the date the returns were due for each of the years 1983 through 1985, petitioner is not entitled to a credit for overpayment.

Furthermore, petitioner asserts that the Division is estopped from denying its obligations to pay refunds for years 1985 and after. However, the Division has absolutely no obligation to grant a refund that is not timely filed. In this case, petitioner failed to request a refund for the tax years 1983 through 1985 until January of 1990. Pursuant to Tax Law § 687(a), petitioner's claims were untimely and, thus, his claims were properly denied.

Additionally, petitioner argues that even though the Administrative Law Judge did not address the issue of Tax Law § 697(d), she should have applied this section to the case herein.

Tax Law § 697(d) states as follows:

> "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."

This section is clearly inapplicable to petitioner. Petitioner has not alleged that the Tax Commission either erroneously or illegally collected money from him or that he paid any moneys under a mistake of fact (see, Matter of Mostachetti, Tax Appeals Tribunal, February 13, 1997).

Lastly, petitioner argues that:

> "as a matter of settled state law, the relief sought by the taxpayer for years 1983 to 1985 should have been granted by the tribunal on its own motion. See Mobil Oil v. Commissioner of Finance of the City of New York, 101 A.D.2d 723; 475 N.Y.S.2d 32 (1st Dept. 1984)" (Petitioner's brief, p. 4).

This argument is wholly without basis. In Mobil Oil, the taxpayer overpaid tax to the City of New York as a result of a mathematical error. This error came to light during an audit by the City. In that instance, the court held that it would be inequitable to allow the City to assert a deficiency against the taxpayer for the years 1974 through 1976 while refusing the taxpayer's right to claim a refund for those same years. Clearly, the facts in Mobil are distinguishable from the facts herein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Harry S. Reiter is denied;

2. The determination of the Administrative Law Judge is sustained;

3. The petition of Harry S. Reiter is denied; and

4. The notices of disallowance are sustained.

DATED: Troy, New York
February 27, 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