

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**BERNARD AND KATHRYN B. (DECEASED) NEWMAN** : DECISION  
for Redetermination of a Deficiency or for Refund of New York : DTA No. 814584  
State and New York City Income Taxes under Article 22 of the :  
Tax Law and the New York City Administrative Code for :  
the Years 1984, 1985 and 1986. :

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Petitioners Bernard and Kathryn B. (Deceased) Newman, 25 East 9th Street, Apt. 11A, New York, New York 10003, filed an exception to the determination of the Administrative Law Judge issued on October 24, 1996. Petitioners appeared by Kostelanetz & Fink, LLP (Kevin M. Flynn, Esq. of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq. of counsel).

Neither party filed a brief on exception. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUES***

I. Whether the Division of Taxation properly denied petitioners' claim for refund of taxes paid on Federal pension income as untimely pursuant to the three-year statute of limitations period of Tax Law § 687(a).

II. Whether the Division of Taxation properly denied petitioners' alternative claim for refund based on the special refund authority of Tax Law § 697(d).

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioners filed New York State and City personal income tax returns for the years 1984, 1985 and 1986 on or before April 15, 1985, April 15, 1986 and April 15, 1987, respectively.

They reported and paid State and City tax, pursuant to Tax Law § 612(c)(3), in the amounts of \$3,000.00, \$3,408.00, and \$3,766.00 with respect to Federal pension income.

In 1989, the United States Supreme Court held in *Davis v. Michigan Dept. of Treasury* (489 U.S. 803, 103 L Ed 2d 891) that a State tax scheme that exempted from tax State retirement benefits, but not Federal retirement benefits, violated the constitutional intergovernmental tax immunity doctrine. Thereafter, in April of 1991, petitioners filed a refund claim for taxes paid on the Federal retirement benefits for the years 1984, 1985 and 1986.

The Division of Taxation sent to petitioners a Notice of Disallowance, dated August 29, 1994, denying the refund claim because it was not filed within three years from the time the returns were filed as required under Tax Law § 687(a).

After a conciliation conference was held, the conferee issued a conciliation order, dated September 15, 1995, sustaining the statutory notice.

Petitioners filed a petition, dated December 12, 1995, protesting the conciliation order. The Division filed an answer, dated March 6, 1996, stating that petitioners failed to file a refund claim within three years of the filing of their income tax returns; that Governor Cuomo's 1994 decision to approve refund claims for those who paid State tax on their Federal pension income was solely limited to those who had filed timely refund claims under Tax Law § 687; and that the application of Tax Law § 697(d) is discretionary in nature and that, in any event, petitioners did not meet the threshold requirements for its application.

In its motion for summary determination, the Division of Taxation argued that there were no material and triable issues of fact and that, as a matter of law, the petition should be denied.

In their cross motion for summary determination, petitioners argued that when they filed their returns for the years 1984 through 1986, they followed the letter of the law as it then existed; that the law was not rendered unconstitutional until the *Davis* decision in 1989; that the retroactive application of *Davis* was not established until the Court decided *Harper v. Virginia Dept. of Taxation* (509 US 86, 125 L Ed 2d 74) in 1993 when the time had lapsed for

petitioners to file refund claims under Tax Law § 687(a); that the State must guarantee a taxpayer a "meaningful" retrospective relief to rectify an unconstitutional law; that the Division of Taxation's position "inexplicably penalizes" petitioners for not anticipating that Tax Law § 612(c)(3) would be declared unconstitutional and denies petitioners "a fair opportunity to contest a patently unconstitutional tax statute"; and that Tax Law § 697(d) was enacted to provide relief to taxpayers who were improperly required to pay taxes under an illegal tax statute, and therefore, it would be arbitrary, capricious and inconsistent with the constitutional principles enunciated in *Davis* and its progeny to deny petitioners' refund under section 697(d).  
The Determination of the Administrative Law Judge

In her determination below, the Administrative Law Judge determined that there were no material or triable issues of fact, thereby making it proper for her to decide the legal issues on the basis of the Division of Taxation's (hereinafter the "Division") motion for summary judgment and petitioners' cross motion for summary judgment.

Turning to the issue of petitioners' claim for refund under Tax Law § 687(a), the Administrative Law Judge noted that although it is true that petitioners could not have anticipated that the taxing statute, with which they complied, would subsequently be declared unconstitutional, the Division's denial of the refund for 1984 through 1986<sup>1</sup> on the ground that it was barred by the three-year statute of limitations of Tax Law § 687(a) is consistent with the United States Supreme Court decisions in *Davis* and its progeny. The Administrative Law Judge, based on her review of *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco* (496 US 18, 110 L Ed 2d 17) and *Harper v. Virginia Dept. of Taxation (supra)*, held that the refund provision of Tax Law § 687(a) provided meaningful backward-looking relief such that any unconstitutional deprivation could be rectified and that these provisions satisfied the Due Process Clause of the 14th Amendment. The Administrative Law Judge, therefore, found that the Division properly denied petitioners' refund claim on the basis that it was not timely filed.

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<sup>1</sup>Although the Administrative Law Judge's conclusion of law "B" refers only to tax year 1985, it is clear from the facts and the remaining conclusions that the reference to only one tax year was an oversight. All three tax years were handled in the same manner, and the final conclusion ("D") denied both the cross motion for summary determination and the petition which addressed all three years.

With respect to petitioners' refund claim pursuant to the authority granted under Tax Law § 697(d), the Administrative Law Judge held that the special refund authority was not applicable, since petitioners' belated refund request involved a mistake of law and not a mistake as to the existence or nonexistence of the underlying material facts, citing *Matter of Fiduciary Trust Co. of N.Y. v. State Tax Commn.*, (120 AD2d 848, 502 NYS2d 119) and *Mercury Mach. Importing Corp. v. City of New York*, (3 NY2d 418, 165 NYS2d 517).

#### ***ARGUMENTS ON EXCEPTION***

Petitioners maintain that their claim for refund is not barred by the three-year statute of limitations, or alternatively, should be granted pursuant to the special refund authority of Tax Law § 697(d). These are the same arguments which were considered by the Administrative Law Judge.

The Division's position relies upon the conclusions of the Administrative Law Judge and the Tribunal's decisions in *Matter of Burkhardt* (Tax Appeals Tribunal, January 9, 1997), *Matter of Jones* (Tax Appeals Tribunal, January 9, 1997), and *Matter of Silverman* (Tax Appeals Tribunal, January 9, 1997).

#### ***OPINION***

We affirm the determination of the Administrative Law Judge.

We collectively address petitioners' claims for refund pursuant to Tax Law § 687(a), and alternatively, pursuant to the special refund authority of Tax Law § 697(d). After careful review of the Administrative Law Judge's determination and the cases cited therein, we see no reason to disturb her conclusions. The Administrative Law Judge properly decided these issues, and she correctly applied the Tax Law and the relevant case law to the facts of this case (*see, Matter of Walter*, Tax Appeals Tribunal, May 15, 1997; *Matter of Lonergan*, Tax Appeals Tribunal, February 13, 1997). Accordingly, we affirm the determination of the Administrative Law Judge for the reasons stated in her determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Bernard and Kathryn B. (Deceased) Newman is denied;

2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Bernard and Kathryn B. (Deceased) Newman is denied; and

4. The Notice of Disallowance dated August 29, 1994 is sustained.

DATED: Troy, New York  
August 21, 1997

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Donald C. DeWitt  
President

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Carroll R. Jenkins  
Commissioner

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Joseph W. Pinto, Jr.  
Commissioner