

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RINALDO AND KATHERINE LORUSSO	:	DECISION
	:	DTA No. 814788
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Taxes under	:	
Article 22 of the Tax Law for the Year 1988.	:	

Petitioners Rinaldo and Katherine LoRusso, 107 West Oak Street, Rome, New York 13440, filed an exception to the determination of the Administrative Law Judge issued on October 10, 1996. Petitioners appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel).

Petitioners submitted a brief in support of their exception. The Division of Taxation filed 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 the Division of Taxation may assert the limitations period of Tax Law § 687(a) to bar petitioners' refund claim for taxes paid on Federal pension income.

FINDINGS OF FACT

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

Petitioners, Rinaldo and Katherine LoRusso, filed a claim for refund, dated July 26, 1994, for the tax year 1988. In that claim, petitioners asserted that they were entitled to a refund in the amount of \$625.00 with respect to the taxation of income from a Federal retirement pension for the tax year 1988.

In its motion papers, the Division of Taxation ("Division") filed an affidavit by Charles Bellamy, a tax technician for the Division responsible for the reviewing and processing of refund claims made by Federal pension recipients. In that affidavit, Mr. Bellamy stated that petitioners filed a refund claim for the year 1988 on August 10, 1994 and that petitioners were issued a notice of disallowance because they failed to file a refund claimor amended return within three years of filing the original return which was filed on or before April 15, 1989.

Petitioners filed a request for a conciliation conference. In that request, petitioners protested the taxation of their income from the Federal retirement pension for the year 1988. Petitioners contended that because of misinformation regarding the taxability of Federal pensions, New York State should have informed each Federal retiree, as he or she appeared on the New York State tax roll, that he or she was entitled to a refund. The conciliation conferee issued to petitioners a Conciliation Order (CMS No. 145432), dated December 8, 1995, sustaining the refund denial. In the caption of the Conciliation Order, there was the statement "Notice of Disallowance Dated November 28, 1994".

Mr. and Mrs. LoRusso filed a petition, dated January 22, 1996, for a refund of \$996.00 for taxes they paid in 1988. Petitioners alleged that they were never notified or even heard about a refund due to them until it was too late. Attached to the petition was an article entitled "Federal retirees would benefit from the Sears bill". In the article, there was a discussion of Senator Sears' introduction of legislation to assist state residents who retired from the Federal government and were unable to obtain refunds of state taxes on their pensions between 1985 and 1988 because of the three-year limitations period for seeking refunds. It was noted that the legislation was aimed at correcting the problem faced by many Federal retirees who, despite the U.S. Supreme Court ruling that the State's taxing of income from Federal pensions was discriminatory, could not obtain a refund of the illegally collected taxes because those retirees did not file refund claims earlier or "did not realize they needed to file, or were told by the state tax officials it wasn't necessary".

The Division filed an answer, dated April 24, 1996, affirmatively stating, inter alia, that because petitioners failed to file a claim for the refund within three years of the filing of the 1988 return, the refund claim was denied as untimely pursuant to Tax Law § 687, and that petitioners bore the burden of proving the disallowance was erroneous or improper.

In its motion for summary determination, the Division noted that in the U.S. Supreme Court's decision in Davis v. Michigan Department of Treasury (489 US 803, 103 L Ed 2d 891), the Court declared unconstitutional State taxation of Federal retirement benefits if that State exempted from taxation State retirement benefits. The Division argued that subsequent to the Davis decision, the U.S. Supreme Court determined that refund provisions with a three-year limitations period were adequate post-deprivation remedies to correct the prior collection of tax on Federal pensions by New York State. The Division also contended that summary determination was warranted because there are no material and triable issues of fact.

OPINION

In her determination below, the Administrative Law Judge sustained the Division's denial of petitioners' claim for refund for the year 1988 based upon the fact that such claim was barred by the three-year statute of limitations contained in Tax Law § 687(a). Accordingly, since there were no material or triable issues of fact, the Administrative Law Judge granted the Division's motion for summary determination in its favor.

The Administrative Law Judge, in reaching her conclusion, cited to Davis v. Michigan Dept. of Treasury (supra) wherein the United States Supreme Court held that a tax scheme which exempts retirement benefits paid by the State but does not exempt retirement benefits paid by the Federal government violates the constitutional intergovernmental tax immunity doctrine. Furthermore, the Administrative Law Judge noted that in Harper v. Virginia Dept. of Taxation (509 US 86, 125 L Ed 2d 74), the Supreme Court further held that the ruling in Davis applies retroactively and that states which violated the tax immunity doctrine must provide meaningful backward-looking relief to rectify any unconstitutional deprivation (Harper v.

Virginia Dept. of Taxation, supra, 125 L Ed 2d at 89, quoting McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 US 18, 110 L Ed 2d at 32) and concluded that Tax Law § 687(a) was consistent with the Supreme Court decisions (see also, Matter of Lonergan, Tax Appeals Tribunal, February 13, 1997 and Matter of Jones, Tax Appeals Tribunal, January 9, 1997).

On exception, petitioners assert the same argument that they made below. Petitioners argue that they were not aware of their right to claim a refund until the time period for filing such refund had already expired. We have consistently held that in order to receive a refund for taxes paid on Federal income, the refund must be timely made pursuant to Tax Law § 687(a) (see, Matter of Steeves, Tax Appeals Tribunal, April 10, 1997; Matter of Hicks, Tax Appeals Tribunal, March 20, 1997 and Matter of Mostachetti, Tax Appeals Tribunal, February 13, 1997). Since petitioners admit that they failed to file their claim for refund within three years of filing their 1988 tax return, they are not entitled to a refund in this case.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Rinaldo and Katherine LoRusso is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Rinaldo and Katherine LoRusso is denied; and

4. The Notice of Disallowance dated November 28, 1994 is sustained.

DATED: Troy, New York
May 8, 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