

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
RUDOLFO PERNASILICE : DECISION
for Redetermination of a Deficiency or for : DTA No. 814838
Refund of New York State Personal Income Tax :
under Article 22 of the Tax Law for the Years :
1985 and 1988. :

Petitioner Rudolfo Pernasilice, 120 Willowood Lane, Camillus, New York 13031, filed an exception to the determination of the Administrative Law Judge issued on November 14, 1996. Petitioner appeared by Albert R. Denti, P.A. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Peter T. Gumaer, 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.

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for refund of personal income tax paid on Federal pension income on the basis that the claim was filed beyond the statute of limitations period for refund.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "1" and "2" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

We modify finding of fact "1" of the Administrative Law Judge's determination to read as follows:

The Division of Taxation ("Division") filed a motion for summary determination, dated July 19, 1996, requesting denial of petitioner's refund claims for the tax years 1985 and 1988. The

Division's motion for summary determination is supported by the affirmation of Peter T. Gumaer, sworn to the 19th day of July 1996 and the affidavit of Charles Bellamy, sworn to the 19th day of July 1996.¹

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

Mr. Gumaer in his affirmation states that since petitioner did not file refund claims or amended returns for his personal income taxes for the years 1985 and 1988 within three years from the time the returns were filed or two years from the time the taxes were paid, whichever is later, pursuant to Tax Law § 687, petitioner's refund claims should be barred as untimely, the petition before the Division of Tax Appeals should be denied with prejudice and the motion for summary determination should be granted. The Division's representative avers that:

"In June 1994, payment of refunds was authorized to all taxpayers who 1) paid personal income tax on their federal pension income and 2) had filed timely refund claims pursuant to Tax Law § 687."

Furthermore, Mr. Gumaer contends that the Division's policy of paying refunds to all taxpayers who had filed timely claims pursuant to Tax Law § 687 is consistent with the dictates of the United States Supreme Court decisions in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco* (496 US 18, 110 L Ed 2d 17), *Harper v. Virginia Dept. of Taxation* (509 US 86, 125 L Ed 2d 74) and *Reich v. Collins* (513 US 106, 130 L Ed 2d 454).

Mr. Gumaer asserts that in the instant case petitioner failed to timely file refund claims or amended returns pursuant to Tax Law § 687.²

Mr. Bellamy is a Tax Technician II with the Division of Taxation and has held this position since 1967. Mr. Bellamy's responsibilities include the review and processing of refund claims made by Federal pension recipients who were taxed on that income prior to 1989.

In his affidavit in support of the motion Mr. Bellamy affirmed that he reviewed petitioner's refund claims for 1985 and 1988. According to Mr. Bellamy, petitioner filed his 1985 New York State personal income tax return on or before April 15, 1986, and his 1988

1

We modified this finding by adding the first sentence to more accurately reflect the record.

2

We modified this finding to more accurately reflect the statement quoted from Mr. Gumaer's affirmation.

New York State personal income tax return on or before April 15, 1989; however, petitioner did not file refund claims or amended returns for those years before January 1995.

Petitioner, Rudolfo Pernasilice, filed his petition with the Division of Tax Appeals on March 12, 1996. Petitioner requested a refund of tax in the amount of \$1,657.37 for tax years 1985 and 1988. Petitioner protested the disallowance of his refund claims for New York State taxes paid on his Federal pension income for tax years 1985 and 1988. Petitioner asserted that:

"DUE TO THE FACT THAT THERE IS A BILL IN THE SENATE AND ASSEMBLY (1532) TO REOPEN THE CASE FOR FEDERAL PENSION PAYMENTS CHAPTER 664 SUPREME COURT RULING. THE DAVIS VS. MICHIGAN SUPREME COURT RULING AND INADEQUACY AS ASSEMBLY BILL 8762 A REFUND WOULD BE DUE TAXPAYER OF \$1657.37 PLUS INTEREST."

Attached to petitioner's petition were the following documents: (1) a copy of the Conciliation Order (CMS No. 147492), dated February 16, 1996, in which the conciliation conferee, after a conciliation conference, denied the request and sustained the statutory notice;³ (2) a copy of the Power of Attorney appointing Albert R. Denti, a public accountant, as petitioner's and Susan Pernasilice's authorized representative; (3) a copy of the Notice of Disallowance letter, dated August 17, 1990, to petitioner and Susan Pernasilice in which they were informed that their refund claim in the amount of \$1,339.74 was disallowed in full for tax year 1986 because New York State was not issuing refunds on Federal pension benefits for years prior to 1989; and (4) a copy of the cover letter, dated February 16, 1996, from conciliation conferee William J. Proefrock, addressed to petitioner and Mrs. Pernasilice, in which they were informed of their right to challenge the conciliation order by filing a petition with the Division of Tax Appeals.

The Division, in its answer dated May 22, 1996, denied the allegations in the petition and stated, *inter alia*, that: (1) petitioner was a former Federal employee who paid New York State tax on his Federal pension income for the years 1985 and 1988; (2) petitioner failed to file a claim for refund within three years of the filing of the return for the years in issue; and (3) therefore, petitioner's claim for refund was properly denied as untimely pursuant to Tax Law §

³The record is silent as to when the statutory notice was issued.

687. In addition, the Division asserted that petitioner bears the burden of proving the disallowance was erroneous and/or improper.

OPINION

In the determination below, the Administrative Law Judge granted the Division's motion for summary determination concluding that there were no material issues of fact in dispute and that the Division was entitled to summary determination as a matter of law. The Administrative Law Judge noted that as a result of the United States Supreme Court decision in *Davis v. Michigan Dept. of Treasury* (489 US 803, 103 L Ed 2d 891), the New York State Legislature amended the Tax Law, effective January 1, 1989, to exclude Federal pensions from New York income tax (*see*, L 1989, ch 664; Tax Law § 612[c][3][ii]). Relying on the subsequent United States Supreme Court decisions in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco (supra)*, *Harper v. Virginia Dept. of Taxation (supra)*, and *Reich v. Collins (supra)*, the Administrative Law Judge determined that the refund provisions of Tax Law § 687(a) provided a "post-deprivation" remedy that met the Supreme Court's due process requirements. Consequently, concluded the Administrative Law Judge, petitioner's failure to file a refund claim within the three-year limitations period provided under Tax Law § 687(a), barred petitioner's claim for refund of State taxes paid on his Federal pension.

In response to petitioner's argument that pending legislation would permit his untimely claims for refund of State taxes paid on Federal pensions, the Administrative Law Judge referred to the statutory period currently set forth in Tax Law § 687(a).

On exception, petitioner repeats the allegation set forth in his petition that:

"DUE TO THE FACT THAT THERE IS A BILL IN THE SENATE AND ASSEMBLY (1532) TO REOPEN THE CASE FOR FEDERAL PENSION PAYMENTS CHAPTER 664 SUPREME COURT RULING. THE DAVIS VS. MICHIGAN SUPREME COURT RULING AND INADEQUACY AS ASSEMBLY BILL 8762 A REFUND WOULD BE DUE TAXPAYER OF \$1657.37 PLUS INTEREST."

We concur with the Administrative Law Judge that the period for refund contained in Tax Law § 687(a) provides an adequate post-deprivation remedy for any unconstitutional

deprivation due to State taxation of petitioner's Federal pension for the years 1985 and 1988, and that because petitioner failed to file his refund claim within the statutory limitations period provided in Tax Law § 687(a), the Division properly denied the refund claim (*see, Matter of Lonergan*, Tax Appeals Tribunal, February 13, 1997; *Matter of Jones*, Tax Appeals Tribunal, January 9, 1997). As noted by the United States Supreme Court in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco* (*supra*, 110 L Ed 2d, at 41), the State is free to impose various procedural requirements for post-deprivation relief including the enforcement of a statute of limitations in order "to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax."

Petitioner's claim that his petition should be granted due to pending legislation has no merit. Assembly bill No. 1532-A passed the Assembly on July 10, 1996 but no further action was taken. Two bills were introduced in the Assembly, on February 12, 1997 (No. 4276) and on March 4, 1997 (No. 5560-A), to permit Federal retirees to retroactively apply for income tax refunds no later than April 15, 1998 for the years 1985 through 1988. It does not appear that any action has been taken on this proposed legislation. Therefore, under the current Tax Law, petitioner is not entitled to a refund inasmuch as his refund claim has been untimely filed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Rudolfo Pernasilice is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Rudolfo Pernasilice is denied; and

4. The Notice of Disallowance dated August 17, 1990 is sustained.

DATED: Troy, New York
August 7, 1997

Donald C. DeWitt
President

Carroll R. Jenkins
Commissioner

Joseph W. Pinto, Jr.
Commissioner