

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
EDWARD J. DEVINS : DECISION
 : DTA No. 814930
for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax Law and :
the Administrative Code of the City of New York for the :
Years 1980 through 1984. :
:

Petitioner Edward J. Devins, 126 84th Street, Brooklyn, New York 11209-4314, filed an exception to the determination of the Administrative Law Judge issued on October 31, 1996. Petitioner appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel).

Petitioner did not submit a brief. The Division of Taxation submitted a letter stating that it would not be filing a brief. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioner's claim for refund of taxes paid on Federal pension income is barred by the three-year limitations period of Tax Law § 687(a).

FINDINGS OF FACT

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

Petitioner, Edward J. Devins, filed a 1980 New York State personal income tax return on or before April 15, 1981, a 1981 return on or before April 15, 1982, a 1982 return on or before April 15, 1983, a 1983 return on or before before April 15, 1984, and a 1984 return on or before April 15, 1985. On each return, petitioner reported and paid tax on Federal pension income.

Petitioner filed claims for refund of personal income tax for the years 1980 through 1984

based upon the income tax paid on his Federal pension income. Petitioner did not file refund claims or amended returns before February 22, 1990.

On or about October 27, 1994, the Division of Taxation ("Division") issued a Notice of Disallowance for the year 1980 through 1984. The basis of the disallowance was that petitioner did not file refund claims or amended returns within three years of the filing of his original returns.

Petitioner filed a petition, dated April 19, 1996, stating that he was seeking a refund for the years 1980 through 1984 in the amount of \$19,877.00 plus interest. In his petition, petitioner argued that the section of the Tax Law which exempted the pensions of officers and employees of the State from income tax was illegal from its inception and therefore the statute of limitations did not apply. Petitioner also maintained that there were cases in other states involving a similar exemption and the statute of limitations and that these cases were in the process of proceeding through the Federal courts. According to petitioner, the claims for refunds for recipients of Federal pensions would eventually be resolved in the Federal courts. Therefore, petitioner requested that proceedings be stayed until a final resolution was reached in the cases proceeding through the Federal court system.

The Division filed an answer, dated June 19, 1996, which asserted that petitioner failed to file a claim for refund within three years of the filing of the return for each year in issue and that, therefore, the claims for refund were denied as untimely. The Division further alleged that the "1994 decision to approve refund claims for those who paid New York State income tax on federal pension income was solely limited to those who had filed timely refund claims under the Tax Law."

The Division filed a motion for summary determination, dated August 1, 1996, pursuant to 20 NYCRR 3000.9(b)(1). In its motion papers, the Division argued that petitioner failed to file a refund claim for the years in issue within the three-year period of section 687 of the Tax Law.

Petitioner filed a letter dated August 9, 1996 which argued that the practice of taxing Federal annuities while exempting the pensions of State retirees was unconstitutional from its inception. Further, this practice was not ruled unconstitutional by the Supreme Court until 1989. It is submitted that, as a result of the foregoing, the statute of limitations is inapplicable.

OPINION

In his determination below, the Administrative Law Judge sustained the Division's denial of petitioner's claim for refund for the years 1980 through 1984 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 his conclusion, analyzed the case law concerning whether taxpayers have a right to a refund for taxes paid on Federal pension income when the State income tax scheme under which the tax was paid was later determined to be unconstitutional. The Administrative Law Judge cited to Davis v. Michigan Dept. of Treasury (489 US 803, 103 L Ed 2d 891) 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 is unconstitutionally discriminatory. 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 17, 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, petitioner asserts the same arguments as made to the Administrative Law Judge. Since the Administrative Law Judge completely and adequately addressed the issue in

his determination, we affirm his determination based upon the reasoning set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Edward J. Devins is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Edward J. Devins is denied; and
4. The Notice of Disallowance dated October 27, 1994 is sustained.

DATED: Troy, New York
May 22, 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