

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
FREDERICK J. KIRCH	:	DECISION
	:	DTA No. 815376
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law for the Years	:	
1986 through 1988.	:	

Petitioner Frederick J. Kirch, 11 Eberle Road, Latham, New York 12110, filed an exception to the determination of the Administrative Law Judge issued on May 22, 1997. Petitioner appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel).

Neither party submitted a brief. Petitioner's request for oral argument was denied.

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 as untimely pursuant to Tax Law § 687(a) where such claim was filed beyond the statutory period of limitation.

FINDINGS OF FACT

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

The affidavit of Charles Bellamy, Tax Technician II, indicates that petitioner, Frederick J. Kirch, filed his 1986 New York State personal income tax return on or before April 15, 1987, his 1987 return on or before April 15, 1988 and his 1988 return on or before April 15, 1989. On each of the returns filed, petitioner reported and paid tax on Federal pension income.

On April 14, 1989, petitioner sent a letter to the Division of Taxation ("Division") requesting a refund of tax paid on his Federal pension income for the 1985 tax year. In the letter (a copy of which was attached to the Division's motion papers), petitioner asked that it be accepted in lieu of a form IT-113-X (Claim for Credit or Refund of Personal Income Tax). The letter stated that "I am filing for a protective claim 1985 because of March 28, 1989, U.S. Supreme Court Ruling on federal employee's retired pay pension."

On February 10, 1995, petitioner sent a letter to the Division (a copy of which was attached to the Division's motion papers) requesting a refund for the tax years 1986, 1987 and 1988. Enclosed with the letter were copies of petitioner's New York State personal income tax returns for the years 1985 through 1988.

On April 24, 1995, the Division issued a notice of disallowance to petitioner on the basis that he had failed to file a refund claim or amended return within three years from the filing of the original returns.¹

On October 4, 1996, petitioner timely filed a petition with the Division of Tax Appeals in response to the Conciliation Order issued on September 20, 1996. In the petition, he stated that the intent of his letter of April 14, 1989 (submitted in lieu of the form IT-113-X) was to cover all years 1985 through 1988 and that "I didn't know I had to submit an amended return for all the years involved." In his letter of April 4, 1997, submitted in opposition to this motion, petitioner states that when he contacted the Division in 1989, he was told that the form IT-113-X was not available, but that he could send a letter instead which would cover the four years involved. He states that he was never told that he had to file a request for refund for each of the years at issue and that he thought that his letter would suffice.

¹While a copy of the notice of disallowance was not made a part of this record, it appears that it denied petitioner's refund claim for each of the years 1985 through 1988. Petitioner's letter in opposition to this motion states that, as a result of his not having received any response to his 1989 letter, he contacted the Division in early 1995 and was informed that the Division had nothing on file regarding his claim. Apparently, he then forwarded a copy of his April 14, 1989 letter along with a certified mail receipt which indicated that it had been received by the Division on April 17, 1989. After he filed a petition for a conciliation conference, a Conciliation Order (CMS No. 147635), dated September 20, 1996, was issued by the Division's Bureau of Conciliation and Mediation Services which granted petitioner a refund in the amount of \$3,512.78 for 1985 and denied his request for the years 1986, 1987 and 1988.

The Bellamy affidavit acknowledges that petitioner asked that his April 14, 1989 letter be accepted in lieu of form IT-113-X. Mr. Bellamy also states that form IT-113-X clearly provides that a separate claim must be filed for each tax year.

In June 1994, then Governor Cuomo authorized the payment of refunds to all taxpayers who had paid New York State personal income tax on their Federal pension income and who had timely filed refund claims pursuant to section 687 of the Tax Law.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge sustained the Division's denial of petitioner's claim for refund since petitioner's claim was not timely filed pursuant to 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 his determination, 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 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 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). The Administrative Law Judge concluded that Tax Law § 687(a) was consistent with the Supreme Court decisions (***see also, Matter of Jones***, Tax Appeals Tribunal, January 9, 1997).

The Administrative Law Judge rejected petitioner's argument that he was misinformed by a Division employee concerning the contents of his protective claim filed with the Division. The Administrative Law Judge noted that petitioner's letter in lieu of filing Form IT-113-X, filed on April 14, 1989, constituted a valid claim for refund for the year set forth in the letter, to

wit, 1985. The Administrative Law Judge emphasized that petitioner failed to submit any proof that any Division employee specifically informed petitioner that a letter seeking a refund for 1985 would also constitute a valid claim for refund for the years 1986, 1987 and 1988. The Administrative Law Judge also rejected petitioner's argument that the Division was under a duty to notify him that he was required to file a claim for refund for each of the years at issue. Therefore, the Administrative Law Judge denied petitioner's petition.

ARGUMENTS ON EXCEPTION

Petitioner suggests in his exception that his claim for refund for the years 1986-1988 would have been processed if his letter of April 14, 1989 with attached copies of his New York State tax returns had not been lost by the Division. Furthermore, he alleges that his failure to obtain Form IT-113-X from the Division was due to the fact that such form was not widely available to the public. Therefore, since he was unable to obtain the form, he necessarily was prohibited from following the directions set forth therein. Lastly, petitioner argues that if his original documents had not been misplaced in the mailroom, he would have been authorized to receive the refunds in question.

In opposition, the Division states that it relies entirely on the determination rendered by the Administrative Law Judge in this matter and requests that said determination be sustained.

OPINION

Although petitioner has made certain allegations in his exception, there is no support for these allegations in the record. After reviewing the record in its entirety, we conclude that the Administrative Law Judge properly determined that petitioner failed to timely file a claim for refund for each of the years 1986, 1987 and 1988 pursuant to the three-year time period set forth in Tax Law § 687(a). Therefore, we affirm the determination of the Administrative Law Judge for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Frederick J. Kirch is denied;
2. The determination of the Administrative Law Judge is sustained; and

3. The petition of Frederick J. Kirch is denied.

DATED: Troy, New York
January 22, 1998

Donald C. DeWitt
President

Carroll R. Jenkins
Commissioner

Joseph W. Pinto, Jr.
Commissioner