

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| SALVATORE J. AND LUCILLE GUERRERIO | : | DECISION |
| | : | DTA NO. 815754 |
| for Redetermination of a Deficiency or for Refund of | : | |
| New York State and New York City Personal Income | : | |
| Taxes under Article 22 of the Tax Law and the | : | |
| Administrative Code of the City of New York for the | : | |
| Years 1985 and 1986. | : | |

Petitioners Salvatore J. and Lucille Guerrierio, 45F Jefferson Oval, Yorktown Heights, New York 10598, filed an exception to the determination of the Administrative Law Judge issued on January 29, 1998. Petitioners appeared *pro se*. 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.

ISSUE

Whether the Division of Taxation properly denied petitioners' claim for refund of tax paid on Federal pension income as untimely pursuant to Tax Law § 687(a).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "4" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Petitioners, Salvatore and Lucille Guerrierio, timely filed claims for refund for tax years 1987 and 1988.¹ In 1994, petitioners received refunds of tax paid on Mr. Guerrierio's Federal pension for the years 1987 and 1988.²

On September 17, 1994, petitioners filed a claim for refund of taxes paid on Federal pension income for the years 1985 and 1986. On January 30, 1995, the Division of Taxation ("Division") issued a Notice of Disallowance to petitioners denying their claim for refund on the basis that such claim had not been filed within three years of the filing of petitioners' tax returns for the years at issue.

Petitioners challenged the Division's Notice of Disallowance by requesting a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS"). BCMS issued a Conciliation Order (CMS No. 155230) dated March 14, 1997 denying petitioners' request and sustaining the Notice of Disallowance.

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

On April 1, 1997, petitioners filed a petition which challenged the Division's denial of their refund claim for the years 1987 and 1988.³ Petitioner Salvatore J. Guerrierio asserts that when he contacted the Division he "was greeted with confusion and

¹The record is silent as to the actual filing date.

²The record is silent as to the exact date of the refund. Those years are not in issue in this proceeding.

³According to petitioners' November 1, 1997 response letter the correct years in issue are 1985 and 1986 (*see*, below).

could not get the proper refund forms” to file his claim for refund in a timely manner. (Emphasis in original.)⁴

The Division served an answer to the petition on June 12, 1997. The Division denied the allegations contained in the petition and affirmatively stated that petitioner Salvatore Guerrierio was a Federal employee who paid tax on his Federal pension for the years 1985 and 1986, that petitioners’ claim for refund for such years was denied as untimely, and that any instances where refunds were approved for those who paid New York State income tax on Federal pension income were limited to instances where timely refund claims had been filed.

The Division’s motion for summary determination is supported by the affirmation of Herbert M. Friedman, Jr., sworn to August 11, 1997, and the affidavit of Charles Bellamy, sworn to August 7, 1997.

Mr. Bellamy is employed by the Division as a Tax Technician II in its Audit Division. His responsibilities include reviewing and processing refund claims filed by taxpayers who paid tax on Federal pension income. Mr. Bellamy, in his affidavit, attests that petitioners: 1) timely filed their 1985 and 1986 personal income tax returns (i.e., filed their returns for such years on or before April 15, 1986 and 1987, respectively); 2) filed a claim for refund for taxes paid on Federal pension income for the years 1985 and 1986 on September 17, 1994; and 3) failed to file any claims for refund or amended returns for the years 1985 and 1986 at any time prior to September 17, 1994.

Mr. Friedman, in his affirmation, asserts that since petitioners did not file refund claims or amended returns for their personal income taxes for the years 1985 and 1986 within three years

⁴We modified this finding to accurately reflect the date petitioners filed their petition with the Division of Tax Appeals.

from the time the returns were filed or two years from the time taxes were paid, whichever is later, pursuant to Tax Law § 687, petitioners' refund claim 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.

This matter was assigned to Administrative Law Judge Maloney who, after an initial review of the papers filed in this matter, determined that there was a question as to which years were actually at issue and granted both parties additional time to respond.⁵ Both parties submitted responses.

To clarify the correct years at issue and in further support of its motion, the Division submitted the affirmation of Herbert M. Friedman, Jr., sworn to September 19, 1997, along with attached documents including, among other things, correspondence from petitioners to Mr. Friedman dated June 29, 1997.⁶ Based on his review of documents submitted by petitioners to the Division, Mr. Friedman affirms that petitioners received their full refunds for tax years 1987 and 1988 in September 1994 and that petitioners are seeking refunds for tax years 1985 and 1986 only.

Attached to Mr. Guerrerio's June 29, 1997 letter is an itemization of events leading up to the filing of the petition in this matter in which Mr. Guerrerio states the following:

- "1. I am a former federal employee who paid New York State taxes on my federal pension income for many years.

⁵Based upon review of the file and the motion papers submitted in this matter, Administrative Law Judge Maloney determined that it appeared that the Division of Tax Appeals used the wrong dates when the matter was set up.

⁶The June 29, 1997 letter was written by petitioner Salvatore J. Guerrerio.

- “2. I was never informed verbally or in writing by the State of NY that I was due a refund for any of the taxes that I had historically paid to the State.
- “3. In 1990 my son informed me that he had read that the State of NY was giving credit and refund [sic] to individuals who had paid NY State Tax on their federal pension income for 1987 & 1988.
- “4. We contacted the State, confirmed this fact, requested the appropriate refund forms and inquired if there were any other years that this refund would apply to. While we did receive the requested forms for 1987 & 1988 months later, we were informed that there were no other years for which this decision applied or for that matter were there any other years being considered for this refund.
- “5. I completed the State Refund Forms for 1987 & 1988 and submitted same.
- “6. Months later I received my tax refunds for 1987 & 1988 together with an instruction letter that talked about the tax refunds not only for 1987 & 1988 but for the years 1985 & 1986. Needless to say I was quite surprised.
- “7. We called the State and immediately requested the appropriate refund forms for 1985 & 1986 and [I] was informed that they would be sent.
- “8. Weeks later, not receiving the promised forms, we called again and [I] was informed that they were forth coming [sic]. We also wrote to the State and requested these forms in writing.
- “9. At no point in this process did we ever receive any instructions about a time limitation on requesting a refund.
- “10. Again not receiving the forms promised we created the 1985 & 1986 refund forms ourselves, based upon the 1987 format.
- “11. In summary, I feel that I was not informed of the State policy change and then after I contacted the State Authorities on this matter I was not given complete and accurate information in a timely fashion. Further, required filing forms were either intentionally, or through bureaucratic mix-ups, [kept] from me. Thus resulting in what the State Authority would consider a late filing.”

By letter dated November 1, 1997, petitioner Salvatore J. Guerrierio confirmed that the correct years at issue are 1985 and 1986. The letter did not address any of the Division's

assertions other than to confirm the years in issue. Mr. Guerrierio's response letter was received by the Division of Tax Appeals on November 19, 1997.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge granted the Division's motion for summary determination stating there were no material or triable issues of fact. The Administrative Law Judge further held that the Division had properly denied petitioners' claim for refund since petitioners' claim was not timely filed pursuant to Tax Law § 687(a).

The Administrative Law Judge, in her 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*** applied 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) met the Supreme Court's due process requirements (***see also, Matter of Jones***, Tax Appeals Tribunal, January 9, 1997; ***Matter of Silverman***, Tax Appeals Tribunal, January 9, 1997).

The Administrative Law Judge rejected petitioners' contention that the Division should have informed them that they were entitled to a refund of tax paid on Federal pension income as

without merit. The Administrative Law Judge stated that it was petitioners' responsibility to ascertain from the Division the procedure for filing a refund claim.

ARGUMENTS ON EXCEPTION

On exception, petitioners again argue that the Division should have informed them of the change in the Tax Law which they would have no way of discovering on their own. In addition, petitioners argue that the statute of limitations should have been set aside in this matter.

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

OPINION

We affirm the determination of the Administrative Law Judge. We have consistently denied a claim for refund of personal income tax paid on Federal pension income where the claim was not filed within the three-year statute of limitations set forth in Tax Law § 687(a) (*see, Matter of Walter*, Tax Appeals Tribunal, May 15, 1997; *Matter of Reiter*, Tax Appeals Tribunal, February 27, 1997; *Matter of Mostachetti*, Tax Appeals Tribunal, February 13, 1997). Given the evidence presented in this case and our previous holdings in similar cases, we find that Tax Law § 687(a) is consistent with the Supreme Court's decision in *Harper*, and affirm the Administrative Law Judge's determination with respect to the years 1985 and 1986.

With respect to petitioners' argument that the Division should have informed them of the change in the Tax Law, as we stated in *Matter of Jones (supra)*:

we refuse to impose on the Division the duty of personally advising every taxpayer who is potentially subject to a refund of his or her right to such a refund because of a change in the law given the State's constitutionally sound scheme which "rectified any unconstitutional deprivation" (Harper v. Virginia Dept. of

Taxation, supra) while simultaneously respecting the State's fisc
(McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,
supra).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Salvatore J. and Lucille Guerrerio is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Salvatore J. and Lucille Guerrerio is denied; and
4. The Notice of Disallowance dated January 30, 1995 is sustained.

DATED: Troy, New York
July 23, 1998

/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