STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JAMES E. & ELSA A. MORGAN	:	DECISION DTA NO. 815795
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1974 through 1984 and 1986 through 1988.	:	

Petitioners James E. and Elsa A. Morgan, 212 Oxhead Road, Centereach, New York 11720, filed an exception to the determination of the Administrative Law Judge issued on February 2, 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 briefs in this matter. Petitioners' request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation properly denied petitioners' claims for refund of taxes paid on Federal pension income as untimely pursuant to the three-year statute of limitations of Tax Law § 687(a).

II. Whether the special refund authority of Tax Law § 697(d) applies herein.

FINDINGS OF FACT

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

Petitioners, James and Elsa Morgan, filed their New York State personal income tax returns for the years 1974 through 1984 on or before April 15, 1985. Petitioners filed their 1986 return on or before April 15, 1987; their 1987 return on or before April 15, 1988; and their 1988 return on or before April 15, 1989. It is alleged by petitioners that on each return they reported and paid tax on Federal pension income paid to James Morgan.

On or about April 14, 1989, petitioners filed a "protective" claim for refund for tax year 1985 on Form IT 113-X, seeking a refund of taxes paid on Mr. Morgan's Federal pension for that year. The claim specifically requests a refund for 1985 only, and the form on which the claim was filed bears the inscription "A separate claim must be filed for each tax year." On Form IT 113-X, petitioners state the following: "I am applying for a 1985 tax refund. As an Air Force retiree, this claim is submitted requesting a refund of taxes paid on my Federal pension. The pension amount for 1985 was $10,727.52. Please deduct this amount from my taxable income from 1985 returns."

On or about July 11, 1994, petitioners filed claims for refund of tax paid on Mr. Morgan's Federal pension income for tax years 1974 through 1984 and 1986 through 1988. Petitioners did not file any refund claims for the years at issue before July 1994.

The Division of Taxation ("Division") denied petitioners' refund claims for 1974 through 1984 and 1986 through 1988 as untimely filed.

Petitioners challenged the Division's refund denial by requesting a conciliation conference. A conference was held on February 11, 1997, and by Conciliation Order (CMS No. 156594) dated March 28, 1997, petitioners' request was denied and the refund denial was

sustained. In turn, petitioners continued their challenge by filing a petition dated April 17, 1997, which was received by the Division of Tax Appeals on April 21, 1997.

In their petition, petitioners set forth the following argument:

> I submitted a claim (IT-1134x) [sic] of refund with my 1988 tax return for taxes paid on my federal pension for the year 1985 believing this would qualify me for a refund for the years 1974 - 1988 in the event that the litigations [sic] as to NYS taxing of my Federal pension was ruled illegal.
>
> Consequently, I received a letter, dated June 28, 1994, from the Commissioner, James W. Wetzler in regard to my claim for a refund of taxes paid on my Federal pension. In this letter, I was requested to submit W-2P's and copies of my Federal and NYS returns. I submitted this information on July 11, 1994 for the years 1974 - 1988 to the Dept. Of Taxation & Finance Audit Div. - Central Office - Income Tax -AGI on August 29, 1994 [sic]. I received a notice of disallowance for the years 1974 -1984 and 1986 - 1988. It was stated that my claims for these years were not timely filed as per subsection (a) [sic] of the NYS Income Tax Law.
>
> I'm protesting the implementation of this tax law, in that the litigation involving NYS tax on Federal pension was not judged to be illegal until August of 1994. In addition, at no time was I issued any information/instructions on the timely filing of a request for refund or the need to file for a refund of Federal pension taxes paid. I filed a It-113x [sic] for the year 1985 because Newsday newspaper ran an article advising Federal pension earners to do so. Had I received guidance from NYS Dept. Of Taxation and Finances [sic], I would have filed a It-113x [sic] for the years 1986 -1988 along with my 1988 tax return.

The Division served an answer to the petition on July 3, 1997. The Division denied the allegations contained in the petition and affirmatively stated that petitioner James Morgan was a Federal employee who paid tax on his Federal pension income for the years in issue, that petitioners' claim for refund for such years was denied as untimely, that a conciliation order was

issued sustaining the refund denial, and that the Tax Appeals Tribunal has consistently sustained the Division's disallowance of similar untimely refund claims.

On or about October 2, 1997, the Division filed its motion for summary determination. In support of its motion, the Division submitted an affidavit sworn to by Charles Bellamy on September 30, 1997. This affidavit attests to petitioners' filing of their New York State personal income tax returns and the filing of claims for refund of taxes paid on Federal pension income for tax years 1974 through 1984, 1985, and 1986 through 1988 as stated above. Mr. Bellamy is employed by the Division as a Tax Technician II for its Audit Division. His responsibilities include reviewing and processing refund claims filed by taxpayers who paid tax on Federal pension income.

The Division's representative also included with the motion an affirmation explaining the legal background concerning state taxation of Federal pensions, and requested that the motion for summary determination be granted since there is no dispute that petitioners' claim for refund was not filed within three years of the filing of the returns for the years at issue, thus leaving no material or triable issue of fact, which should result in judgment in the Division's favor as a matter of law.

In response to the Division's motion, petitioners submitted an affirmation protesting the implementation of Tax Law § 687(a), and additionally raised the issue that Mr. Morgan's annual pension earnings did not exceed $20,000.00, and thus, on this basis as well, petitioners should not have paid New York State income tax on his Federal pension income. Petitioners seek relief under the special refund authority of Tax Law § 697(d).

Petitioners have raised no challenge and submitted no evidence to counter the Division's position that the earliest request for refund of tax paid on Mr. Morgan's Federal pension income for the years 1974 through 1984 and 1986 through 1988 was the refund claim filed on or about July 11, 1994.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge concluded that there were no material or triable issues of fact and granted the Division's motion for summary determination. Relying on previous decisions of this Tribunal concerning claims for refunds of personal income tax paid on Federal pension income where such claims were not filed within the three-year statute of limitations provided in Tax Law § 687(a), the Administrative Law Judge denied petitioners' refund claims for tax years 1974 through 1984 and 1986 through 1988 since petitioners' claims were not timely filed. Refunds were sought by petitioners because of the State's taxation of Federal pensions prior to the enactment of Tax Law § 612(c)(3)(ii) (***see***, L 1989, ch 664).

In ***Harper v. Virginia Dept. of Taxation*** (509 US 86, 125 L Ed 2d 74), the United States Supreme Court held that states which violated the tax immunity doctrine must provide meaningful backward-looking relief to rectify any unconstitutional deprivation. The Administrative Law Judge noted that in its prior decisions, this Tribunal had found that the backward-looking relief provided by Tax Law § 687(a) was sufficient pursuant to the standard set forth in ***Harper***. Thus, the three-year statute of limitations set forth in Tax Law § 687(a) applied to petitioners' refund claims.

The Administrative Law Judge rejected petitioners' argument that their refund claim for 1985 adequately notified the Division of Mr. Morgan's eligibility for this and future refunds.

The Administrative Law Judge noted that on November 6, 1989 the Division had issued a Technical Services Bureau memorandum to the public entitled ***Taxation of Federal Pensions*** (TSB-M-89-[9]I) which this Tribunal held, in ***Matter of Jones*** (Tax Appeals Tribunal, January 9, 1997), placed taxpayers on notice of the right to file protective refund claims during the pendency of the litigation addressing the issue of whether the State would be required to issue refunds for years prior to 1989. Further, the Administrative Law Judge noted that their 1985 refund claim form clearly informed petitioners that a separate refund claim must be filed for each tax year for which a refund is sought.

The Administrative Law Judge also rejected petitioners' argument that Tax Law § 687(a) is not properly applicable when taxes are paid under a law later determined to be unconstitutional. The Administrative Law Judge concluded that "payment of a tax later determined to be unconstitutional is an 'overpayment' of tax under Tax Law § 687(a) and a claim for refund of such an overpayment is subject to the three-year limitations period" (Determination, conclusion of law "D").

The Administrative Law Judge also concluded that the special refund authority of section 697(d) does not apply to petitioners' situation. Relying on the decision of this Tribunal in ***Matter of Mackay*** (Tax Appeals Tribunal, March 23, 1989), the Administrative Law Judge concluded that petitioners' failure to exclude Mr. Morgan's pension earnings from New York State taxation was one of law and not one of fact. Further, petitioners did not demonstrate that the Division collected moneys from them erroneously or illegally.

ARGUMENTS ON EXCEPTION

On exception, petitioners argue that the Division failed to adequately notify them of the need to file separate refund claims for each year at issue in order to preserve their right to a refund. In addition, petitioners argue that their payments of tax on Federal pension income was an erroneous payment for which the provisions of Tax Law § 697(d) should allow a refund.

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 claims for refund of personal income tax paid on Federal pension income where the claims were 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 v. Virginia Dept. of Taxation*** (***supra***), and affirm the Administrative Law Judge's determination.

Petitioners' assertion that the Division failed in its responsibility to notify all affected taxpayers of the need to file refund claims for each year at issue so as to preserve their right to a refund is rejected. Petitioners claim to have been misled by the statements attributed to a Division spokesman in an article appearing in ***Newsday*** in April 1989. The content of the article, included as an attachment to petitioners' affidavit in opposition to the Division's motion for summary determination, does not substantiate their position. Further, as the Administrative Law

Judge concluded, the refund claim filed by petitioners for 1985 contained the inscription "a separate claim must be filed for each tax year" (Determination, conclusion of law "C"). As the Administrative Law Judge noted, this argument was addressed in ***Matter of Jones*** (***supra***) wherein we stated that:

> 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***, [496 US 18, 110 L Ed 2d 17]).

With respect to petitioners' argument that they are entitled to a refund pursuant to the special refund authority of Tax Law § 697(d), we agree with the Administrative Law Judge that this section does not apply to petitioners. Tax Law § 697(d) provides as follows:

> Where no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts, pursuant to the provisions of this article, the tax commission at any time, without regard to any period of limitations, shall have the power, upon making a record of its reasons therefor in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certificate to the comptroller.

Although the erroneous or illegal collection of moneys is sufficient to invoke the special refund authority, there has been no demonstration by petitioners that money was collected from them illegally or erroneously. In fact, petitioners paid income tax on Mr. Morgan's Federal pension income as was required by law at the time when his individual income tax returns were filed for the years in question. Although the statute has been rendered unconstitutional, this does not alter

the fact that at the time of payment by petitioners, the payments were made pursuant to law (***see, Matter of Fiduciary Trust Co. v. State Tax Commn.***, 120 AD2d 848, 502 NYS2d 119).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of James E. and Elsa A. Morgan is denied;

2. The determination of the Administrative Law Judge is sustained;

3. The petition of James E. and Elsa A. Morgan is denied; and

4. The denial of petitioners' refund claims for tax years 1974 through 1984 and 1986 through 1988 is sustained.

DATED: Troy, New York
August 20, 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