

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
DONALD WEEDEN	:	DECISION
	:	DTA NO. 816209
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 1987 and 1988.	:	

Petitioner Donald Weeden, 359 West Sand Lake Road, Wynantskill, New York 12198, filed an exception to the determination of the Administrative Law Judge issued on July 23, 1998. Petitioner 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. 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 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. These facts are set forth below.

In August 1994, petitioner, Donald Weeden, filed amended New York State personal income tax returns for the years 1987 and 1988 claiming refunds of taxes paid on Federal

pension income. On November 8, 1996, the Division of Taxation (“Division”) issued a Notice of Disallowance to petitioner denying his claims for refund on the basis that such claims had not been filed within three years of the filing of petitioner’s tax returns for the years at issue.

Petitioner 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. 159836) dated October 17, 1997 denying petitioner’s request and sustaining the Notice of Disallowance.

On November 18, 1997, petitioner filed a petition which challenged the Division’s denial of his refund claims for the years 1987 and 1988. In his petition, petitioner states that he had paid New York State income tax on his U.S. Air Force pension. He asserts that he tried unsuccessfully to get information from the Division concerning what and how to file, as well as the years for which he could file claims for refund of income taxes paid on his Federal pension. Petitioner contends that he made inquiries and was told that once the New York State Income Tax office knew what to do, it would send him the necessary information. He argues that he never received the information and did not receive any help from the Division even though he made numerous telephone calls. He states that after one call, he did receive a form which he filled out and returned to the Division.¹ Petitioner contends that even though he tried to do everything correctly with the sparse information given to him by the State, he received a refund for the 1986 tax year only. He asserts that he cooperated with the Division and, when asked, supplied the Division with copies of his tax returns for the years 1977 through 1993.

¹A copy of this form is not part of the record.

Lastly, petitioner argues that he should not be penalized because the Division erroneously required him to pay income tax on his Federal pension.

Attached to the petition are: 1) the October 17, 1997 Conciliation Order which denied petitioner's request and sustained the Notice of Disallowance and the October 17, 1997 cover letter from Thomas E. Drake, BCMS conciliation conferee, which accompanied the Conciliation Order; 2) a September 19, 1997 letter from Mr. Drake explaining why he must sustain the Notice of Disallowance; 3) a December 16, 1996 letter from Steven U. Teitelbaum, Deputy Commissioner and Counsel of Taxation and Finance, responding to petitioner's letter to Governor Pataki regarding the refund of previously taxed Federal pension income; and 4) the November 8, 1996 Notice of Disallowance for tax years 1987 and 1988.

The Division served an answer to the petition on January 22, 1998. The Division denied the allegations contained in the petition and affirmatively stated that Donald Weeden was a Federal employee who paid tax on his Federal pension income for the years at issue, that petitioner's 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 April 24, 1998, and the affidavit of Charles Bellamy, sworn to April 24, 1998.

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 petitioner: 1) timely filed

his 1987 and 1988 personal income tax returns (i.e., filed his returns for such years on or before April 15, 1988 and 1989, respectively); 2) filed a claim for refund for taxes paid on Federal pension income for the years 1987 and 1988 in August 1994; and 3) failed to file any claims for refund or amended returns for the years 1987 and 1988 at any time prior to August 1994.

Mr. Friedman, in his affirmation, asserts that since petitioner did not file refund claims or amended returns for his personal income taxes for the years 1987 and 1988 within three years from the time the returns were filed or two years from the time 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.

Petitioner did not respond to the Division's motion for summary determination.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge concluded that the matter was properly decided through summary determination since there were no material and triable issues of fact presented. The Administrative Law Judge, in reviewing *Davis v. Michigan Dept. of Treasury* (489 US 803, 103 L Ed 2d 891), noted that the United States Supreme Court held that state taxation of Federal pension income while exempting from taxation pensions from state or local government employees was unconstitutional. In light of the *Davis* decision, New York State was required to amend Tax Law § 612(c) (former [3]) to conform with the *Davis* decision by providing the exemption from income tax to include Federal pension income beginning with the tax year 1989 (*see*, L 1989, ch 664, eff July 21, 1989). As noted by the Administrative Law Judge, this relief was prospective only.

The issue of retroactivity was decided by the Court in *Harper v. Virginia Dept. of Taxation* (509 US 86, 125 L Ed 2d 74). The Court held that, in fact, *Davis* did apply retroactively, however, it did not determine that a refund was owed in the particular case therein. Rather, the Court remanded the matter for a determination on whether state law provided an adequate remedy that complied with the due process requirements of the constitution (*Harper v. Virginia Dept. of Taxation, supra*, 125 L Ed 2d, at 89, *citing McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 US 18, 110 L Ed 2d 17). In relying on the language of *McKesson*, the Administrative Law Judge held that the refund provisions of Tax Law § 687(a) provided meaningful backward-looking relief such that any unconstitutional deprivation could be rectified and that these provisions met the Federal requirements of due process as set forth in the above-mentioned line of cases. Therefore, since there was no dispute that petitioner failed to timely file his claim for refund for the years 1987 and 1988, the Administrative Law Judge found that such claim was properly denied by the Division and she granted the Division's motion for summary determination in its favor.

ARGUMENTS ON EXCEPTION

Petitioner argues that since he was not provided with any information from the Division on the required procedure for filing a claim for refund, it resulted in his failure to timely file such claim. Moreover, petitioner continues to argue that he did not overpay his taxes, but rather, paid taxes on income which was required to be reported to New York State. Therefore, he was required to pay the taxes that he paid and, thus, petitioner states that once the law which required Federal retirees to pay income tax on their pensions was found to be unconstitutional, the State should be required to refund all the retirees who paid such income taxes regardless of whether

they, in fact, filed timely refund claims. Petitioner urges, at a minimum, that the Division should have notified all affected retirees that they were due a refund and told them how to obtain the refunds.

In opposition, the Division states that the determination of the Administrative Law Judge is correct in all respects and, thus, it requests that such determination be sustained.

OPINION

Petitioner continues to argue that he contacted the Division on several occasions in an attempt to obtain information concerning the refund procedure yet he never received any information until it was too late. These bare assertions, without any proof, do not alter the fact that Tax Law § 687(a) requires that a claim for refund must be filed within three years from the date that the return was filed or within two years after payment has been made, whichever is later. Since there is no dispute that petitioner failed to timely file his refund in this case, the Division properly disallowed his refund claim.

Moreover, petitioner's assertion that the Division failed in its responsibility to notify all affected taxpayers is rejected. This argument was addressed in *Matter of Jones* (Tax Appeals Tribunal, January 9, 1997) 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, supra*).

Therefore, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Donald Weeden is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Donald Weeden is denied; and
4. The Notice of Disallowance dated November 8, 1996 is sustained.

DATED: Troy, New York
February 25, 1999

/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