STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JAMES V. BATTAGLIA	:	DECISION DTA NO. 817477
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1986, 1987 and 1988.	:	

Petitioner James V. Battaglia, 171 East 89th Street, Apt. 11A, New York, New York 10128, filed an exception to the determination of the Administrative Law Judge issued on May 10, 2001. Petitioner appeared by Donald Rosenkrantz, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Peter T. Ostwald, Esq. and Herbert M. Friedman, Esq., of counsel).

Petitioner filed a brief in support of his exception, the Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on January 17, 2002.

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 petitioner's claim for refund of tax paid on Federal pension income for the years 1986, 1987 and 1988 on the basis that petitioner failed to file timely refund claims for any of such years.

II. Whether the Division of Taxation should be estopped from asserting the statute of limitations as an affirmative defense to petitioner's claim for refund.

FINDINGS OF FACT

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

Petitioner, James V. Battaglia, filed timely New York State personal income tax returns for each of the years 1986, 1987 and 1988. On each of such returns, petitioner reported and paid tax on Federal pension income.

On or about April 10, 1989, petitioner filed Form IT-201-X (New York State Amended Resident Income Tax Return) for the year 1985. By this filing, petitioner sought a refund in the amount of $739.00, representing the tax paid on his Federal pension income for the year 1985, plus interest. This filing was made as the result of petitioner's becoming aware, earlier in 1989, of a pending challenge by a Michigan taxpayer concerning state taxation of Federal pension income. It is undisputed that petitioner did not, at this same time, file amended returns or refund claims for 1986, 1987 or 1988.

On or about May 1, 1989, petitioner telephoned the Division of Taxation ("Division") regarding the status of his amended return for 1985. Petitioner was advised that the issue regarding the taxability of Federal pension income remained undecided. Petitioner's handwritten notes concerning this telephone call reflect the following:

> Legal Dept. will decide in another 30 days, & if favorable, will simply announce a change in position (no legislation required). [off-the-record: "more likely they'll exempt Fed pensions than tax state pensions so *no need to file amended returns for 86 on until they decide* . . . they won't

> acknowledge your 85 201X until they decide on above policy. Around mid-July before amended returns can be acted upon (emphasis as in original).

In a second telephone call made either the same day or the day after, petitioner's handwritten notes reflect the following advice given by a different Division employee:

> No refunds will be made for years prior to '89; but as of 1/89 no more taxes due. Decision was made recently, but amended returns just began to be processed.[1]

By a letter dated March 2, 1990, the Division disallowed petitioner's refund claim for 1985. This letter, which specifically referenced the year 1985 and the refund amount of $739.00, explained the Division's then-current position to be that Federal pension benefits received in years beginning on or after January 1, 1989 would not be subject to tax, but that refunds would not be granted with respect to taxes paid on such benefits for years prior to 1989. Petitioner was further advised that if he did not accept the findings, he could file a petition with the Division of Tax Appeals or request a conciliation conference with the Bureau of Conciliation and Mediation Services. The letter also provided that if then-pending court action changed this decision, petitioner's claim would be automatically reconsidered.

By a letter dated December 27, 1991, the Division further advised petitioner, with respect to his pending refund claim for 1985, that the Division's previous letter was based on anticipation of a speedier judicial resolution of the controversy than had occurred. The Division's letter, which referenced audit case number X-184648180, further provided as follows:

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[1] Petitioner also stated in testimony that he was advised the filing of refund claims for years other than 1985 "could hurt his chances" or "jeopardize his rights" to obtaining refunds. Petitioner's notes of his telephone calls to the Division do not reflect this claim or information (***see*** above), nor do any of the letters issued to petitioner by the Division.

> [s]ince it now appears that a final court resolution from which no appeal is taken will certainly require far more than two years from the date of our last letter, this is to let you know that a petition for a hearing regarding your entitlement to a refund *upon a timely and validly interposed claim will not be necessary*.
>
> In the interest of a uniform, just resolution of the issue, this letter constitutes the Department's assurance that when there is a final judicial determination regarding the rights of taxpayers to refunds of taxes paid on Federal pension benefits received prior to 1989, your refund *claim* will be automatically reconsidered without the necessity of further application on your part. You will not be required to petition for administrative adjudication unless you disagree with our determination on such reconsideration (emphasis supplied).

The record is clear that as of the dates of the foregoing letters, the only pending refund claim filed by petitioner was his claim for the year 1985.

By a letter dated August 23, 1993, again referencing audit case number X-184648180, the Division advised petitioner that there was some misunderstanding regarding the impact of the U.S. Supreme Court's decision in ***Harper v. Virginia Dept. of Revenue*** (509 US 86, 125 L Ed 2d 74) as it pertained to Federal retirees who had pending refund claims. The letter explained that, based upon its decision in ***Harper***, the Supreme Court referred the New York case of ***Duffy v. Wetzler*** (207 AD2d 375, 616 NYS2d 48, ***lv denied*** 84 NY2d 838, 617 NYS2d 129, ***cert denied*** 513 US 1103, 130 L Ed 2d 673) to the Appellate Division of the State of New York for further review. According to the Division, there were outstanding issues which rendered the status of refund claims of New York's Federal retirees uncertain and that action on refund claims could not proceed until the Appellate Division rendered a decision. The letter further stated that:

> [w]hen the judicial process surrounding the ***Duffy*** case is complete, we will have a final legal decision concerning the entitlement of federal retirees, *who made timely claims*, to tax refunds. If New York State is directed to pay such refunds, they will be paid, with interest, as promptly as possible.

> After a judicial decision is issued, we well be in contact with you as soon as possible (emphasis supplied).

By a letter dated June 28, 1994, again referencing audit case number X-184648180, petitioner was advised that the Division had decided to approve refunds claimed on taxes paid on Federal pension income rather than await a judicial resolution of the issue. The letter further stated that if there was more than one refund claim, that is, for more than one tax year, a separate check would be issued for each year "*for which a timely claim was submitted*" (emphasis supplied).

On or about September 13, 1994, petitioner received a refund check for the year 1985, including tax plus the interest due thereon.

On or about December 26, 1996, petitioner filed a separate Claim for Credit or Refund of Personal Income Tax (Form IT-113-X) for each of the years 1986, 1987 and 1988, seeking a refund for each of such years in the respective amounts of $682.00, $696.00 and $717.00, plus interest. Each form contained the identical statement in support of petitioner's claim, to wit, "I am (and was) entitled to a refund of all NYS & NYC taxes paid on my Federal pension due to (1) Davis vs. Mich. and (2) Duffy vs. Wetzler and (3) Harper vs. Virginia; also under the N.Y.S. constitution."

By a letter dated February 5, 1997, the Division notified petitioner that his refund claims for the years 1986, 1987 and 1988 were disallowed in full. The stated basis for the disallowance was that either no tax was paid on the Federal pension income or the claims were not timely filed.

Petitioner challenged the disallowance of his refund claims by filing a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services. A

conference was held on December 10, 1998 and, by a subsequent Conciliation Order (CMS No. 164004) dated October 8, 1999, the request was denied and the Notice of Disallowance was sustained.

Petitioner continued his challenge to the disallowance by filing a petition which claimed the Division "violated a 1939 U.S. Supreme Court ruling requiring states to tax Federal pensions no more harshly than state/local pensions."[2] Petitioner also reiterated his position that he had been told that he only needed to file a refund claim for 1985 and that subsequent years would be "automatically reconsidered without . . . further application."

The Division filed an answer to the petition, asserting that petitioner's claims for refund for the years 1986, 1987 and 1988 had not been filed within three years of the filing of the tax returns for such years and that therefore the refund claims were properly denied as untimely.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that in ***Davis v. Michigan Dept. of Treasury*** (489 US 803, 103 L Ed 2d 891), the United States Supreme Court held that a tax scheme that exempts retirement benefits paid by the state from tax but does not exempt retirement benefits paid by the Federal government is unconstitutionally discriminatory. In ***Harper v. Virginia Dept. of Revenue*** (***supra***), the U.S. Supreme Court held that ***Davis*** had retroactive application 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). Such relief may consist of

[2] It was later made clear that petitioner was referring to the Public Salary Tax Act of 1939 (4 USC § 111).

awarding refunds to those illegally taxed or provide some other relief that "create[s] in hindsight a nondiscriminatory scheme" (***McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, supra***, 110 L Ed 2d, at 38).

The Administrative Law Judge observed that in response to these decisions, New York amended Tax Law § 612(c)(3) to place pensions paid to Federal retirees in the same position as pensions paid to State and local retirees. The amendment was to apply to federal pension benefits received in taxable years beginning on or after January 1, 1989.

The Administrative Law Judge pointed out that Tax Law § 687 provides a period of limitations for the filing of a claim for credit or refund of income tax. Further, the Administrative Law Judge observed that this section satisfies the Due Process Clause of the 14th Amendment by providing "meaningful backward-looking relief to rectify any unconstitutional deprivation" required by ***McKesson***. The Administrative Law Judge also noted that Tax Law § 687(a) adequately meets the ***McKesson*** requirements that a state "might provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint . . ." (***McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, supra***, 110 L Ed 2d, at 41). Relying on ***Matter of Burkhardt*** (Tax Appeals Tribunal, January 9, 1997), the Administrative Law Judge concluded that these procedural requirements addressed the State's obligation to refund the unconstitutionally collected funds while satisfying the State's need for sound fiscal planning.

The Administrative Law Judge found that petitioner did not dispute the Division's assertion that he did not file the claims for refund in issue within three years of the filing of the respective tax returns or within two years of paying the tax as required by Tax Law § 687.

Therefore, the Administrative Law Judge concluded that the claims for refund for the years 1986, 1987 and 1988 were untimely and were properly disallowed by the Division.

The Administrative Law Judge rejected petitioner's argument that the Division should be estopped from raising the statute of limitations as a basis for denying the claims for refund because of letters issued by the Division to petitioner and alleged misstatements by employees of the Division. The Administrative Law Judge, relying on applicable case law, stated that the doctrine of estoppel does not apply to government acts unless there are exceptional facts which require the application of the doctrine in order to avoid a manifest injustice. Further, when a taxing authority is involved, this rule is considered particularly applicable because public policy supports enforcement of the Tax Law. The Administrative Law Judge relied on the test utilized by the Tax Appeals Tribunal to determine whether there should be an estoppel; i.e., whether there was a right to rely on the Division's representation, whether there was reliance and whether the reliance was to the detriment of the party who relied upon the representation. The Administrative Law Judge found that in a situation similar to the present case, ***Matter of Glover Bottled Gas Corp***. (Tax Appeals Tribunal, September 27, 1990), the taxpayers therein had alleged that an employee of the Division erroneously advised them over the telephone of the last permissible date for filing a claim for refund. However, the Tax Appeals Tribunal found estoppel was inappropriate because the advice was communicated over the telephone and it contradicted the clear language of the Tax Law.

The Administrative Law Judge concluded that here there was no unequivocal written message from the Division advising petitioner not to file amended returns or refund claims. The Administrative Law Judge rejected petitioner's interpretation that such a message was implied in

the Division's correspondence. Further, the Administrative Law Judge found that such advice was in direct contradiction to the explicit language of Tax Law § 687(a). Accordingly, the Administrative Law Judge found that it was unreasonable for petitioner to have relied on the advice that he did not have to file refund claims for the years 1986 through 1988, and the Division was not estopped from asserting that the statute of limitations bars petitioner's refund claims for the years in issue.

The Administrative Law Judge also rejected, as a matter of law, petitioner's claim that his telephone inquiries represented timely oral claims for refund which were later perfected by the filing of the written claims on forms IT-113-X. The Administrative Law Judge noted that the Tax Appeals Tribunal has held, as a threshold requirement, that refund claims must be made in a timely written document which adequately apprises the Division that a refund is sought and of the period in question. Oral claims do not suffice to toll the statutory period of limitations for filing.

The Administrative Law Judge also rejected petitioner's claim that the special refund authority of Tax Law § 697(d) should be invoked, in light of the Public Salary Tax Act of 1939 (4 USC § 111), so as to conclude that the tax in issue was illegally collected. In order to invoke the special refund authority granted by Tax Law § 697(d), the Administrative Law Judge pointed out that it must be shown that the moneys at issue have been erroneously or illegally collected or paid by the taxpayer under a mistake of fact. The Administrative Law Judge concluded that in the present case, no monies were paid by petitioner under a mistake of fact. Petitioner properly paid New York State personal income tax on Federal pension benefits received in the years 1986 through 1988. Although the erroneous or illegal collection of moneys is sufficient to invoke the

special refund authority, the Administrative Law Judge found that there was no showing by petitioner that money was collected illegally or erroneously in this case. Petitioner paid income tax on his 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, the Administrative Law Judge concluded that this does not alter the fact that at the time of payment by petitioner, the payments were made pursuant to law. Petitioner, at all times, had the right and opportunity for meaningful backward-looking relief to challenge the payment of tax on his Federal pension income by filing a timely claim for refund for the years in issue.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that he presented the only evidence concerning conversations with Division employees. Therefore, it must be given credence. Petitioner asserts that it was error for the Administrative Law Judge to find it unreasonable for petitioner to have relied on the telephone advice of Division employees. If the Division did not want taxpayers to rely on telephone information given by its employees, it should have directed these employees to warn taxpayers that their telephone advice was not to be relied upon. To allow the Division to disavow its employees' statements is against public policy and fosters mistrust.

Petitioner maintains that Tax Law § 687(a) does not require that a claim for refund must be in writing. Petitioner claims that he submitted several oral refund claims. Further, he asserts that the Division wrote letters to the petitioner which stated that his refund claims would be automatically reconsidered without further application on his part, thus suggesting that no further writings were necessary under the circumstances. Petitioner filed a written refund claim for

1985. He contends that the only logical reason why he didn't file additional written claims for 1986 - 1988 is because he was told by an employee of the Division that he need not do so.

Petitioner argues that the Division should be estopped from asserting the statute of limitations against him because of the unusual circumstances presented by this case, such as the unsettled state of the law; advice from Division employees that further filings might endanger his refund; and that petitioner was never warned until it was too late that this advice was not to be relied upon. Petitioner maintains that he was always diligent about seeking his claim for refund and made numerous inquiries and filed detailed correspondence. To find that he simply failed to file a written refund claim in a timely manner misstates his case.

The Division, in opposition, argues that the Administrative Law Judge correctly determined that petitioner's refund claims for tax years 1986 through 1988 were properly disallowed. In order to have received a refund for those years, petitioner was required to have filed a refund claim or amended return within three years of the time the return was filed or within two years from the time that the tax was paid, whichever was later. The Division notes that petitioner did not dispute that his claims for refund were not filed until December 1996 and were, therefore, outside of the statute of limitations set forth in the Tax Law.

The Division asserts that petitioner has failed to show a basis to invoke the doctrine of estoppel against the Division because he has failed to show that he was explicitly advised by a Division employee that a refund claim for tax year 1985 would be considered a refund claim for tax years 1986 through 1988 as well. Despite petitioner's argument, the Division believes that this is not an unusual case and is not atypical of other cases concerning the refund of taxes paid on Federal pensions. The Division maintains that it was unreasonable for petitioner to have

relied on the purported advice that was communicated over the telephone by Division employees as it contradicted the clear and unequivocal language of the Tax Law.

The Division also contends that refund claims must be made in a timely written document which adequately apprises the taxing authority that a refund is sought and of the period in question. Oral claims do not suffice to toll the statutory period of limitations. Thus, the Division claims that petitioner's oral refund request is prohibited as a matter of law.

OPINION

Despite petitioner's argument that it was not unreasonable for him to rely on the telephone advice given to him by Division employees, we agree that the Administrative Law Judge properly rejected this argument. Tax Law § 687(a) requires that claims for credit or refund of income tax be "filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later." There is no evidence that such a claim was filed for any tax year other than 1985. Notwithstanding the fact that the Division did not present evidence to refute petitioner's claim that Division employees made certain oral representations to petitioner, we find, as did the Administrative Law Judge, that even if such representations had been made by a Division employee, there was no basis for petitioner to have relied on them as they are contrary to express provisions of the Tax Law. In ***Matter of Glover Bottled Gas Corp. (supra)***, we found that estoppel was inappropriate because it was unreasonable for petitioner to rely on advice communicated over the telephone which contradicted the clear language of the Tax Law concerning the timely filing of an application for refund. We see no distinction between the present case and the situation presented in ***Glover***.

Petitioner maintains that Tax Law § 687(a) does not provide that a claim for refund must be in writing. Petitioner is correct that the statute does not mandate this. Further, we have recognized that informal claims for refund may be filed (***see, Matter of Rand***, Tax Appeals Tribunal, May 10, 1990) and, in such cases, we have held that in determining the validity of informal refund claims, it is appropriate to look to federal cases for guidance:

> Tax Law section 687 is similar to section 6511 of the Internal Revenue Code and was intended to conform to federal law (Memorandum of State Department of Taxation and Finance, l962 McKinney's Session Laws of NY, at 3536-3537).
>
> The federal courts have frequently ruled that a timely claim for refund can be made in an informal manner. A valid informal claim must have a written component that adequately apprises the taxing authority that a refund is requested and the tax year in question. It must contain enough information to enable the taxing authority to begin an investigation of the matter, if it so chooses (***Wall Industries, Inc. v. U.S.***, 10 Cl Ct 82, 86-1 USTC ¶ 9438, at 84,028; ***American Radiator and Standard Sanitary Corp. v. U.S.***, 3l8 F2d 9l5, 63-2 USTC ¶ 9525, at 89,179 [1963]). "[A] notice fairly advising the Commissioner of the nature of the taxpayer's claim ... will ... be treated as a claim where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period" (***United States v. Kales***, 314 US 186, 41-2 USTC ¶ 9785, at 1,041 [1941]) (***Matter of Rand***, ***supra***).

In ***Matter of Francis Greenburger & RS & P/WVII Limited Partnership*** (Tax Appeals Tribunal, September 8, 1994), we considered the requirements of an informal claim:

> What constitutes an adequate or valid "informal refund claim" is not well settled. The sufficiency or adequacy of an informal refund claim is largely a question of fact (***see, United States v. Commercial Natl. Bank of Peoria*** (874 F2d 1165, 89-1 USTC ¶ 9333). Because courts created the concept of an informal claim or notice which may toll the statute of limitations, no specific rules address the requirements for such notice; only general principles exist (***United States v. Commercial Natl. Bank of Peoria, supra***). Other than the fact a taxpayer cannot rely on oral communication, courts often vary on which elements satisfy the requisite notice. When determining if a valid informal claim exists, courts will look to any statute or regulation in effect that addresses formal claims applications for the relevant tax (***see generally, United States v. Kales, supra***).

It appears clear that petitioner did not file an informal claim for refund for the years 1986 through 1988. There is no dispute that a written claim for refund was only filed for tax year 1985. Despite petitioner's claim that he did not file additional written claims for 1986 through 1988 because he was told by an employee of the Division that he need not do so, oral refund claims are not sufficient to be considered as informal claims which toll the statute of limitations.

Petitioner has offered no evidence below, and no argument on exception, that demonstrates that the Administrative Law Judge's determination is incorrect. We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and we see no reason to modify them in any respect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of James V. Battaglia is denied;

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

3. The petition of James V. Battaglia is denied; and

4. The Notice of Disallowance dated February 5, 1997 of petitioner's claims for refund is sustained.

DATED: Troy, New York
April 18, 2002

/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