STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MAX AND SHIRLEY A. SILVERMAN	:	DETERMINATION DTA NO. 808936
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1985 through 1988.	:	

Petitioners, Max Silverman and Shirley A. Silverman, 3850 Sedgwick Avenue, Bronx, New York 10403, filed a petition for refund of personal income tax under Article 22 of the Tax Law for the years 1985 through 1988.

The Division of Taxation, represented by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Esq., of counsel), filed a motion for summary determination, dated February 23, 1996, in the above-captioned case. Pursuant to 20 NYCRR 3000.5(b), responding papers were due on March 25, 1996. Petitioners, pro se, did not file any responding papers. Based on the affidavits of Herbert M. Friedman, Jr. and Charles Bellamy, Marilyn Mann Faulkner, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners' refund claim for taxes paid on Federal pension income is barred by the three-year limitations period of Tax Law § 687(a).

FINDINGS OF FACT

1. Sometime after April 15, 1989, petitioners filed a refund claim for personal income taxes paid on Federal pension benefits for the years 1985 through 1988.

2. By letter dated May 18, 1990, the Division of Taxation ("Division") denied the refund claim for taxes paid on Federal pension benefits for theyears prior to 1989. In that letter, the Division stated that although the U.S. Supreme Court in Davis v. Michigan Dept. of Treasury (489 US 803, 103 L Ed 2d 89 [1989]) addressed the issue of similar tax treatment of Federal and

State pensions of retirees, it did not address the issue of retroactive application. The Division noted that the New York law was changed and that Federal pension benefits received in taxable years beginning on or after January 1, 1989 are no longer taxable.

3. Petitioners filed a petition, dated November 19, 1990, alleging that the Division's disallowance of their refund request for the years 1985 through 1988 was contrary to the Supreme Court holding in Davis v. Michigan.

4. On February 23, 1996, the Division filed a motion for summary determination pursuant to 20 NYCRR 3000.9(b). In support of the motion, the Division submitted an affidavit by Charles Bellamy, an employee of the Audit Division who reviews refund claims made by Federal pension recipients. Mr. Bellamy stated that based on his review of petitioners' file, petitioners filed their 1985 New York State personal income tax return on or before April 15, 1986; that petitioners were issued a refund denial letter for the year 1985 because they did not file a claim for refund within three years of filing their original return for that year; and that in October of 1994, petitioners were issued 80 percent refunds for the years 1986 through 1988 but that the remaining 20 percent of the refunds for the years 1986 through 1988 were paid to their attorneys as fees in the State Supreme Court case of Alderman v. Wetzler pursuant to the order of Justice Alan Levine dated September 29, 1995.

5. The Division argued in its motion that because the refunds for 1986 through 1988 have been paid to petitioners, their claim for those years is now moot. With respect to the year 1985, the Division argued that petitioners' claim is barred by the three-year statute of limitations of Tax Law § 687(a).

6. Petitioners have not filed any responding papers opposing the motion for summary determination.

CONCLUSIONS OF LAW

A. A party may move for summary determination pursuant to 20 NYCRR 3000.9(b) after issue has been joined. The regulations provide that the motion may be granted if the movant has sufficiently established that no material and triable issue of fact is present, and the motion may be

denied "if any party shows facts sufficient to require a hearing of any material and triable issue of fact." "Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted" (Kuehne & Nagel, Inc. v. Baiden, 36 NY2d 544, 369 NYS2d 667, 671).

In the petition, petitioners requested refunds for the years 1985 through 1988. In his affidavit, Mr. Bellamy stated that after the petition was filed, the Division refunded to petitioners 80% of the refund requested for the years 1986 through 1988, and to petitioners' attorneys 20% of the refund for those years pursuant to a court order. Mr. Bellamy also alleged that petitioners filed their 1985 personal income tax return on or before April 15, 1986.

Mr. Bellamy's affidavit constitutes evidence sufficient to establish the prima facie fact that petitioners' request for refunds for the years of 1986 through 1988 have been granted. Inasmuch as petitioners have not filed any opposing papers to this evidence, petitioners have admitted to the truth of the facts alleged in the affidavit. Therefore, the refund claim for the years 1986 through 1988 is moot. Because petitioners filed the 1985 refund request beyond three years from the date they filed their 1985 tax return, the remaining issue is whether the three-year statute of limitations of section 687(a) bars petitioners' refund claim for 1985.

B. In Davis v. Michigan Dept. of Treasury (489 US 803, 102 L Ed 2d 89 [1989]), the U.S. Supreme Court held that a tax scheme that exempts retirement benefits paid by the State but not retirement benefits paid by the Federal Government violates the constitutional intergovernmental tax immunity doctrine. In Harper v. Virginia Dept. of Taxation (509 US __, 125 L Ed 2d 74 [1993]), the Supreme Court further held that the ruling in Davis applies retroactively and that States which violated the tax immunity doctrine must provide a "meaningful backward-looking relief to rectify any unconstitutional deprivation" (Id., 125 L Ed 2d at 89, quoting, McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 US 18, 31, 110 L Ed 2d 17 [1990]). A State may provide such relief by awarding refunds to those illegally taxed or provide some other relief that "create[s] in hindsight a nondiscriminatory scheme" (Mc Kesson Corp. v. Division of Alcoholic Beverages & Tobacco, supra, 496 US at 40). Applying this principle, the

U.S. Supreme Court found that the State of Georgia had not provided a taxpayer "meaningful backward-looking relief" when it construed a refund statute not to apply to the taxpayer on the ground that the law under which taxes were assessed and collected was subsequently declared unconstitutional (Reich v. Collins, 513 US __, 130 L Ed 2d 454 [1994]).

In this case, the refund provision of Tax Law § 687(a) was applied to grant petitioners relief for the taxes they paid for 1986 through 1988. The question remains whether the three-year statute of limitations provision of the statute may constitutionally be applied to bar petitioners' requested refund for the year 1985. Postdeprivation remedies, such as refund provisions, must satisfy minimum due process requirements, however, the State is free to impose various procedural requirements for postdeprivation relief including the enforcement of a statute of limitations (McKesson v. Division of Alcoholic Beverages & Tobacco, supra, 496 US at 45). In McKesson, the Court indicated that the purpose of such procedural protections was "to secure the State's interest in stable fiscal planning when weighted against its constitutional obligation to provide relief for an unlawful tax" (Id., at 45, citing, Ward v. Love County Board of Commrs, 253 US 17, 25, 64 L Ed 2d 751).

The Division's denial of the refund for 1985 on the ground that it is barred by the three-year statute of limitations contained in Tax Law § 687(a) is consistent with the U.S. Supreme Court decisions in Davis and its progeny. Therefore, because there are no material or triable issues of fact, the Division is entitled to summary determination based on the federal case law.

C. The Division of Taxation's motion for summmary determination is granted and the petition of Max and Shirley A. Silverman is denied.

DATED: Troy, New York
May 9, 1996

/s/ Marilyn Mann Faulkner
ADMINISTRATIVE LAW JUDGE