

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>HARRY S. REITER</b>	:	DETERMINATION
	:	DTA NO. 814255
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1983 through 1985.	:	

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Petitioner, Harry S. Reiter, 37 Dalton Street, Long Beach, New York 11561, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1983 through 1985.

The Division of Taxation brought a motion for summary determination, dated January 24, 1996, pursuant to section 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner filed an answer to the motion on February 21, 1996. The Division of Taxation appeared in support of the motion by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel). Petitioner appeared in opposition to the motion pro se.

After reviewing the motion papers and pleadings filed in this case, Jean Corigliano, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner is entitled to a refund of personal income taxes for the years 1983 through 1985.

***FINDINGS OF FACT***

1. Petitioner, Harry S. Reiter, filed a petition on August 24, 1995 seeking a refund of personal income taxes paid for the years 1983 through 1985 in the amount of \$8,893.14. Petitioner is a retired Federal employee and a retired United States Army officer. He received

pension payments from the Federal government in the years 1983 through 1985 and included the amount of the payments in his calculation of New York State taxable income.

2. At the time petitioner's returns were filed, New York State had a tax statute which excluded State pensions from taxation, but not Federal pensions (Tax Law § 612[c][former (3)], amended by L 1989, ch 664, § 1). The United States Supreme Court reviewed the constitutionality of a similar Michigan statute in Davis v. Michigan Dept. of Treasury (489 US 803, 103 L Ed 2d 891) and invalidated the Michigan statute on the ground that it violated the tenets of inter-governmental tax immunity because it favored State retired employees over Federal employees.

3. Following the Davis decision, the New York State Legislature amended Tax Law § 612(c)(3) to afford the same exemption from taxation to Federal pensions as had previously been afforded to State pensions; however, the amendment did not apply retroactively to tax years before the Davis decision was issued (L 1989, ch 664, §§ 1, 2, effective July 21, 1989 and applicable to Federal pension benefits received in taxable years beginning on or after January 1, 1989).

4. Petitioner filed amended personal income tax returns for the years 1983, 1984 and 1985 in January 1990, requesting a refund of the tax paid on his Federal pension payments. On or about February 15, 1991, the Division of Taxation ("Division") issued three separate but identical letters to petitioner denying his refund claims. In its letter, the Division stated that it would not "issue refunds on federal pension benefits for years prior to 1989." It was the Division's position at that time that the Davis decision did not apply retroactively.

5. Petitioner requested a Conciliation Conference to challenge the Division's determination. The Division issued a Conciliation Order, dated July 7, 1995, sustaining the denial of petitioner's request for a refund.

6. Petitioner filed a petition challenging the denial of his refund claims. In that petition, and in his answer to the instant motion, petitioner concedes that the refund claims

were filed beyond the three-year period prescribed in Tax Law § 687(a).<sup>1</sup> Petitioner claimed that the denial of a refund of taxes exacted in violation of rights protected by the United States Constitution is in itself a denial of the due process rights guaranteed by the 14th Amendment to the Constitution and that he is entitled to a refund of all taxes collected under the authority of an unconstitutional taxing statute. Petitioner also stated that he is entitled to claim a six-year statute of limitations under 42 USC § 1983. Petitioner did not allege that his refund claims were timely under New York State law.

7. In an answer to the petition, the Division claimed that it correctly denied petitioner's refund claims because they were not filed within the three-year statute of limitations. The Division then brought this motion for summary determination.

8. Included in the Division's motion papers is the affidavit of Charles Bellamy, an employee of the Division. Mr. Bellamy's duties include the review and processing of refund claims made by Federal pensioners claiming a refund based on the Davis decision. He avers that he has reviewed petitioner's file and determined that petitioner's 1983 personal income tax return was filed on or before April 15, 1983, his 1984 personal income tax return was filed on or before April 15, 1985 and his 1985 personal income tax return was filed on or before April 15, 1986. He also states that petitioner filed amended returns for 1983, 1984 and 1985 in January 1990. Mr. Bellamy states that petitioner did not file a claim for refund of taxes or amended tax returns for 1983, 1984 and 1985 until January 1990.

9. In his affidavit in opposition to the Division's motion, petitioner does not challenge the Division's factual assertions regarding the dates of filing of the 1983, 1984 and 1985 returns and amended returns.

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<sup>1</sup>Tax Law § 687(a) provides that:

"[a] claim for credit . . . of an overpayment of income tax shall be filed . . . within three years from the time the return was filed or two years from the time the tax was paid . . . or, if no return was filed, within two years from the time the tax was paid."

### ***CONCLUSIONS OF LAW***

A. To obtain summary determination, the moving party must submit an affidavit, made by a person having knowledge of the facts, a copy of the pleadings and other available proof. The documents must show that there is no material issue of fact and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (Glick & Dolleck, Inc. v. Tri-Pac Export Corp., 22 NY2d 439, 293 NYS2d 93, 94; Museums at Stony Brook v. Village of Patchogue Fire Dept., 146 AD2d 572, 536 NYS2d 177, 179). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (see, Gerard v. Inglese, 11 AD2d 381, 206 NYS2d 879, 881).

To establish that petitioner's claim for refund of taxes was not made within the statute of limitations, the Division offered the affidavit of Charles Bellamy, a Division employee whose duties include the review of refund claims. Mr. Bellamy asserts that petitioner did not file refund claims within three years of filing his 1983, 1984 and 1985 personal income tax returns. Petitioner concedes that his claims for refund were untimely. Accordingly, there are no material and triable issues of fact presented, and a determination may be issued, as a matter of law.

B. In Davis v. Michigan Dept. of Treasury (*supra*), the Supreme Court held that a Michigan tax statute that exempted state retirement pensions from taxation but taxed Federal pensions violates the United States Constitution. At the time of the Davis decision at least 19 states, including New York, had tax or pension statutes that discriminated between state and federal pensions.<sup>2</sup> Following Davis, pensioners in several states sought refunds of taxes or the cancelation of assessments basing their claims on the Davis opinion. The state courts were

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<sup>2</sup>Tax Law § 612(c)(former [3]) states that in computing New York adjusted gross income a subtraction from Federal gross income is required for "[p]ensions to officers and employees of this state, its subdivisions and agencies, to the extent includible in gross income for federal income tax purposes . . . ."

then called upon to determine whether the holding in Davis should be given retroactive application to tax years prior to the date of the decision. The issue was definitively decided in Harper v. Virginia Dept. of Taxation (509 US \_\_\_\_, 125 L Ed 2d 74), where the Supreme Court, reversing a decision of the Virginia Supreme Court, held that the ruling in Davis is to be applied retroactively. However, the Court did not award a refund to the Harper petitioners "because federal law does not necessarily entitle them to a refund." Rather, the Court stated, the Constitution requires "relief consistent with due process principles" (Harper v. Virginia Dept. of Taxation, *supra*, 125 L Ed 2d at 88, quoting American Trucking Assns. v. Smith, 496 US 167, 110 L Ed 2d 148). It remanded to the Virginia Supreme Court to determine whether, under Virginia law, petitioners are afforded a remedy which satisfies the minimum federal requirements outlined by the Court in its decision (*id.*, 125 L Ed 2d at 89).

The issue of retroactive application of the Davis holding was addressed in New York in the case of Duffy v. Wetzler (174 AD2d 253, 579 NYS2d 684, appeal dismissed 79 NY2d 976, 583 NYS2d 190, appeal dismissed 80 NY2d 890, 587 NYS2d 900, revd 509 US \_\_\_\_, 125 L Ed 2d 716). The Appellate Division, Second Department, held that the Davis decision applied prospectively only and did not require a refund of tax for years before the issuance of the Davis decision (*id.*). The United States Supreme Court granted certiorari and vacated that judgement for further consideration in light of the opinion in Harper (Duffy v. Wetzler, *supra*, 125 L Ed 2d 716).

Although the Division now concedes that the Davis decision has retroactive application, it contends that the refunds in question are barred by Tax Law § 687(a). Petitioner contends that where a constitutional violation has occurred the time limitations of section 687(a) do not apply. He claims that the United States Constitution requires the refund of all taxes paid under an unconstitutional state taxing statute and that a state refund provision which precludes recovery of illegally collected taxes is in itself violative of the Fourteenth Amendment. I disagree and find that a refund of tax for the years 1983, 1984 and 1985 is barred by the statute of limitations.

In a long line of cases, the United States Supreme Court has held that due process requires the states to afford taxpayers a meaningful opportunity to secure relief for taxes paid pursuant to a tax scheme ultimately found unconstitutional (McKesson v. Division of Alcoholic Beverages (496 US 18, 110 L Ed 2d 17, 27). At the same time, the Supreme Court has recognized a state's "exceedingly strong interest in financial stability" (McKesson v. Division of Alcoholic Beverages, supra, at 37, 110 L Ed 2d at 36); and, as a consequence, has extended to the states a considerable amount of flexibility in fashioning a remedy that responds to the harm sought to be redressed (Harper v. Virginia Dept. of Taxation, supra). A state may allow the taxpayer to challenge the tax before paying, or it may require a taxpayer to pay the tax first and later dispute the validity of the tax by applying for a refund (Reich v. Collins, 513 US \_\_, 130 L Ed 2d 454, 457). Either remedy is acceptable as long as the state provides "meaningful backward-looking relief to rectify any unconstitutional deprivation" (Harper v. Virginia, supra, 125 L Ed 2d at 89, quoting McKesson v. Division of Alcoholic Beverages, supra, at 31, 110 L Ed 2d at 32; Reich v. Collins, supra). The ultimate question then is whether New York's three-year statute of limitations is consistent with the demands of due process and the McKesson line of cases. I find that it is.

New York provides a clear and certain postdeprivation remedy. A taxpayer may file a claim for refund of an overpayment of tax within three years from the time the return was filed or two years from the time the tax was paid (Tax Law § 687[a]). This is exactly the kind of "meaningful backward-looking relief" required by the United States Constitution as demonstrated by the McKesson opinion. There, the Supreme Court recognized the state's concern that its "obligation to provide refunds for what later turns out to be an unconstitutional tax" might undermine its ability to engage in sound financial planning (McKesson v. Division of Alcoholic Beverages, supra, at 45, 110 L Ed 2d at 41). It theorized that a state might protect its interest in financial stability while fulfilling its "constitutional obligation to provide relief for an unlawful tax" by, for instance, imposing "relatively short statutes of limitations applicable to such actions" (id.). This statement contradicts petitioner's claim that a state

refund provision which denies the refund of illegally collected taxes on the ground of timeliness is itself in contravention of the Fourteenth Amendment.

New York State's interest in financial stability justifies its enforcement of the three-year statute of limitations. If petitioner believed that the taxes he paid in 1983, 1984 and 1985 were constitutionally invalid, he might have protected his interests by paying the tax under protest or filing a claim for refund within the statute of limitations. The provisions of Tax Law § 689 would then have provided petitioner with a meaningful opportunity to be heard. By not notifying the Division of his disagreement with the tax statute until January 1990, petitioner relinquished his entitlement to a refund for years prior to 1987 (see, Matter of Fiduciary Trust Co. v. State Tax Commn., 120 AD2d 848, 502 NYS2d 119).

The administrative procedure provided by the Tax Law affords taxpayers meaningful retroactive relief while securing New York State's interest in stable fiscal planning. It is consistent with the Supreme Court precedent established in McKesson and later cases, and it satisfies due process concerns.

C. In his answer to the Division's motion, petitioner states: "The six year statute of limitations is claimed in connection with the violation of 42 USC 1983." 42 USC § 1983 provides a cause of action for the deprivation of a constitutionally protected right under the color of state law. The Division of Tax Appeals has no jurisdiction to decide claims under 42 USC § 1983.

D. The petition of Harry S. Reiter is denied, and the denial of petitioner's claim for refund is sustained.

DATED: Troy, New York  
April 4, 1996

Jean Corigliano  
ADMINISTRATIVE LAW JUDGE