STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FREDERICK J. KIRCH	:	DETERMINATION DTA NO. 815376
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1986 through 1988.	: :	

Petitioner, Frederick J. Kirch, 11 Eberle Road, Latham, New York 12110, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1986 through 1988.

The Division of Taxation, by its representative, Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel), brought a motion dated April 1, 1997 for summary determination in the above-referenced matter. Pursuant to section 3000.5(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, petitioner had 30 days to file a response to the motion. Petitioner timely filed a letter in opposition to the motion. Accordingly, the 90-day period for the issuance of this determination under section 3000.5(d) of the Rules of Practice and Procedure began on May 1, 1997. Based upon the motion papers, the affidavits submitted therewith, the letter in opposition and all pleadings and documents submitted, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for refund of personal income tax paid on Federal pension income as untimelypursuant to Tax Law § 687(a) where such claim was filed beyond the statutory period of limitation.

FINDINGS OF FACT

1. The affidavit of Charles Bellamy, Tax Technician II, indicates that petitioner, Frederick J. Kirch, filed his 1986 New York State personal income tax return on or before

April 15, 1987, his 1987 return on or before April 15, 1988 and his 1988 return on or before April 15, 1989. On each of the returns filed, petitioner reported and paid tax on Federal pension income.

2. On April 14, 1989, petitioner sent a letter to the Division of Taxation ("Division") requesting a refund of tax paid on his Federal pension income for the 1985 tax year. In the letter (a copy of which was attached to the Division's motion papers), petitioner asked that it be accepted in lieu of a form IT-113-X (Claim for Credit or Refund of Personal Income Tax). The letter stated that "I am filing for a protective claim 1985 because of March 28, 1989, U.S. Supreme Court Ruling on federal employee's retired pay pension."

3. On February 10, 1995, petitioner sent a letter to the Division (a copy of which was attached to the Division's motion papers) requesting a refund for the tax years 1986, 1987 and 1988. Enclosed with the letter were copies of petitioner's New York State personal income tax returns for the years 1985 through 1988.

4. On April 24, 1995, the Division issued a notice of disallowance to petitioner on the basis that he had failed to file a refund claim or amended return within three years from the filing of the original returns.[1] On October 4, 1996, petitioner timely filed a petition with the Division of Tax Appeals in response to the Conciliation Order issued on September 20, 1996. In the petition, he stated that the intent of his letter of April 14, 1989 (submitted in lieu of the form IT-113-X) was to cover all years 1985 through 1988 and that "I didn't know I had to submit an amended return for all the years involved." In his letter of April 4, 1997, submitted in opposition to this motion, petitioner states that when he contacted the Division in 1989, he was told that the form IT-113-X was not available, but that he could send a letter instead which

[1]While a copy of the notice of disallowance was not made a part of this record, it appears that it denied petitioner's refund claim for each of the years 1985 through 1988. Petitioner's letter in opposition to this motion states that, as a result of his not having received any response to his 1989 letter, he contacted the Division in early 1995 and was informed that the Division had nothing on file regarding his claim. Apparently, he then forwarded a copy of his April 14, 1989 letter along with a certified mail receipt which indicated that it had been received by the Division on April 17, 1989. After he filed a petition for a conciliation conference, a Conciliation Order (CMS No. 147635), dated September 20, 1996, was issued by the Division's Bureau of Conciliation and Mediation Services which granted petitioner a refund in the amount of $3,512.78 for 1985 and denied his request for the years 1986, 1987 and 1988.

would cover the four years involved. He states that he was never told that he had to file a request for refund for each of the years at issue and that he thought that his letter would suffice.

5. The Bellamy affidavit acknowledges that petitioner asked that his April 14, 1989 letter be accepted in lieu of form IT-113-X. Mr. Bellamy also states that form IT-113-X clearly provides that a separate claim must be filed for each tax year.

6. In June 1994, then Governor Cuomo authorized the payment of refunds to all taxpayers who had paid New York State personal income tax on their Federal pension income and who had timely filed refund claims pursuant to section 687 of the Tax Law.

CONCLUSIONS OF LAW

A. On March 28, 1989, the United States Supreme Court issued Davis v. Michigan Dept. of Treasury (489 US 803, 103 L Ed 2d 891). Davis held that state income tax schemes which provide for inconsistent treatment of state and Federal retirement benefits violate 4 USC § 111, which protects Federal employees from discriminatory state taxation, and further held that such schemes are unconstitutional under the doctrine of intergovernmental tax immunity.

B. At the time of the issuance of Davis, New York's Tax Law provided for similarly discriminatory treatment of Federal and State retirement benefits. Specifically, Tax Law § 612(c)(former [3]) provided that pensions to officers and employees of New York State and its political subdivisions were excluded from New York State income tax. At the same time, the Tax Law contained no similar provision for pensions to Federal retirees; such pensions were therefore subject to tax. In an apparent effort to remedy this situation, the Legislature amended the Tax Law, effective January 1, 1989, to exclude Federal pensions from New York income tax (see, L 1989, ch 664; Tax Law § 612[c][3][ii]) and thereby place both State and Federal retirees on equal footing. This remedy, however, was explicitly prospective and the Davis decision did not address the issue of retroactive application of its holding. At the time, the Division of Taxation took the position that Davis applied prospectively only and therefore denied refunds of tax on Federal pensions for years prior to 1989 even where timely refund claims were filed. Not surprisingly, Federal pensioners disagreed and commenced litigation in New York and

throughout the country (see, e.g., Duffy v. Wetzler 148 Misc 2d 459, 555 NYS2d 543, mod 174 AD2d 253, 579 NYS2d 684, appeal dismissed 80 NY2d 890, 587 NYS2d 900, revd 509 US 917, 125 L Ed 2d 716, on remand 207 AD2d 375, 616 NYS2d 48, lv denied 84 NY2d 838, 617 NYS2d 129, cert denied 513 US 1103, 130 L Ed 2d 673).

C. The issue of the retroactive application of the Davis holding was resolved in the affirmative in Harper v. Virginia Dept. of Taxation (509 US 86, 125 L Ed 2d 74). In that case, while the Court held that the rule announced in Davis was to be given full retroactive effect, it did not provide relief to the petitioners therein. Rather, citing McKesson Corp. v. Division of Alcoholic Beverages & Tobacco (496 US 18, 110 L Ed 2d 17), the Court held that a state is free to choose the form of remedy it will provide to rectify any unconstitutional deprivation, but that such a remedy must satisfy the demands of Federal due process (Harper v. Virginia Dept. of Taxation, supra at 101, 125 L Ed 2d at 88-89). In this context, Federal due process requires that where taxes are paid pursuant to a scheme ultimately found unconstitutional, the state must provide taxpayers with "meaningful retrospective relief" from taxes, meaning that in refund actions the state must afford taxpayers a "fair" opportunity to challenge the accuracy and legal validity of the tax and a clear and certain remedy for any erroneous or unlawful tax collection (see, McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, supra at 39, 110 L Ed 2d at 37-38).

D. Harper thus requires that Davis be given retroactive application. Accordingly, applying Davis to the instant matter, it is clear that petitioner "overpaid" his income taxes during the years at issue within the meaning of Tax Law § 687(a) (see, Fiduciary Trust Co. v.State Tax Commn., 120 AD2d 848, 502 NYS2d 119, 120).

E. Tax Law § 687(a) controls refunds of overpayments of income tax in New York and provides, in relevant part, as follows:

> "Claim for credit or refund of an overpayment of income tax shall 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."

F. The dispute in the instant matter involves the time limitation portion of Tax Law

§ 687(a). Pursuant to this section, petitioner was required to file a refund claim within three years from the date of filing of his returns for the years at issue. Petitioner contends that he was advised by an employee of the Division that his letter, in lieu of the filing of form IT-113-X which allegedly was not available, would suffice as claim for refund for all four years, i.e., 1985 through 1988. First, however, the issue which must be resolved is whether the limitations period set forth in Tax Law § 687(a), as applied in this instance, complies with Federal due process requirements under the standard enunciated in McKesson.

G. In McKesson, the Court discussed various constitutionally permissible procedural requirements available to a state to protect its interest in maintaining fiscal stability:

> "The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint; execute any refunds on a reasonable installment basis; enforce relatively short statutes of limitations applicable to such actions, refrain from collecting taxes pursuant to a scheme that has been declared invalid by a court or other competent tribunal pending further review of such declaration on appeal; and/or place challenged tax payments into an escrow account or employ other accounting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds. The State's ability in the future to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax." (McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, supra at 45, 110 L Ed 2d at 41; emphasis supplied.)

H. Clearly, the three-year statute of limitations at issue herein falls well within the range of permissible procedural protections discussed in McKesson. As the Tax Appeals Tribunal stated in Matter of Burkhardt (Tax Appeals Tribunal, January 9, 1997), "We also note from our review of the various cases dealing with Federal retirees that in no instance has a court allowed a refund to a Federal retiree where said retiree failed to initiate the timely filing of a claim for refund within the applicable statute of limitations for refund."

I. Apart from the due process analysis utilized in the McKesson and Davis line of cases, the Appellate Division has indicated that the limitations provisions of Tax Law § 687(a) operate to bar refund claims filed beyond the statutory period even where, as here, the tax in question is subsequently determined to be unconstitutional (see, Fiduciary Trust Co. v. State Tax Commn., supra). The Court in Fiduciary Trust Co. relied on the principle that there can be no recovery of

taxes voluntarily paid, without protest, under a mistake of law (id., 502 NYS2d at 120). In this case, there is no evidentiary basis nor is there any legal authority supporting the proposition that petitioner's inclusion of Federal pension income on his return and payment of tax thereon for the years at issue represents a "payment under demand" rather than an "erroneous overpayment" by petitioner. Petitioner's payment of tax on Federal pension income per his 1986, 1987 and 1988 personal income tax returns represents a voluntary payment under a mistake of law with no subsequent timely protest and, therefore, no recovery may be had. (Id.)

J. Petitioner's argument that he was misinformed by an employee of the Division is without merit. This is true for a number of reasons. First, the statement that a letter, in lieu of the filing of form IT-113-X, would suffice was correct. Petitioner's letter, filed on April 14, 1989 constituted a valid claim for refund for the year set forth thereon, namely 1985. The Division issued a refund to petitioner for 1985. Second, there is no proof that the Division's employee specifically informed petitioner that a letter seeking a refund for a specific tax year (1985) would also constitute a valid claim for the years 1986, 1987 and 1988. Petitioner also alleges that he was never told that he had to file a claim for refund for each of the years. The Tax Appeals Tribunal has addressed notification of taxpayers on the Federal pension issue as follows:

> "[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).
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> "In addition, we note that on November 6, 1989, the Division did issue a Technical Services Bureau memorandum to the public which informed taxpayers of their right to file protective refund claims during the pendency of two cases dealing with the issue of whether Davis v. Michigan Dept. of Treasury (supra) was to apply retroactively (see, TSB-M-89[9]I). Hence, although petitioner was placed on notice of his right to file protective refund claims, he chose not to exercise said right." (Matter of Jones, Tax Appeals Tribunal, January 9, 1997.)

While, as the Bellamy affidavit correctly notes (see, Finding of Fact "5"), form IT-113-X, Claim for Credit or Refund of Personal Income Tax, states that a separate claim must be filed for each tax year, there is no affirmative duty on the part of the Division to notify taxpayers of the due

dates for the filing of such claims. As previously noted, the information conveyed to petitioner by the Division's employee that a letter, in lieu of the form IT-113-X, would be accepted as a claim for refund was correct. It was petitioner who failed to include the years 1986, 1987 and 1988 when composing the letter. The time to apply for a refund is statutory and the statute contains no exceptions to the time limitations provided therein.

K. A successful motion for summary determination must show that there are no material issues of fact and that the only issues involve questions of law (see, 20 NYCRR 3000.5[c]). Such showing can be made by "tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York University, 64 NY2d 851, 853, 487 NYS2d 316, 318, citing Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595). Inasmuch as summary determination 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 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).

Here, the Division provided sufficient evidence in support of its assertion that no refund claims or amended returns for the years 1986 through 1988 were filed by petitioner within three years of the filing of the original returns for those years. Petitioner's initial request for a refund for such years was his letter of February 10, 1995 (see, Finding of Fact "3"). Petitioner's contention that he was never notified that separate claims had to be filed for each year and/or that he thought that his letter of April 14, 1989 would suffice as a claim for each of the years at issue is not proof of compliance with the provisions of Tax Law § 687(a). Accordingly, there being no material facts at issue and the Division being entitled to summary determination on the law, petitioner's claim for refunds of personal income tax for the years 1986 through 1988 are barred as untimely pursuant to Tax Law § 687(a).

L. The motion of the Division of Taxation for summary determination is granted and the petition of Frederick J. Kirch is denied.

DATED: Troy, New York
May 22, 1997

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE