STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JAMES E. & ELSA A. MORGAN	:	**DETERMINATION** DTA NO. 815795
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1974 through 1984 and 1986 through 1988.	:	

Petitioners, James E. and Elsa A. Morgan, 212 Oxhead Road, Centereach, New York 11720, 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 1974 through 1984 and 1986 through 1988.

The Division of Taxation, by its representative Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel), brought a motion dated October 2, 1997 for an order of summary determination in the above-referenced matter pursuant to section 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, to which petitioners had until November 3, 1997 to file a response, which date commenced the 90-day period for the issuance of this determination. Petitioners James and Elsa Morgan appeared *pro se.* On October 14, 1997, petitioners submitted an affirmation in support of their position.

Based on the motion papers, the affirmation and affidavit submitted therewith, petitioners' affirmation in response, and all pleadings and documents submitted, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly denied petitioners' claims for refund of taxes paid on Federal pension income as untimely pursuant to the three-year statute of limitations of Tax Law § 687(a).

II. Whether the special refund authority of Tax Law § 697(d) applies herein.

FINDINGS OF FACT

1. Petitioners, James and Elsa Morgan, filed their New York State personal income tax returns for the years 1974 through 1984 on or before April 15, 1985. Petitioners filed their 1986 return on or before April 15, 1987; their 1987 return on or before April 15, 1988; and their 1988 return on or before April 15, 1989. It is alleged by petitioners that on each return they reported and paid tax on Federal pension income paid to James Morgan.

2. On or about April 14, 1989, petitioners filed a "protective" claim for refund for tax year 1985 on Form IT 113-X, seeking a refund of taxes paid on Mr. Morgan's Federal pension for that year. The claim specifically requests a refund for 1985 only, and the form on which the claim was filed bears the inscription "A separate claim must be filed for each tax year." On Form IT 113-X, petitioners state the following: "I am applying for a 1985 tax refund. As an Air Force retiree, this claim is submitted requesting a refund of taxes paid on my Federal pension. The pension amount for 1985 was $10,727.52. Please deduct this amount from my taxable income from 1985 returns."

3. On or about July 11, 1994, petitioners filed claims for refund of tax paid on Mr. Morgan's Federal pension income for tax years 1974 through 1984 and 1986 through 1988. Petitioners did not file any refund claims for the years at issue before July 1994.

4. The Division of Taxation ("Division") denied petitioners' refund claims for 1974 through 1984 and 1986 through 1988 as untimely filed.

5. Petitioners challenged the Division's refund denial by requesting a conciliation conference. A conference was held on February 11, 1997, and by Conciliation Order (CMS No. 156594) dated March 28, 1997, petitioners' request was denied and the refund denial was sustained. In turn, petitioners continued their challenge by filing a petition dated April 17, 1997, which was received by the Division of Tax Appeals on April 21, 1997.

6. In their petition, petitioners set forth the following argument:

> "I submitted a claim (IT-1134x) [sic] of refund with my 1988 tax return for taxes paid on my federal pension for the year 1985 believing this would qualify me for a refund for the years 1974 - 1988 in the event that the litigations [sic] as to NYS taxing of my Federal pension was ruled illegal.
>
> "Consequently, I received a letter, dated June 28, 1994, from the Commissioner, James W. Wetzler in regard to my claim for a refund of taxes paid on my Federal pension. In this letter, I was requested to submit W-2P's and copies of my Federal and NYS returns. I submitted this information on July 11, 1994 for the years 1974 - 1988 to the Dept. Of Taxation & Finance Audit Div. - Central Office - Income Tax -AGI on August 29, 1994 [sic]. I received a notice of disallowance for the years 1974 -1984 and 1986 - 1988. It was stated that my claims for these years were not timely filed as per subsection (a) [sic] of the NYS Income Tax Law.
>
> "I'm protesting the implementation of this tax law, in that the litigation involving NYS tax on Federal pension was not judged to be illegal until August of 1994. In addition, at no time was I issued any information/instructions on the timely filing of a request for refund or the need to file for a refund of Federal pension taxes paid. I filed a It-113x [sic] for the year 1985 because Newsday newspaper ran an article advising Federal pension earners to do so. Had I received guidance from NYS Dept. Of Taxation and Finances [sic], I would have filed a It-113x [sic] for the years 1986 -1988 along with my 1988 tax return."

7. The Division served an answer to the petition on July 3, 1997. The Division denied the allegations contained in the petition and affirmatively stated that petitioner James Morgan was a Federal employee who paid tax on his Federal pension income for the years in issue, that petitioners' claim for refund for such years was denied as untimely, that a conciliation order was

issued sustaining the refund denial, and that the Tax Appeals Tribunal has consistently sustained the Division's disallowance of similar untimely refund claims.

8. On or about October 2, 1997, the Division filed its motion for summary determination. In support of its motion, the Division submitted an affidavit sworn to by Charles Bellamy on September 30, 1997. This affidavit attests to petitioners' filing of their New York State personal income tax returns and the filing of claims for refund of taxes paid on Federal pension income for tax years 1974 through 1984, 1985, and 1986 through 1988 as stated in Findings of Fact "1" through "3". Mr. Bellamy is employed by the Division as a Tax Technician II for its Audit Division. His responsibilities include reviewing and processing refund claims filed by taxpayers who paid tax on Federal pension income.

The Division's representative also included with the motion an affirmation explaining the legal background concerning state taxation of Federal pensions, and requested that the motion for summary determination be granted since there is no dispute that petitioners' claim for refund was not filed within three years of the filing of the returns for the years at issue, thus leaving no material or triable issue of fact, which should result in judgment in the Division's favor as a matter of law.

9. In response to the Division's motion, petitioners submitted an affirmation protesting the implementation of Tax Law § 687(a), and additionally raised the issue that Mr. Morgan's annual pension earnings did not exceed $20,000.00, and thus, on this basis as well, petitioners should not have paid New York State income tax on his Federal pension income. Petitioners seek relief under the special refund authority of Tax Law § 697(d).

10. Petitioners have raised no challenge and submitted no evidence to counter the Division's position that the earliest request for refund of tax paid on Mr. Morgan's Federal

pension income for the years 1974 through 1984 and 1986 through 1988 was the refund claim filed on or about July 11, 1994.

CONCLUSIONS OF LAW

A. The Tax Appeals Tribunal has consistently denied claims for refunds of personal income tax paid on Federal pension income where, as here, such claims were not filed within the three-year statute of limitations set forth in Tax Law § 687(a) (*see*, *e.g.*, *Matter of Purvin*, Tax Appeals Tribunal, October 9, 1997; *Matter of Nuzzi*, Tax Appeals Tribunal, October 2, 1997; *Matter of Hotaling*, Tax Appeals Tribunal, June 19, 1997; *Matter of Burkhardt*, Tax Appeals Tribunal, January 9, 1997; *Matter of Jones,* Tax Appeals Tribunal, January 9, 1997). The basis for the Tribunal's conclusion in these cases has been that the backward-looking relief afforded by the three-year limitations period of section 687(a) is sufficiently "meaningful" under the rule of *Harper v. Virginia Dept. of Taxation* (509 US 86, 125 L Ed 2d 74, 89, citing *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* 496 US 18, 110 L Ed 2d 17) to remedy the unconstitutional deprivation caused by the discriminatory treatment of Federal pensions prior to the enactment of Tax Law § 612(c)(3)(ii) (*see*, L 1989, ch 664). In other words, the Tribunal has held that, in this context, Tax Law § 687(a) satisfies the demands of Federal due process.

The identity of facts between this case and the cited Tribunal cases compels an identical conclusion; that is, that petitioners' claim for refund for the years at issue was untimely filed.

B. Petitioners assert that they acted on the assumption that their claim for 1985 notified the Division of Mr. Morgan's eligibility for this and future refunds, based on the rationale that the issue of State taxation of Federal pensions was in the middle of litigation and a final ruling had not been made by the U. S. Supreme Court. Petitioners stated in their petition that the Division failed to adequately notify them of the need to file refund claims to preserve their right

to a refund. In response to a similar argument advanced by the petitioner in *Matter of Jones (supra)* the Tribunal stated:

> "[W]e 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*)."

C. On November 6, 1989, the Division issued a Technical Services Bureau memorandum to the public entitled *Taxation of Federal Pensions* (TSB-M-89-[9]I) which advised that Tax Law § 612(c)(3) had been amended in response to the Supreme Court's decision in *Davis v. Michigan Dept. of Treasury* (489 US 803, 103 L Ed 2d 891) to exempt Federal pensions from state income taxation. The memorandum further advised that the amendment was effective with respect to pension payments received on or after January 1, 1989 and that the State would not issue refunds for prior years even where the statute of limitations had not yet expired. The memorandum also advised of pending court cases which "may result in the state being required to issue refunds" for years prior to 1989 and that, pending the outcome of such litigation, "taxpayers have the right to file protective claims for all open years." The Tax Appeals Tribunal noted in *Matter of Jones* (*supra*) that the issuance of the Technical Services Bureau memorandum on November 6, 1989 placed the petitioner therein on notice of his right to file protective refund claims during the pendency of the litigation addressing the issue of whether the State would be required to issue refunds for years prior to 1989. Any argument regarding the adequacy of the Division's notice must therefore be rejected pursuant to *Matter of Jones*. Petitioners' argument that the 1985 claim put the Division on notice for all future claims is further undermined by the fact that, on or about April 14, 1989, petitioners filed a timely claim

for refund for the year 1985 (*see*, Finding of Fact "2"), and the form clearly states that a separate claim must be filed for each tax year. If petitioners knew in April 1989 that they needed to file a refund claim for 1985, they should have known of the need to file similar claims for 1986 through 1988, or made an inquiry to determine the same.

D. Petitioners contend that Tax Law § 687(a) is not properly applicable where, as in this case, taxes are paid under a law later determined to be unconstitutional. This contention is rejected. The payment of a tax later determined to be unconstitutional is an "overpayment" of tax under Tax Law § 687(a) and a claim for refund of such an overpayment is subject to the three-year limitations period (*see*, *Fiduciary Trust Co. v. State Tax Commn*., 120 AD2d 848, 502 NYS2d 119). Furthermore, in *McKesson v. Division of Alcoholic Beverages & Tobacco (supra)* the Supreme Court acknowledged the State's interest in maintaining its fiscal stability and suggested various constitutionally permissible procedural requirements for refunds including "enforc[ing] relatively short statues of limitations applicable to such [refund] actions" (496 US at 45, 46, 110 L Ed 2d at 41).

E. Petitioners additionally maintain that the Division should exercise its special refund authority in their favor, pursuant to Tax Law § 697(d), which provides as follows:

> "Where no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts, pursuant to the provisions of this article, the tax commission at any time, without regard to any period of limitations, shall have the power, upon making a record of its reasons therefor in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certificate to the comptroller."

F. The special refund authority of section 697(d) does not apply to petitioners' situation. The Tax Appeals Tribunal has addressed the special refund authority under section 697(d) in

Matter of The Estate of Mackay (Tax Appeals Tribunal, March 23, 1989). The Tribunal, in that decision, set forth the following legal standard:

> "A mistake of fact has been defined as an understanding of the facts in a manner different than they actually are (54 Am Jur 2d *Mistake, Accident or Surprise* § 4; *Wendell Foundation v. Moredall Realty Corp.*, 176 Misc 1006, 1009). A mistake of law, on the other hand, has been defined as acquaintance with the existence or nonexistence of facts, but ignorance of the legal consequences following from the facts (54 Am Jur 2d *Mistake, Accident or Surprise* § 8; *Wendell Foundation v. Moredall Realty Corp.*, supra at 1009)."

Petitioners' failure to exclude Mr. Morgan's pension earnings from New York State taxation apparently resulted from either petitioners' misinterpretation of the law or their ignorance of the law which allows such exclusion, and not from a mistake as to the existence or nonexistence of the underlying material facts. Based on the legal standard set forth by the Tribunal in *Mackay*, petitioners' mistake was one of law and not one of fact (*see, Matter of Nathel*, Tax Appeals Tribunal, August 31, 1995) and thus, the special refund authority of § 697(d) is not applicable. Although the erroneous or illegal collection of taxpayer funds is sufficient to invoke the special refund authority, petitioners have not demonstrated that the Division collected moneys from them erroneously or illegally (*see, Matter of Lonergan*, Tax Appeals Tribunal, February 13, 1997).

G. Based on the conclusions of law above, and inasmuch as there are no triable issues of fact, summary determination should be granted in favor of the Division pursuant to 20 NYCRR 3000.9(b).

H. The Division of Taxation's Motion for Summary Determination is granted, the petition of James E. and Elsa A. Morgan is denied, and the Division of Taxation's denial of petitioners' refund claim for tax years 1974 through 1984 and 1986 through 1988 is hereby sustained.

DATED: Troy, New York

February 2, 1998

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE