STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
HARVEY J. COOPERSMITH	:	DECISION DTA No. 813823
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1991.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on August 1, 1996 with respect to the petition of Harvey J. Coopersmith, 487 New Forge Road, Ancram, New York 12502. Petitioner appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Gary Palmer, Esq., of counsel).

The Division of Taxation filed a letter brief in support of its exception. Petitioner filed a letter in reply. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether a nonresident taxpayer with New York source income who files a nonresident New York tax return may reduce his New York taxable income because of alimony paid to his former wife.

FINDINGS OF FACT

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

Petitioner, Harvey J. Coopersmith, in 1991, resided at 770 East Saddle River Road, HoHoKus, New Jersey and was a nonresident of New York.

In 1991, Mr. Coopersmith sold, at a substantial gain, ($315,319.00) land which was situated in New York and which he had acquired while he was a resident of New York.

Mr. Coopersmith also had dividend income ($24,230.00) and he sold securities at a loss ($22,889.00). His total Federal income was $316,660.00.

Mr. Coopersmith paid alimony of $10,000.00 to his former wife in 1991. This was shown on his Federal tax return as an adjustment to income (that is, as a subtraction to arrive at adjusted gross income of $306,660.00).

On his New York return, Mr. Coopersmith first calculated a tax on his Federal adjusted gross income as reduced by a standard deduction ($23,598.00) and apportioned this to New York by the ratio of the New York amounts he declared (the gain from the New York land as reduced by the alimony he paid or $305,319.00) divided by Federal adjusted gross income. This ratio came to 99.56%.

A Notice of Deficiency was issued to petitioner dated April 7, 1995 for tax due of $769.30 plus interest of $166.89 for a total of $936.19.

The deficiency is based upon a denial of the alimony deduction for New York purposes, thereby increasing the numerator of the allocation ratio to be applied to Federal adjusted gross income. This increase was by 3.26% to 102.82% and an increase in tax of $769.30. (The ratio goes above 100% because of the losses from non-New York sources. Without those losses the increase would have been from 92.64% to 94.68% or 3.04%).

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In ***Matter of Lunding*** (Tax Appeals Tribunal, February 23, 1995, ***annulled Matter of Lunding v. Tax Appeals Tribunal***, 218 AD2d 268, 639 NYS2d 519, ***revd*** 89 NY2d 283, 653 NYS2d 62, ***cert granted*** ___ US ___, 137 L Ed 2d 1026), on facts similar to those presented here, we rejected a nonresident petitioner's claim that he should be able to deduct his alimony payments from New York source income and noted that we did not have statutory authority to "declare Tax Law § 631(b)(6) unconstitutional on its face."

On appeal in ***Lunding***, the Appellate Division, Third Department, relying on its earlier decision in ***Matter of Friedsam v. State Tax Commn.*** (98 AD2d 26, 470 NYS2d 848, ***affd on other grounds*** 64 NY2d 76, 484 NYS2d 807), vacated our decision and held Tax Law

§ 631(b)(6) unconstitutional under the Privileges and Immunities Clause (***Matter of Lunding v. Tax Appeals Tribunal***, 218 AD2d 268, 639 NYS2d 519).

Based on the Appellate Division's decision in ***Lunding***, the Administrative Law Judge in the instant matter held for petitioner and cancelled the Notice of Deficiency.

ARGUMENTS ON EXCEPTION

Petitioner claims that based on the Appellate Division's decision in ***Lunding***, Tax Law § 631, as applied in this case, deprived him, a nonresident of New York, of a deduction for alimony paid when a resident of New York would receive such a deduction. Petitioner asserts that this constitutes a violation of his privileges and immunities guaranteed by the United States Constitution, article IV, § 2, clause 1.

The Division points out that the Court of Appeals reversed the Appellate Division in ***Lunding*** and Tax Law § 631(b)(6) was declared constitutional (***Matter of Lunding v. Tax Appeals Tribunal***, 89 NY2d 283, 653 NYS2d 62).

OPINION

We reverse the determination of the Administrative Law Judge.

During the period relevant in this case, Tax Law § 631(b)(6), relating to New York source income and deductions of nonresident individuals, provided:

> "(6) The deduction allowed by section two hundred fifteen of the internal revenue code, relating to alimony, shall not constitute a deduction derived from New York sources."

Petitioner, a New Jersey resident, filed a New York nonresident personal income tax return for 1991. On this return, petitioner reported as a New York deduction alimony paid to his former wife in the sum of $10,000.00. The Division disallowed the alimony deduction based on Tax Law § 631(b)(6) and issued a Notice of Deficiency for the tax here in dispute.

Petitioner urges that denying him this alimony deduction violates his constitutional rights under the Privileges and Immunities Clause (US Const., art IV, § 2). The Administrative Law Judge, relying on the Appellate Division's decision in ***Matter of Lunding v. Tax Appeals Tribunal*** (***supra***), agreed and cancelled the deficiency.

After the Administrative Law Judge had rendered his determination in this matter, the Court of Appeals reversed ***Lunding***. On the subject of the Privileges and Immunities Clause, the Court of Appeals stated:

> ". . . the [U.S.] Supreme Court established that limiting taxation of nonresidents to their in-State income was a sufficient justification for similarly limiting their deductions to expenses derived from sources producing that in-State income [citations omitted]" (***Matter of Lunding v. Tax Appeals Tribunal, supra***, 653 NYS2d, at 65).
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> ". . . [T]he Privileges and Immunities Clause does not mandate absolute equality in tax treatment. Rather, disparity in tax treatment between residents and nonresidents is permissible 'in the many situations where there are perfectly valid independent reasons for it' [citations omitted]. Therefore, the Clause is not violated where '(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective.' (***Supreme Ct. of N.H. v. Piper***, 470 U.S. at 284, 105 S.Ct. at 1278.)" (***id.***, 653 NYS2d, at 66).
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> "Now applying well-established principles to the facts before us, we conclude there is no violation of the Privileges and Immunities Clause. The disparate tax treatment of alimony paid by a nonresident is fully justified in light of the disparate treatment of income: nonresidents are taxed only on income earned in New York, while residents are taxed on all income earned from whatever sources. Focusing on the practical effect and operation of the challenged tax it is clear that the advantage granted residents is offset by the additional burden of being taxed on all sources of income" (***id.***, 653 NYS2d, at 67).

The Court noted that ***Lunding*** would fair no better under the Equal Protection and Commerce Clauses, stating:

> "[n]othing in the Fourteenth Amendment prevents the States from imposing unequal taxation on nonresidents, so long as the inequality is rationally related to the furtherance of a legitimate State interest [citations omitted]. Here, New York's treatment of alimony deductions is rationally related to its substantial policy of taxing only those gains realized and losses incurred by a nonresident in New York, while taxing residents on all income from whatever sources. Further, the challenged treatment is rationally related to its policy of limiting a nonresident's deductions to those attributable to income-producing activities in New York" (***id.***).

The Administrative Law Judge's determination held for petitioner based solely on the Appellate Division's decision in ***Lunding***. That decision has since been reversed by the Court

of Appeals (***Matter of Lunding v. Tax Appeals Tribunal, supra***). Therefore, the determination of the Administrative Law Judge must be reversed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of Harvey J. Coopersmith is denied; and
4. The Notice of Deficiency dated April 7, 1995 is sustained.

DATED: Troy, New York
September 25, 1997

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Donald C. DeWitt
President

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Carroll R. Jenkins
Commissioner

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Joseph W. Pinto, Jr.
Commissioner