STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JAMES & YON H. SCUDIERI	:	DETERMINATION DTA NO. 816047
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1992.	:	

Petitioners, James and Yon H. Scudieri, 3889 Stikes Drive SE, Lacy, Washington 98503, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1992.

On March 30 and 31, 1998, respectively, petitioners, appearing *pro se,* and the Division of Taxation by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by July 17, 1998, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation correctly determined that petitioner Yon H. Scudieri improperly adjusted for out-of-state income on her New York State nonresident income tax return for the year at issue.

FINDINGS OF FACT

1. On January 22, 1996, the Division of Taxation ("Division") issued to Yon H. Scudieri ("petitioner") a Notice of Deficiency asserting additional personal income tax due in the amount of $225.76, plus interest, for a total amount due of $275.08 for the year 1992.

2. On July 19, 1996, the Division issued a letter to petitioner with an explanation of the Division's position stating, in relevant part, as follows:

> On December 22, 1992, the New York State Court of Appeals ruled in ***Lawrence J. Brady et al., v. the State of New York et al.,*** that a nonresident married couple filing a joint federal income tax return must file a joint New York State income tax return. The combined income of both spouses must be used to determine the base tax subject to the Income allocation percentage, even if only one spouse has income from New York sources. This decision applies to tax years 1992 and thereafter.
>
> The Court of Appeals further held that the spouse with no New York income cannot be held liable for any tax, penalty or interest that may be due.
>
> Items of income on your Form IT-203 tax return must be entered in the Federal Amount Column exactly as they appear on your federal return. This column must be computed as if you were a full year resident of New York State.
>
> The Tax Reform and Reduction Act of 1987 substantially changes the method of figuring your nonresident tax. You must first figure a base tax as if you were a New York State resident, including income, gains, losses and deductions from all sources. Then you must multiply the base tax by a fraction whose numerator is income from New York sources, and whose denominator is federal adjusted gross income.
>
> Please be advised you are not being taxed on your Non New York Income (Active Duty Military). However, based on the above State [sic] New York State Court of Appeals decision, all income earned must be used in computing the base tax. Then only a portion of the allocated [sic] is New York tax based on the income percentage, line 56, which is the ratio of the New York income to total income.

3. For the year at issue, petitioner Yon H. Scudieri filed a Form IT-203 (a New York State Nonresident Income Tax Return) under the filing status "married filing separate return." During the year, petitioner Yon H. Scudieri was employed by the U.S. Department of the Army as a

dental assistant at the United States Military Academy in West Point, New York. Petitioner Major James Scudieri was stationed in New York State on active duty with the military.

On the income section of the New York State nonresident return, petitioner Yon H. Scudieri listed her wages, interest and dividend income exactly the same in both the Federal amount column and the New York State column. The addition of these three items resulted in Federal adjusted gross income, and subsequently New York adjusted gross income, of $19,161.63. Ms. Scudieri then subtracted the standard deduction from this amount to arrive at taxable income of $14,411.63 and tax due of $777.00. Major Scudieri's income was not shown on the return. Petitioners filed a joint Federal income tax return for the year 1992 which indicated their Federal adjusted gross income to be $55,400.00. This figure included Major Scudieri's non-New York source income derived from his active military status.

4. Pursuant to Internal Revenue Code § 6103, the Division obtained from the Internal Revenue Service the amounts shown on petitioners' Federal tax return. Using the information shown on their return, the Division recomputed petitioners' tax liability as follows:

RETURN LINE	PREVIOUS AMT.	ADJUSTED AMT.
New York Adjusted Gross Income	$19,161.00	$55,400.00
New York Deduction	4,750.00	9,500.00
New York Taxable Income	14,411.00	45,900.00
New York State Tax	777.00	2,899.00
Income Percentage	100%	34.59%
Allocated New York State Tax	777.00	1,002.76
Total New York State Tax Due	777.00	225.76

The Division determined the income percentage by dividing petitioners' New York source income ($19,161.00) by their total Federal adjusted gross income ($55,400.00).

5. At the Bureau of Conciliation and Mediation Services ("BCMS") conference, the amount of tax due was reduced to $133.87. The reduction was based upon the removal from New York source income of the interest and dividends received which were not connected with a business, trade or profession carried on in New York. The removal of these items resulted in petitioners' New York source income being $17,407.00. Dividing this figure by their Federal adjusted gross income resulted in an income percentage of 31.42% and tax due of $910.87.

CONCLUSIONS OF LAW

A. Tax Law § 601 (former [e][1]), in effect during the years at issue, provided as follows:

> There is hereby imposed for each taxable year on the taxable income which is derived from sources in this state of every nonresident and part-year resident individual and trust and every nonresident estate a tax which shall be equal to the tax computed under subsections (a) through (d) of this section, as the case may be, reduced by the credits permitted under subsections (b) and (c) of section six hundred six, as if such nonresident or part-year resident individual, estate or trust were a resident, multiplied by a fraction, the numerator of which is such individual's, estate's or trust's New York source income determined in accordance with part III of this article and the denominator of which is such individual's, estate's or trust's federal adjusted gross income for the taxable year.

This subsection was originally added to the Tax Law by chapter 28 of the Laws of 1987.

B. Since Tax Law § 601(former [e][1]) requires an initial computation of tax due to be made as if the nonresident were a resident, it is necessary to look to the appropriate sections of Article 22 of the Tax Law, applicable to resident individuals, in order to ascertain the meaning of terms.

Tax Law § 611(a) provides that the New York taxable income of a resident individual is his New York adjusted gross income less his New York deduction and exemptions.

Tax Law § 612(a) states that the New York adjusted gross income of a resident individual means his Federal adjusted gross income, as defined in the laws of the United States (Internal Revenue Code) for the taxable year, with certain modifications as specified in section 612.

C. Petitioners challenge the use by the State of their non-New York income to calculate the tax rate to be applied to their New York source income. It is their position that only New York source income can be used in the computation of the tax rate to be applied to their New York source income. The Division correctly points out that the New York State Court of Appeals has previously addressed this issue in ***Matter of Brady v. State of New York*** (80 NY2d 596, 592 NYS2d 955).

D. It is well established that legislative enactments enjoy a presumption of constitutionality (***Montgomery v. Daniels***, 38 NY2d 41, 378 NYS2d 1). Furthermore, the States have the power to tax the income of nonresidents which is derived from sources within their borders (***Travis v. Yale & Towne Mfg. Co.***, 252 US 60, 64 L Ed 460; ***Shaffer v. Carter***, 252 US 37, 64 L Ed 445). In addition, progressive tax systems, which apportion the tax burden based upon the taxpayer's ability to pay, have been held to be constitutional (***Brushaber v. Union Pac. R.R.***, 240 US 1, 60 L Ed 493), and indeed are "widespread among the United States and firmly imbedded in the federal tax structure" (***Wheeler v. State,*** 127 Vt 361, 249 A2d 887, ***appeal dismissed for want of a substantial Federal question*** 396 US 4, 24 L Ed 2d 4).[1]

States may refer to nontaxable out-of-state assets in setting their rates for taxable assets (***see, Atlantic & Pacific Tea Co. V. Grosjean,*** 301 US 412, 81 L Ed 1193; ***Maxwell v. Bugbee***, 250 US 525, 63 L Ed 1124). The ***Maxwell*** case involved a New Jersey inheritance tax that

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[1]Dismissal for want of a substantial constitutional question operates as a decision on the merits (***see, Washington v. Yakima Indian Nation***, 439 US 463, 58 L Ed 2d 740).

required the inclusion of the entire estate of the decedent, wherever located, to determine the rate by which the New Jersey property would be taxed. The actual tax was calculated by applying the rate applicable to the entire estate, but then reducing the tax to reflect only the percentage of the estate located in New Jersey, as is done in the present situation. In ***Grosjean,*** the Supreme Court upheld a Louisiana license tax on in-state chain stores that was calculated on the basis of the taxpayer's nationwide operation, stating that the tax was appropriate as it did not impose a tax upon property situated without its borders.

Since the above-mentioned decisions, high courts in several other states have upheld tax schemes similar to the one at issue herein (***see, Stevens v. State Tax Assessor***, 571 A2d 1195 [Maine], ***cert denied*** 498 US 819, 112 L Ed 2d 40; ***Wheeler v. State***, ***supra***; ***cf., United States v. State of Kansas***, 810 F2d 935 [upholding validity of including nonresident military income — which was not taxable by state — in determining state tax rate]; ***Aronov v. Secretary of Revenue***, 323 NC 132, 371 SE2d 468 ***cert denied*** 489 US 1096, 103 L Ed 2d 935 [upholding requirement that nonresident taxpayer reduce net operating loss from North Carolina partnership by amount of out-of-state income]).

As in ***Stevens*** and ***Wheeler***, the subject matter regulated herein is a tax on in-state income, which is within the jurisdiction of the state. When the state imposes taxes within its authority, "property not itself taxable can be used as a measure of the tax imposed on property within the state and . . . to do so is 'in no just sense a tax on the foreign property.'" (***United States v. State of Kansas***, ***supra,*** quoting ***Maxwell v. Bugbee***, ***supra***; ***Brady v. State of New York***, ***supra***).

E. In ***Brady***, the Court of Appeals, in addressing the question before it, i.e., whether in fixing the tax rate, New York could refer to spousal income included in the total adjusted gross

income on the couple's joint Federal return, outlined New York's existing statutory procedure for taxing New York source income of the nonresident taxpayer. The Court stated:

> The laws at issue are Tax Law § 601(d) and (e), sections of the Tax Reform and Reduction Act of 1987 (L 1987, ch 28) (TRARA). Under Tax Law § 601(e)(1), the tax of a nonresident is first calculated "as if [the taxpayer] were a resident." Thus, the nonresident's tax base (as that term is used by the parties) is determined by applying the appropriate graduated rate in Tax Law § 601(a) through (c) to the taxpayer's total income from all sources (less any statutory deductions, exemptions or credits [Tax Law §§ 606, 611(a)]). The taxpayer's total income is derived from "New York adjusted gross income" (Tax Law § 611[a]), which is determined by reference to the taxpayer's "federal adjusted gross income" (Tax Law § 612[a]).
>
> Residents pay their entire tax base. For nonresidents, however, the amount is reduced by the percentage of income earned in New York compared to total income (Tax Law § 601[e][1]). Therefore, while residents and nonresidents with the same total income are taxed at the same rate, the nonresident pays tax only on the percentage of income attributable to New York. (***Id.***, at 600, 592 NYS2d at 956-957.)

The Court held that the statutory procedure for determining a nonresident's tax on income earned in New York by taking into account New York and non-New York source income in order to calculate the tax rate to be applied to the New York income does not violate the privileges and immunities or equal protection clauses of the U.S. Constitution since similarly situated residents and nonresidents receive equal treatment.

F. The Court of Appeals, in concluding its decision in ***Brady***, stated as follows:

> Plaintiff's real quarrel, in the end, is with the graduated tax. A system of progressive taxation apportions the tax burden based on ability to pay — higher income taxpayers can pay more and are therefore taxed at a higher rate than lower income taxpayers. This system does not implicate the State or Federal Constitution so long as the rates are applied, as here, in a nondiscriminatory manner and only to taxable New York income.

Petitioners in the present matter stand in the same position as that occupied by the taxpayers in ***Brady***; they object to the use of non-New York source income to increase the tax rate which is applied to their New York income. However, as the statutory procedure applies the tax rates in a

nondiscriminatory manner and only to taxable New York income, the Division's adjustment to petitioner Yon H. Scudieri's nonresident income tax return by taking into account petitioner Major Scudieri's non-New York income to compute the tax rate was proper.

G. The petition of James and Yon H. Scudieri is denied and the Notice of Deficiency dated January 22, 1996, as modified at the Bureau of Conciliation and Mediation Services conference, is sustained.

DATED: Troy, New York
November 25, 1998

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE