STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DOUGLAS R. DEAN	:	DETERMINATION DTA NO. 816511
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1993.	:	

Petitioner, Douglas R. Dean, 1211 Green Turf Drive, Snellville, Georgia 30278, 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 1993.

On August 4, 1998 and August 12, 1998, respectively, petitioner, appearing *pro se*, and the Division of Taxation by Steven U. Teitelbaum, Esq. (Andrew S. Haber, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by December 4, 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 improperly adjusted for out-of-state income on his New York State nonresident income tax return filed for the year at issue.

FINDINGS OF FACT

1. On April 7, 1997, the Division of Taxation ("Division") issued to Douglas R. Dean ("petitioner") a Notice of Deficiency asserting additional personal income tax due in the amount of $452.98, plus interest, for a total amount due of $571.00 for the year 1993.

2. Previously, on January 24, 1997, the Division had issued a Statement of Proposed Audit Changes to petitioner asserting personal income tax due of $452.98, plus interest, for a total amount due of $561.94 for the year 1993. The Statement of Proposed Audit Changes contained an explanation of the Division's position stating, in pertinent part, as follows:

> The Tax Reform and Reduction Act of 1987 substantially changed the method of computing part-year resident tax. You must first compute 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.
>
> If a joint federal return was filed and one spouse is a part year resident and the other is a non resident with no New York source income, the same method of computing your liability must be used.
>
> We have corrected your adjusted gross income (federal) to include all items reported on your federal return.
>
> * * *
>
> To compute the correct New York itemized deduction, all state and local income taxes included in federal itemized deductions must be subtracted on line 40 of your New York State tax return.
>
> * * *
>
> The adjustment(s) result in a correction of the income percentage.

3. For the year 1993, petitioner filed a Nonresident and Part-Year Resident Personal Income Tax Return, Form IT-203, with a filing status of "married filing separate return." On the return petitioner indicated that he had lived in New York for eight months during the year, and

had left the State at the end of September 1993. Attached to the New York State income tax return was a Wage and Tax Statement which indicated that during the year 1993, petitioner earned $39,755.71 from his New York employer. Petitioner used the amount earned from his New York employer under both the Federal Amount and New York State Amount columns on his New York State income tax return. During 1993, his wife was a nonresident of New York State with no New York source income. For Federal purposes, petitioner and his wife had filed a joint income tax return indicating Federal adjusted gross income of $95,332.00. Included within federal adjusted gross income is an item entitled "Taxable IRA Distribution" in the amount of $30,756.00.

4. On December 9, 1997, petitioner participated in a Bureau of Conciliation and Mediation Services conference in Albany, New York. Following the conference, a Conciliation Order was issued on January 30, 1998 which reduced the tax due amount to $303.28.

CONCLUSIONS OF LAW

A. Tax Law former § 601(e)(1), as applicable to the year 1993, provided, in relevant part, as follows:

> Nonresidents and part-year residents. (1) 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 . . . 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 . . . were a resident, multiplied by a fraction, the numerator of which is such individual's . . . New York source income determined in accordance with part III of this article and the denominator of which is such individual's . . . federal adjusted gross income for the taxable year.

Therefore, the New York source fraction applicable to petitioner for 1993 was as follows:

$$\frac{\text{New York source income of a part-year resident}}{\text{Federal adjusted gross income for the taxable year}}$$

B. Tax Law former § 638, as applicable to the year 1993, provided for the New York source income of a part-year resident, in relevant part, as follows:

> (a) Individuals. The New York source income of a part-year resident individual shall be the sum of the following:
>
> (1) Federal adjusted gross income for the period of residence, computed as if his taxable year for federal income tax purposes were limited to the period of residence.
>
> (2) New York source income for the period of nonresidence determined in accordance with section six hundred thirty-one[1] as if his taxable year for federal income tax purposes were limited to the period of nonresidence.

Applying Tax Law former § 638 to the above, the New York source fraction becomes:

$$\frac{\text{Federal AGI for resident period determined as if federal taxable year limited to resident period} + \text{NY source income for period of nonresidence determined as if federal taxable year limited to nonresident period}}{\text{Federal AGI for the taxable year}}$$

C. 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.

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[1]Tax Law former § 631 defined New York source income of a nonresident individual to include the net amount of income, gain, loss and deduction entering into the individual's federal adjusted gross income derived from or connected with New York sources, including the individual's distributive share of partnership income, gain, loss and deduction determined under Tax Law former § 632.

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.

D. Petitioner challenges the use by the State of his non-New York income to calculate the tax rate to be applied to his New York source income. It is his position that only New York source income can be used in the computation of the tax rate to be applied to his 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).

E. 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, 365, 249 A2d 887, 890, ***appeal dismissed for want of a substantial Federal question*** 396 US 4, 24 L Ed 2d 4).[2]

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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[2] 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***.)

F. 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 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. The taxing scheme in the present matter is consistent with that upheld by the Court in ***Brady***; it employs all of the income of petitioner, including the IRA distribution, in determining the tax rate to be applied, but applies the tax rate only to petitioner's New York source income, excluding the IRA distribution.

G. 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. ***(Id.* at 605, 592 NYS2d at 960.)**

Petitioner in the present matter stands in the same position as that occupied by the taxpayers in ***Brady***; he objects to the use of non-New York source income to increase the tax rate which is applied to his 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 Douglas R. Dean's nonresident income tax return by taking into account petitioner's and his wife's non-New York income to compute the tax rate was proper.

H. The petition of Douglas R. Dean is denied and the Notice of Deficiency dated April 7, 1997, as modified by the Conciliation order dated January 30, 1998, is sustained.

DATED: Troy, New York
February 25, 1999

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE