STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
THOMAS R. TOOTHAKER AND NANCY J. TOOTHAKER	:	DECISION DTA No. 809302
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1988.	:	

Petitioners Thomas R. Toothaker and Nancy J. Toothaker, 235 Thayer Pond Road, Wilton, Connecticut 06897, filed an exception to the determination of the Administrative Law Judge issued on February 4, 1993. Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation filed a letter in lieu of a brief in opposition to petitioners' exception. Any reply brief by petitioners was due on April 22, 1993, which date began the six-month period to issue this decision. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the statutory scheme for taxing the New York source income of a nonresident taxpayer violates the Due Process Clause, the Equal Protection Clause, the Commerce Clause or the Privilege and Immunities Clause of the United States Constitution.

II. Whether the interest imposed on the tax deficiency may be cancelled.

FINDINGS OF FACT

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

Petitioners, Thomas R. Toothaker and Nancy J. Toothaker, filed a timely 1988 nonresident income tax return (form IT-203) under filing status "Married filing joint return."

A wage and tax statement attached to petitioners' return states that Thomas R. Toothaker received wages, tips and other compensation in the amount of $253,752.00 from Swiss Bank Corporation of New York, New York. Onthe IT-203, petitioners allocated $228,487.00 of this amount to New York State, based on an allocation of days worked in and out of New York City by Mr. Toothaker.

Petitioners reported additional Federal income of $94,015.00, calculated as follows:

Taxable interest income:	$ 64,883.00
Dividend income:	598.00
Taxable refunds of state and local income taxes:	2,712.00
Rents, royalties, partnerships, etc.	25,822.00

A Federal schedule E attached to petitioners' return indicates that a portion of the income reported as rental income was from real property located in California and from a partnership distribution.

Pursuant to the State Administrative Procedure Act § 306(4), official notice is taken of the contents of the 1988 Instructions for Form IT-203, a publication of the Division of Taxation ("Division"). In a section entitled Income Subject to Tax (1988 Instructions for Form IT-203, at 5), the Division provided the following information:

> **"New York source income**
>
> **"Nonresident -** The New York source income of a nonresident is the sum of the income, gain, loss or deduction derived from or connected with New York State included in your federal adjusted gross income."

Petitioners properly reported items of Federal income, totalling $347,767.00, and correctly followed an instruction on the face of the form IT-203 which states: "Enter in the New York State Amount column the amounts from New York State sources." Thus, petitioners did not include income from interest, dividends and rents, royalties and partnerships in the "New York amount". They reported a total New York amount (or New York source income) of $228,487.00, all of it attributable to Mr. Toothaker's salary and wage income.

On line 32 of form IT-203, petitioners reported New York adjusted gross income of $345,055.00.[1] Line 53 of the form IT-203 states:

> "Additional tax on unearned income (if line 32 is more than $100,000.00, or more than $50,000 if you are married filing a separate return), see instructions, page 17; all others enter '0' on lines 53 and 54".

The instruction for line 53 on page 17 of the Instruction for Form IT-203 states:

> **"Additional tax on unearned income**
>
> "If line 32 is **more than $100,000** (or more than $50,000.00 if you are married filing a separate return), enter the additional tax on unearned income from Form IT-203-ATT, worksheet line 39 (see instructions on page 23).
>
> * * *
>
> "You may be subject to the additional tax on unearned income even if you have no New York taxable income on line 51."

Petitioners filed a form IT-203-ATT (completing Schedule A of that form); however, they did not complete the worksheet pertaining to the tax on unearned income as instructed. On line 53 of their 1988 IT-203, petitioners entered "0".

Petitioners' calculated an income percentage (total income allocable to New York State) of 65.70% by dividing the "New York amount" of $228,487.00 by Federal adjusted gross income of $347,767.00. This percentage was applied to petitioners' calculation of New York State tax to calculate a final New York tax of $15,410.00.

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[1]Under Tax Law § 601(e), New York imposes a tax "on the taxable income which is derived from sources in this state of every nonresident." Section 601(e) sets forth a two-step process to determine the tax due. First, a preliminary tax is calculated "as if such nonresident . . . were a resident" (Tax Law § 601[e][1]; emphasis added). Once the tax is initially fixed as though the nonresident was a resident taxpayer, it is then multiplied by a fraction, the numerator of which is the nonresident's New York income and the denominator of which is that person's Federal adjusted gross income, in order to arrive at the final tax due (see, Tax Law § 601[e][1]). Thus, the initial tax computation for the liability of a nonresident takes into account the taxpayer's income from all sources, in and out of New York State, but the actual tax due is a fraction of the tax initially calculated that is equivalent to the ratio of the taxpayer's New York income to total income. Petitioners' New York adjusted gross income, as reported on line 32, was derived by subtracting taxable refunds of State and local income taxes from Federal adjusted gross income (see, Tax Law § 612). It correctly includes income from all sources, in and out of New York State.

On September 25, 1989, the Division issued to petitioners a Statement of Proposed Audit Changes which explained that an additional amount of income tax, in the amount of $1,910.00, was found due based on an audit of petitioners' filed 1988 income tax return. An attachment to the Statement of Proposed Audit Changes provides an explanation for the Division's adjustments to petitioners' return. Of several adjustments made only two are pertinent here. The Division determined that the total number of days worked in New York by Mr. Toothaker was 211, rather than the 207 days claimed. This resulted in an allocation of $235,866.00 to New York wages. Also, using the worksheet on the IT-203-ATT, the Division calculated the additional tax on unearned income, as follows:

New York adjusted gross income	$345,055.00
Deductions and subtractions	-0-
Earned income	253,752.00
Allowable deductions	-0-
Unearned income	91,303.00
Tax rate	x .02
Additional tax on unearned income	$ 1,826.00

In response to the Statement of Proposed Audit Changes, petitioners executed a "Payment Document" indicating that they disagreed with the amount due as calculated by the Division. Petitioners attached a statement to this document explaining their own calculation of tax due. In their statement, they asserted that the total number of days worked in New York was 209, and on this basis they calculated total New York wages of $234,664.00. They stated their agreement with certain minor adjustments made by the Division, but they expressed their total disagreement with the Division's calculation of the additional tax on unearned income. Based on their own calculations, petitioners conceded additional tax due of $579.00 and included payment in that amount with the Payment Document.

On or about November 6, 1989, the Division issued to petitioners a Notice of Deficiency, asserting a balance due for the year ended December 31, 1988 calculated as follows:

"Tax Amount Assessed"		$1,910.00
Interest Assessed		89.08
Penalty	-0-	
Payments		579.00
Balance Due		1,420.00

Following a conciliation conference, the Division recalculated the tax deficiency based upon its acceptance of petitioners' assertion of days worked in and out of New York State. After crediting petitioner for the payment of $579.00, the Division determined a balance of personal income tax due of $1,277.94. On or about December 28, 1990, the Division issued a Conciliation Order reducing the asserted tax deficiency to this amount. The only audit adjustment which remains in contention is the Division's calculation of the additional tax on unearned income.

OPINION

The Administrative Law Judge found that the Division properly calculated petitioners' unearned income and the additional tax on unearned income. The Administrative Law Judge determined that Tax Law § 601(d)(8) applied only to tax years beginning in 1987 and, therefore, that it has no application to 1988, the tax year in question.

With respect to petitioners' contention that Tax Law § 601(e) is unconstitutional on its face, the Administrative Law Judge found, relying on Matter of Brussel (Tax Appeals Tribunal, June 25, 1992) and Matter of Wizard Corp. (Tax Appeals Tribunal, January 12, 1989) that the jurisdiction of the Division of Tax Appeals and the Tax Appeals Tribunal does not encompass challenges to the constitutionality of a statute on its face. The Administrative Law Judge further found that petitioners did not present any evidence to show that section 601(e) was unconstitutional as applied in this matter.

Finally, the Administrative Law Judge found that the Division's Instructions for Form IT-203 were not responsible for petitioners' failure to calculate the additional tax on unearned income. Therefore, petitioners' request to have interest on the tax deficiency cancelled was denied.

On exception, petitioners continue to assert that Tax Law § 601(e) was unconstitutionally applied in this matter.

In addition, petitioners disagree with the Administrative Law Judge's finding that the Division's Instructions for Form IT-203 were not responsible for their failure to calculate the additional tax on unearned income.

Finally, petitioners state that they first became aware that Tax Law § 601(d)(8) was only effective for tax years beginning in 1987 when it was discussed by the Administrative Law Judge in her decision. Petitioners argue that they were misled by the Division and should not have to pay interest, as the Division did not inform them of section 601(d)(8)'s effective date even though that section was the crux of petitioners' position throughout these proceedings.

In response, the Division relies on its written arguments before the Administrative Law Judge and on the analysis of the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge.

With respect to the constitutionality of Tax Law § 601(e), we find that the Administrative Law Judge adequately addressed petitioners' arguments. The Administrative Law Judge properly found that we do not have jurisdiction over challenges to the constitutionality of a statute on its face and that petitioners presented no evidence to demonstrate that the statute was unconstitutionally applied.

We also agree with the Administrative Law Judge that the forms and publications relating to Form IT-203 did not cause petitioners to miscalculate the additional tax on unearned income. Had petitioners completed the additional tax on unearned income worksheet, as the instructions indicate, they would have calculated the additional tax.

Finally, we can understand petitioners' confusion with regard to Tax Law § 601(d)(8). Although the Division did give an explanation of the changes made by the Tax Reform and Reduction Act in its letter in lieu of a brief, it would have been helpful if the Division had set forth the effective date provisions of Chapter 333 of the Laws of 1987, specifically that Tax Law

§ 601(d)(8) applies only to tax years beginning in 1987. Petitioners' reliance on section 601(d)(8) was explicitly stated in their petition (Exhibit "F"). Clearly, much time and effort could have been saved if the Division had informed petitioners of that section's particular effective date at an earlier time. Nevertheless, any inaction on the part of the Division does not permit petitioners to rely on Tax Law § 601(d)(8) for a year that it was not in effect, nor does any inaction authorize us to cancel interest.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Thomas R. Toothaker and Nancy J. Toothaker is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Thomas R. Toothaker and Nancy J. Toothaker is denied; and
4. The Notice of Deficiency, as modified by the conciliation order, is sustained.

DATED: Troy, New York
September 9, 1993

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner