STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CHRISTOPHER H. AND BARBARA J. LUNDING	:	DECISION DTA No. 810921
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1990.	:	

Petitioners Christopher H. and Barbara J. Lunding, 276 Otter Rock Drive, Greenwich, Connecticut 06830, filed an exception to the determination of the Administrative Law Judge issued on April 28, 1994. Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter in lieu of a brief referring the Tax Appeals Tribunal to its brief filed before the Administrative Law Judge. This letter was received on August 26, 1994 and began the six-month period for the issuance of this decision. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether Tax Law § 631(b)(6) is unconstitutional under the Privileges and Immunities Clause, the Commerce Clause and/or the Equal Protection Clause of the United States Constitution.

II. Whether the principles of stare decisis and collateral estoppel are properly applicable in this matter as to Matter of Friedsam v. State Tax Commn. (98 AD2d 26, 470 NYS2d 848, affd 64 NY2d 76, 484 NYS2d 807).

FINDINGS OF FACT

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

STIPULATED FACTS

Pursuant to 20 NYCRR 3000.7, the parties stipulated and agreed that the following facts shall be taken as true for all purposes of this proceeding.

In 1990, petitioner Christopher H. Lunding derived substantial income in New York State from his practice of the legal profession in New YorkState as a partner in the law firm of Cleary, Gottlieb, Steen & Hamilton and worked at the office of that law firm located in the City and State of New York. New York was the principal source of earned income of petitioner Christopher H. Lunding in 1990.

Petitioners timely filed a joint Nonresident New York State Personal Income Tax Return on Form IT-203 for the year 1990 (the "1990 New York return").

Petitioners included $108,000.00 of alimony reported to have been paid in 1990 by petitioner Christopher H. Lunding (the "alimony") on line 18 of the 1990 New York return as part of their total Federal adjustments to income and included 48.0868% of that alimony ($51,934.00) in the "New York State Amount" on that line. Said 48.0868% was the percentage of the 1990 business income of petitioner Christopher H. Lunding reported in Form IT-203-A included in the 1990 New York return as having been derived from or connected with New York State sources.

The Division of Taxation ("Division") of the Department of Taxation and Finance denied this $51,934.00 New York deduction and issued a Notice of Deficiency against petitioners on March 16, 1992, for the stated reason that Tax Law § 631(b)(6) provides that the deduction for alimony allowed by section 215 of the Internal Revenue Code of 1986 shall not constitute a deduction derived from New York sources for nonresident individuals.

The effect of this denial was to increase petitioners' alleged New York State personal income tax liability for 1990 (excluding interest) by $3,724.00 (the "disputed amount") from the total New York State personal income tax liability shown by petitioners on the 1990 New York return as originally filed.

In the event that Tax Law § 631(b)(6) is a valid, constitutional statute (as the Division contends), petitioners owe the disputed amount. In the event that Tax Law § 631(b)(6) is unconstitutional (as petitioners contend), petitioners do not owe the disputed amount.

On June 10, 1992, petitioners duly filed a petition in the Division of Tax Appeals seeking a redetermination/revision of the above-referenced Notice of Deficiency. On August 28, 1992, the Division duly filed its answer to this petition.

ADDITIONAL FACTS

At all times since 1980, petitioner Christopher H. Lunding has been a resident of the State of Connecticut and has resided continuously at 276 Otter Rock Drive, Greenwich, Connecticut, approximately two miles from the New York State border.

On July 7, 1989, a judgment was entered in the Superior Court of the State of Connecticut, at Bridgeport, Connecticut, adjudging and declaring the marriage of petitioner Christopher H. Lunding to his then spouse to be dissolved, and ordering the parties to that action to comply with the Separation Agreement between them, dated May 31, 1989 (the "Separation Agreement"), which was incorporated by reference into that judgment.

The Separation Agreement requires petitioner Christopher H. Lunding to pay alimony to his former spouse in the annual amount of $108,000.00, which alimony was in fact paid by Mr. Lunding in 1990. Mr. Lunding's former spouse was a resident of the State of Connecticut at all times in 1990.

On August 19, 1989, petitioner Christopher H. Lunding married petitioner Barbara J. Lunding at Greenwich, Connecticut. Since that date, petitioners have resided continuously at 276 Otter Rock Drive, Greenwich, Connecticut.

Prior to the issuance of the Notice of Deficiency, the Division issued to petitioners a Statement of Proposed Audit Changes. The statement indicated that:

> "A nonresident is not allowed the Federal deduction for alimony paid because it is not considered a deduction from income derived from New York sources. (Section 631[b][6] of the New York State Tax Law)."

The statement also provided a computation of tax due for the year 1990 based upon the disallowance of the deduction for alimony paid as follows:

"TAX PERIOD ENDED DATE: 12/31/90
TAX YEAR: 1990 FILE DUE DATE: 08/15/91 DATE RECEIVED: 07/30/91
FILING STATUS: 02

CORRECTED NEW YORK LINE 18:		$17,741.00
CORRECTED NEW YORK LINE 19:		$402,422.00
	New York State Tax:	$56,487.00
	Income Percentage:	.5106
	Allocated New York State Tax:	$28,842.00
	Tax Previously Stated/Adjusted:	$25,118.00
	Additional Tax Due:	$3,724.00

Tax Per Taxpayer:	25,119.00
Tax Per Dept of Tax & Finance:	28,842.00
Timely Payments/Credits:	45,251.00
Late Payments:	0.00
Amount Previously Assessed/Refunded:	20,133.00-
BALANCE:	3,724.00

Tax Amount Assessed: 3,724.00"

OPINION

Tax Law § 631(a) provides that:

> "[t]he New York source income of a nonresident individual shall be the sum of the net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income . . . derived from or connected with New York sources . . . ."

Pursuant to section 215 of the Internal Revenue Code, alimony paid is a deductible expenditure when arriving at adjusted gross income (Internal Revenue Code § 215). However, for New York State income tax purposes, a nonresident is not allowed a deduction for alimony paid on his or her New York return pursuant to Tax Law § 631(b)(6). This provision was added by chapter 28 of the Laws of 1987.

Prior to the enactment of section 631(b)(6), in Matter of Friedsam v. State Tax Commn. (98 AD2d 26, 470 NYS2d 848, affd 64 NY2d 76, 484 NYS2d 807), the former State Tax Commission disallowed a deduction for alimony paid by a nonresident taxpayer on his New York nonresident return holding that alimony is not a deduction associated with the production of New York source income pursuant to Tax Law former § 632(b)(1)(B). Tax Law former § 632 provided as follows:

> "(a) General. The New York adjusted gross income of a nonresident individual shall be the sum of the following:
>
> "(1) the net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources . . . .
>
> * * *
>
> "(b) Income and deductions from New York sources.
>
> "(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:
>
> * * *
>
> "(B) a business, trade, profession or occupation carried on in this state."

Special Term, Albany County annulled the determination of the State Tax Commission holding that the disparate treatment accorded nonresidents seeking an alimony deduction as compared to residents was violative of the Privileges and Immunities Clause of the United States Constitution. The Appellate Division, Third Department affirmed Special Term holding that it was unconstitutional to deny the deduction based solely on the taxpayer's status as a nonresident (Matter of Friedsam v. State Tax Commn., supra, 470 NYS2d 848, 850). The Appellate Division framed the issue as whether the application of section 632 by the State Tax Commission violated the constitution.

The Court of Appeals affirmed the Appellate Division on statutory grounds, not constitutional grounds. The Court of Appeals held that in disallowing the nonresident taxpayer's alimony deduction, the State Tax Commission "improperly applied [former] section 632 (subd. [a], par. [1]) of the Tax Law and failed to apply section 635 (subd. [c], par. [1]) of

the Tax Law" (Matter of Friedsam v. State Tax Commn., supra, 484 NYS2d 807, 810). The Court stated that

> "[t]he passage of section 635 (subd. [c], par. [1]) reflected a policy decision 'that nonresidents be allowed the same non-business deductions as residents, but that such deductions be allowed to nonresidents in the proportion of their New York income to income from all sources'" (Matter of Friedsam v. State Tax Commn., supra, 484 NYS2d 807, 810 quoting Murphy and Petite, Taxation of Nonresidents by New York State, 12 Syracuse L. Rev. 147, 161-162).

The Administrative Law Judge held that at the administrative level statutes are presumed constitutional, so petitioners' assertion that Tax Law § 631(b)(6) is unconstitutional was not within the jurisdiction of the Division of Tax Appeals or the Tax Appeals Tribunal.

Next, the Administrative Law Judge held that the doctrines of collateral estoppel and stare decisis[1] were not applicable in this matter because the Division's disallowance of petitioners' alimony deduction on their nonresident return is premised on different authority than the former State Tax Commission's denial in Matter of Friedsam v. State Tax Commn. (supra). The Administrative Law Judge stated:

> "requirements for application of the doctrine [of collateral estoppel] are: (1) that the issue as to which preclusion is sought be identical with that in the prior proceeding; (2) that the issue was necessarily decided in the prior proceeding; and (3) that the litigant who will be held precluded in the present matter had a full and fair opportunity to litigate the issue in the prior proceeding [citation omitted]" (Determination, conclusion of law "F").

The Administrative Law Judge held that there was no identity of issues since the disallowance of the alimony deduction in Matter of Friedsam v. State Tax Commn. (supra) was not premised on Tax Law § 631(b)(6) as it was not enacted until 1987. Thus, the doctrine of collateral estoppel was not applicable.

On exception, petitioners concede that the Tax Appeals Tribunal's jurisdiction does not encompass challenges to the constitutionality of a statute on its face, but assert that as a matter of law the Appellate Division, Third Department has already ruled that it is unconstitutional todisallow an alimony deduction to a nonresident taxpayer. Petitioners contend that although

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[1]The Administrative Law Judge stated that it was unnecessary to separately address petitioners' stare decisis argument because he deemed the two arguments interrelated.

the Court of Appeals decided Matter of Friedsam v. State Tax Commn. (supra) upon statutory grounds, the Third Department's decision in Friedsam was neither modified nor vacated by the Court of Appeals, so it is still binding precedent. Thus, petitioners assert that under principles of stare decisis and collateral estoppel, the Tax Appeals Tribunal is compelled to follow the Third Department's decision in Matter of Friedsam v. State Tax Commn. (supra).

We affirm the determination of the Administrative Law Judge.

The assertions made by petitioners concerning the applicability of the doctrine of collateral estoppel in this matter are the same as those made at hearing. The determination of the Administrative Law Judge dealt fully and correctly with this issue and we affirm for the reasons stated therein.

Next, because stare decisis is a much broader concept than collateral estoppel, we feel it is necessary to separately address whether Matter of Friedsam v. State Tax Commn. (supra) should be followed in the instant matter.

We find petitioners' reliance on Matter of Friedsam v. State Tax Commn. (supra), misplaced. The former State Tax Commission's denial of the nonresident taxpayer's alimony deduction in Friedsam was an application of the general definition of adjusted gross income of a nonresident individual contained in Tax Law former § 632. The Appellate Division found this application by the State Tax Commission to be unconstitutional. In petitioners' case, the denial was predicated on Tax Law § 631(b)(6) which, on its face, explicitly denies a nonresident an alimony deduction on his or her New York return. Although petitioners carefully craft their arguments in terms of a general issue, i.e., whether the disparate treatment accorded nonresident taxpayers as compared to resident taxpayers concerning the deductibility of alimony payments on their New York returns is constitutional, Friedman established a principal of law that is not dispositive of the issue before us. Therefore, the doctrine of stare decisis does not require us to do indirectly that which cannot be done directly -- declare Tax Law § 631(b)(6) unconstitutional on its face.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Christopher H. and Barbara J. Lunding is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Christopher H. and Barbara J. Lunding is denied.

DATED: Troy, New York
February 23, 1995

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

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