STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HARVEY J. COOPERSMITH	:	DETERMINATION 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.	:	

Petitioner, Harvey J. Coopersmith, 770 East Saddle River Road, HoHoKus New Jersey 07423, 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 1991.

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on January 23, 1996 at 1:15 P.M. Petitioner appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Susan Hutchison, Esq., of counsel). Briefs were due from the Division of Taxation on January 31, 1996 and from petitioner on February 15, 1996.

On June 17, 1996, this matter was reassigned to Daniel J. Ranalli, Administrative Law Judge, who renders the following determination.

ISSUE

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

FINDINGS OF FACT

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

2. 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

3. 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).

4. 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%.

5. 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%).

CONCLUSIONS OF LAW

A. Petitioner argues that the statutory provisions (Tax Law § 601(e); § 631) applied in this case deprive him, a nonresident, of a deduction for alimony paid when a resident would receive such a deduction and, therefore, there is a violation of his privileges and immunities as a United States citizen as guaranteed by the United States Constitution, article IV, § 2, clause 1. He cites as a precedent the case of Matter of Friedsam v. State Tax Commn. (98 AD2d 26, 470 NYS2d 848, affd 64 NY2d 76, 484 NYS2d 807). There, a denial of an alimony deduction by the former State Tax Commission for 1979 under provisions of the Tax Law in effect prior to 1988, was held to be a violation of the Constitution. The State Tax Commission had held that the definition of New York adjusted gross income did not allow the deduction of alimony

because alimony is not derived from a trade or business and thus could not be from New York sources. It had further stated that at the administrative level statutes are presumed to be constitutional. (Matter of Friedsam, State Tax Commission, March 17, 1982 [TSB-H-82(37)I].) The Appellate Division annulled the Commission determination on the grounds that the State did not justify the disparate treatment of nonresidents by simply stating that the alimony deduction was personal and not business related and, therefore, Tax Law former § 632 as applied by the Commission was unconstitutional.

The Division of Taxation argues in answer that the Court of Appeals affirmed the Appellate Division not on constitutional grounds but on statutory grounds and that since the time of that decision the statute has been amended to revise the rules for nonresidents. (See, L 1987, ch 28, § 3, adding Tax Law § 601[e] and § 631.) Therefore the Friedsam case is not good precedent for petitioner. The Tax Appeals Tribunal has in fact decided to this effect in the case of Matter of Lunding (Tax Appeals Tribunal, February 23, 1995). That involved the tax year 1990. The Lunding case stated that because the statutory provisions were not the same as in the Friedsam case then the rule of stare decisis did not apply. The Tribunal stated further that it itself could not "declare Tax Law § 631(b)(6) unconstitutional on its face." The Division of Taxation similarly argues here that under the Division of Tax Appeals' enabling legislation the jurisdiction of the Division does not encompass "challenges to the facial constitutionality" of the Tax Law. The Division cited Matter of J.C. Penney Co., Inc. (Tax Appeals Tribunal, April 27, 1989) and Matter of New Milford Tractor Co. (Tax Appeals Tribunal, September 1, 1994). (See also, Matter of Unger, Tax Appeals Tribunal, March 24, 1994.)

Since the instant case was argued, however, the petitioner in the Lunding case appealed the Tribunal's decision pursuant to CPLR article 78. The Appellate Division decided that it would give stare decisis effect to its decision in the Friedsam case and therefore that Tax Law § 631(b)(6) is unconstitutional (Matter of Lunding v. Tax Appeals Tribunal, ___ AD2d ___, 639 NYS2d 519). The Court also annulled the Tribunal's decision as a function of its Article 78

review. Since the Court has already decided, in a case before it, that the statute is unconstitutional, the instant determination must be decided for petitioner.

B. The petition of Harvey J. Coopersmith is granted and the Notice of Deficiency dated April 7, 1995 is cancelled.

DATED: Troy, New York
August 1, 1996

/s/ Daniel J. Ranalli
ADMINISTRATIVE LAW JUDGE