ILLINOIS INDEPENDENT
TAX TRIBUNAL

JEREMY A. DUBOW,	)	
Petitioner,	)	
	)	
	)	
v.	)	23 TT 31
	)	Judge Brian F. Barov
ILLINOIS DEPARTMENT	)	
OF REVENUE,	)	
Respondent.	)	

ORDER ON SUMMARY JUDGMENT MOTIONS

This case involves a dispute over the denial of Petitioner's claim for an income tax refund. The dispute arises from a disagreement between the Petitioner and the Department of Revenue ("Department") over how to calculate the foreign income tax credit available to the Petitioner under section 601(b)(3) of the Illinois Income Tax Act ("IITA"), 35 ILCS 5/601(b)(3). The Petitioner, an individual income tax filer, contended that the credit should be calculated by apportioning certain tax deductions considered in computing the credit to the income deemed his non-Illinois income. The Department of Revenue ("Department") determined that the deductions should be allocated to the non-Illinois income entirely, rather than being apportioned. By allocating, rather than apportioning the deductions, the Department reduced the amount of non-Illinois income subject to the tax credit, which, in turn, reduced the Petitioner's refund claim. The Petitioner contended that the calculation unreasonably construed the IITA because it left him worse off than a non-resident who, earning income in Illinois and following the same rules, would have reduced his Illinois income and thus his Illinois tax bill.

The parties have filed cross-motions for summary judgment contesting the proper method for computing the tax credit. I find that the Department correctly

allocated rather than apportioned the deductions in question, and, for the reasons stated below, grant summary judgment in its favor.

Background

The tax periods involved here were the 2019, 2020 and 2021 years. Pet'r Statement at ¶¶ 1-2.[1] The Petitioner, an Illinois resident, was divorced and paid his ex-spouse alimony during the tax periods involved. Pet'r Statement at ¶ 1; Dubow Aff. at ¶ 4. The Petitioner also made contributions to a Health Savings Account ("HSA"). Pet'r Statement at ¶ 2; Dubow Aff. at ¶ 6. He reported income earned in states other than Illinois, most of it in California. *See* Pet'r Opening Br. at 5; Dep't Exs. 1,4, 7.

For all three tax periods, the Petitioner sought to claim the foreign income tax credit for taxes paid on the non-Illinois sourced income. *See* Dep't Ex. 1, 4, 7, 10. The amount of the foreign income tax credit that is allowed in Illinois is computed and reported on the Illinois Schedule CR form. Dep't Ex. 1, 2019 Schedule CR.[2] On the Schedule CR form, the calculation of the tax credit began with the Petitioner's federal adjusted gross income, and the taxpayer was directed to divide the adjusted gross income and deductions between total income and the income earned in non-Illinois jurisdictions. *See id.*; *see also* Dep't Ex. 13, 2019 Schedule CR Instructions.

The Schedule CR form has two columns: Column A for reporting all income or deductions, as reported on the Petitioner's federal income tax return, and Column B for reporting the non-Illinois portion of his income and deductions. Dep't

[1] The facts are taken from the Petitioner's Opening Brief in Support of His Motion for Summary Judgment ("Pet'r Opening Br. ___") and his Statement of Undisputed Material Facts ("Pet'r Statement ___"); the Affidavit of Jeremy A. Dubow "(Dubow Aff.___"); and the Department's Exhibits ("Dep't Ex. ____").

[2] The Schedule CR forms and instructions are identical for all of the tax years involved here. The 2019 Schedule CR and Instructions are cited as the representative sample.

Ex. 1. The Schedule CR Instructions state:

> In Column B for each line, include only the portion of an amount included in Column A of that line that is non-Illinois income or deduction, *as determined using Illinois' rules for sourcing income*. Do not include any amount that is not included in Column A, or any portion of an amount that is included in Column A unless specifically instructed to do so below or in Publication 111. (emphasis added).

Ex. 13.

For some of the adjustments, the Schedule CR form directed the Petitioner to apportion the amounts to the non-Illinois jurisdiction. For example, Line 19 provided that "[i]f only a portion of the compensation related to your total business expenses shown in Column A is allocated outside Illinois, allocate the same portion of these expenses in Column B." *Id.* (Line 19). For other adjustments, such as those at issue in this case, for Alimony (Line 26) and HSA payments (Line 20), the amounts were not divided between income everywhere and the non-Illinois jurisdiction; rather, the Petitioner was directed to allocate the total amount from Column A into Column B, and applied the total amount to non-Illinois sourced income. *Id.* (Lines 26 & 20).

For the 2019 tax year, the Petitioner filed an original return and Schedule CR on which he reported alimony and HSA payments in Column A and Column B of Schedule CR by apportioning rather than allocating those amounts. Pet'r Statement at ¶¶ 1-2; *see* Dep't Ex. 1. He did this by apportioning "to Column B of Schedule CR an amount of alimony and HSA deductions equal to one minus the Illinois apportionment percentage for Petitioner's business income multiplied by each of the deductions consistent with the source of business deductions for health insurance, self-employment tax and retirement deductions." Pet'r Statement at ¶ 4; *see* Dep't Ex. 1. The Department issued the Petitioner a return correction notice rejecting his calculation. Dept's Exs. 2-3. The Petitioner then filed an amended income tax return for the 2019 tax year seeking a refund based on his apportioned calculation of the tax credit. Dep't Ex. 4.

For the 2020 and 2021 tax years the Petitioner filed original returns following the instructions on Schedule CR, including allocating the entire amounts of alimony paid and HSA deductions to total income. Dep't Exs. 6, 9. He then filed amended returns to those tax years, in which he apportioned the alimony and HSA deductions, using the same apportionment percentage as he did for the 2019 tax years. *See* Dep't Exs. 7, 10; Pet'r Statement at ¶ 4. By apportioning alimony and HSA payment amounts on Column B, the Petitioner increased the portion of his federal adjusted gross income sourced to non-Illinois jurisdictions, which, in turn, increased the foreign income tax credit applied against his Illinois incomes taxes, and, thus, increased his claimed Illinois income tax refund claim. *See* Pet'r Opening Br. at 4-5; *see* Dep't Exs. 4-11.

The Department denied the refund claims for all three tax periods on the ground that it correctly allocated all of the Petitioner's alimony and HSA payments to Column B, which thus reduced his claimed non-Illinois income. Dep't Exs. 5, 8, 11. The Petitioner timely filed his petition challenging the income tax refund denials.

Analysis

The parties have brought cross-motions for summary judgment addressing the question of whether the Department properly calculated the Petitioner's foreign income tax credit. Summary judgment "shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c). "When parties file cross-motions for summary judgment, they mutually agree that there are no genuine issues of material fact and that only a question of law is involved." (internal quotation marks omitted). *Safety-Kleen Systems, Inc. v. Department of Revenue*, 2020 IL App (1st) 191078, ¶ 21 [Citation].

Illinois imposes "[a] tax measured by net income . . . on every individual . . . on the privilege of earning or receiving income in or as a resident of this State." 35 ILCS 5/201. A taxpayer's net income is defined as "his base income for such year

which is allocable to this State under the provisions of Article 3," minus a standard exemption and certain losses, not applicable here. 35 ILCS 5/202. Base income starts with a taxpayer's federal adjusted gross income subject to modification by various additions and subtractions. *See* 35 ILCS 5/203; *accord Chicago Title & Trust Co. v. Department of Revenue*, 146 Ill. App. 3d 923, 924-925 (1st Dist. 1986) (explaining that for corporations Illinois base income started with federal taxable income subject to modification under the IITA). During the tax periods in question, a taxpayer was entitled to deduct alimony payments and HSA payments in computing federal adjusted gross income. *See Martino v. Comm'r*, T.C. Memo 2024-18, 1-2, 7 (noting that alimony is not deductible for divorce or separation agreements entered into after December 31, 2018 but prior law continued to apply for agreements executed on or before that date) (citing the Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11051, 131 Stat. 2054, 2089-90).

Under section 601(b)(3), of the IITA, 35 ILCS 5/601(b)(3), an Illinois resident is allowed a tax credit against income taxes paid by the resident on income earned in other states. The amount of non-Illinois income on which the tax credit is allowed is computed as if it were Illinois income earned by a non-resident. *See* 35 ILCS 601(b)(3); 86 Ill. Adm. Code 100.2197.[3] To put it another way, as the parties do not dispute, a nonresident earning income in Illinois and a resident computing his non-Illinois income for section 601(b)(3) tax credit purposes both follow the same

[3] Section 601(b)(3) limited the credit to "that amount which bears the same ratio to the tax imposed by subsections 201(a) and (b) otherwise due under this Act as the amount of the taxpayer's base income that would be allocated or apportioned to other states if all other states had adopted the provisions in Article 3 of this Act bears to the taxpayer's total base income subject to tax by this State for the taxable year." 35 ILCS 5/601(b)(3). The Department's regulations provide that "[a] tax qualifies for the credit only if it is imposed upon or measured by income and is paid by an Illinois resident to another state on income which is also subject to Illinois income tax." 86 Ill. Adm. Code 100.2197(b)(1)(B). "A tax is 'paid by an Illinois resident' to another state 'on income which is also subject to Illinois income tax' only to the extent the income included in the tax base of the other state is also included in base income computed under IITA under section 203 during a period in which the taxpayer is an Illinois resident." *Id.*

rules for sourcing income and deductions to Illinois.[4] *See* Dep't Cross-Mot. for Summ J. and Response to Taxpayer's Mot. for Summ. J. ("Dep't Cross-Mot.") at 2, 11-12; Pet'r Br. in Suppt. of His Mot. for Summ J. and Response to Department's Cross-Mot. for Summ J. ("Pet'r Resp. Br.") at 4; Dep't Reply Br. in Suppt. of Cross-Mot. for Summ. J. ("Dep't Reply Br.") at 2; Dep't Supp. Reply in Support of Its Cross-Mot. for Summ J. ("Dep't Supp. Br.") at 3.

The problem, according to the Petitioner, is that computing a resident's tax credit and a non-resident's income taxes under the same rules discriminated against the resident. Pet'r Resp. Br. at 4; *see also* Dep't Supp. Br. at 4-5. For a nonresident, the allocation of the alimony and HSA deduction to Illinois reduced his Illinois income subject to Illinois income taxes and thus the amount of taxes he owed to Illinois. *See* Pet'r Resp. Br. at 4-5. Whereas for a resident, like the Petitioner, allocating the alimony and HSA deduction to Illinois reduced his non-Illinois income and thus reduced his available tax credit, which increased the amount of taxes he paid to Illinois. *See* Pet'r Opening Br. at 4-5; Pet'r Resp. Br. at 5; *see also* Dep't Supp. Br. at 5. The Department did not contest that its application of section 601(b)(3) during the tax years in question resulted in a disparity between residents and nonresidents applying the same income sourcing rules. Pet'r Opening Br. at 5; Pet'r Resp. Br. at 4-5; Dep't Supp. Br. at 5.

The Petitioner contended that the disparate impact on him due to the Department's schedule CR instructions for sourcing the alimony and HSA deductions was an unreasonable construction of Illinois law because it violated the rule of *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287 (1998). *See* Pet'r Resp. Br. at 4-6. The Petitioner contended that a reasonable rule must consider the financial outcome to the taxpayers who follow it. *See* Pet'r Opening Br. at 5-6; Pet'r

[4] The instructions and form directing a nonresident how to distribute his income in calculating Illinois and non-Illinois income is virtually identical to the CR forms and instructions at issue in this case. *Compare* tax.illinois.gov/content/dam/soi/en/web/tax/forms/incometax/documents/2019/individual/il-1040-schedule-nr.pdf; *with* https://tax.illinois.gov/content/dam/soi/en/web/tax/forms/incometax/documents/2019/individual/il-1040-schedule-cr-instr.pdf

Resp. Br. at 4. Under a reasonable application of *Lunding,* which the Petitioner contended looked to the impact on taxpayers, the Department should have allowed him to apportion alimony and HSA deductions among the states where income is earned, a practice other states follow. *See* Pet'r Opening Br. at 5-6; Pet'r Resp. Br. at 4-5; Pet'r Exhibit (citing tax statutes and instructions for California, New York, Iowa, Michigan, Kentucky and Nebraska).

Again, the Department did not dispute the Petitioner's characterization of the effect of the Schedule CR instructions on the Petitioner. Dep't Supp. Br. at 5-6. It contended, however, that the IITA did not permit the apportionment of the deductions in question, and that it correctly applied *Lunding* and properly allocated the alimony and HSA payments to Petitioner's income within the framework of the IITA. *See id.* at 6. The Department's analysis is correct.

In *Lunding*, New York, like Illinois, taxed nonresident taxpayers' income as if they were residents. 522 U.S. at 291. In calculating the portion of the non-resident taxpayers' income that was allocable to New York, the State disallowed the deductions for alimony that was used to calculate federal adjusted gross income for nonresidents but allowed residents to retain it. *Id.* at 291-92. The *Lunding* Court held that allowing an alimony deduction for New York residents but not non-residents impermissibly discriminated against non-residents of New York and violated the Privilege and Immunities Clause of the United States Constitution. *See id*. at 314-15.

During the tax years in issue (and currently), the IITA made no specific provision for alimony or HSA deductions. The rules for sourcing income and deduction are found in Article III of the IITA. *See* 35 ILCS 5/301-5/308. Under section 301(a), for a resident, "all items of income or deduction which were taken into account in the computation of base income for the taxable year [are] . . . allocated" to Illinois. 35 ILCS 5/301(a). For a nonresident, section 301(c)(2), required that "[a]ny item of income or deduction which was taken into account in the computation of base income for the taxable year . . . and which [was] not

otherwise specifically allocated or apportioned pursuant to Section 302, 303 or 304 . . . shall not be allocated to this State." 35 ILCS 5/301(c)(2).[5]

In light of *Lunding*, however, the Department could no longer disallow a non-resident from allocating the alimony or HSA deduction to Illinois as a resident was allowed to do under section 301(a). However, the IITA did not permit a resident to apportion those deductions in computing their section 601(3)(b) tax credit.

The Department's only available course in attempting to comply with both *Lunding* and section 601(b)(3) was to allocate the alimony and HSA deductions to both a non-resident calculating Illinois net income and a resident calculating the amount of income deemed subject to the 601(b)(3) tax credit. It is the attempt to comply with both *Lunding* and the IITA's plain language that resulted in the disparity that the Petitioner complains of.

In *Lunding*, the Court held that New York's denial of a non-resident tax deduction for alimony payments that it allowed for a resident was unreasonable because the denial of the deduction violated the United States Privileges and Immunities Clause. 522 U.S. at 302-03. The protection of the Privileges and Immunities Clause extended "to the right of nonresidents 'to carry on business in another [State] without being subjected in property or person to taxes more onerous.'" *Stahl v. Village of Hoffman Estates*, 296 Ill. App. 3d 550, 558 (1st Dist. 1998) (quoting *Shaffer v. Carter*, 252 U.S. 37, 56 (1920)). The New York rule meant that similarly situated nonresidents paid more income taxes to New York than residents and thus the rule was unconstitutional. *See Lunding*, 522 U.S. at 315.

Petitioner, however, has disavowed any reliance on the Privilege and Immunities clause as basis for his objection to the Department's application of its allocation rules. Indeed, he contended that had the legislature created the same rule it would not violate the Privilege and Immunities Clause. *See* Dep't Additional Authority Relating to Privilege and Immunities Clause at 2 (citing email from

[5] The parties do not dispute that sections 302, 303 and 304 are not applicable here. *See* Ill Tax Tribunal Resp. 8-11-24 Pet'r Response to Dep't Surreply ("Pet'r Supp. Resp.") at 2; Dep't Supp. Reply at 4.

Jeremey Dubow, August 11, 2024) (stating "[a]s previously communicated, I do not intend to provide additional support on the question of discrimination against residents. I acknowledge that the legislature can create discriminatory law."). Moreover, the Privilege and Immunities clause has not been applied to cases involving intrastate discrimination between residents, *see, e.g.*, *Broeckl v. Chicago Park District*, 131 Ill. 2d 79, 87-88 (holding that intrastate discrimination among residents is not a privilege and immunities violation); *Stahl*, 296 Ill. App. 3d at 558 (dismissing privilege and immunities attack on village real estate transfer tax because "the appellants were Village (and therefore Illinois) residents when they . . . incurred the tax."), and neither party provided any authority that it applied to protect in-state residents from their own state's tax rules even if the impact favored nonresidents. This absence of authority is plausible because the Privilege and Immunities Clause was designed to only protect against discrimination against out-of-state residents, not in-state residents. *See Broeckl,* 131 Ill. 2d at 88 (citing *United Building & Construction Trades Council of Camden County v. Mayor of Camden*, 465 U.S. 208, 217-18 (1984)). The Department's application of the CR instructions was not a Privilege and Immunities Clause violation.

The Petitioner's additional argument that Illinois' allocation rule ran afoul of the Supreme Court's Commerce Clause holding in *Comptroller of the Treasury of Maryland v. Wynne*, 575 US 542 (2015), fails too. In *Wynne*, Maryland imposed a two-tier income tax on its residents: one it called a "state" income tax and the other a "county" income tax. 575 U.S. at 545-46. Maryland provided a tax credit for taxes paid on out-of-state income earned by Maryland residents against the "state" income tax but not against the "county" income tax. *Id.* at 546-47. The Court characterized this taxing scheme as a "tariff" on out-of-state income, which was "inherently" discriminatory. *Id.* at 565.

Allocating the alimony and HSA deductions to non-Illinois income did not act as a tariff on non-Illinois income. If anything, the allocation rule favored non-residents earning income in Illinois (as least compared to their Illinois counterparts). The Department's allocation rule thus did not "benefit in-state

economic interests by burdening out-of-state competitors." *Geja's Cafe v. Metropolitan Pier & Exposition Authority*, 153 Ill. 2d 239, 256 (1992) (internal quotations omitted), and did not violate the Commerce Clause. *See id.*; *Stahl*, 296 Ill. App. 3d at 557-58 (upholding local property tax exemption that did not discriminate *against* nonresidents) (emphasis in original).

Absent a constitutional infirmity, the Petitioner has not provided any persuasive argument or authority that the Department's rule for allocating the alimony and HSA deductions in the same manner to residents and nonresidents is unreasonable. The CR form and its instructions applied the IITA's plain language and neither narrowed nor broadened its scope. The instructions were thus valid. *See Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 61; *Craftmaster, Inc. v. Department of Revenue*, 269 Ill. App. 3d 934, 940-41 (4th Dist. 1995).

The Petitioner has moved to cite as supplemental authority the recent Supreme Court case of *Loper Bright Enterprises v. Raimondo*, ___ U.S. ___, 144 S. Ct. 2244 (2024), which overturned the so-called "*Chevron* rule," requiring deferential review for administrative rulemaking by federal courts, to argue that the Department's rule is not entitled to any deference. I have allowed the motion and subsequent briefing on the impact of the *Loper Bright Enterprises* on the present case. Putting aside that the decision involved a construction of the federal Administrative Procedures Act, 5 U.S.C. 706, *see* 144 S. Ct. at 2261-62, and not Illinois administrative law (a point not argued by the Department), this case did not require the Tribunal to resolve a statutory ambiguity. The IITA is unambiguous. The *Lunding* decision did not create an ambiguity, as Pet'r argued, *see* Pet'r Br. Addressing Supp. Authority, at 4-5; *see also* Dep't Surreply in Support of its Cross-Mot. for Summ J. at 3-5, its application resulted in an anomaly. As the above analysis indicates, even under a *de novo* review of the Department's allocation rule, it did the only thing it could do, constrained as it was by the *Lunding* decision and the IITA's plain language. Absent legislative action, the Department could not provide the tax relief that the Petitioner sought here.

Conclusion

The Petitioner's motion for leave to cite supplement authority is ALLOWED but his motion for summary judgment is DENIED. The Department's cross-motion for summary judgment is GRANTED. The Department's Notices of Claim Denial at issue in this matter are AFFIRMED.

This is a final order subject to appeal under section 3-113 of the Administrative Review Law, 735 ILCS 5/3-113, and service by email is service under section 3-113(a), *see* 35 ILCS 1010/1-90; 86 Ill. Adm. Code 5000.330. The Tribunal is a necessary party to this appeal.

s/ *Brian Barov*
BRIAN F. BAROV
Administrative Law Judge

Date: August 29, 2024