STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **JOVANNI GIUSEPPE WHYTE BEY** for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2018 and 2019.	DECISION DTA NO. 850261

Petitioner, Jovanni Giuseppe Whyte Bey, filed an exception to the determination of the Administrative Law Judge issued on May 18, 2023. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Amanda K. Alteri, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. The sixth-month period for issuance of this decision began on August 7, 2023, the date that petitioner's reply brief was received.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation has established that no material facts exist such that summary determination may be granted in its favor.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 8 and 10 to more fully reflect the record. As so modified, those facts are set forth below.

1. Petitioner, Jovanni Giuseppe Whyte Bey, filed a New York State resident income tax return (form IT-201) for the tax year 2018 on or about March 31, 2020. On this return, he reported $0.00 for all items of income and requested a refund in the amount of $1,007.00. The requested refund equaled the amount of his New York State tax withheld for 2018.

2. The Division of Taxation (Division) conducted an audit of tax year 2018 based upon petitioner's failure to report income on his form IT-201. On January 19, 2021, the Division issued an account adjustment notice - personal income tax to petitioner. It allowed a partial refund in the amount of $385.57, after adjusting petitioner's New York wage income to include the amount of $23,624.00 reflected on his form W-2 wage and tax statement for the year 2018 that he failed to report on his form IT-201.

3. On or about March 31, 2020, petitioner filed a form IT-201 for the tax year 2019. On his return, petitioner reported $0.00 for all items of income and requested a refund in the amount of $958.00. The requested refund equaled the amount of his New York State tax withheld for 2019.

4. On May 8, 2020, the Division issued an account adjustment notice – personal income tax to petitioner. It allowed a partial refund in the amount of $326.00, after adjusting petitioner's New York State wage income to include the amount of $23,131.00 as reflected on his form W-2 wage and tax statement for the year 2019 that he failed to report on his form IT-201.

5. Petitioner filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of the two notices of account adjustment. A conciliation conference was conducted on April 26, 2022.

6. On July 22, 2022, BCMS issued a conciliation order, CMS No. 329200, that denied the refund claims and sustained the notices of account adjustment.

7. On September 1, 2022, petitioner filed a timely petition with the Division of Tax Appeals protesting the conciliation order and asserting additional claims.

8. Petitioner continues to contest the balance of his refund claims. That is, petitioner seeks a refund of all New York State income tax withheld from his wages for 2018 and 2019. In support of this claim, petitioner asserts that his wages are not income. Additionally, petitioner seeks a refund in the amount of $6,110,000.00. Petitioner claims this refund based on article 26 of the Tax Law. Specifically, petitioner references gift and estate tax and generation-skipping transfer tax returns.

9. On November 23, 2022, the Division filed its answer to the petition and requested that the Division of Tax Appeals impose the maximum penalty for filing a frivolous petition.

10. On December 19, 2022, petitioner filed a response to the Division's answer in which he moved to strike a frivolous defense. In sum, petitioner argues that the Division is on notice that he is protesting multiple tax years by his article 26 claim and that he is not merely protesting the years addressed by the conciliation order. Petitioner asserts that, by its answer, the Division is attempting to bypass his protest of multiple tax years.

11. By correspondence dated December 27, 2022, the Supervising Administrative Law Judge informed petitioner that the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) require that any reply to an answer filed by the Division must be made within 20 days of the answer.

12. Thereafter, on January 6, 2023, petitioner replied that the time frame, from which the 20 days to file a reply, should commence on the date he received the answer from the Division, and not on the date the answer was mailed.

13. On January 31, 2023, the Division filed its motion for summary determination. Included with its motion papers are: (i) the affirmation of Amanda K. Alteri; (ii) an affidavit, dated January 31, 2023, of Joseph Giuffre, a Tax Technician 1, employed by the Division; (iii) copies of petitioner's forms IT-201 for the tax years 2018 and 2019; (iv) copies of the account adjustment notices, dated January 19, 2021 and May 8, 2020, respectively, for the tax years 2018 and 2019; and (v) the conciliation order dated July 22, 2022.

14. Mr. Giuffre has been employed by the Division for 19 years. As a Tax Technician 1 in the Income Franchise Desk Audit Bureau, he reviews and processes New York State personal income tax returns, conducting audits and resolving protests. These responsibilities include communicating with taxpayers and preparing administrative records, reports and forms.

15. Mr. Giuffre explained his review of petitioner's forms IT-201 for the years 2018 and 2019. The Division conducted an audit of petitioner because he claimed $0.00 in income on his forms IT-201, yet his employer, SCO Family of Services located in Glen Cove, New York, issued him a W-2 wage and tax statement for 2018 that reflected wage income in the amount of $23,062.44 and a W-2 wage and tax statement for 2019 that reflected wage income in the amount of $23,161.16.

16. Mr. Giuffre explained that the Division issued account adjustment notices to petitioner after it recomputed petitioner's forms IT-201 to include the wage income received by him for 2018 and 2019, and issued refunds based upon the adjustments.

17. In opposition to the motion, petitioner submitted his affidavit, dated February 14, 2023, wherein he asserts that his correspondence, filed on December 19, 2022, in reply to the Division's answer be accepted as timely filed. Petitioner argues, among other things, that he is entitled to attorney's fees, damages, pre-judgment and post-judgment interest and monetary relief over $100,000.00, but not to exceed $6,110,000.00, that relates to a real property interest.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge's determination addressed four issues raised in the pleadings and the motion papers. The first is petitioner's assertion that wages are not income. This is the basis upon which petitioner claims a refund of all state taxes withheld for 2018 and 2019. The second concerns petitioner's claim for a refund of estate tax under Article 26 of the Tax Law. The third issue is whether petitioner's reply to the answer of the Division was filed in a timely fashion. The final issue is whether petitioner should be subject to the provisions of Tax § 2018, which authorizes the Tax Appeals Tribunal to levy a penalty of up to $500 for the filing of a frivolous petition.

The Administrative Law Judge found that petitioner's claim that wage income was not subject to state taxation was without foundation. It was further determined that the Division properly denied petitioner's request for a refund above what was calculated on audit. The Administrative Law Judge also concluded that the Division of Tax Appeals was without the authority to consider the article 26 estate tax claim, as it was not premised on a deficiency, determination, denial of a refund or any other notice that could confer jurisdiction. Measuring the date of the Division's answer to the date of the filing of petitioner's reply, the Administrative Law Judge determined that it was late filed, after the 20-day period outlined in the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). Finally, the Administrative Law

Judge found that petitioner's argument that wages are not income has been fully litigated and specifically found to be frivolous.

Having determined that there were no triable issues of fact, the Administrative Law Judge granted the Division's motion for a summary determination. The Administrative Law Judge thus denied the petition in full, sustained the notices and levied a penalty of $500.00 for the filing of a frivolous petition.

ARGUMENTS ON EXCEPTION

On exception, petitioner acknowledges that their reply was filed more than 20 days after the date the Division's answer was filed with the Division of Tax Appeals, but argues that the timeliness of that reply should be measured from the date it was received by petitioner. Petitioner does not dispute wages and withholding as indicated on W-2 forms, but repeated their assertion that wages are not subject to taxation. Petitioner further demands additional refunds and the payment of interest to them by the State of New York. Petitioner asserts that their claim under article 26 is properly before the Division of Tax Appeals.

While not enumerating a specific argument against the imposition of the penalty for filing a frivolous petition, petitioner generally demands a "refund of any wrongfully or improperly collected fees and payments . . . ." Petitioner also disagreed with the Administrative Law Judge's conclusion that there were no material or triable issues of fact.

The Division favorably cites the determination of the Administrative Law Judge and declares, in support of the summary determination, that petitioner's case relies on nothing more than "unsubstantiated allegations or assertions . . . insufficient to raise a triable issue of fact." The Division also asserts that petitioner has not disputed that they received wage income for the periods in question or that petitioner filed "zero" tax returns for those years. The Division

requests that the Tribunal reject what is characterized as "conclusory tax protester rhetoric" and that the maximum penalty for filing a frivolous petition should be affirmed.

OPINION

We start with the question of the timeliness of petitioner's reply to the Division's answer. The answer was filed with the Division of Tax Appeals on November 23, 2022 and duly mailed to petitioner. Petitioner's reply was not filed until December 19, 2022, beyond the 20-day period specified in the Rules (20 NYCRR 3000.4 [c]). Petitioner's argument that the time for filing a pleading should be measured from their receipt is inconsistent with our Rules pertaining to the service and filing of documents. According to 20 NYCRR 3000.22 (a) (1), the date of the United States postmark stamped on the envelope or other appropriate wrapper in which such document is contained will be deemed to be the date of filing. Petitioner acknowledges that the date the answer was mailed and postmarked was November 23, 2022. Accordingly, a reply filed on December 19, 2022 is more than 20 days after the filing date and is therefore untimely. The Administrative Law Judge correctly determined that a reply filed more than 20 days after the filing date of an answer is untimely. The determination to exclude the pleading is hereby sustained.

Next, we address petitioner's claim for a refund under article 26 of the Tax Law. Petitioner offered no deficiency, determination, denial of a refund or any other notice that could confer jurisdiction in the Division of Tax Appeals. Ours is a forum of limited jurisdiction and we are compelled to abide by the constraints of authority granted in legislation (***Matter of Scharff***, Tax Appeals Tribunal, October 4, 1990, ***vacated on other grounds sub nom Matter of New York State Dept. of Taxation & Fin. v Tax Appeals Trib.*** 151 Misc 2d 326 [1991]). There exists no authority to extend our jurisdiction to areas not specifically delegated (***Matter of***

Meltzer, Tax Appeals Tribunal, March 29, 2018). Proceedings in the Division of Tax Appeals "shall be commenced by the filing of a petition . . . protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency, a determination of tax due, a denial of a refund or credit application, . . . or any other notice which gives a person a right to a hearing" (Tax Law § 2008 [1]).

The jurisdiction of the Division of Tax Appeals is premised on the filing of a petition protesting a particular kind of written notice. The scope of our jurisdiction is confined by the notice and the petition of that notice. No such basis exists for the Division of Tax Appeals to rule on a claim for refund that has not been presented to and processed by the Division. Appending such a request or demand to a petition in another matter does not make it so. The Division of Tax Appeals is without the jurisdiction to consider the article 26 claim. Accordingly, the determination of the Administrative Law Judge in this regard is sustained.[1]

We turn now to the issue of whether the Division had a rational basis for their determination of tax due, which resulted in the issuance of an account adjustment notice (notice) to petitioner. Where a notice issued by the Division has a rational basis and has been properly issued, it is presumed correct, leaving the burden upon petitioner to prove that it is erroneous (***see Matter of Thomas***, Tax Appeals Tribunal, April 19, 2001; ***Matter of Gilmartin v Tax Appeals Trib.***, 31 AD3d 1008 [3d Dept 2006]; ***Matter of Leogrande v Tax Appeals Trib.***, 187 AD2d 768 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]; Tax Law § 689 [e]; 20 NYCRR 3000.15 [d] [5]).

[1] Our lack of jurisdiction over petitioner's article 26 claim effectively renders moot the previously discussed procedural question of the timeliness of petitioner's reply because the article 26 claim was the subject of the reply (***see*** finding of fact 10).

For tax years 2018 and 2019, petitioner filed IT-201 forms each indicating income of zero dollars and requesting a refund of all state tax withholding amounts. An audit ensued and it was determined that petitioner was paid wages in the amounts of $23,624.00 and $23,131.00, respectively. It was also determined that $1,007.00 in state income tax was withheld from petitioner's wages in 2018 and $958.00 was withheld in state income tax in 2019. A refund of $385.57 was computed for 2018 and $326.00 was computed for 2019. As petitioner had requested a refund of the full amount, two notices were issued recomputing the tax as indicated and denying petitioner's claim for a refund of all amounts paid. The information used to perform the calculations was based entirely on W-2 forms issued by petitioner's employer.

It is significant that none of these facts are in dispute. Instead, petitioner relies upon the claim that wages are not income and therefore not subject to taxation by the State of New York. That claim is based on a legal theory, not a factual dispute. It is well-settled that the theory that wages are not subject to income tax is entirely without legal basis. Federal tax law expressly includes "compensation for services" in its definition of gross income ("all income from whatever source derived") (***see*** IRC [26 USC] § 61 [a] [1]). Petitioner's wage income is squarely within this definition. We sustain the determination of the Administrative Law Judge in this respect in its entirety.

Next, we address the imposition of a penalty under Tax Law § 2018 for the filing of a frivolous petition. That wage income is subject to income tax is well-settled law. Furthermore, courts have uniformly rejected and deemed frivolous the argument that money received in compensation for labor is not income subject to tax (***see e.g. Sullivan v United States***, 788 F2d 813, 815 [1st Cir 1986]); ***Mahfood v Post***, 1994 WL 675086 [EDNY 1994], ***affd*** 50 F3d 3 [2d Cir 1995]). In addition, basing a petition on that theory is specifically enumerated in our Rules

as frivolous (20 NYCRR 3000.21 [a]). We find that the Administrative Law Judge was correct in imposing that penalty.

Finally, we consider the Division's motion for summary determination. Summary determination "shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented" (20 NYCRR 3000.9 [b] [1]; ***see also Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851 [1985]). We conclude, as did the Administrative Law Judge, that there are no material issues of fact here. Indeed, the matter before us is premised solely and exclusively on legal theories, not factual disputes. We sustain the ruling of the Administrative Law Judge granting summary determination.

Petitioner received wage income, had tax withheld, with a portion refunded in accordance with a standard tax computation. There is no disagreement regarding those facts. Petitioner did not provide any documentation that would confer jurisdiction on the Division of Tax Appeals regarding estate tax under article 26 of the Tax Law and does not assert that such documentation exists. Petitioner also acknowledges that their reply was filed more than 20 days after the filing of the answer. The petition in this matter was filed protesting wages as being not subject to income tax, a specifically enumerated basis for the imposition of a penalty for filing a frivolous petition under our Rules. Every relevant point raised by petitioner is a question of law, not fact, and contrary to well-settled principles previously enunciated herein and in other authoritative sources.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jovanni Giuseppe Whyte Bey is denied;

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

3. The petition of Jovanni Giuseppe Whyte Bey is denied;

4. The notices of adjustment dated May 8, 2020 and January 19, 2021 are sustained; and

5. The penalty of $500.00 imposed against petitioner for filing a frivolous petition is sustained.

DATED: Albany, New York
February 7, 2024

/s/ Anthony Giardina
Anthony Giardina
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner