

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
DAVID GILMARTIN : DECISION
for Redetermination of a Deficiency or for Refund : DTA NO. 819271
of Personal Income Tax under Article 22 of the Tax :
Law and the Administrative Code of the City of New :
York for the Years 1995 and 1996. :
:

Petitioner David Gilmartin, 174 West 89th Street, New York, New York 10024, filed an exception to the determination of the Administrative Law Judge issued on August 7, 2003.

Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Kevin R. Law, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was denied.

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

ISSUES

I. Whether summary determination should be granted in favor of the Division of Taxation because there are no facts in dispute and, as a matter of law, the facts mandate a determination in favor of the Division.

II. Whether a frivolous petition penalty should be imposed under the authority of Tax Law § 2018 and 20 NYCRR 3000.21.

FINDINGS OF FACT

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

Based upon information obtained from the Internal Revenue Service (“IRS”), the Division of Taxation (“Division”) began an audit of petitioner by sending him letters in February and June of 2001, which sought to determine if personal income tax returns for the years 1995 and 1996 had been filed. The Division had no record of any returns filed by petitioner for those years.

Petitioner responded by letter, dated August 8, 2001, in which he acknowledged receiving the Division’s letters and conceded that he was compensated for work he performed, but denied receiving “income” because he contended that such term is not defined in either the Laws of New York or the Internal Revenue Code.

The Division issued two proposed statements of audit changes to petitioner for the years 1995 and 1996, dated October 15, 2001, based upon the information it had obtained from the IRS with respect to petitioner’s income for those years. Primary among the information received from the IRS was a statement of income tax changes for the years 1995 and 1996, indicating petitioner’s income as determined by the IRS.

For the year 1995, the Division determined that petitioner had \$80,675.00 in nonemployee compensation and \$117.00 in interest income for a total income of \$80,792.00. After an adjustment for self-employment tax and the standard deduction this resulted in additional New York State tax due of \$4,973.00, New York City tax of \$2,867.00 for a total of \$7,840.00.

For the year 1996, the Division determined that petitioner had \$99,147.00 in nonemployee compensation and \$93.00 in interest income for a total income of \$99,240.00. After an

adjustment for the self-employment tax and the standard deduction this income resulted in additional New York State income tax due of \$5,911.00 and New York City tax of \$3,681.00 for a total of \$9,592.00.

In addition, the Division imposed interest and penalties pursuant to Tax Law § 685(a)(1); (b)(1) and (2).

The Division issued two notices of deficiency to petitioner, dated December 31, 2001. The first asserted a deficiency of New York State and New York City personal income tax for 1995 in the sum of \$7,839.36, penalty of \$4,396.60, and interest of \$4,089.70, for a balance due of \$16,325.66. The second deficiency asserted additional tax due in the sum of \$9,592.26, penalty of \$4,832.66, and interest of \$3,910.13, for a balance due of \$18,335.05.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that 20 NYCRR 3000.9(b)(1) provides that in order to obtain summary determination, the moving party must submit an affidavit, made by a person having knowledge of the facts, which demonstrates that there is no material issue of fact and that the facts mandate a determination in the moving party's favor.

The Administrative Law Judge found that the Division had presented sufficient evidence to establish that there was no triable issue of fact in this proceeding based on petitioner's August 8, 2001 letter in which he admitted receiving compensation and the affidavit of Sean O'Connor which established that income had been received. Further, the Statement of Income Tax Changes from the IRS which was submitted allowed calculation of New York State and New York City personal income taxes due. The Administrative Law Judge noted that petitioner did not dispute the nonemployee compensation received, only his liability for personal income tax

thereon. The Administrative Law Judge also found that petitioner submitted no credible evidence which raised a material and triable issue of fact.

Relying on applicable provisions of the Internal Revenue Code and the Tax Law, the Administrative Law Judge concluded that petitioner had income which was subject to Federal income tax in 1995 and 1996. Therefore, petitioner was subject to New York State personal income tax on the same amount. The Administrative Law Judge also observed that once the Division issues a notice of deficiency, a presumption of correctness attaches to it and it is incumbent upon petitioner to demonstrate that the notice was erroneous. The Administrative Law Judge found that petitioner offered no proof to overcome the presumption of correctness, further supporting the propriety of granting the Division's motion.

The Administrative Law Judge considered the Division's request for the imposition of a penalty of \$500.00 pursuant to Tax Law § 2018 for maintaining a position in a proceeding that was frivolous. The Administrative Law Judge found that petitioner's arguments were without merit and were similar to those raised and rejected by the Tax Court in *Schiff v. Commissioner* (T.C. Memo 1992-183, 63 TCM 2572) as "stale and long discredited tax protester arguments." The Administrative Law Judge noted that where a position has been soundly rejected by the Federal courts and absolutely no basis for the assertion can be found, the frivolous position penalty is appropriate (*see, Matter of Thomas*, Tax Appeals Tribunal, April 19, 2001). Therefore, he concluded that petitioner's position was frivolous and imposed the penalty provided for in Tax Law § 2018 in the sum of \$500.00.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the evidence of income submitted as part of the Division's motion for summary determination was without foundation and inadmissible as hearsay. Petitioner maintains that he is entitled to an evidentiary hearing. Petitioner contends that the Commissioner of Taxation and his representatives were without authority to act since they have failed to take their oaths of office.

The Division argues that the Administrative Law Judge properly granted its motion for summary determination as it put forth a prima facie case against petitioner while petitioner, in opposition, submitted what was essentially a statement of his legal position. The Division maintains that petitioner's arguments are meritless and that he has failed to raise bona fide issues of fact regarding his liability for personal income tax.

OPINION

We have held that a fair and efficient hearing process must be defined and final, and the acceptance of evidence after the record is closed is not helpful towards that end and does not provide an opportunity for the adversary to question the evidence on the record (*see, Matter of Purvin*, Tax Appeals Tribunal, October 9, 1997; *see also, Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991). As summary judgment is the procedural equivalent of a trial (*see, Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93), we find this principle equally applicable to attempts to submit additional evidence for consideration subsequent to the granting of a motion for summary determination. As a result, we reject petitioner's attempts to introduce additional evidence into the record after the determination of the Division's motion for

summary determination had been issued by the Administrative Law Judge (*see, Matter of Moore*, Tax Appeals Tribunal, June 28, 2001).

We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and correctly applied the relevant law to the facts of this case. Petitioner has offered no evidence below, and no argument on exception, that would provide a basis for us to modify the determination in any respect. Thus, we affirm the determination of the Administrative Law Judge granting the Division's motion for summary determination and we also affirm the imposition of the \$500.00 penalty.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of David Gilmartin is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of David Gilmartin is denied;
4. The Notices of Deficiency dated December 31, 2001 are sustained; and
5. Penalty in the amount of \$500.00 for filing a petition in which petitioner maintains a frivolous position is sustained.

DATED: Troy, New York
June 24, 2004

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner