

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

CHRISTIANE C. MAY :

DECISION
DTA NO. 820102

for Redetermination of Deficiencies or for Refund of
Personal Income Tax under Article 22 of the Tax Law for
the Years 1997, 1998, 1999 and 2000. :

Petitioner Christiane C. May, PMB 200, 4465 East Genesee Street, Dewitt, New York 13214, filed an exception to the determination of the Administrative Law Judge issued on March 17, 2005. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michele W. Milavec, Esq., of counsel).

Petitioner filed a brief in support of her exception and the Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner filed a reply brief. Petitioner did not request oral argument.

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

ISSUES

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

II. Whether a frivolous petition penalty should be imposed against petitioner pursuant to Tax Law § 2018 and 20 NYCRR 3000.21.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. We have also made an additional finding of fact. The Administrative Law Judge's findings of facts and the additional finding of fact are set forth below.

The Division of Taxation ("Division") maintains, in the ordinary course of business, an electronic database containing information required to be submitted by New York State employers pursuant to Tax Law § 171-a and 20 NYCRR 2380. The Wage Reporting System, as the database is known, provides the name, social security number and gross wages paid to each employee who resides in New York State.

In this matter, a review of the Wage Reporting System, cross-referenced against the social security number of petitioner for the year 1997, indicated that three employers reported paying her a total of \$44,111.00 in wages, from which income tax of \$453.00 was withheld. For the year 1998, the system reported that petitioner received wages from three employers in the sum of \$33,609.00, from which income tax of \$743.00 was withheld.

A review of the Wage Reporting System for the year 1999 indicated that two employers paid petitioner \$34,709.00 in wages, from which \$756.00 in income tax was withheld, and for 2000, the System indicated that two employers paid petitioner wages of \$48,916.00, from which \$801.00 in income tax was withheld.

The Division found no record of New York State income tax returns filed by petitioner for any of the years in issue, and petitioner has conceded not filing any returns for those periods.

On January 13, 2003, the Division issued four statements of proposed audit changes to petitioner, one for each year in the audit period, that informed her that the Division had discovered her failure to file a return for the years in issue and that her income tax liability had been estimated based on information it had at hand. In its computations, the Division gave petitioner credit for the standard deduction and taxes withheld by petitioner's employers.

On March 3, 2003, the Division issued four notices of deficiency, one for each of the years in issue, based upon the computations in the aforementioned statements of proposed audit changes. The notices set forth the following information:

Tax Period	Tax	Interest	Penalty	Total
1997	\$1,659.00	\$654.43	\$924.55	\$3,237.98
1998	650.00	197.22	330.76	1,177.98
1999	712.00	152.94	327.86	1,192.80
2000	1,640.00	199.88	706.10	2,545.98

Petitioner timely requested a conciliation conference with respect to all four notices in issue, which was held on February 25, 2004. The conciliation order denied the relief sought and sustained the four notices of deficiency.

Petitioner filed the instant petition on July 19, 2004, protesting all four notices of deficiency.

We make the following additional finding of fact.

On February 1, 2005, the Division of Taxation, by its representative, Christopher C. O'Brien, Esq. (Michele W. Milavec, Esq., of counsel), filed a motion for an order pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b) granting summary determination to the Division of Taxation on the ground that there exists no material issue of fact and imposing a penalty for the filing of a frivolous petition pursuant to Tax Law § 2018. The

Division of Taxation submitted the affidavit with exhibits of Michele W. Milavec, Esq., sworn to January 31, 2005, and the affidavit with exhibits of Sean O'Connor, sworn to January 31, 2005, in support of its motion. Petitioner filed an affidavit, with an attached exhibit in opposition to the motion, sworn to March 1, 2005.

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 the affidavit of Sean O'Connor which established that wage income had been received by petitioner for the years at issue and that petitioner had failed to file New York State income tax returns for those years or to pay the full amount of income tax due on said income. The Administrative Law Judge noted that petitioner did not dispute these facts but only her liability for personal income tax.

Relying on applicable provisions of the Internal Revenue Code and the Tax Law, the Administrative Law Judge concluded that petitioner had wage income which was subject to Federal income tax for the years at issue. Therefore, petitioner was subject to New York State personal income tax on the same amount. The Administrative Law Judge soundly rejected as meritless and frivolous petitioner's argument that she was not subject to Federal taxation, and hence taxation by New York State, because she was not a citizen or resident of a territory under the jurisdiction of the United States.

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 *Schroeder v.*

Commissioner (T.C. Memo 2002-211, 84 TCM 220, *affd* 63 Fed Appx 414, 2003-1 USTC ¶ 50,511, *cert denied* 540 US 1220, 158 L Ed 2d 156). 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. 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 asserts the same arguments presented to and rejected by the Administrative Law Judge; i.e., that she was not required to file a New York State personal income tax return because she was not required to file a Federal income tax return. The underpinning of petitioner's argument is her interpretation of the Internal Revenue Code's definition of the term "United States," which she believes does not include New York. Hence, petitioner argues that the Federal government has no jurisdiction to impose an income tax on her wage income, which to petitioner is not a source of taxable income.

In opposition, the Division argues that the Administrative Law Judge correctly determined that petitioner had wage income during the years in issue which was subject to New York income tax. Further, the Division asserts that the Administrative Law Judge correctly imposed the maximum penalty allowable for filing a frivolous petition.

OPINION

We held in *Matter of Atlantic & Hudson Ltd. Partnership* (Tax Appeals Tribunal, January 30, 1992) that:

Although a determination of tax must have a rational basis in order to be sustained upon review (*see, Matter of Grecian Sq. v. New York State Tax Commn.*, 119 AD2d 948, 501 NYS2d 219), the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment (*see, Matter of Tavolacci v. State Tax Commn.*, 77 AD2d 759, 431 NYS2d 174; *Matter of Leogrande*, Tax Appeals Tribunal, July 18, 1991, *confirmed Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768, 589 NYS2d 383, *lv denied* 81 NY2d 704, 595 NYS2d 398).

Once a Notice of Deficiency was issued to petitioner, she bore the burden of proof to demonstrate that the basis for the assessment was unreasonable or that the amount of tax assessed was incorrect (*Matter of Micheli Contr. Corp. v. New York State Tax Commn.*, 109 AD2d 957, 486 NYS2d 448, *see also*, Tax Law § 689[e]; 20 NYCRR 3000.15[d][5]). However, petitioner introduced no evidence which would support either the unreasonableness of the assessment or the incorrectness of the tax assessed. Therefore, petitioner is deemed to have submitted to the presumption of correctness.

Tax Law § 2018 provides that:

If any petitioner commences or maintains a proceeding in the division of tax appeals primarily for delay, or if the petitioner's position in such proceeding is frivolous, then the tax appeals tribunal may impose a penalty against such petitioner of not more than five hundred dollars. The tax appeals tribunal shall promulgate rules and regulations as to what constitutes a frivolous petition.

The Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.21) provide, in part, that a frivolous position includes: “(a) that wages are not taxable as income.” We hold,

as did the Administrative Law Judge, that petitioner's position in this proceeding that she is not liable for personal income tax on her wage income is patently frivolous.

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 Christiane C. May is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Christiane C. May is denied;
4. The notices of deficiency dated March 3, 2003 are sustained; and
5. Penalty in the amount of \$500.00 imposed for filing a frivolous petition is sustained.

DATED: Troy, New York
November 17, 2005

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott

Robert J. McDermott
Commissioner