

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>CHARLES PAULLING</b>	:	DECISION
	:	DTA NO. 820368
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 2001 and 2002.	:	

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Petitioner Charles Paulling, c/o 71 South Orange Avenue, Suite 184, South Orange, New Jersey 07079, filed an exception to the determination of the Administrative Law Judge issued on September 15, 2005. Petitioner appeared *pro se*. The Division of Taxation, appeared by Mark F. Volk, Esq. (Michele W. Milavec, Esq., of counsel).

Petitioner did not file a brief in support or a reply brief. The Division of Taxation filed a letter brief in opposition. Oral argument was not requested.

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

***ISSUE***

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 of Taxation.

***FINDINGS OF FACT***

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

Sean O'Connor is a Tax Technician I in the Division of Taxation ("Division"), Personal Income Tax Unit. He has been employed by the Division since 1982 and has been a Tax Technician I since 1990.

Mr. O'Connor's responsibilities include reviewing and processing New York State personal income tax returns, conducting audits and resolving protests, including communicating with taxpayers and preparing administrative records, reports and forms. An affidavit of Mr. O'Connor submitted by the Division is based upon his personal knowledge of the facts in this matter and upon a review of the Division's official records which are kept in the ordinary course of business.

On May 1, 2002, petitioner, Charles Paulling, filed a 2001 New York State Nonresident and Part-Year Resident Income Tax Return, Form IT-203, for tax year 2001 reporting \$0.00 for all items of income and requesting a refund of \$2,382.00 for all withholding tax paid. Attached to the return was a Form W-2, Wage and Tax Statement, for the year 2001 which indicated that petitioner earned \$50,994.08 in income during 2001.

Based on the wage and tax statement for the year 2001 attached to petitioner's return, a New York State personal income tax liability of \$2,721.00 was computed. Petitioner was given a credit for withholding as reflected on the wage and tax statement. On March 24, 2003, petitioner was issued a Statement of Proposed Audit Changes for additional tax due of \$339.00 plus penalty pursuant to Tax Law § 685(b)(1) and (2) as well as interest for tax year 2001.

Subsequently, on June 9, 2003, Notice of Deficiency L-022126273 was issued to petitioner for the deficiency as computed by the Statement of Proposed Audit Changes for tax year 2001.

On April 15, 2003, petitioner filed a 2002 New York State Nonresident and Part-Year Resident Income Tax Return, Form IT-203, for tax year 2002 reporting \$0.00 for all items of income and requesting a refund of \$2,489.66 for all withholding tax paid. Attached to the return was a Form W-2, Wage and Tax Statement, for the year 2002 which indicated that petitioner earned \$53,299.30 in income during 2002.

Based on the wage and tax statement for the year 2002 attached to petitioner's return, a New York State personal income tax liability of \$2,882.00 was computed. Petitioner was given a credit for withholding as reflected on the wage and tax statement. On September 25, 2003, petitioner was issued a Statement of Proposed Audit Changes for additional tax due of \$392.34 plus penalty pursuant to Tax Law § 685(b)(1) and (2) as well as interest for tax year 2002.

Subsequently, on November 10, 2003, Notice of Deficiency L-023032119 was issued to petitioner for the deficiency as computed by the Statement of Proposed Audit Changes for tax year 2002.

Petitioner thereafter submitted a timely request for a conciliation conference for tax years 2001 and 2002 which was conducted on September 9, 2004. By order dated October 29, 2004 (CMS No. 199354) the conferee sustained the statutory notices.

Petitioner filed the instant petition on February 8, 2005, protesting the notices of deficiency for both 2001 and 2002.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Division filed a motion on June 14, 2005 for an order pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b) granting summary determination to the Division on the ground that no material issue of fact exists for resolution and urging imposition of a frivolous petition penalty pursuant to Tax Law § 2018. In support of its motion, the Division submitted the affidavit with exhibits of Michele W. Milavec, Esq., sworn to June 3, 2005, and the affidavit with exhibits of Sean O'Connor, sworn to June 3, 2005. Petitioner failed to file an affidavit setting forth facts in opposition to the motion. Therefore, summary determination was granted to the Division as a matter of law since petitioner failed to dispute any of the facts raised by the Division's motion.

***ARGUMENTS ON EXCEPTION***

Petitioner failed to submit any argument whatsoever in support of his exception.

The Division states that the Administrative Law Judge properly granted its motion for summary determination. The Division maintains that petitioner's claim that he did not have any income for 2001 and 2002 should be rejected as basic tax protester rhetoric. Thus, it requested that the determination of the Administrative Law Judge be sustained.

***OPINION***

To obtain summary determination, the moving party must submit an affidavit, made by a person having knowledge of the facts, along with other available proof. The motion documents must show that there is no material issue of fact for resolution by the Administrative Law Judge and that the facts and evidence submitted by the movant require a determination in the moving party's favor (*see*, 20 NYCRR 3000.9[b][1]). Summary judgment is the procedural equivalent of

a trial and should be denied if there is any doubt as to the existence of a triable issue (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177). If material facts are in dispute, or if contrary inferences may reasonably be drawn from undisputed facts, then a full trial is warranted and the case should not be decided on motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879). Generally, to defeat a motion for summary judgment, the opponent must produce evidence in admissible form sufficient to raise an issue of fact requiring a trial (CPLR 3212[b]). Unsubstantiated allegations or arguments are insufficient to raise an issue of fact (*Matter of Alvord & Swift v. Muller Constr. Co.*, 46 NY2d 276, 413 NYS2d 309).

In this matter, the Division submitted the affidavit of Sean O'Connor which established that wage income was received by petitioner in the years 2001 and 2002; that petitioner filed a “zero” tax return for the years 2001 and 2002; and that the full tax on the wage income for both years was not paid. In response, petitioner offered no evidence in admissible form to dispute the Division’s position.

The record indicates that petitioner received wage income from a New York employer<sup>1</sup> which was reported on the W-2 wage and tax statements attached to his returns. The Administrative Law Judge found that these wages should have been included in petitioner’s Federal income and, derivatively, he is subject to New York State personal income tax on the same reported wages. Further, in the absence of proof to the contrary, every other item of income received by petitioner in both 2001 and 2002 is includible in Federal adjusted gross

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<sup>1</sup>MTA New York City Transit Co.

income and is likewise subject to New York personal income tax (*see*, Tax Law § 611[a], § 612[a]; IRC § 62).

We note that petitioner filed no affidavit of fact or other evidence in opposition to the Division's motion or to substantiate his claim that the statutory notices for 2001 and 2002 are incorrect (*see*, Tax Law § 689[e]; 20 NYCRR 3000.15[d][5]). Since the facts asserted by the Division's motion papers are undisputed, they must be deemed admitted (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 369 NYS2d 667). We also note that petitioner on exception has offered no legal arguments by filing a brief in support of his exception and the exception itself fails to state how the disputed assessments are incorrect in any respect.

Petitioner argued below that neither the State nor Federal government has enacted a statute which confers liability for income taxes. Based upon the body of law extant on this issue, the Administrative Law Judge found that petitioner's argument is frivolous. We note that petitioner offered no arguments on exception with respect to this issue.

In *Myrick v. United States* (217 F Supp 2d 979, 984), plaintiff argued that he had no taxable "income" because the term when used in the Federal income tax statutes must have the same meaning as in the Federal Corporation Excise Tax Act of 1909 and must be derived from corporate activities. The Court rejected Myrick's argument stating:

[T]ax protestor claims such as Plaintiff's are nothing more than a hodgepodge of unsupported assertions, irrelevant platitudes, and legalistic gibberish. The Government should not have been put to the trouble of responding to such spurious arguments, nor this court to the trouble of "adjudicating" this meritless appeal [citing *Crain v. Commissioner*, 737 F2d 1417].

We agree with the Administrative Law Judge's conclusion that petitioner's argument's are similarly without merit and frivolous. Thus, we conclude based on this motion record that the

Administrative Law Judge properly granted the Division's motion for summary determination (*see, Matter of Klein*, Tax Appeals Tribunal, August 28, 2003).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Charles Paulling is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Charles Paulling is denied;
4. The notices of deficiency, dated June 9, 2003 and November 10, 2003, are sustained;

and

5. Penalty in the amount of \$500.00 imposed for filing a frivolous petition is sustained.

DATED: Troy, New York  
January 25, 2007

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/s/Charles H. Nesbitt  
Charles H. Nesbitt  
President

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

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/s/Robert J. McDermott  
Robert J. McDermott  
Commissioner