STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ALEXANDER HYATT	:	DECISION DTA NO. 821862
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 2003.	:	

Petitioner, Alexander Hyatt, filed an exception to the determination of the Administrative Law Judge issued on January 22, 2009. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioner filed a brief in support of his exception. 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 the Division of Taxation properly computed petitioner's tax liability for tax year 2003.

II. Whether a frivolous petition penalty should be imposed.

FINDINGS OF FACT

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

Petitioner, Alexander Hyatt, a New York City resident, did not file a New York State personal income tax return for the year 2003. During the year in issue, petitioner was employed by the New York City Transit Authority, which paid wages to him. He resided at 601 East 19th Street, #4L, Brooklyn, New York.

In accordance with Internal Revenue Code § 6103(d), the Division of Taxation ("Division") received information from the Internal Revenue Service ("IRS") that indicated that petitioner had New York income sufficient to require the filing of a New York State personal income tax return for tax year 2003. A search of the Division's records determined that petitioner failed to file such return.

The Division issued a Statement of Proposed Audit Changes dated May 19, 2006, setting forth the Division's calculations of petitioner's tax liability for 2003 and offering petitioner an opportunity to forward a copy of his 2003 return, if filed, or to provide additional information or an alternate explanation of filing, for example with another state. According to the Statement of Proposed Audit Changes, petitioner's federal adjusted gross income was $60,114.00, upon which New York State and City tax was calculated to be $5,031.00. The calculation then permitted the tax to be offset by a City school tax credit ($62.00) and petitioner's tax withheld ($4,539.00) leaving a balance that is the subject of this case, $430.00. Petitioner does not dispute the amount of wages earned in 2003 or any of the Division's tax calculations.

On the basis of the forgoing adjustments, the Division issued a Notice of Deficiency, dated July 13, 2006, which asserted New York State and New York City personal income tax due in the amount of $430.00 plus interest and penalty.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Petitioner did not dispute the amount of income he received or the Division's calculation of tax, but claims that he is not the party liable for the tax and, thus, was not required to file a return. In an attempt to meet this burden, petitioner relied upon Treas Reg § 31.3403-1, which requires employers to deduct and withhold the tax under section 3402 from the wages of their employees.

The Administrative Law Judge observed that the taxpayers in ***Anderson v. Commissioner*** (TC Memo 2007-265) made the same argument in an attempt to convince the court that the taxpayers' income tax liabilities were the responsibility of the employer under IRC § 3403. The Tax Court rejected the argument stating, in pertinent part:

> The obvious fallacy in petitioners' reasoning is that the income tax is petitioners' obligation in the first instance. An employer, on the other hand is an intermediary or collection agent who may be obligated to withhold amounts from an employee for the employee's future use as a credit or payment of any income tax liability.

The Administrative Law Judge noted that petitioner did not offer any proof that his employer failed to meet its statutory obligation to withhold and remit tax, but rather, argues that any amount determined to be due and owing after the amount withheld (such as the assessment calculated herein) is the liability of his employer. The Administrative Law Judge found that petitioner misapplied the federal tax code provisions to justify his failure to file an income tax return and pay the balance of his income taxes, an argument similarly made by tax protesters. The Administrative Law Judge found petitioner's arguments to be without merit, and held that the Division correctly assessed petitioner for 2003.

Accordingly, the Administrative Law Judge denied the petition and imposed a penalty of $500.00 against petitioner for maintaining a frivolous position pursuant to Tax Law § 2018 and 20 NYCRR 3000.21.

ARGUMENTS ON EXCEPTION

Petitioner, on exception, urges that the Administrative Law Judge failed to adequately address the issue raised. Petitioner argues that the employer is required to deduct and withhold New York State personal income tax and file an employer's return of tax withheld. Petitioner submits that an employer is liable for the payment of New York State income tax whether or not it is collected from the employee by the employer.

Petitioner next argues that the presumption of validity is not sufficient to hold him liable for the tax imposed, since it is not evidence. Further, petitioner claims that, contrary to the Administrative Law Judge's framing of the issue, he is not trying to convince this forum that his income tax liability is the responsibility of his employer. Rather, he states that he does not have a tax liability under New York's statutory scheme, because New York law does not impose a tax on wage income. Accordingly, petitioner urges that he had no obligation to file an income tax return. In any event, petitioner argues that the Administrative Law Judge mischaracterized the tax asserted as an income tax when it is actually an excise tax. Petitioner also argues that the Federal Tax Court erred in its decision in ***Roscoe v. Commissioner*** (TC Memo 1984-484). Finally, petitioner urges that his arguments are not frivolous, and that he has been denied Due Process.

The Division asserts that the statutory obligation to file a timely New York State personal income tax return and remit any liability due thereon falls solely on petitioner, and that an

employer's responsibility to withhold and remit tax on behalf of an employee does not obviate the employee's obligation to file an appropriate tax return for the taxable year.

OPINION

The facts are not in dispute. Petitioner admits that he lives and works in New York and that he had New York adjusted gross income as reflected in the Statement of Proposed Audit Changes of $61,340.00; that amounts representing New York State tax were duly withheld from his paychecks; that he failed to file New York State Personal Income Tax Returns for tax year 2003; and that $430.00 in tax, plus interest and penalties, as asserted in the Notice of Deficiency, remain due (***see***, Exhibits "D" and "G").

Although an outstanding liability may exist, petitioner claims that he is not responsible for such liability. Petitioner argues that his employer was liable for, and should have paid, the additional income tax asserted (***see***, Tr., p. 24), because the law makes the employer liable for withholding, and it is the party who is liable who must file the income tax return and pay the tax (***see***, Tr., p. 27).

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, he bore the burden of proof to demonstrate by evidence at the hearing in this matter that the basis for the assessment was unreasonable or that the amount of tax assessed was incorrect (***see***, ***Matter of Micheli Contr. Corp. v. New York State Tax Commn.***, 109 AD2d 957 [1985], ***see also,*** Tax Law § 689[e]; 20 NYCRR 3000.15[d][5]). However, petitioner introduced no evidence that would support either the unreasonableness of the assessment or the incorrectness of the tax assessed. As we have noted in other cases, a taxpayer's arguments do not constitute evidence. Therefore, we find that this petitioner has surrendered to the presumption of correctness (***see***, ***Matter of Tavolacci v. State Tax Commn.***, supra).

Contrary to petitioner's argument, wage income of a New York State resident individual is properly subject to both Federal and New York State personal income tax (***see***, IRC § 1; Treas Reg § 1.1-1[a], [b]; Tax Law §§ 601, 611, 612). An employer in New York State is required to withhold taxes from amounts payable to its employees as wage income (***see***, Tax Law § 671) and can be sanctioned for failure to withhold such tax amounts (***see***, Tax Law § 675). However, Tax Law § 675 does not relieve the employee-taxpayer of his obligation to pay the personal income tax due on his wages. The purpose of section 675 is to hold the employer answerable for income tax due from its employees *in the event the employer fails in its obligation* to properly withhold and pay over to the Division the income taxes due in compliance with Tax Law § 671. Petitioner has not offered any evidence that his employer failed to properly withhold taxes from the wages earned by him during the year in question, and even if he had, an employee is not absolved from liability for income tax by the failure of his employer to withhold tax as required by law (***see***, ***Anderson v. Commssioner, supra***). In ***Roscoe v. Commissioner*** (***supra***),

the petitioners similarly argued that withholding taxes (and FICA contributions) were not assessable against them. They, too, claimed that the withholding tax is a tax upon employers, separate and distinct from petitioners' income. In ***Roscoe***, the Court held that the burden for the taxes is placed upon the petitioners as employees and they are primarily liable for payment. The Tax Court rejected ***Roscoe's*** arguments, as we do here.

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 position.

The Rules of Practice and Procedure of the Tax Appeals Tribunal for the Division of Tax Appeals (20 NYCRR 3000.21) provide, in part, that a frivolous position includes: "(a) that wages are not taxable as income." We hold that petitioner's position in this proceeding that he is not liable for personal income tax on his wage income is patently frivolous (***see, Matter of Solomon v. Commissioner***, TC Memo 1993-509, affd 42 F3d 1391 [1994]; ***see also***, ***Matter of Pettis,*** Tax Appeals Tribunal, August 18, 2005; ***Matter of Nicholson***, Tax Appeals Tribunal, October 30, 2003).

We also find unpersuasive petitioner's claim that his due process rights were violated in some way. Upon reading the transcript of this proceeding, it is clear that petitioner's right to a full and fair hearing has been satisfied. We have considered and also reject petitioner's remaining arguments as not based in law or supported by the facts.

The Administrative Law Judge completely and correctly addressed the issues presented to her 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 for the reasons stated herein and we also affirm the imposition of the $500.00 penalty.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Alexander Hyatt is denied;

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

3. The petition of Alexander Hyatt is denied;

4. The Notice of Deficiency dated April 15, 2005 is sustained together with interest and penalties; and

5. A penalty of $500.00 for filing a frivolous petition is sustained.

DATED:Troy, New York
November 12, 2009

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

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