STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| **KYLE D. NELSON** | : | DECISION<br>DTA NO. 822547 |
| for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2001 through 2003. | : | |

Petitioner, Kyle D. Nelson, filed an exception to the determination of the Administrative Law Judge issued on June 3, 2010. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (Kevin R. Law, 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. Oral argument was not requested.

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

## *ISSUES*

I. Whether petitioner may be represented at a hearing before an Administrative Law Judge by an individual who does not meet any of the qualifications listed in Tax Law § 2014(1).

II. Whether additional tax due as asserted in three notices of deficiency should be sustained.

III. Whether fraud penalties imposed under Tax Law § 685(e) should be sustained.

IV. 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.

On February 22, 2005, the Division of Taxation (Division) issued to petitioner, Kyle D. Nelson, three notices of deficiency for the years 2001 through 2003 asserting additional income tax due as follows:

| 2001 | 2002 | 2003 |
|---|---|---|
| $1,229.00 | $3,324.00 | $3,227.00 |

Each of the notices of deficiency also asserted fraud penalty under Tax Law § 685(e) and interest.

During the three years at issue, petitioner was employed by the New York City Transit Authority.

Petitioner did not file any New York State income tax returns with respect to any of the years at issue.

The Division calculated the subject tax deficiencies using wage and withholding tax information reported to the Division by petitioner's employer. Such information indicates that petitioner received wages and had New York tax withheld for the years at issue as follows:

| Year | Wages | NY Tax Withheld |
|---|---|---|
| 2001 | $68,147.00 | $2,633.00 |
| 2002 | $60,230.00 | $0 |
| 2003 | $66,548.00 | $419.00 |

On December 27, 2004, the Division issued to petitioner three statements of proposed audit changes, which advised petitioner of the proposed liabilities indicated in the Findings of

Fact above. The statements also advised petitioner that the Division had no record of tax returns filed by petitioner for the years at issue and that, therefore, petitioner's liability had been estimated. The statements also detailed the Division's computations of tax due. Specifically, the statements show that the Division computed petitioner's liability as a nonresident individual with 100 percent of his wage income from the New York City Transit Authority deemed New York source income and allowed petitioner a standard deduction.

By letter dated July 6, 2005, petitioner requested an explanation of the outstanding deficiencies. The Division responded by letter dated August 15, 2005 explaining that it had reviewed information provided by petitioner's employer indicating wages paid to petitioner during the years at issue; that such wages were subject to New York income tax; and that petitioner did not file any New York tax returns for the years in question.

On April 15, 2004, following a nonjury trial in Supreme Court, New York County, petitioner was convicted of 3rd degree grand larceny in connection with his New York income tax returns for the years 1998 through 2000. Petitioner's conviction was premised on the Court's finding that, with larcenous intent, he filed fraudulent tax returns for those years by which he requested and obtained refunds. Specifically, petitioner claimed a foreign earned income exclusion equal to his wages to evade tax and to obtain refunds. Petitioner was employed by the New York City Transit Authority during the 1998-2000 period.

Throughout this proceeding petitioner sought to be represented by Mr. Garry Webb Bey. By correspondence dated October 7, 2008, the Division of Tax Appeals advised petitioner that, because Mr. Bey was neither an attorney, certified public accountant, public accountant nor enrolled agent as required under the Rules of Practice and Procedure (20 NYCRR 3000.2), Mr. Bey would not be permitted to represent petitioner in a proceeding before an Administrative Law

Judge. At the hearing in this matter, petitioner reiterated his request that Mr. Bey be allowed to represent him. The Administrative Law Judge denied this request.

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

The Administrative Law Judge found that petitioner's proposed representative was unqualified to represent him before an Administrative Law Judge pursuant to Tax Law § 2014(1), which restricts such representation to attorneys, certified public accountants, public accountants and enrolled agents. Because petitioner's proposed representative did not meet the statutory requirements, he could not represent petitioner at the hearing.

The Administrative Law Judge next determined that petitioner was required to file a New York nonresident return for each of the years at issue pursuant to Tax Law § 651(a)(3). The Administrative Law Judge found that because petitioner failed to file any returns for the years at issue, the Division was authorized to determine petitioner's liability for those years and issue notices of deficiency accordingly. The Administrative Law Judge noted that the use of employer wage reporting information is a reasonable and rational method of estimating income tax liability, and that petitioner offered no evidence to show that the information upon which the Division relied was erroneous.

The Administrative Law Judge rejected petitioner's contention that he was not provided with an accounting of payments, finding that because petitioner has the burden to show that the notices are in error, it was petitioner's burden, and not the Division's, to show payments on the subject deficiencies. Petitioner presented no evidence of such payments. The Administrative Law Judge further noted that the Division of Tax Appeals has jurisdiction over only those years that are the subject of the statutory notices under petition (2001, 2002 and 2003), and any payment issues in respect of other years is beyond the Division of Tax Appeals' jurisdiction.

The Administrative Law Judge also rejected petitioner's complaint that the Division failed to explain its position and the law upon which it relied, noting that a presumption of correctness attaches to a notice of deficiency upon its issuance, and that petitioner bears the burden of proof to show that the basis for the assessment was unreasonable or that the amount of the assessment was in error. The Administrative Law Judge further found that petitioner's complaint was refuted by the facts, in that the Division explained its position and its calculation of the deficiencies.

Addressing petitioner's argument that he was not required to file a return or pay any tax, the Administrative Law Judge observed that "[c]ompensation for services" is among the listed examples of "gross income" as defined in IRC § 61(a)(1), and found that petitioner's wages from his employer fall within this definition. The Administrative Law Judge cited the applicable provisions of the Internal Revenue Code, which provide that such wage income, less certain adjustments, equals federal adjusted gross income, and that federal adjusted gross income less deductions and exemptions is federal taxable income. The Administrative Law Judge noted that IRC § 1 imposes federal income tax on taxable income, and IRC § 6012 sets forth requirements for the filing of a federal return.

With respect to petitioner's New York liability, the Administrative Law Judge determined that as a nonresident individual with New York source income and New York adjusted gross income in excess of his New York standard deduction, petitioner was required to file a New York nonresident return for each of the years at issue. The Administrative Law Judge observed that New York adjusted gross income equals federal adjusted gross income with certain modifications, and concluded that petitioner's wage income, which is includible in his federal adjusted gross income, is also includible in his New York adjusted gross income. The

Administrative Law Judge also noted that petitioner did not object to the classification of his wages as New York source income.

The Administrative Law Judge rejected petitioner's argument that under Labor Law § 518, not all of the remuneration he received from his employer constituted wages. The Administrative Law Judge found that the definition of "wages" under the Labor Law was for purposes of the Unemployment Insurance Law, and that such definition has no application to the Tax Law and thus no relevance herein.

The Administrative Law Judge determined that the Division met its burden of proof with respect to the fraud penalty and appropriately imposed the fraud penalty with respect to the subject deficiencies. The Administrative Law Judge found that petitioner knowingly filed false New York income tax returns for the years 1998 through 2000, for which he was convicted of grand larceny on April 15, 2004. Such criminal conviction, the Administrative Law Judge observed, was emphatic notice that, given petitioner's employment with the New York City Transit Authority, he was subject to New York income tax. Yet, petitioner did not file New York returns for the years 2001 through 2003. As such, the Administrative Law Judge found that petitioner consistently and substantially underreported his income for the six-year period comprising the years 1998 through 2003. Considering that petitioner knowingly lied on his returns for the earlier years, that he knew through his criminal conviction that he was subject to New York income tax, and considering the absence of any colorable reason for his failure to file returns for the years at issue, the Administrative Law Judge concluded that petitioner's decision not to file New York nonresident returns for the years at issue, properly report his New York income and pay the tax due thereon was willfully and deliberately done with intent to evade tax.

As such, the Administrative Law Judge found that the imposition of the fraud penalty was proper.

The Administrative Law Judge further found that the imposition of a frivolous petition penalty was proper, noting that petitioner's position that the law does not make him liable to pay tax on his wages is essentially the same as the argument that "wages are not taxable as income," which is specifically cited in the Rules of Practice and Procedure as a frivolous position. Additionally, the Administrative Law Judge observed that petitioner's assertion that his employer is liable for income tax and that he, as an employee, is not liable, has been deemed a frivolous position in ***Matter of Hyatt*** (Tax Appeals Tribunal, November 12, 2009).

***ARGUMENTS ON EXCEPTION***

Petitioner asserts that the Division of Tax Appeals may not restrict his right to the representative of his choice in this proceeding, and that such a restriction is a denial of due process. Petitioner argues that under 20 NYCRR 3000.2(a), where a petitioner is present in the proceeding, the restrictions on representation do not apply.

Petitioner further contends that the Administrative Law Judge erred in determining that petitioner was required to file tax returns and pay taxes for the years at issue. Petitioner argues that wages are not "normal" or "ordinary" income and that he is not required to a file a return reporting such wages and pay tax thereon. Instead, according to petitioner, the tax on wages is paid strictly through withholding, and the employer is responsible for the reporting and payment of such tax.

Petitioner next argues that the Administrative Law Judge erred in sustaining the Division's assertion of a fraud penalty. Petitioner asserts that he was not convicted of filing a false return for previous years, but instead was convicted of grand larceny, and that such conviction did not

give him notice of a requirement to file a return in subsequent years. Petitioner further reiterates his argument that he was not required to report wages and pay tax thereon, contending that his employer was responsible for such taxes, and as such, no penalty should be imposed.

Finally, petitioner argues that the frivolous penalty was improperly imposed, asserting that his position was not frivolous.

The Division asserts that the Administrative Law Judge correctly addressed the issues presented, and that the determination should be affirmed.

***OPINION***

We affirm the determination of the Administrative Law Judge.

Tax Law § 2014(1) expressly restricts representation of a petitioner in a proceeding before an Administrative Law Judge or before the Tax Appeals Tribunal to attorneys, certified public accountants, public accountants and enrolled agents (***see also*** 20 NYCRR 3000.2[a][2]). Contrary to petitioner's argument, the regulations do not provide that if a petitioner personally appears at the proceeding, he may be represented by someone who does not meet the specified qualifications. Petitioner argues that if he makes a personal appearance pursuant to 20 NYCRR 3000.2(a)(1), the restrictions on representatives contained in 20 NYCRR 3000.2(a)(2) do not apply. Petitioner's argument is without merit. It is a fundamental rule of statutory construction that "[a] statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent" (McKinney's Cons Laws of NY, Book 1, Statutes § 97). This principle of statutory construction also applies to the interpretation of administrative regulations (***see Cortland-Clinton v. New York State Dept. of Health***, 59 AD2d 228 [1977]). The language of both the statute and the regulation are clear regarding the qualifications that must be met by a representative, and the statute and regulations make no

distinction where petitioner personally appears. Petitioner's proposed representative, Mr. Bey, does not meet the statutorily required criteria. Thus, the Administrative Law Judge properly determined that petitioner's proposed representative is unqualified under Tax Law § 2014(1).

Next, we reject petitioner's argument that he was not required to file tax returns for the years at issue and pay taxes on the wages he earned from the New York City Transit Authority. Petitioner does not dispute either 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 support of his argument, petitioner relies upon Treas Reg § 31.3403-1, which requires employers to deduct and withhold the tax under section 3402 from the wages of their employees. This same argument was made previously by the taxpayer in ***Matter of Hyatt*** (***supra***), in an attempt to convince this Tribunal that the taxpayer's income tax liabilities were the responsibility of the employer. We rejected the taxpayer's argument and stated that:

> 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. (***Matter***

> ***of Hyatt***, ***supra***, ***citing Anderson v. Commssioner***, TC Memo 2007-265; ***Roscoe v. Commissioner***, TC Memo 1984-484).

Petitioner presented no evidence that his employer failed to properly withhold taxes from the wages he earned during the years at issue, and as stated above, even if he had, he would not be absolved from liability for income tax due on his wages.

We further find that the Division met its burden of proof with respect to the fraud penalty asserted pursuant to Tax Law § 685(e). We have explained the standard for the imposition of the fraud penalty under Tax Law § 685(e) as follows:

> For the Division to establish fraud by a taxpayer, it must produce "clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing" (***Matter of Sener***, Tax Appeals Tribunal, May 5, 1988; ***see also***, ***Schaffer v. Commissioner***, 779 F2d 849, 86-1 USTC ¶ 9132; ***Matter of Cousins Serv. Sta.***, Tax Appeals Tribunal, August 11, 1988).
>
> The Division need not establish fraud by direct evidence, but can establish it by circumstantial evidence by surveying the taxpayer's entire course of conduct in the context of the events in question and drawing reasonable inferences therefrom (***Plunkett v. Commissioner***, 465 F2d 299, 72-2 USTC ¶ 9541; ***Biggs v. Commissioner***, 440 F2d 1, 71-1 USTC ¶ 9306; ***Matter of Cinelli***, Tax Appeals Tribunal, September 14, 1989, citing ***Korecky v. Commissioner***, 781 F2d 1566, 86-1 USTC ¶ 9232).
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> Among the factors that have been considered in finding fraudulent intent are consistent and substantial understatement of taxes (***Foster v. Commissioner***, 391 F2d 727, 68-1 USTC ¶ 9256; ***Merritt v. Commissioner***, 301 F2d 484, 62-1 USTC ¶ 9408). Understatement alone is not sufficient to prove fraudulent intent but, where other factors indicate fraudulent intent, the size and frequency of the omissions are to be considered in determining fraud (***see***, ***Foster v. Commissioner***, ***supra***). (***Matter of Ellett***, Tax Appeals Tribunal, December 18, 2003.)

We agree with the Administrative Law Judge's findings that petitioner knowingly filed false New York income tax returns for the years 1998 through 2000, upon which he made the bogus claim of a foreign income exclusion in the amount of his wages. Petitioner was convicted

of grand larceny as a result of these fraudulent filings on April 15, 2004. Petitioner disputes the Administrative Law Judge's finding that such conviction was emphatic notice that, given his employment with the New York City Transit Authority, he was subject to New York income tax. Petitioner argues that he was not convicted for filing false returns, but for grand larceny, and that such conviction did not give him notice of a requirement to file a return. Despite petitioner's conviction, he maintains that the returns for those years were correct, and reiterates his argument that for the years at issue, he was not required to file returns reporting his wages, and thus the fraud penalty was improperly imposed. Petitioner's arguments are without merit.

Petitioner's argument that he did not file false returns in the years for which he was the subject of a criminal conviction is disingenuous. The record shows that petitioner's conviction of 3rd degree grand larceny for the years 1998 through 2000 was premised on the Court's finding that, with larcenous intent, petitioner filed fraudulent tax returns for those years. As a result of the conviction, petitioner was well aware of his obligation to file tax returns, but failed to do so for the subsequent years. As such, we find that petitioner knowingly and intentionally failed to file income tax returns for the years at issue with the intent to evade tax, and willfully and deliberately failed to pay the tax due thereon. Moreover, as stated above, we reject petitioner's argument that he was not required to report and pay taxes on his wage income, and find that the imposition of the fraud penalty was proper.

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 arguments alleging: "(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 find the remainder of petitioner's arguments to be without merit and frivolous, as such arguments are similar to tax protestor rhetoric, which has long been rejected (***see Schiff v. Commissioner***, TC Memo 1992-183). In ***Schiff***, the Tax Court considered allegations similar to those raised by petitioner herein and found them to be "stale and long discredited tax protester arguments" that were "totally unfounded and without merit." As such, the Administrative Law Judge properly imposed a frivolous petition penalty of $500.00 pursuant to Tax Law § 2018. Thus, we affirm the determination of the Administrative Law Judge for the reasons stated herein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Kyle D. Nelson is denied;

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

3. The petition of Kyle D. Nelson is denied;

4. The Notices of Deficiency dated February 22, 2005 are sustained together with interest and penalties; and

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

DATED:Troy, New York
April 21, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

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

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner