

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
<b>JAMES E. ELLETT</b>	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 818858
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 1999.	:	

---

Petitioner, James E. Ellett, c/o 5171 Rt. 32, Catskill, New York 12414, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 1999.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 3, 2002 at 10:30 A.M., with all briefs to be submitted by December 20, 2002, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Kathleen D. O'Connell, Esq., of counsel).

***ISSUES***

- I. Whether petitioner's wage income was subject to New York State personal income tax.
- II. Whether the fraud penalty provided by Tax Law § 685(e) should be imposed in lieu of the Tax Law § 685(b)(1) and (2) penalties asserted by the Division of Taxation in the Notice of Deficiency issued to petitioner.

III. Whether, under the instant circumstances, a frivolous petition penalty pursuant to Tax Law § 2018 and 20 NYCRR 3000.21 should be imposed.

***FINDINGS OF FACT***

1. In 1999, petitioner, James E. Ellett, earned \$63,658.08 in wage income from Central Hudson Gas & Electric Corporation of Poughkeepsie, New York. Petitioner's employer withheld New York State income tax of \$3,446.10 from these wages.

2. Petitioner filed a timely 1999 New York State resident personal income tax return. He reported \$63,658.08 in wage income on line 1 of the return and \$2,517.14 in taxable interest income on line 2, and by adding these two amounts arrived at Federal adjusted gross income of \$66,175.22, which he reported on line 18 of the return. Petitioner then subtracted interest income on United States government bonds in the amount of \$2,470.72 from his Federal adjusted gross income on line 26 as a "New York subtraction." This resulted in reported New York adjusted gross income of \$63,704.50. After taking an itemized deduction in the amount of \$72,261.56, the return reported zero New York taxable income and claimed a refund in the amount of New York income tax withheld by his employer, i.e., \$3,446.10. The Division of Taxation ("Division") paid the claimed refund.

Petitioner's itemized deductions consisted of amounts claimed for taxes, interest and gifts to charities. The itemized deductions also included on line 7, "other miscellaneous deductions," an amount equal to his wage income of \$63,658.08.

3. The Division later audited petitioner's 1999 return and disallowed the claimed itemized deductions when petitioner failed to respond to the Division's request for documentation supporting the itemized deductions. The Division thus determined petitioner's 1999 New York

adjusted gross income to be \$63,704.00. After allowing a standard deduction of \$6,500.00, the Division calculated taxable income of \$57,204.00 with tax due thereon of \$3,523.00.

4. On December 11, 2000, the Division issued to petitioner a Notice of Deficiency which asserted \$3,523.00 in income tax due for the year 1999, plus penalty under Tax Law § 685(b)(1), (2), and interest.

5. On November 23, 1998, petitioner signed and filed with his employer a Withholding Exemption Certificate, Form W-4, which claimed he was exempt from the imposition of Federal income tax for the year 1999. Petitioner's Wage and Tax Statement, Form W-2, for the year at issue indicates that no Federal income tax was withheld.

6. Following the issuance of the Notice of Deficiency petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS"). BCMS issued an order sustaining the statutory notice and petitioner subsequently filed a petition with the Division of Tax Appeals which made the following assertions:

a) That the Commissioner of Taxation and Finance made the incorrect assumption that petitioner was a person liable for the Federal income tax, and therefore subject to New York State personal income tax.

b) That petitioner is not a United States citizen and is not a person liable for the Federal individual income tax and therefore, not a person liable for the New York State personal income tax.

7. In its answer filed in response to the petition and at the commencement and close of the hearing, the Division requested that the Division of Tax Appeals impose the maximum penalty for filing a frivolous petition pursuant to Tax Law § 2018 and 20 NYCRR 3000.21.

8. Petitioner was born in the United States of America. At all times relevant herein he was a New York resident.

### ***SUMMARY OF PETITIONER'S POSITION***

9. At hearing petitioner expanded on the argument contained in his petition. He noted that the starting point for determining New York taxable income under Article 22 for a resident individual such as himself is Federal adjusted gross income. He asserted, however, that he was not subject to Federal income tax, that no Federal income taxes were withheld from his wages, and therefore he was not liable for any New York income tax during the year at issue.

Petitioner's claim that he was not subject to Federal income tax rests on his stated contention that he was not a citizen of the United States.

### ***CONCLUSIONS OF LAW***

A. Petitioner's contention that he is not subject to New York personal income tax because he is not a United States citizen is obviously incorrect. Petitioner was born in the United States and is therefore a citizen of the United States (*see*, US Const, 14th Amend, § 1; 8 USC § 1401[a]; Treas Reg § 1.1-1[a], [c]). Petitioner's wage income was 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). Furthermore, the position espoused by petitioner has been rejected and deemed frivolous by the Tax Appeals Tribunal and the Federal courts (*see, Matter of Ellett*, Tax Appeals Tribunal, July 3, 2002; *Matter of Ellett*, Tax Appeals Tribunal, October 18, 2001; *Matter of Lang*, Tax Appeals Tribunal, July 8, 1993; *United States v. Grant*, 988 F2d 123 [9th Cir 1993]).

Petitioner's assertion at hearing that the failure of his employer to withhold Federal income taxes from his wages for the year at issue supports his position that he is not subject to Federal income tax is equally without merit. The employer's decision to not withhold Federal income tax was based on the Withholding Exemption Certificate completed and filed by petitioner, and not on any action or determination made by the Internal Revenue Service.

B. Tax Law § 2018 authorizes the Tax Appeals Tribunal to impose a penalty "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." Such penalty may be imposed on the Tribunal's own motion or on motion of the Office of Counsel of the Division of Taxation (20 NYCRR 3000.21). The maximum penalty allowable under this provision is \$500.00 (Tax Law § 2018).

C. The position taken by petitioner in this proceeding is that he is not subject to New York personal income tax because he is not a United States citizen, notwithstanding that he was born in the United States and is a resident of New York. This position has no basis in fact or law and is therefore frivolous (*see, Matter of Lang, supra*).

D. Under the circumstances of this case, I find that a frivolous petition penalty of \$500.00 is appropriate. I note that the Tax Appeals Tribunal has on two previous occasions imposed a \$500.00 frivolous petition penalty against this petitioner (*see, Matter of Ellett, supra; Matter of Ellett, supra*).

E. The Division has requested that the penalty for fraud provided by Tax Law § 685(e) be imposed in lieu of the Tax Law § 685(b)(1) and (2) penalties asserted in the Notice of Deficiency issued to petitioner. Where the fraud penalty is requested, the Division bears the burden of proving by clear and convincing evidence that petitioner failed to report additional

income on his State personal income tax return; and, that his failure to report this additional income was with the intent to evade tax (*Matter of Drebin*, Tax Appeals Tribunal, February 20, 1997; *Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989). Once the Division has established the elements of fraud, the burden would then shift to petitioner to overcome the presumption of correctness that requires a taxpayer to demonstrate that the deficiency is incorrect (*cf.*, *Schaffer v. Commissioner*, 779 F2d 849).

A finding of civil liability for fraud requires proof of "willful, knowledgeable and intentional wrongful acts resulting in deliberate nonpayment or underpayment of taxes due and owing" (*Matter of Fahy*, Tax Appeals Tribunal, April 5, 1990). Proof of "willfulness" within the meaning of the statute does not require proof of an evil or bad purpose. "An act is done 'willfully' if done voluntarily and with the specific intent to do something the law forbids" (*United States v. Malinowski*, 472 F2d 850, 73-1 US Tax Cas ¶ 9199, *cert denied* 411 US 970). Fraud may be inferred from any conduct, the effect of which would be to mislead or conceal (*Spies v. United States*, 317 US 492), or can be found where an entire course of conduct establishes the necessary intent (*Patton v. Commissioner*, 799 F2d 166, 86-2 US Tax Cas ¶ 9670).

Petitioner knowingly and willfully submitted a false Form W-4 claiming exemption from Federal withholding for the year at issue. In addition, and without basis, petitioner claimed as an itemized deduction a category entitled "other miscellaneous deductions," which was an amount equal to his wage income of \$63,658.08. In short, I am convinced that petitioner deliberately disrupted the orderly process of tax collection and attempted to evade payment of a tax he knew he owed (*Hebrank v. Commissioner*, 81 TC 640). Therefore, it is determined that the Division

of Taxation has proven by clear and convincing evidence that petitioner intended to evade tax. Accordingly, the Division's request that the penalty for fraud be imposed is granted.

E. The petition of James E. Ellett is in all respects denied and the notice of deficiency, dated December 1, 2000, is sustained, and in addition, the penalty for fraud under Tax Law § 685(e) is imposed in lieu of the penalties under Tax Law § 685(b)(1), (2). Additionally, there is hereby imposed a penalty of \$500.00 for the filing of a frivolous petition.

DATED: Troy, New York  
March 20, 2003

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE