STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MICHAEL CIPOLLA	:	
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1999.	:	DETERMINATION DTA NO. 818919
	:	

Petitioner, Michael Cipolla, 3030 Emmons Avenue, Apartment 1P, Brooklyn, New York 11235, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code 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 November 7, 2002 at 10:30 A.M., with all briefs to be submitted by February 14, 2003, 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. (Kevin R. Law, Esq., of counsel).

ISSUES

I. Whether petitioner's wage income was subject to New York State personal income tax.

II. Whether the notice of deficiency issued by the Division of Taxation fails to meet the requirements of the Tax Law as it does not contain the signature or the seal of the Commissioner of Taxation and Finance.

III. Whether the Division of Taxation's request for the imposition of a frivolous petition penalty pursuant to 20 NYCRR 3000.21 was proper.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued a Statement of Proposed Audit Adjustment to Michael Cipolla ("petitioner"), dated October 2, 2000, which asserted New York State personal income tax due in the amount of $2,266.00, plus penalty and interest, for a total amount due of $2,627.86, and New York City income tax due in the amount of $1,541.00, plus penalty and interest, for a total amount due of $1,769.58, for tax year 1999. The additions to the tax alleged to be due were for negligence, a penalty equal to 50% of the amount of any interest due on a deficiency attributable to negligence or the intentional disregard of the Tax Law, a penalty for the underestimation of petitioner's New York State personal income tax and a penalty for the underestimation of petitioner's New York City personal income tax. The Statement of Proposed Audit Adjustment was issued by the Division after petitioner filed a timely 1999 New York State personal income tax return with a wage and tax statement, but did not report any wages on Line 1 of the return. Petitioner requested a refund of all New York State and New York City income taxes withheld.

2. On or about November 27, 2000, the Division of Taxation issued a Notice of Deficiency to petitioner which set forth additional tax due of $3,807.00, penalty of $470.33 and interest of $193.29, for a total amount due of $4,470.62.

3. Petitioner filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services. A conference was held on December 20, 2001, after which an order was issued on February 1, 2002 sustaining the notice of deficiency in its entirety. Petitioner filed a petition with the Division of Tax Appeals on February 22, 2002, disputing the

conciliation order on the basis of his belief that he had no obligation or duty to pay income taxes and that he had failed to receive a notice of deficiency signed by and with the seal of the Commissioner of Taxation and Finance.

4. During the year 1999 petitioner received from the New York Telephone Company wage income in the amount of $52,354.00.

5. The Internal Revenue Service, as of November 2002, had not issued an assessment to petitioner for the year 1999. Petitioner's Federal income tax return for the year at issue, like the New York State return, indicated zero dollars ($0.00) earned.

6. The Division of Taxation utilized the wages reported on the wage and tax statement issued by the New York Telephone Company of $52,354.00 to calculate additional New York State and City personal income tax due on both the statement of proposed audit changes and the notice of deficiency. This amount has not been disputed by petitioner.

7. All of the documents issued by the Division were sent to petitioner at 3030 Emmons Avenue, Apartment 1P, Brooklyn, New York 11235, the same address used in the petition filed with the Division of Tax Appeals, which was signed by petitioner.

CONCLUSIONS OF LAW

A. Petitioner first challenges whether the Division of Taxation has personal jurisdiction and authority over him. Due process of law requires that in order to obtain in personam jurisdiction, the one subjected to such jurisdiction be present or have minimum contacts with the forum, such that legal action does not offend traditional notions of fair play and substantial justice (***International Shoe Co. v. State of Washington,*** 326 US 310, 90 L Ed 95). Although clearly an individual who is a New York domiciliary is amenable to the jurisdiction of the New York courts, no matter where served with process, the Court of Appeals has also indicated that a

person's residence, perhaps without domicile, would also constitute the basis for personal jurisdiction (***Dobkin v. Chapman***, 21 NY2d 490, 289 NYS2d 161).

The evidence in this record indicates that, for the years at issue, petitioner was a New York resident, as is indicated by his receipt of all the Division's correspondence and notices at the same address, and petitioner set forth the same address on his petition filed with the Division of Tax Appeals. Given the fact that petitioner had residency in the State and the aforementioned contacts with New York, the Division clearly had personal jurisdiction over petitioner.

B. Petitioner claims that because the Commissioner of Taxation and Finance failed to sign and place his seal on the notice of deficiency, the notice is invalid as it does not meet the requirements of Tax Law §§ 171, 172 and 175. It is petitioner's contention that read together, these statutes require that all notices be issued personally by the commissioner. First, it must be noted that the issuance of personal income tax statutory notices by the Division is governed by the provisions of Tax Law § 681 which provides that when there is a determination that there is a deficiency of income tax, a notice of deficiency shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of the State. Petitioner has neither alleged nor proven that the Division failed to comply with the provisions of Tax Law § 681 when it issued the notice to him (***see***, Tax Law § 689[e]; 20 NYCRR 3000.15[d][5]). Moreover, there is no requirement in the Tax Law that a notice of deficiency be signed or certified by any personnel of the Division, including the commissioner.

C. Pursuant to Tax Law § 612(a), "[t]he New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year." IRC § 62(a) defines federal adjusted gross income in the case of an individual, as "gross income minus [specified] deductions." None of the deductions listed in IRC § 62(a)

include wage, salary or interest income. "Compensation for services, including fees, commissions, fringe benefits, and similar items" are among the items included as income for Federal tax purposes (IRC § 61[a][1]; Treas Reg § 1.61-2[a][1]). The record indicates that petitioner was subject to Federal income tax on his 1999 wage income regardless of what he placed on his Federal return. Therefore, petitioner is subject to New York State personal income tax on the same amount (***see,*** Tax Law § 611[a]; § 612[a]).

D. Petitioner maintains there is no statute, Federal or State, which allows his return to be changed. The Division has not changed petitioner's return as filed, but instead has issued an assessment as a result of its determination of a deficiency of income tax.

E. Petitioner maintains that the Division was under a duty to provide him with a valid Federal assessment before it could assert State income tax liability. No such duty exists under the Tax Law and, accordingly, this contention is without merit. So, too, is his assertion that there can be no New York State income tax due because no valid Federal assessment exists. In fact, the same arguments were addressed and rejected by the Tax Court in ***Schiff v. Commissioner*** (63 TCM 2572, 2573-2574), wherein the Court stated:

> According to petitioner, no deficiency can exist, and, therefore, no valid notice of deficiency can be issued without and until a valid assessment has been made. Petitioner's basic premise is that no valid assessment can be made without a voluntarily filed tax return, which petitioner strenuously asserts is something that he has not done.
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> These are stale and long discredited tax protester arguments that have been proffered to and rejected by this and other courts countless times [citations omitted]. . . . We will not countenance those who would continue to waste judicial resources by engaging in a detailed scholarly refutation of petitioner's specious claims [citation omitted]. Suffice it to say that they are totally unfounded and without merit.

The notice of deficiency was properly issued by the Division and petitioner's arguments are rejected in their entirety.

F. 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." A 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). The regulation at 20 NYCRR 3000.21 provides as examples of a frivolous position "that wages are not taxable as income" and that "the income tax system is based on voluntary compliance and petitioner therefore need not file a return." The facts and circumstances of this matter justify the imposition of the frivolous position penalty because of their similarity to those in ***Schiff (supra)*** where the court labeled the arguments "specious" and "a waste of judicial resources."

It has been held 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 (***Matter of Thomas,*** Tax Appeals Tribunal, April 19, 2001). Therefore, it is determined that petitioner's position is frivolous and the penalty provided for in Tax Law § 2018 is imposed in the sum of $500.00.

G. The petition of Michael Cipolla is in all respects denied and the notice of deficiency, dated November 27, 2000, is sustained. Additionally, there is hereby imposed a penalty of $500.00 for the filing of a frivolous petition.

DATED: Troy, New York
July 24, 2003

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE