STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DENNIS J. KLEIN	:	DETERMINATION DTA NO. 819070
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2000.	:	

Petitioner, Dennis J. Klein, 12332 Marcel Lake Estates, Dingman's Ferry, Pennsylvania 18328-9585, filed a petition for redetermination of deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2000.

On November 19, 2002, the Division of Taxation, by its representative, Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel) filed a motion for an order pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b) granting summary determination to the Division of Taxation on the ground that there exists no material issue of fact and imposing a penalty for the filing of a frivolous petition pursuant to Tax Law § 2018. The Division of Taxation submitted a Notice of Motion dated November 18, 2002, the affidavit of Kevin R. Law, Esq., dated November 14, 2002, and the affidavit of Sean O'Connor, dated November 14, 2002, with annexed exhibits, in support of its motion. Petitioner filed a timely response to the motion on November 26, 2002, submitting an unsworn statement and annexed documents. Based upon the motion papers and all the pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUES

I. 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.

II. Whether a frivolous petition penalty should be imposed under the authority of Tax Law § 2018 and the regulation at 20 NYCRR 3000.21.

FINDINGS OF FACT

1. As a result of an audit of petitioner's 2000 New York personal income tax return, the Division of Taxation issued a statement of proposed audit changes, dated June 21, 2001, to petitioner, Dennis R. Klein, which indicated that his New York State personal income tax return for the year 2000 had been recomputed, resulting in additional tax in the sum of $180.00, penalty of $134.49 and interest of $1.59 for a total amount due of $316.08.

2. On or about September 4, 2001, the Division of Taxation issued a Notice of Deficiency to petitioner which set forth additional tax due of $180.00, penalty of $136.01 and interest of $4.63 for a total amount due of $320.24.

3. On or about September 10, 2001, petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services. A conference was held on May 22, 2002, after which an order was issued on June 28, 2002 sustaining the Notice of Deficiency in its entirety. Petitioner filed a petition with the Division of Tax Appeals on July 10, 2002, disputing the conciliation order on the basis of his belief that he has no obligation or duty to pay income taxes and that no authority exists which requires him to do so.

4. Petitioner filed a form IT-203, Nonresident and Part-Year Resident Income Tax Return, for the year 2000, which reported zero dollars ($0.00) for all items of income and requested a

refund of all withholding tax paid in the sum of $2,493.04. Attached to the return was a Federal form 4852, Substitute for Form W-2, which set forth all taxes withheld from petitioner's wages for the year 2000, but failed to disclose petitioner's wage income. In addition, attached to petitioner's IT-203 was a four-page "tax statement" which set forth petitioner's reasons why he believed he was not liable for New York personal income tax. Although largely unintelligible, this statement contends that the filing of a tax return is voluntary, that it was filed under protest to avoid prosecution, and that no section of the Internal Revenue Code creates a tax liability based on his wage income for 2000, because the definition of income is derived from the Corporate Excise Tax of 1909, which the statement avers does not include wages.

5. Petitioner submitted a letter addressed to him from the Internal Revenue Service, dated August 1, 2002, which advised him that he had an overpayment in the sum of $6,057.58 for the year 2000. A copy of a check to petitioner from the Treasury Department in the amount of $6,605.70, dated August 9, 2002, was also submitted. The difference in these amounts was $548.12 in interest credited to petitioner by the Internal Revenue Service. Neither the letter nor the check explains the reason the refund was issued.

6. The Division of Taxation utilized the Federal adjusted gross income of $51,307.00 as reported on his Federal return to calculate additional New York 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.

SUMMARY OF THE PARTIES' POSITIONS

7. In his "tax statement," petitioner contends that his wage income is not subject to taxation by New York State. As noted above, petitioner does not believe his wages are taxable as income because his definition of income is derived from the Corporate Excise Tax of 1909,

which does not include wage income. Petitioner argues that the Internal Revenue Service and the income tax itself are illegal and unconstitutional. Petitioner reasons that the money withheld by his employer was taken without legal authority and demands its return. Further, petitioner submitted a copy of a check from the United States Treasury, which he states demonstrates the validity of his claim for a refund from New York State for the same tax year.

8. The Division of Taxation argues that petitioner's arguments are without merit, noting that the Internal Revenue Code imposes tax on the taxable income of every citizen, including compensation for services. The Division maintains that wages are income unless specifically exempted by statute and that petitioner has not established entitlement to any exemption which would permit a refund of tax herein.

9. In addition, the Division believes that petitioner's position is frivolous and urges that the maximum penalty permitted by Tax Law § 2018 should be imposed. Specifically, the Division argues that petitioner's position is based on "tax protestor rhetoric," examples of which are found in the Tax Appeals Tribunal's regulations at 20 NYCRR 3000.21.

CONCLUSIONS OF LAW

A. To obtain summary determination, the moving party must submit an affidavit, made by a person having knowledge of the facts, a copy of the pleadings and other available proof. The documents must show that there is no material issue of fact and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (***Glick & Dolleck, Inc. v. Tri-Pac Export Corp.***, 22 NY2d 439, 293 NYS2d 93, 94; ***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572, 536 NYS2d 177, 179). If material facts are in

dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (***see***, ***Gerard v. Inglese***, 11 AD2d 381, 206 NYS2d 879, 881).

"To obtain summary determination it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd. [b]), and he must do so by tender of evidentiary proof in admissible form" (***Friends of Animals v. Associated Fur Mfrs***., 46 NY2d 1065, 416 NYS2d 790, 791-792; ***see also***, 20 NYCRR 3000.9[b]). Generally, with exceptions not relevant here, 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 assertions are insufficient to raise an issue of fact (***Matter of Alvord & Swift v. Muller Constr. Co.,*** 46 NY2d 276, 413 NYS2d 309).

B. The Division has presented sufficient evidence to establish that there is no triable issue of fact. The Division's submission of petitioner's return for 2000 and attached "tax statement" established that petitioner reported no wage or other income for the year 2000, despite the $51,307.00 he received in wage income reported on his Federal return. Petitioner does not dispute the wage income received or its amount, only his liability for personal income tax thereon. Petitioner submitted no credible evidence which raised a material and triable issue of fact.

C. The question remaining is whether the Division has demonstrated that summary determination should be granted in its favor as a matter of law. 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]). The record indicates that petitioner was subject to Federal income tax on his 2000 wage income and paid Federal tax thereon, albeit receiving a refund check for unspecified reasons.[1] Therefore, petitioner is subject to New York State personal income tax on the same amount. (***See,*** Tax Law §§ 611[a]; 612[a].)

Petitioner has not presented any cogent or credible evidence to substantiate his claim that the statutory notice is incorrect. (***See***, Tax Law § 689[e]; 20 NYCRR 3000.15[d][5].) Accordingly, the facts are undisputed and a determination may be entered in favor of the Division as a matter of law.

D. Petitioner has made unclear references to constitutional challenges to the taxation of his wage income. The Division of Tax Appeals lacks jurisdiction over constitutional challenges to statutes presumed to be constitutional on their face. (***Matter of Geneva Pennysaver***, Tax Appeals Tribunal, September 11, 1989; ***Matter of Fourth Day Enters.,*** Tax Appeals Tribunal, October 27, 1988.) Therefore, those arguments will not be addressed herein.

E. The remainder of petitioner's arguments are without merit. In fact, the same arguments were addressed and rejected by the Tax Court in ***Schiff v. Commissioner*** (63 TCM 2572), 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.

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[1]The copy of the refund check submitted by petitioner and the letter from the Internal Revenue Service are of little probative value because the record is silent with respect to the reason the refund check was issued.

> 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. Petitioner also argues that respondent cannot determine a tax on his income for which Congress has not made him liable; that he had no income within the meaning of the Internal Revenue Code; that respondent seeks to impose a tax not authorized by the taxing clauses of the United States Constitution; that this Court has no jurisdiction over petitioner; and that the Tax Court is not a court anyway.
>
> These are stale and long discredited tax protester arguments that have been proffered to and rejected by this and other courts countless times. . . . 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. (***Id.*** at 2573-2574.)

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 Division's motion for summary determination in its favor is granted; the petition of Dennis R. Klein is denied; the Notice of Deficiency dated September 4, 2001 is sustained; and additional penalty of $500.00 is imposed pursuant to Tax Law § 2018.

DATED: Troy, New York
January 23, 2003

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE