STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RICKY SINCLAIR, JR.	:	DETERMINATION DTA NO. 819595
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 2001.	:	

Petitioner, Ricky Sinclair, Jr., P.O. Box 61, Hailesboro, New York 13645, 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 2001.

Pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b), by a motion dated November 14, 2003, the Division of Taxation ("Division"), which appeared by Mark F. Volk, Esq. (Kevin R. Law, Esq., of counsel), moved for summary determination on the grounds that there were no material issues of fact and the undisputed facts mandated a finding in the Division's favor. Answering papers due by December 14, 2003 were never filed, and such due date commenced the 90-day period for issuance of this determination. After due consideration of the record, Frank W. Barrie, Administrative Law Judge, hereby renders the following determination.

ISSUES

I. Whether wages received by petitioner were properly held subject to New York State personal income tax.

II. Whether the Division may impose penalty under Tax Law § 685(q) for the filing of a frivolous tax return by asserting such penalty in its answer.

III. Whether the Division's request for penalty under Tax Law § 2018 for the filing of a frivolous petition to be imposed against petitioner should be granted.

FINDINGS OF FACT

1. During 2001, petitioner, Ricky Sinclair, Jr., a resident of St. Lawrence County in northern upstate New York, received total wages for the year of $33,556.80, as an employee of four different employers for certain unspecified construction[1] work. As noted on wage and tax statements (W-2 forms) attached to his tax return, his wages were as follows:

Employer	Wages
Davis-Fetch Acoustical Corp.	$10,948.86
Parker Deco, Inc.	5,265.54
Henderson-Johnson Co., Inc.	7,879.68
RRS, Inc.	9,462.72
Total wages	$33,556.80

2. On his New York income tax return for 2001, petitioner reported no tax due on New York taxable income of zero. He claimed an overpayment of income tax of $1,176.61, representing the total of New York State income tax withheld by his four employers from his wages as follows:

Employer	New York State income tax withheld
Davis-Fetch Acoustical Corp.	$ 466.18
Parker Deco, Inc.	205.76
Henderson-Johnson Co., Inc.	105.46
RRS, Inc	399.21
Total New York State income tax withheld	$1,176.61

[1] On his Federal income tax return for the year, petitioner described his occupation as "construction."

3. As part of his New York State personal income tax return for 2001, petitioner attached a two-page typed statement, which he apparently obtained from some unidentified third party. The statement included a line on which petitioner wrote his name and a line on which he wrote the year 2001. This statement is largely babble, which protests the imposition of income tax by the Internal Revenue Service on wages because taxable income "can only be a derivative of corporate activity." This statement also contended that the Internal Revenue Service lacked any basis to impose a penalty against petitioner on the basis that his tax return was "frivolous" because petitioner was relying upon various United States Supreme Court decisions and other legal authority for his position that his wages were not subject to income tax. Presumably, petitioner would have these contentions concerning the Internal Revenue Service extend to the Division of Taxation.

4. The Division issued a Statement of Proposed Audit Changes dated April 29, 2002 against petitioner asserting personal income tax due of $212.00 plus penalty and interest computed as follows:

Wages	$33,557.00
Federal Adjusted Gross Income	33,557.00
New York Adjusted Gross Income	33,557.00
Standard Deduction	7,500.00
New York Taxable Income	26,057.00
New York State Tax	1,389.00
New York State Tax Withheld	1,177.00
Personal Income Tax Due	$212.00

This statement included the following explanation:

> A recomputation of your return results in a balance due.
>
> Wages [of zero] reported on your return do not agree with your wage and tax statement(s).
>
> You have been allowed the appropriate New York standard deduction.

> You have been allowed credit for taxes withheld as shown on your wage and tax statement(s).
>
> A negligence penalty of 5% is imposed as an addition to tax under section 685(b)(1) of the New York State Tax Law.
>
> In addition to the 5% negligence penalty, an amount equal to 50% of any interest due on a deficiency or portion of a deficiency attributable to negligence or intentional disregard of the Tax Law has been imposed. (Section 685(b)(2) of the New York State Tax Law.)
>
> Interest is due for late payment or underpayment at the applicable rate. Interest is required under the New York State Tax Law
>
> When an issue such as yours has been addressed in Federal Tax Court and Federal Appeals Court, the results have been that these kinds of protests were considered frivolous and without merit. New York State regards them in the same manner.

5. The Division then issued a Notice of Deficiency dated July 8, 2002 against petitioner asserting additional tax due of $212.00 plus penalty and interest. This notice referenced the earlier statement dated April 29, 2002 described above for a "detailed computation of the additional amount due."

6. Petitioner responded by filing a request for a conciliation conference before the Bureau of Conciliation and Mediation Services and a conciliation conference was conducted at petitioner's request in Syracuse on March 19, 2003. By a conciliation order dated May 9, 2003, petitioner's request was denied by the conciliation conferee. Petitioner's response was to file a petition dated April 14, 2003 in which he asserted the proposition that New York may tax only "profit" and since he makes "*a living not a profit*" (emphasis in original) to impose income tax on his wages "makes me a *slave* which is unconstitutional" (emphasis in original).

7. By its answer dated October 15, 2003, the Division sought to impose "the maximum penalty of $500.00 for the filing of a frivolous return pursuant to Tax Law § 685(q) as if originally imposed on the Statement of Proposed Audit Changes and the Notice of Deficiency."

It also requested the Division of Tax Appeals to "impose the maximum penalty for filing a frivolous petition pursuant to section 2018 of the Tax Law and 20 NYCRR 3000.21."

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted,

> [I]f, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

Here, petitioner did not respond to the Division's motion, and he is therefore deemed to have conceded that no question of fact exists which would require a hearing to resolve (***see, Kuehne & Nagel v. Baiden***, 36 NY2d 539, 544, 369 NYS2d 667, 671; ***Costello Assocs. v. Standard Metals Corp.***, 99 AD2d 227, 472 NYS2d 325, ***appeal dismissed*** 62 NY2d 942). Moreover, the Division has established that there is no triable issue of fact by its submission of petitioner's tax return for 2001 and his attached "statement," as detailed in Finding of Fact "3". Petitioner's tax return shows that he reported no wages subject to tax for the year 2001, despite the $33,556.80 he received in wages. Petitioner does not dispute that he received such wages but rather argues that the Internal Revenue Service and, in turn, the State of New York, which uses Federal adjusted gross income as its starting point for its definition of New York adjusted gross income, lacks authority to impose income tax on wages. Consequently, the relevant facts are not in dispute.

B. Tax Law § 612(a) provides that:

> The 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 . . . .

C. Federal adjusted gross income includes wages and salaries since the definition of "federal adjusted gross income" in the Internal Revenue Code at IRC § 62(a) encompasses an

individual's wage or salary income. Petitioner's proposition, boldly asserted in the year 2004, that a taxpayer's wages may not be the subject of the income tax is gibberish (***cf.***, ***United States v. Gerads***, 999 F2d 1255, ***cert denied*** 510 US 1193, 127 L Ed 2d 652, 114 S Ct 1300; ***Parker v. Commr***, 724 F2d 469, 84-1 US Tax Cas ¶ 9209 [wherein the Federal Court of Appeals (5th Cir), affirming a Tax Court decision, noted that the Sixteenth Amendment empowered Congress to levy income tax against any source of income]; ***Matter of Klein***, Tax Appeals Tribunal, August 28, 2003 [wherein the Tribunal viewed the claim that wages may not be subject to income tax as "without merit and frivolous" in a matter where the taxpayer attached a protest statement to his tax return very similar to the statement that petitioner attached to his tax return, as noted in Finding of Fact "3"]).

D. At 20 NYCRR 3000.21(a), the regulations of the Tax Appeals Tribunal treat a taxpayer's position that wages are not taxable as income as "frivolous" for purposes of the imposition of a penalty for the filing of a frivolous petition under Tax Law § 2018. Consequently, a penalty of $500.00 is hereby imposed against petitioner on the grounds that petitioner's position in this proceeding is frivolous (***see***, ***Matter of Thomas***, Tax Appeals Tribunal, April 19, 2001).

E. Furthermore, *negligence* penalties asserted against petitioner, as noted in Finding of Fact "4", are also properly upheld against petitioner for his failure to pay income tax on his wages (***see***, ***Matter of Lang***, Tax Appeals Tribunal, July 8, 1993 [wherein the Tribunal sustained the imposition of negligence penalties against taxpayers, who like petitioner, contended that their wages were not subject to New York State personal income tax]).

F. However, unlike the situation in ***Lang (supra),*** wherein the Tribunal also upheld the imposition of a penalty under Tax Law § 685(q) for the filing of a frivolous tax return **,** the

Division did not include in its *assessment* against petitioner, i.e., the Notice of Deficiency dated July 8, 2002, such additional penalty as it did in ***Lang (supra)***. Pursuant to Tax Law § 685(l), penalties "shall be assessed . . . in the same manner as taxes." Consequently, the Division lacked authority to assert such penalty in its answer "as if originally imposed on the . . . Notice of Deficiency" since it was required under statute to assess the penalty for the filing of a frivolous tax return in the Notice of Deficiency dated July 8, 2002.

G. The petition of Ricky Sinclair, Jr. is denied, the Notice of Deficiency dated July 8, 2002 is sustained, and a penalty of $500.00 is imposed against petitioner for filing a frivolous petition.

DATED: Troy, New York

February 19, 2004

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE