STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHARLES W. SCHAUBHUT	:	DETERMINATION DTA NO. 819681
for Redetermination of a Deficiency or for Refund of Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1998.	:	

Petitioner, Charles W. Schaubhut, 241 Eldridge Street, New York, New York 10002, filed a petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 1998.

On February 18, 2004, the Division of Taxation, by its representative, Mark F. Volk, 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 the affidavit of Kevin R. Law, Esq., dated February 18, 2004, the affidavit of Sean O'Connor, dated February 18, 2004, and the affidavit of Carl Decesare, dated February 17, 2004, with annexed exhibits, in support of its motion. Petitioner did not respond to the motion. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced March 18, 2004. Based upon the motion papers and all the pleadings and proceedings had herein, Timothy J. Alston, 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 20 NYCRR 3000.21.

FINDINGS OF FACT

1. On June 24, 2002, the Division of Taxation ("Division") sent a letter to petitioner, Charles W. Schaubhut, inquiring as to whether petitioner had filed a New York State personal income tax return for the year 1998. The letter advised that the Division had information indicating that petitioner had sufficient income during 1998 that would require him to file a New York State and New York City personal income tax return. The letter stated that the Division had records indicating that petitioner received a distribution from a subchapter S corporation which had filed a 1998 New York State return. The letter further stated that the Division had no record of any return filed by petitioner for the year 1998.

2. By letter dated July 9, 2002 petitioner acknowledged the Division's June 24, 2002 letter and asserted that, while he provided labor and professional services for the "East Village Veterinary" during 1998 in exchange for checks, such checks did not constitute payment of compensation or income and were therefore not subject to tax.

3. The Division subsequently reviewed the 1998 New York S Corporation Franchise Tax Return and 1998 Federal S corporation income tax return of The East Village Veterinarian, P.C. Such returns indicated that the corporation's 1998 entire net income was $32,277.00 and that petitioner was the sole shareholder of such corporation. The Division thus determined

petitioner's 1998 New York adjusted gross income to be $32,277.00 and calculated $2,238.00 in New York State and City income tax due accordingly.

4. On October 15, 2002 the Division issued to petitioner a Statement of Proposed Audit Changes which asserted the income tax deficiency for 1998 as noted above, plus penalty and interest, and provided the following explanation:

> A search of our files fails to show a New York state income tax return filed under your name or social security number. Therefore, your New York State income tax is estimated as allowed by New York State Income 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. On December 9, 2002, the Division issued a Notice of Deficiency to petitioner which asserted $2,238.00 in New York State and City income tax due, plus penalty and interest, for the year 1998.

6. Petitioner filed a timely Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") on or about February 4, 2003. Attached to petitioner's request was a letter dated January 7, 2003, which asserted the same or similar arguments as petitioner's July 9, 2002 letter to the Division.

7. By letter dated May 12, 2003 BCMS gave petitioner notice that the conciliation conference in respect of his request was scheduled for June 18, 2003 at 2:00 P.M. at the BCMS offices in New York City. The letter further advised: "Failure to appear at the conference without an adjournment may result in the dismissal of your protest."

8. Petitioner did not appear at the scheduled conference and BCMS issued a Conciliation Default Order dated June 27, 2003. The covering letter accompanying the default order stated:

> If there is a reasonable excuse for your non-appearance, you may request that the order be vacated. A request to vacate the order must be filed with the undersigned within thirty (30) days from the date of this order.

9. Petitioner responded to the Conciliation Default Order by letter dated July 2, 2003 with attachments. In such letter petitioner asserted that he did not owe any tax and sought assistance in resolving the matter, but did not state a reason for his failure to appear at the scheduled conciliation conference.

10. BCMS deemed the July 2, 2003 letter as an application to vacate the default and by letter dated July 8, 2003, BCMS denied such application.

11. By letter dated September 30, 2003, petitioner specifically requested that the default be vacated. As part of this request, petitioner asserted that BCMS had incorrectly addressed the May 12, 2003 conciliation conference notice to petitioner because of an incorrect zip code. Petitioner further claimed that the conciliation conference notice was not mailed to the correct name. Petitioner also stated in the letter that he did not "acknowledge receipt" of the May 12, 2003 conciliation conference notice.

12. By letter dated October 3, 2003, BCMS denied petitioner's request.

13. All notices and correspondence from the Division and BCMS related to this matter were mailed to Charles Schaubhut at 241 Eldridge Street, New York, New York. The Statement of Proposed Audit Changes, the Notice of Deficiency, the May 12, 2003 letter giving notice of the scheduled conciliation conference, and the Conciliation Default Order dated June 27, 2003 listed an erroneous zip code of 10463 rather than the correct zip code of 10002.

SUMMARY OF THE PARTIES' POSITIONS

14. In his petition, petitioner seeks, first, that the Conciliation Default Order be vacated. Petitioner asserts that he was not given proper notice of the conciliation conference and contends

that documents mailed to him by BCMS were incorrectly addressed and that his name was not correctly listed thereon.

15. Although he concedes that he provided services to the S corporation and received checks as payment for such services, petitioner asserts that such checks were not compensation and therefore not income. Rather, by his petition petitioner asserts that the "corporate securities," i.e., checks, that he received were offers of payment which resulted in unpaid charges for his labor and professional services rendered to the S corporation. Such checks were then exchanged for Federal Reserve notes, another unpaid debt obligation, in a like kind exchange for which he received no gain or profit. Petitioner thus concludes that he received only debt in exchange for his labor and professional services and not money.

16. The Division contends that petitioner was given adequate notice of the conciliation conference and that he has failed to offer a reasonable or timely excuse for his nonappearance. The Division further contends that its assessment was proper and that the Notice of Deficiency should be sustained. Finally, the Division asserts that a frivolous petition penalty be imposed against petitioner because his position in this matter is based upon "tax protestor rhetoric."

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

> if, 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]).

B. Here, petitioner did not respond to the Division's motion; he is therefore deemed to have conceded that no question of fact requiring a hearing exists (***see***, ***Kuehne & Nagel v. Baiden***, 36 NY2d 539, 544, 369 NYS2d 667, 671; ***Costello v. Standard Metals***, 99 AD2d 227,

472 NYS2d 325). Specifically, petitioner presented no evidence to contest the facts alleged in the affidavits of Sean O'Connor and Carl Decesare; thus, those facts may be deemed admitted (***see***, ***Kuehne & Nagel v. Baiden***, ***supra***, at 544, 369 NYS2d at 671; ***Whelan By Whelan v. GTE Sylvania***, 182 AD2d 446, 582 NYS2d 170, 173). Accordingly, there are no material or triable issues of fact presented in this matter, but only issues of law. Summary determination may, therefore, be granted in this matter, and, for the reasons discussed below, the Division's motion for summary determination will be granted.

C. As noted, the petition seeks, first, that the Conciliation Default Order be vacated. The Division's regulations provide the following with respect to situations where a conciliation conference requester fails to appear at a scheduled conference:

> Where a requester fails to appear personally or by representative and where an adjournment has not been granted, the conciliation conferee may issue a conciliation order dismissing the request for nonappearance. Upon written application filed within 30 days after the issuance of a conciliation order dismissing the timely request, such order may be vacated and a conciliation conference scheduled where the requester shows a reasonable excuse for the nonappearance. In the alternative, the requester may file a petition with the Division of Tax Appeals . . . within 90 days after the conciliation order dismissing the timely request is issued (20 NYCRR 4000.5[b][3]).

Here, in response to the Conciliation Default Order dated June 27, 2003, petitioner filed the July 2, 2003 letter with attachments. Such correspondence offered no excuse for petitioner's failure to appear at the scheduled conference. Accordingly, by letter dated July 8, 2003, BCMS properly declined to vacate the default pursuant to the regulation.

Petitioner subsequently filed the letter dated September 30, 2003 seeking to vacate the default. This letter was filed well beyond the 30-day limitations period for the filing of applications to vacate conciliation conference defaults. Accordingly, such application was properly denied. Even if timely filed, the September 30, 2003 letter does not show a reasonable

excuse for the default as required under the regulation. Specifically, petitioner does not claim in the letter that he did not receive the May 12, 2002 notice of the conciliation conference; rather, petitioner does not "acknowledge receipt of this notice." Such a statement is not a "reasonable excuse" as required under the regulation.

Petitioner also asserted in the September 30, 2003 letter that the notice of the conference was incorrectly addressed because of the incorrect zip code. The Tax Appeals Tribunal has held, however, that a zip code is not a required part of the address (***see***, ***Matter of Karolight***, Tax Appeals Tribunal, July 30, 1992). Such an error is thus inconsequential. Petitioner also claimed that he was incorrectly named on the notice of conference, but did not elaborate. The notice was addressed to "Charles Schaubhut."

Notwithstanding the default at the conciliation level, petitioner has not been denied an administrative review of his protest, as he filed a timely petition with the Division of Tax Appeals. The filing of such a petition is set forth in the BCMS regulation as an alternative remedy in the event of a conciliation conference default (***see***, 20 NYCRR 4000.5[b][3]) .

D. Turning to the substance of petitioner's claim, where, as here, a taxpayer fails to file an income tax return as required under Article 22, the Division is authorized to estimate the taxpayer's income tax liability "from any information in its possession" (***see***, Tax Law 681[a]). Here, the Division determined petitioner's tax liability using the 1998 New York S Corporation Franchise Tax Return and Federal S corporation income tax return of The East Village Veterinarian, P.C., of which petitioner was the sole shareholder. As noted such returns indicate that the corporation's 1998 entire net income was $32,277.00. Because the S corporation is treated as a conduit for Federal and State income tax purposes, shareholders must account for their pro rata share of the S corporation's income on their personal income tax returns (***see***,

Internal Revenue Code ("IRC") § 1366[a]). The Division thus properly determined that petitioner's pro rata share of the S corporation's income was $32,277.00, and its calculation of petitioner's 1998 New York State and City income tax liability was in all respects proper.

Petitioner's arguments for cancellation of the subject Notice of Deficiency (***see***, Paragraph "15") are unfounded tax protester blather. One wonders whether petitioner was able to purchase food or pay his rent with the so-called "debt" he received from the corporation for his services. To indulge petitioner very briefly, New York taxable income is premised on the definition of income under the Internal Revenue Code (***see***, Tax Law §§ 611, 612). IRC § 61 expansively defines gross income as "all income from whatever source derived, including (but not limited to) . . . (1) Compensation for services . . . [and] (2) Gross income derived from business." The Commissioner's regulations further provide that gross income "includes income realized in any form, whether in money, property or services" (Treas Reg § 1.61-1[a]). Moreover, the Supreme Court has broadly defined income as "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion" (***Commissioner v. Glenshaw Glass Co.***, 348 US 426, 431). More specifically, it is well established that payments by check ordinarily constitute taxable income (***see***, ***Kamm's Estate v. Commissioner***, 349 F2d 953, 955; ***Kahler v. Commissioner***, 18 TC 31; ***RTS Investment Corp. v. Commissioner*** 53 TCM 171). The checks paid to petitioner by the corporation for his services thus were unquestionably subject to income tax.

E. 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 (***see***, 20 NYCRR 3000.21). The maximum penalty allowable under this provision is $500.00 (***see***, Tax Law § 2018).

Petitioner's position is a variation of the nonsensical tax protester arguments that Federal Reserve notes are not money and that wages are not taxable as income. Both of these arguments are listed as examples of frivolous positions in the Rules of Practice and Procedure of the Tax Appeals Tribunal (***see***, 20 NYCRR 3000.21). The similarity between petitioner's specious arguments and the examples of frivolous positions in the regulations justify the imposition of a frivolous petition penalty in this matter in the amount of $500.00.

F. The Division of Taxation's motion for summary determination is granted; the petition of Charles W. Schaubhut is denied; the Notice of Deficiency dated December 9, 2002 is sustained; and a frivolous petition penalty of $500.00 is imposed pursuant to Tax Law § 2018.

DATED: Troy, New York
April 29, 2004

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE