STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ANN MARIE PETTIS	:	
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the years 1998, 1999 and 2000.	:	DETERMINATION DTA NO. 819921

Petitioner, Ann Marie Pettis, 2 Lochnavar Parkway, Pittsford, New York 14534, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 1998, 1999 and 2000.

On August 11, 2004, the Division of Taxation, by its representative, Christopher C. O'Brien, 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 August 10, 2004, and the affidavit of Leonard Slaveikis, dated August 10, 2004, with annexed exhibits, in support of its motion. Petitioner filed a timely response to the motion on September 13, 2004. 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 pursuant to Tax Law § 2018 and 20 NYCRR 3000.21.

FINDINGS OF FACT

1. The affidavit of Leonard Slaveikis, a tax technician in the Audit Division, sworn to August 10, 2004, was submitted with the motion in order to establish the facts upon which the Division based its notice of deficiency, most of which are incorporated in the findings below.

2. In the ordinary course of business, during the years in issue, 1998, 1999 and 2000, the Division of Taxation ("Division") maintained an electronic database known as the Wage Reporting System, which contained information submitted by employers pursuant to Tax Law § 171-a and 20 NYCRR part 2380. The information included the employer and the name, social security number and gross wages paid to each employee residing in New York State.

3. A review of the wage reporting system information for the years 1998, 1999 and 2000, when cross-referenced with petitioner's social security number, revealed that Highland Hospital of Rochester had paid petitioner wages of $50,255.00 in 1998, $51,168.00 in 1999 and $50,957.54 in 2000.

4. After a review of its records, the Division determined that it had no record of petitioner's filing personal income tax returns with New York State for any of the years in issue.

5. On November 14, 2002, the Division issued three statements of proposed audit changes to petitioner, each of which contained the following explanation:

Under section 61 of the Internal Revenue Code, compensation received as wages is subject to tax. Since New York State Tax Law conforms with the Internal Revenue Code, your wages are taxable for New York State tax purposes.

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 law.

You have been allowed the appropriate [$7,500.00] New York standard deduction.

Penalty for late filing has been applied at 5% per month up to a maximum of 25% (section 685(a)(1) of the New York State Tax Law).

Section 685(b) penalty has been imposed due to your negligence and/or intentional disregard of the Tax Law or Regulations.

Interest is required by section 684(a) of the New York State Tax Law.

In addition, petitioner was credited for tax withheld for each of the years in issue: $1,916.00 in 1998; $1,979.00 in 1999; and $1,965.04 in 2000.

After allowance for the standard deduction, tax was computed and a credit was applied for tax withheld. Additional personal income tax was determined to be due in the following amounts: $617.00 in 1998; $616.00 in 1999; and $616.00 in 2000. As set forth in the explanation on each of the statements, penalties and interest were also asserted.

6. On January 10, 2003, the Division issued to petitioner three notices of deficiency, based upon the statements of proposed audit changes, which set forth the following additional tax, penalties and interest due:

Period Ended	Tax	Interest	Penalty	Total
12-31-98	$617.00	$180.37	$371.08	$1,168.45
12-31-99	$616.00	$125.95	$346.72	$1,088.67
12-31-00	$616.00	$69.20	$317.64	$1,002.84

SUMMARY OF THE PARTIES' POSITIONS

7. Petitioner contends that the New York State income tax is an excise tax, inapplicable to petitioner's wages. Petitioner reasons that since the Division of Taxation does not agree that the income tax is an excise tax there is a material and triable issue of fact warranting the denial of its motion.

8. The Division of Taxation argues that petitioner had wage income during the years in issue which was subject to New York income tax; that petitioner did not report receiving the wages for any of the years in issue and failed to pay the total income tax due on said income. Further, the Division urges this forum to impose the maximum penalty allowable for filing a frivolous petition.

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).

In this matter, the Division submitted the affidavit of Leonard Slaveikis which established the facts that wage income was received by petitioner; that petitioner filed no New York personal income tax returns for the years in issue; and that the full tax on the wage income was not paid. Petitioner has not disputed any of these facts, only raised a vague argument that her income was not derived from an "excise taxable activity."

B. "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).

C. The Division has presented sufficient evidence to establish that there is no triable issue of fact. As noted above, the Division has established that petitioner failed to pay the personal income tax due on wage income paid to her by Highland Hospital of Rochester and failed to file returns for the years in issue. Although the Division sought petitioner's cooperation in determining the proper amount of tax due, petitioner failed to respond to the proposed statements of audit changes and the notices were issued using the data available. Petitioner has never disputed the calculation of the tax herein.

What petitioner does assert is that the personal income tax is an excise tax and that she engages in no "excise taxable activity." Petitioner has never elaborated on this theory, but it

constitutes a legal argument which does not raise an issue of fact. For the reasons set forth below, this legal argument is without merit and the Division's motion must be granted as a matter of law.

D. 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." Internal Revenue Code § 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].) Since petitioner received compensation from Highland Hospital of Rochester, she is subject to New York State personal income tax on the amount reported. (***See,*** Tax Law § 611[a]; § 612[a].)

Petitioner has not presented any cogent or credible evidence to substantiate her 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. (***See, Matter of Klein***, Tax Appeals Tribunal, August 28, 2003.)

E. From petitioner's response to the Division's motion, it appears she is arguing, albeit inarticulately, that wage income is not subject to taxation by New York State because the definition of income is derived from the Corporate Excise Tax of 1909, which does not include wage income. Petitioner is in error. In ***Myrick v. United States of America*** (2002-2 US Tax Cas ¶50,487), the plaintiff made a similar argument, contending that he had no taxable income since the term "income," when used in the Income Tax Acts of Congress, must have the same meaning as it does in the Corporation Excise Tax Act of 1909, and can only be derived from corporate

activities. The Court flatly rejected the argument as meritless, noting that plaintiff's pension income was "expressly and unambiguously" included in the definition of income in IRC § 61(a). On the frivolous nature of Myrick's argument the court said:

> [T]ax protestor claims such as Plaintiff's are nothing more than a hodgepodge of unsupported assertions, irrelevant platitudes, and legalistic gibberish. The Government should not have been put to the trouble of responding to such spurious arguments, nor this court to the trouble of 'adjudicating' this meritless appeal [citing ***Crain v. Commissioner of Internal Revenue***, 737 F2d 1417].
>
> Petitioner's argument is no less frivolous in this forum.

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 an example of a frivolous position "that wages are not taxable as income."

Further, when a plaintiff raised the same argument petitioner raises herein before the United States Tax Court, it was rejected out of hand:

> In his petition and memorandum, petitioner makes tax protester arguments that have been repeatedly rejected by this Court and others, including the Court of Appeals for the Ninth Circuit . . . as inapplicable or without merit. (***Schroeder v. Commissioner,*** 84 TCM 220, ***affd*** 63 Fed Appx 414 [9th Cir], ***cert denied*** _US_ 158 L Ed 2d 156.)

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 Ann Marie Pettis is denied; the three notices of deficiency, dated January 10, 2003, are sustained; and additional penalty of $500.00 is imposed pursuant to Tax Law § 2018.

DATED: Troy, New York
November 18, 2004

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