STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FRITZROY HUTTON	:	SMALL CLAIMS DETERMINATION DTA NO. 820084
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Personal Income Tax pursuant to the Administrative Code of the City of New York for the Year 2001.	:	

Petitioner, Fritzroy Hutton, c/o 120-35 Guy R. Brewer Boulevard, Jamaica, New York 11434, 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 and New York City personal income tax pursuant to the Administrative Code of the City of New York for the year 2001.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 1740 Broadway, New York, New York on January 19, 2005 at 10:45 A.M. Petitioner appeared by Garry: Webb: Bey. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Kal Safren).

The final brief was to be submitted by May 18, 2005, which date began the three-month period for the issuance of this determination.

ISSUES

I. Whether the petition should be dismissed on the basis that it was not filed within 90 days of the date the Conciliation Order was issued.

II. Whether the Division of Taxation properly determined that petitioner was not eligible to claim a foreign earned income exclusion for the 2001 tax year.

III. Whether, in an employer-employee transaction, Tax Law § 675 renders the employer the party liable for payment of any income tax liability.

IV. Whether the petition filed herein is frivolous and, if so, whether petitioner should be held liable for the maximum penalty of $500.00 imposed pursuant to Tax Law § 2018 for the filing of a frivolous petition.

FINDINGS OF FACT

1. On or before April 15, 2002, petitioner, Fritzroy Hutton, together with his spouse, Carol F. Hutton, timely filed a 2001 New York State and City resident personal income tax return claiming a "Married filing joint return" filing status. Petitioner's return reported the following items of income, gain, loss and deduction:

ITEM	**AMOUNT**
Wages	$41,720.79
Form 2555-EZ	(41,720.79)
Adjusted gross income	0.00
Standard deduction	13,400.00
Taxable income	0.00
NYS & NYC tax	0.00
Tax withheld	2,729.93
Refund	$2,729.93

2. Attached to petitioner's 2001 tax return were two forms W-2, Wage and Tax Statement ("Form W-2"). One Form W-2 was issued to petitioner by an employer identified as J. C. Steel Corporation located in Bohemia, New York and the other Form W-2 was issued to petitioner's

spouse by Northeastern Conference located in Jamaica, New York. When the wages and New York State and City tax withheld reported on the two forms W-2 are combined, the respective totals equal the amounts reported on the 2001 joint income tax return.

3. Upon receipt of petitioner's return for 2001, the Division of Taxation ("Division") did not allow the refund as claimed on the return but instead corresponded with petitioner stating that it was "unable to verify the eligibility for the income exclusion." The letter requested that petitioner provide a copy of Form 2555-EZ as filed with the Internal Revenue Service.

4. Petitioner ultimately forwarded a copy of Federal Form 2555-EZ, Foreign Earned Income Exclusion, to the Division for the 2001 tax year. On Form 2555-EZ petitioner claimed that: (a) he was entitled to the foreign earned income exclusion based on the physical presence test; (b) he was present in a foreign country for 365 days during the 2001 tax year; (c) his tax home was in a foreign country for all of 2001; and (d) his sole tax home during 2001 was New York State.

5. On January 10, 2003, the Division issued a Notice of Disallowance to petitioner indicating that the $2,729.93 refund as claimed on the 2001 tax return was disallowed in full. The Notice of Disallowance advised petitioner that if he disagreed with the notice and would like further review he must file either a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") or a petition for a hearing with the Division of Tax Appeals within two years of the date of the notice.

6. Petitioner filed a Request for Conciliation Conference with BCMS, and on September 12, 2003 BCMS issued a Conciliation Order which sustained the refund denial dated January 10, 2003. On July 1, 2004, petitioner filed a petition with the Division of Tax Appeals contesting the denial of the refund claimed on his 2001 tax return and this small claims proceeding ensued.

7. It is undisputed in this matter that petitioner and his spouse resided and worked within the State and City of New York for the entire 2001 tax year.

SUMMARY OF THE PARTIES' POSITIONS

8. Petitioner maintains that the $41,720.79 of income reported on the 2001 tax return qualifies for the foreign earned income exclusion pursuant to section 911 of the Internal Revenue Code ("IRC") because the government of New York State is separate from the United States government, and as such, and in relation to the United States government, New York State is a foreign country. Petitioner objects to the Division's use of the term "wages," preferring instead the term "remuneration" in describing the source of his income. Petitioner's representative explained that pursuant to IRC § 3401(a)(8)(A)(i), remuneration for services performed for an employer by a United States citizen which is subject to the exclusion provided under IRC § 911 is excluded from the definition of wages.

Petitioner also argues that Tax Law § 675 renders his employer responsible for the payment of his New York State personal income tax, and that he is entitled to a refund of the $2,729.90 of income tax withheld from wages as claimed on the 2001 income tax return.

Finally, petitioner contends that ***Matter of Nicholson*** (Tax Appeals Tribunal, October 30, 2003) is not controlling because it was determined in an arbitrary and perfunctory manner and that there is no basis to impose the frivolous petition penalty.

9. Initially, the Division argues that the Division of Tax Appeals lacks jurisdiction in this matter since the petition, postmarked on July 1, 2004, was not filed, as required by statute, within 90 days of the September 12, 2003 Conciliation Order.

The Division next contends that petitioner's claim, that he is entitled to the foreign earned income exclusion on the theory that New York State is a foreign country, is both erroneous and

frivolous. The Division asserts that it properly denied the refund as claimed on petitioner's 2001 tax return and that the frivolous petition penalty provided for in Tax Law § 2018 should be imposed in this matter.

CONCLUSIONS OF LAW

A. With respect to the jurisdictional issue concerning the timeliness of the petition, it is concluded that the petition postmarked on July 1, 2004 was timely filed. While the Division is correct in its position that the petition was not timely filed within 90 days of the date the Conciliation Order was issued as required by Tax Law § 170(3-a)(e), it has overlooked the provisions of Tax Law § 689(c)(3) which provides that a petition for refund can be filed within two years of the date of the mailing of the notice of disallowance. Here, the Division formally denied petitioner's refund claim by notice dated January 10, 2003, and in accordance with Tax Law § 689(c)(3) petitioner had until January 10, 2005 to file a petition for refund. Since the petition in the instant matter was filed on July 1, 2004, it is concluded that said petition is timely and the Division of Tax Appeals has proper jurisdiction in this matter. While there appears to be a conflict between the two statutes, I do not believe that the Legislature, in this scenario, ever intended Tax Law § 170(3-a)(e) to limit or restrict a taxpayer's right to a hearing (***see, Meyers v. Tax Appeals Tribunal*** 201 AD2d 185, 615 NYS2d 90, ***lv denied*** 84 NY2d 810, 621 NYS2d 519).

B. Turning next to the substantive issues, it must be noted that petitioner has the burden to prove (Tax Law § 689[e]) that the wage income reported on the 2001 income tax return was, in fact, foreign earned income that qualified for the foreign earned income exclusion from gross income pursuant to IRC § 911. Petitioner purports to meet his burden by claiming that New York State is a foreign country and, as a person residing and working in New York State, he is

entitled to the benefit of the foreign earned income exclusion. The Tax Appeals Tribunal in ***Matter of Nicholson (supra)*** rejected this very argument based on the definition of the term "foreign country" found in 26 CFR § 1.911-2(h). Petitioner has failed to distinguish the facts of ***Nicholson*** from the facts in the case at hand. While petitioner chooses to ignore ***Nicholson***, I cannot ignore binding precedent. In order for a taxpayer to be eligible to claim the foreign earned income exclusion, he or she must be a United States citizen (***see***, IRC § 911[d][1][A]), and in accordance with section 1 of the Fourteenth Amendment to the United States Constitution, United States citizens residing in the United States are also citizens of the state wherein they reside and entitled to all privileges and immunities of citizens of the several states (US Const, art IV, § 2). These principles make clear that the United States government is the government of all the states (***New York v. United States***, 326 US 572, 90 L Ed 326), and because the United States Congress is composed entirely of elected representatives and senators from all the states, petitioner's argument that New York State is a foreign country is without merit. Furthermore, in ***Solomon v. Commr.*** (66 TCM 1201), the Tax Court concluded that a taxpayer who lived in the state of Illinois and received wage income from International United Auto had "no foreign income and is not a qualified individual for purposes of section 911." The Court further stated that:

> Petitioner attempts to argue an absurd proposition, essentially that the State of Illinois is not part of the United States. His hope is that he will find some semantic technicality which will render him exempt from Federal income tax, which applies generally to all U.S. citizens and residents. Petitioner's arguments are no more than stale tax protester contentions long dismissed summarily by this Court and all other courts which have heard such contentions.

The conclusion reached by the Tax Court in ***Solomon*** is equally applicable here. Petitioner and his spouse lived and worked in the State and City of New York and they are not

entitled to exclude their wage income from taxation as income earned from foreign sources. Accordingly, since petitioner has not met the conditions of IRC § 911, he is not entitled to the $41,720.79 foreign earned income exclusion as claimed on the 2001 income tax return.

C. Tax Law § 675 does not relieve petitioner of his obligation to pay personal income tax on his wages. The purpose of section 675 is to hold the employer answerable for income tax due from its employees in the event the employer fails in its obligation to properly withhold and pay over to the Division the income taxes due in compliance with Tax Law § 671. Here, there is no evidence in the record before me to establish that the respective employers failed to properly withhold taxes from the wages earned by petitioner and his spouse.

D. With respect to the Division's request for the imposition of a penalty of $500.00 imposed pursuant to Tax Law § 2018 for the filing of a frivolous petition, the Tribunal's regulation at 20 NYCRR 3000.21 provides, in part, as follows:

> If a petitioner commences or maintains a proceeding primarily for delay, or if the petitioner's position in a proceeding is frivolous, the tribunal may, on its own motion or on the motion of the office of counsel, impose a penalty against such petitioner of not more than $500. This penalty shall be in addition to any other penalty provided by law, and shall be collected and distributed in the same manner as the tax to which the penalty relates.

E. In ***Matter of Nicholson (supra)*** the Tax Appeals Tribunal stated in its October 30, 2003 decision that "We find that petitioner's position in this proceeding that she is not liable for personal income tax on her wage income because it was earned in a foreign country (i.e., New York State) is patently frivolous." The Tax Appeals Tribunal in ***Nicholson*** imposed a frivolous petition penalty of $500.00. It is difficult to imagine a case more directly on point respecting the question of what constitutes a frivolous position than ***Nicholson***. Further review of the history

of ***Nicholson*** reveals that a power of attorney purporting to appoint Garry: Webb: Bey as Ms. Nicholson's representative was filed with the Division of Tax Appeals on September 6, 2002.

F. In ***Solomon (supra)*** the Tax Court imposed a penalty of $5,000.00 for filing a frivolous petition noting that "petitioner has raised only tired, discredited arguments which are characterized as tax protester rhetoric. A petition to the Tax Court is frivolous if it is contrary to established law and unsupported by a reasoned, colorable argument for change in the law." The Tax Appeals Tribunal has also consistently held that the frivolous petition penalty was properly imposed against tax protesters (***see, Matter of Nicholson, supra***; ***Matter of Thomas,*** Tax Appeals Tribunal, April 19, 2001; ***Matter of Ellett,*** Tax Appeals Tribunal, October 18, 2001). There is no question that petitioner's claim, as promoted by his representative, that New York State is a foreign country is unsupported by established legal principles and was undertaken to delay and frustrate the collection of New York State and City income taxes. The hearing in this matter and the subsequent proceedings in the Division of Tax Appeals served to delay the hearings of other taxpayers with genuine controversies. A penalty of $500.00 is imposed pursuant to Tax Law § 2018 and 20 NYCRR 3000.21 for maintaining a position that is clearly frivolous.

G. The Division is directed to compute petitioner's 2001 New York State and City personal income tax liability based on the amounts reported on the 2001 tax return, i.e., using a New York adjusted gross income figure of $41,720.79; allowing the $13,400.00 standard deduction and giving credit for the New York State and City taxes which were withheld from wages.

H. The petition of Fritzroy Hutton is granted only to the extent indicated in Conclusion of Law "G"; the Division of Taxation is directed to recompute petitioner's 2001 New York State

and City personal income tax liability consistent with this determination; in accordance with Conclusion of Law "F," a penalty of $500.00 is imposed for the filing of a frivolous petition; and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York
August 11, 2005

/s/ James Hoefer
PRESIDING OFFICER