STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHRISTIANE C. MAY	:	DETERMINATION DTA NO. 820102
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1997, 1998, 1999 and 2000.	:	

Petitioner, Christiane C. May, 204 Stanton Drive, Syracuse, New York 13214-1225, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 1997, 1998, 1999 and 2000.

On February 1, 2005, the Division of Taxation, by its representative, Christopher C. O'Brien, Esq. (Michele W. Milavec, 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 with exhibits of Michele W. Milavec, Esq., sworn to January 31, 2005, and the affidavit with exhibits of Sean O'Connor, sworn to January 31, 2005, in support of its motion. Petitioner filed an affidavit with an attached exhibit in opposition to the motion, sworn to March 1, 2005. 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 Division of Taxation ("Division") maintains, in the ordinary course of business, an electronic database containing information required to be submitted by New York State employers pursuant to Tax Law § 171-a and 20 NYCRR 2380. The Wage Reporting System, as the database is known, provides the name, social security number and gross wages paid to each employee who resides in New York State.

2. In this matter, a review of the Wage Reporting System, cross-referenced against the social security number of petitioner for the year 1997, indicated that three employers reported paying her a total of $44,111.00 in wages, from which income tax of $453.00 was withheld. For the year 1998, the system reported that petitioner received wages from three employers in the sum of $33,609.00, from which income tax of $743.00 was withheld.

A review of the Wage Reporting System for the year 1999 indicated that two employers paid petitioner $34,709.00 in wages, from which $756.00 in income tax was withheld, and for 2000, the System indicated that two employers paid petitioner wages of $48,916.00, from which $801.00 in income tax was withheld.

3. The Division found no record of New York State income tax returns filed by petitioner for any of the years in issue, and petitioner has conceded not filing any returns for those periods.

4. On January 13, 2003, the Division issued four statements of proposed audit changes to petitioner, one for each year in the audit period, that informed her that the Division had discovered her failure to file a return for the years in issue and that her income tax liability had been estimated based on information it had at hand. In its computations, the Division gave petitioner credit for the standard deduction and taxes withheld by petitioner's employers.

5. On March 3, 2003, the Division issued four notices of deficiency, one for each of the years in issue, based upon the computations in the aforementioned statements of proposed audit changes. The notices set forth the following information:

Tax Period	Tax	Interest	Penalty	Total
1997	$1,659.00	$654.43	$924.55	$3,237.98
1998	650.00	197.22	330.76	1,177.98
1999	712.00	152.94	327.86	1,192.80
2000	1,640.00	199.88	706.10	2,545.98

6. Petitioner timely requested a conciliation conference with respect to all four notices in issue, which was held on February 25, 2004. The conciliation order denied the relief sought and sustained the four notices of deficiency.

9. Petitioner filed the instant petition on July 19, 2004, protesting all four notices of deficiency.

SUMMARY OF THE PARTIES' POSITIONS

11. Petitioner contends that she was not required to file a New York State personal income tax return because she was not required to file a Federal income tax return. The underpinning of this argument is petitioner's interpretation of the Internal Revenue Code's definition of the term "United States," which she believes does not include the 50 states. Hence,

petitioner argues that when the Internal Revenue Code states in section 1 that it imposes an income tax on all citizens or residents of the United States, it does not include her.

12. In addition, petitioner argues that the wages she earned constituted "property" which is not taxable as income by the Federal government.

13. 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 failed to file income tax returns for the years in issue; and that petitioner failed to pay the total income tax due on said income in 1997, 1998, 1999 and 2000. Further, the Division urges this forum to impose the maximum penalty allowable for filing a frivolous petition because petitioner's arguments consist merely of tax protestor rhetoric.

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 Sean O'Connor which established that wage income was received by petitioner in the years 1997, 1998, 1999 and 2000 from a number of employers. In addition, petitioner failed to file New York State personal income tax returns for all of the years in issue and pay the full amount of income tax due on said income. Petitioner has not disputed these facts, only raised a legal argument that she is not liable for New York State income tax because she was not liable for Federal income tax and that any compensation she earned was "property" not subject to income tax by the Internal Revenue Code.

C. "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).

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 wage income as indicated by the Wage Reporting System, said wages should have been included in her Federal income and, derivatively, she is subject to New York State personal income tax on the same reported wages. (***See,*** Tax Law § 611[a]; § 612[a]; IRC § 62.)

Petitioner's attempt to claim that she was not subject to tax on her wage income for the years in issue is disingenuous and based on her mistaken belief that she is not a citizen or resident of the "United States," a blatant misinterpretation of that term as defined in the Internal Revenue Code. Accordingly, it is determined that 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. In her petition, petitioner also argues that her compensation is property not taxable by the Federal government. However, petitioner is overlooking the obvious. Internal Revenue Code § 1(c) provides that "there is hereby imposed on the taxable income of every individual . . . a tax determined in accordance with the following table . . . ." Taxable income is defined in IRC § 63(a) as gross income less certain specified deductions. As discussed, gross income includes wages, income from business, interest, dividends, royalties, rents, annuities, alimony, pensions, gains from the sale of real property, etc. (IRC § 61[a].) Petitioner's sole argument supporting her position why she is not subject to these sections of the Internal Revenue Code is that she is not a citizen or resident of a territory under the jurisdiction of the United States. She references Internal Revenue Code § 7701 and its definitions in support of this argument, wherein the "United States" is defined as the "States" and "State" is defined to "include the District of Columbia." (IRC § 7701[9].) In addition, petitioner cites IRC §§ 3306 and 3121 for similar definitions.

This argument is without merit. New York State is part of the United States and petitioner, having been born in the United States and living in New York State, is a citizen and resident of the United States (US Const, 14th Amend, § 1; 8 USC § 1401[a]; Treas Reg § 1.1-1[a], [c]; ***see, Matter of Lang***, Tax Appeals Tribunal, July 8, 1993). Petitioner's wage income was properly subject to both Federal and New York State personal income tax (IRC § 1; Treas Reg § 1.1-1[a], [b]; Tax Law §§ 601, 611, 612).

When a taxpayer maintained an equally frivolous argument in ***Myrick v. United States of America*** (2002-2 US Tax Cas ¶50,487 [where the plaintiff contended 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.

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 the same argument was raised 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 [including, that wages are not reportable income]. (***Schroeder v. Commissioner***, 84 TCM 220, ***affd*** 63 Fed Appx 414, ***cert denied*** 540 US 1220.)

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 Christiane C. May is denied; the four notices of deficiency, dated March 3, 2003, are sustained; and additional penalty of $500.00 is imposed pursuant to Tax Law § 2018.

DATED: Troy, New York
March 17, 2005

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