STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
QUENTIN RIVERS	:	SMALL CLAIMS DETERMINATION DTA NO. 820156
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 2002.	:	
	:	

Petitioner, Quentin Rivers, c/o 291 Patchen Avenue, #5E, Brooklyn, New York 11233-2122, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 2002.

A small claims hearing was held before Arthur S. Bray, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on August 2, 2005 at 1:15 P.M. Petitioner appeared *pro se* at the hearing and by Garry: Webb: Bey on the brief. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Mac Wyszomirski). All briefs were to be submitted by October 4, 2005, which date began the three-month period for the issuance of this determination.

ISSUES

I. Whether petitioner was not subject to New York State and City income tax because income earned in New York was covered by the foreign earned income exclusion.

II. Whether a frivolous petition penalty should be imposed.

FINDINGS OF FACT

1. Petitioner filed a New York State and City of New York Resident Income Tax Return for the year 2002 with the Division of Taxation ("Division"). Petitioner's return reported the following items of income, gain, loss and deduction:

ITEM	AMOUNT
Wages	$55,073.29
Unemployment Compensation	$4,860.00
2555-EZ	$(59,933.29)
Adjusted Gross Income	$0.00
Taxable Income	$0.00
NYS & NYC Tax	$0.00
Tax Withheld	$3,917.94[1]
Refund	$3,917.94

2. Petitioner's New York State income tax return included a wage and tax statement from Morgan Stanley DW Inc. which was located at 195 Broadway, 17th Floor, New York, New York 10007. According to the statement, petitioner received wages from his employer in the amount of $55,073.29.

3. On or about October 27, 2003, the Division of Taxation ("Division") sent a letter to petitioner asking for a copy of Form 2555-EZ and an explanation of the foreign earned income exclusion. Petitioner did not respond to this letter and, as a result, the Division issued a Statement of Proposed Audit Changes, dated December 8, 2003, which asserted that New York

[1] The reported amount of tax withheld appears to be in error. According to wage and tax statement for 2002, the amount of New York State tax withheld was $2,149.19 and the amount of New York City tax withheld was $1,168.75 for a total amount of $3,317.94.

State and New York City personal income tax was due in the amount of $1,607.50 plus interest in the amount of $63.85 for a balance due of $1,671.35. The statement further explained that the Division determined that petitioner's New York adjusted gross income was $59,933.00 which was reduced by the New York deduction of $7,500.00 to calculate New York taxable income of $52,433.00. Thereafter, the Division determined that New York State personal income tax of $3,194.00 and New York City personal income tax of $1,794.00 was due on this amount. The respective amounts of New York State and New York City personal income tax due were then reduced by the corresponding amounts of tax withheld to determine the net tax due. When performing the foregoing calculation, the Division gave petitioner the benefit of a New York City school tax credit in the amount of $62.50.

4. On the basis of the forgoing, the Division issued a Notice of Deficiency, dated February 2, 2004, which asserted a deficiency of New York State and New York City personal income tax in the amount of $1,607.50 plus interest in the amount of $79.31 for a balance due of $1,686.81.

SUMMARY OF THE PARTIES' POSITIONS

5. Petitioner, through his representative, maintains that the New York State taxing scheme does not impose tax on income but actually imposes a tax on those required to file returns. Petitioner further argues that the employer is required to deduct and withhold New York State personal income tax and file an employer's return of tax withheld. Petitioner submits that an employer is liable for the payment of New York State income tax whether or not it is collected from the employee by the employer. On the basis of the forgoing, petitioner surmises that, being an employee, he is not a party required to file a return and he is not responsible for payment of the tax.

6. Petitioner next contends that under the political system of the United States, the states are distinct from the United States government and that the states exercise sovereignty within their respective borders. This argument proceeds that in order to be considered a foreign country, one must be present in an area under a government other than the government of the United States. Since New York State has a constitution and a government with a legislature empowered to make laws, petitioner submits that New York State meets the criteria of a foreign country.

7. In recognition of the previous cases he has argued and lost, petitioner's representative submits that his arguments have been ignored or wrongly characterized. Petitioner's representative also submits that petitioner is not a tax protester and has no problem in paying any tax for which he is liable.

8. The Division contends that petitioner's arguments have been found deficient by the Tax Appeals Tribunal and that the petition should be dismissed.

CONCLUSIONS OF LAW

A. In this matter, petitioner has the burden to prove that the wage income he reported on his income tax return for 2002 was, in fact, foreign earned income that was subject to the foreign earned income exclusion from gross income of IRC § 911.

B. In order to meet this burden, petitioner claims 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. In his brief, petitioner pointed out that the Tax Appeals Tribunal in ***Matter of Nicholson*** (Tax Appeals Tribunal, October 30, 2003) rejected this very argument based on the definition of the term "foreign country" found in 26 CFR 1.911-2(h).

Petitioner seeks to distinguish ***Nicholson*** for the following reason:

> In the *Nicholson* decision the Administrative Law Judge (ALJ) merely reprints the regulation under IRC § 911 which defines the term 'Foreign Country' and then concludes that NYS can not be considered a foreign country and proceeded to impose a $500 frivolous penalty.
>
> No explanation was given as to the legal authorities cited with respect to the principle of 'territorial sovereignty' and where Petitioner's argument went wrong. This is a text book case of an 'arbitrary and capricious' decision. This is the precedent that 'bound' the other ALJ in the cases that followed. (Petitioner's brief, p.11.)

C. Petitioner's persistence in arguing this issue appears to arise from a misunderstanding of the concept of federalism. As pointed out by the Tribunal, a "foreign country" for purposes of IRC § 911 is defined as:

> any territory under the sovereignty of a government other than that of the United States. It includes the territorial waters of the foreign country (determined in accordance with the laws of the United States), the air space over the foreign country, and the seabed and subsoil of those submarine areas which are adjacent to the territorial waters of the foreign country and over which the foreign country has exclusive rights, in accordance with international law, with respect to the exploration and exploitation of natural resources. (26 CFR 1.911-2[h].)

Petitioner has not distinguished the facts of ***Nicholson*** from the facts in the instant proceeding. He simply chose to ignore ***Nicholson***. At the hearing level, ***Nicholson*** is binding precedent and may not be ignored.

D. 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]). 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 it

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). Since 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.

E. 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. Thus, these sections have no bearing on the issues presented in this matter.

F. 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.

In his brief, petitioner's representative argues that petitioner is entitled to have his arguments evaluated in a fair and comprehensive manner without being labeled a tax protester and charged with frivolous petition penalties. It is asserted that petitioner is not a tax protester.

G. In ***Matter of Nicholson (supra)*** the Tax Appeals Tribunal stated:

> 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 Tribunal in ***Nicholson*** then proceeded to impose a frivolous petition penalty of $500.00. In reaching its conclusion, the Tax Appeals Tribunal rejected the same arguments

which were presented in this proceeding. Therefore, a penalty of $500.00 is hereby imposed against petitioner pursuant to Tax Law § 2018 and 20 NYCRR 3000.21 for maintaining a position which is frivolous (***see, Solomon v. Commissioner***, 66 TCM 120, ***affd*** 42 F3d 1391; ***Matter of Nicholson***, ***supra***). Contrary to petitioner's request, an effort will not be expended evaluating the cases cited to support an argument which has repeatedly been held to be frivolous (***id.***)

H. The petition of Quentin Rivers is denied and the Notice of Deficiency dated February 2, 2004 is sustained and, in accordance with Conclusion of Law "G," a penalty of $500.00 is imposed for the filing of a frivolous petition.

DATED: Troy, New York
December 22, 2005

/s/ Arthur S. Bray
PRESIDING OFFICER