STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FANNIE OSBORNE	:	DETERMINATION DTA NO. 820161
for Redetermination of a Deficiency or for Refund of New York State and City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Year 2000.	:	

Petitioner, Fannie Osborne, 2037 Seagirt Boulevard, Far Rockaway, New York 11691, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 2000.

The Division of Taxation, by its representative, Christopher C. O'Brien, Esq. (Andrew Haber, Esq., of counsel), filed a motion for an order pursuant to 20 NYCRR 3000.5 and 3000.9(b) granting summary determination to the Division of Taxation on the ground that there exist no material issues of law or fact and that the Division's motion must be granted as a matter of law. The Division of Taxation submitted the affirmation of Andrew Haber, Esq., dated April 21, 2005, with annexed exhibits, in support of its motion. Petitioner, appearing *pro se*, did not respond to the motion of the Division of Taxation. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced May 21, 2005. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner, in computing her New York adjusted gross income, is entitled to exclude from Federal adjusted gross income pension income received from the State of Washington.

FINDINGS OF FACT

1. Petitioner, Fannie Osborne, filed a timely New York State Resident Income Tax Return, Form IT-200, for the year 2000 indicating her address to be "2037 Seagirt Blvd., #3A, Far Rockaway, NY 11691." Petitioner filed as a head of household reporting income of $9,938.00 and claiming the New York standard deduction, resulting in a total refund of $324.00. The refund consisted of $155.00 in New York State withholding tax paid, $124.00 in New York City withholding tax paid and the $45.00 New York City Tax Credit. Petitioner's address is within the City of New York.

2. The Division of Taxation ("Division") compared the information supplied by petitioner on her New York State personal income tax return with the information she had provided to the Internal Revenue Service on her Federal income tax return. The comparison revealed that petitioner had failed to report to New York State an IRA or pension income distribution received during 2000 in the amount of $19,855.00 which was reported on her Federal income tax return as taxable income. The information also indicated that petitioner's date of birth was May 26, 1948. Later information received from petitioner established that the income was payment from a taxable pension from the Washington State Department of Retirement System, and that petitioner was entitled to such pension income as a result of her 30 years of service as an employee of the State of Washington.

3. The Division issued, on April 21, 2003, a Statement of Proposed Audit Changes which increased petitioner's New York taxable income by the amount of the pension income, resulting in taxable income of $19,393.00. The increase in taxable income resulted in additional New York State tax due of $845.00 and additional New York City tax due of $617.00.

4. On June 16, 2003, the Division issued to petitioner Notice of Deficiency L-022245607 indicating additional tax due for the year 2000 of $1,462.00, plus interest.

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]).

Furthermore, a motion for summary determination made before the Division of Tax Appeals is "subject to the same provisions as [summary judgment] motions filed pursuant to section three thousand two hundred twelve of the CPLR." (20 NYCRR 3000.9[c]; ***see also***, ***Matter of Service Merchandise, Co***., Tax Appeals Tribunal, January 14, 1999.) Summary judgment is a "drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (***Moskowitz v. Garlock***, 23 AD2d 943, 259 NYS2d 1003, 1004; ***see***, ***Daliendo v. Johnson***, 147 AD2d 312, 543 NYS2d 987, 990). Because it is the "procedural equivalent of a trial" (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572, 536 NYS2d 177, 179), undermining the notion of a "day in court," summary judgment must be used sparingly (***Wanger v. Zeh***, 45 Misc 2d 93, 256 NYS2d 227, 229, ***affd*** 26 AD2d 729). It is not for the court "to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist" (***Daliendo v. Johnson***, ***supra***, 543 NYS2d at 990). If any

material facts are in dispute, if the existence of a triable issue of fact is "arguable," or if contrary inferences may be reasonably drawn from undisputed facts, the motion must be denied (***Glick & Dolleck v. Tri-Pac Export Corp.***, 22 NY2d 439, 293 NYS2d 93, 94; ***Gerard v. Inglese***, 11 AD2d 381, 206 NYS2d 879, 881).

As noted, a party moving for summary determination must show that there is no material issue of fact (20 NYCRR 3000.9[b][1]). Such a showing can be made by "tendering sufficient evidence to eliminate any material issue of fact from the case" (***Winegrad v. New York University Medical Center***, 64 NY2d 851, 487 NYS2d 316, 317, ***citing Zuckerman v. City of New York***, 49 NY2d 557, 562, 427 NYS2d 595). On the other hand, one opposing a motion for summary determination:

> must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (***Zuckerman v. City of New York, supra***).

B. Petitioner in this case did not respond to the motion of the Division for summary determination. Therefore, petitioner is deemed to have conceded that the facts as presented in the affidavit submitted by the Division are correct (***see***, ***Kuehne & Nagel v. Baiden***, 36 NY2d 539, 369 NYS2d 667, 671; ***Whelan By Whelan v. GTE Sylvania***, 182 AD2d 446, 582 NYS2d 170, 173). However, in determining a motion for summary determination the evidence must be viewed in a manner most favorable to the party opposing the motion (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, ***supra*** at 179; ***see also***, ***Weiss v. Garfield***, 21 AD2d 156, 249 NYS2d 458, 461). Such evidence in this matter includes the petition and the attachments submitted with the petition (20 NYCRR 3000.9[b][1]). In this case, upon all of the proof

presented and pursuant to the following discussion, I conclude that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. Petitioner does not challenge the facts that she was a resident of New York State for the year 2000, that she earned pension income from the State of Washington which was paid to her during the year at issue in the amount of $19,855.00, that she reported her pension income to the Internal Revenue Service on her Federal income tax return for the purpose of computing her Federal adjusted gross income, that she did not report such pension income on her 2000 New York State income tax return and that she had not yet reached the age of 59 ½ in the year 2000.

D. Tax Law § 612(a)[1] provides that the New York adjusted gross income of a resident individual is her Federal adjusted gross income with certain modifications provided for in subsections (b) and (c) of Tax Law § 612. In the instant matter, there is no dispute that the pension income petitioner received from the State of Washington in the year 2000 was properly included in Federal adjusted gross income for the year at issue. It is equally clear that there is no provision in Tax Law § 612(c) which would allow petitioner to subtract the pension distribution received in 2000 from Federal adjusted gross income in computing New York adjusted gross income.

E. Tax Law § 612(c) provides, in relevant part, that there shall be subtracted from Federal adjusted gross income:

> (3)(i) Pensions to officers and employees of this state, its subdivisions and agencies, to the extent includible in gross income for federal income tax purposes;
>
> (ii) Pensions to officers and employees of the United States of America, any territory or possession or political subdivision of such territory or possession, the

[1] As the provisions of the New York City Administrative Code are virtually identical to the provisions of the Tax Law, references to the Tax Law herein, unless specifically noted, are also references to the applicable sections of the New York City Administrative Code.

> District of Columbia, or any agency or instrumentality of one of the foregoing, to the extent includible in gross income for federal income tax purposes;
>
> (3-a) Pensions and annuities received by an individual who has attained the age of fifty-nine and one-half, not otherwise excluded pursuant to paragraph three of this subsection, to the extent includible in gross income for federal income tax purposes, but not in excess of twenty thousand dollars . . . .

As the pension paid by the State of Washington to petitioner does not meet the requirements for the exemptions provided by Tax Law § 612(c)(3)(i) or (ii), and petitioner had not reached the age of 59 ½ in the year 2000 so as to meet the requirements for the exemption provided by Tax Law § 612(c)(3-a), the pension income received by petitioner during the year 2000 is properly included in computing New York State and City adjusted gross income pursuant to Tax Law § 612(a).

F. The Division's Motion for Summary Determination is granted, the petition of Fannie Osborne is denied and the Notice of Deficiency, dated June 16, 2003, is sustained.

DATED: Troy, New York
June 23, 2005

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE