STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHARLES PAULLING	:	DETERMINATION DTA NO. 820368
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2001 and 2002.	:	

Petitioner, Charles Paulling, c/o 71 South Orange Avenue, Suite 184, South Orange, New Jersey 07079, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 2001 and 2002.

On June 14, 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 June 3, 2005, and the affidavit with exhibits of Sean O' Connor, sworn to June 3, 2005, in support of its motion. Petitioner failed to file a response to the motion. His response was due on July 14, 2005, which date commenced the 90-day period for the issuance of this determination. Based upon the motion papers and all the pleadings and proceedings had herein, Thomas C. Sacca, 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. Sean O'Connor is a Tax Technician I in the Division of Taxation ("Division"), Personal Income Tax Unit. He has been employed by the Division since 1982 and has been a Tax Technician I since 1990.

2. Mr. O'Connor's responsibilities include reviewing and processing New York State personal income tax returns, conducting audits and resolving protests, including communicating with taxpayers and preparing administrative records, reports and forms. An affidavit of Mr. O'Connor submitted by the Division is based upon his personal knowledge of the facts in this matter and upon a review of the Division's official records which are kept in the ordinary course of business.

3. On May 1, 2002, petitioner, Charles Paulling, filed a 2001 New York State Nonresident and Part-Year Resident Income Tax Return, Form IT-203, for tax year 2001 reporting $0.00 for all items of income and requesting a refund of $2,382.00 for all withholding tax paid. Attached to the return was a Form W-2, Wage and Tax Statement, for the year 2001 which indicated that petitioner earned $50,994.08 in income during 2001.

4. Based on the wage and tax statement for the year 2001 attached to petitioner's return, a New York State personal income tax liability of $2,721.00 was computed. Petitioner was given

a credit for withholding as reflected on the wage and tax statement. On March 24, 2003, petitioner was issued a Statement of Proposed Audit Changes for additional tax due of $339.00 plus penalty pursuant to Tax Law § 685(b)(1) and (2) as well as interest for tax year 2001.

5. Subsequently, on June 9, 2003, Notice of Deficiency L-022126273 was issued to petitioner for the deficiency as computed by the Statement of Proposed Audit Changes for tax year 2001.

6. On April 15, 2003, petitioner filed a 2002 New York State Nonresident and Part-Year Resident Income Tax Return, Form IT-203, for tax year 2002 reporting $0.00 for all items of income and requesting a refund of $2,489.66 for all withholding tax paid. Attached to the return was a Form W-2, Wage and Tax Statement, for the year 2002 which indicated that petitioner earned $53,299.30 in income during 2002.

7. Based on the wage and tax statement for the year 2002 attached to petitioner's return, a New York State personal income tax liability of $2,882.00 was computed. Petitioner was given a credit for withholding as reflected on the wage and tax statement. On September 25, 2003, petitioner was issued a Statement of Proposed Audit Changes for additional tax due of $392.34 plus penalty pursuant to Tax Law § 685(b)(1) and (2) as well as interest for tax year 2002.

8. Subsequently, on November 10, 2003, Notice of Deficiency L-023032119 was issued to petitioner for the deficiency as computed by the Statement of Proposed Audit Changes for tax year 2002.

9. Petitioner thereafter submitted a timely request for a conciliation conference for tax years 2001 and 2002 which was conducted on September 9, 2004. By order dated October 29, 2004 (CMS No. 199354) the conferee sustained the statutory notices.

10. Petitioner filed the instant petition on February 8, 2005, protesting the notices of deficiency for both 2001 and 2002.

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).

B. In this matter, the Division submitted the affidavit of Sean O'Connor which established that wage income was received by petitioner in the years 2001 and 2002; that petitioner filed a "zero" tax return for the years 2001 and 2002; and that the full tax on the wage income for both years was not paid. Petitioner has not disputed these facts, but only raised the arguments that his wages do not constitute "income" for Federal purposes and that as he reported no taxable income on his Federal return for the years in issue, he had no reportable income for New York personal income tax purposes.

C. 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 reported on the W-2 wage and tax statements attached to his returns, said wages should have been included in his Federal income and, derivatively, he is subject to New York State personal income tax on the same reported wages. Further, every other item of income received by petitioner in both 2001 and 2002 is includible in Federal adjusted gross income and is likewise subject to New York personal income tax. (***See,*** Tax Law § 611[a]; § 612[a]; IRC § 62.)

E. Petitioner has not presented any cogent or credible evidence to substantiate his claim that the statutory notices for 2001 and 2002 are incorrect. (***See***, Tax Law § 689[e]; 20 NYCRR 3000.15[d][5].) Petitioner's attempt to claim that he had no income for 2001 and 2002 is disingenuous and based on his mistaken belief that he is not liable for income tax. 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.)

F. From petitioner's attachment to the returns filed, it appears he is arguing that there is no provision in the Internal Revenue Code which makes him liable for income taxes. Petitioner

argues that neither the State nor Federal government has produced a statute which confers liability for income taxes. Petitioner cites IRC §§ 6001 and 6011 in support of his contention. 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 arguments do not explain why he is not subject to these sections of the Internal Revenue Code.

G. When a taxpayer maintained an equally frivolous argument in ***Myrick v. United States of America*** (217 F Supp 2d 979, 2002-2 US TaxCas ¶ 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 in this forum.

H. 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.)

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.

I. The Division's motion for summary determination in its favor is granted; the petition of Charles Paulling is denied; the notices of deficiency, dated June 9, 2003 and November 10, 2003, are sustained; and an additional penalty of $500.00 is imposed pursuant to Tax Law § 2018.

DATED: Troy, New York
September 15, 2005

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE