STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ANTHONY L. AND NICOLE H. MONTONE	:	DETERMINATION DTA NO. 820465
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2002.	:	

Petitioners, Anthony L. and Nicole H. Montone, 258 Princeton Road, Webster, New York 14580, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2002.

On November 9, 2005, the Division of Taxation, appearing by Christopher C. O'Brien, Esq. (Kevin R. Law, 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 Kevin R. Law, Esq., sworn to November 8, 2005, and the affidavit with exhibits of Sean O'Connor, sworn to November 8, 2005, in support of its motion. Petitioners filed a timely response to the motion on December 7, 2005, which commenced the 90-day period for the issuance of this determination. Based upon the motion papers and all pleadings and proceedings had herein, Winifred M. Maloney, 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. During 2002, petitioners, Anthony L. and Nicole H. Montone, were both employed by the Victor Central School District in Victor, New York. From their employer, Mr. Montone received wage income in the amount of $38,286.05 and Mrs. Montone received wage income in the amount of $48,948.87. Mr. Montone's wage and tax statement (Form W-2) for 2002 shows Federal income tax of $668.72 and New York income tax of $1,804.74 were withheld from his wages. Mrs. Montone's wage and tax statement (Form W-2) for 2002 shows Federal income tax of $1,122.20 and New York income tax of $2,650.22 were withheld from her wages.

2. Petitioners, who reside in Monroe County, filed a joint 2002 New York State Resident Income Tax Return (Form IT-201) with wage and tax statements attached. On this return, petitioners reported zero as their wage income on Line 1, a taxable state and local income tax refund of $142.00 on Line 4, public employee 414(h) retirement contributions in the amount of $2,738.94 on Line 20 of the return and, after subtracting the taxable state and local income tax refund of $142.00, reported New York State adjusted gross income in the amount of $2,738.94. After claiming a standard deduction in the amount of $14,200.00, petitioners reported taxable

income of negative $11,461.06. After making voluntary gifts to four charities totaling $500.00,[1] petitioners claimed a refund of $3,954.966, the balance of the total New York State income tax withheld.

3. As part of their New York State personal income tax return for 2002, petitioners attached a two-page typed and single-spaced statement which purported to explain why they were not liable for taxes on their wage income at both the Federal and State levels. The claims set forth in this statement included, among other things, petitioners' contention that since they had no earnings in 2002 that were taxable as "income" as defined under the Corporation Excise Tax Act of 1909, to wit, gain or increase arising from corporate activity, they could only swear to having "zero" income for 2002 on their Federal income tax return. They also claimed that "wages," "salaries" or "compensation for personal services" are not within the definition of income subject to tax under section 61 of the 1954 Internal Revenue Code. This statement also contended that they filed their Federal income tax return out of fear of prosecution for failing to file an income tax return for 2002. Petitioners further claimed that the Internal Revenue Service lacked any basis to impose a penalty against them on the basis that their tax return was "frivolous" because there was no statute that required petitioners to make a "self-assessment" and petitioners were relying upon 13 United States Supreme Court decisions and other legal authority for their position that their wages were not subject to income tax. In this statement, petitioners claimed that since they had "zero" income in 2002 for Federal income tax purposes, they had "zero" income in 2002 for New York State income tax purposes. They further claimed

[1] On their 2002 New York State income tax return, petitioners designated the following voluntary gifts: $50.00 to "Return a Gift to Wildlife," $200.00 to "Missing/Exploited Children Fund," $200.00 to "Breast Cancer Research Fund" and $50.00 to "Alzheimer's Fund."

that since they owed no Federal income tax for the year 2002, they were entitled to a refund of New York State income tax withheld from their wages in the amount of $3,954.96.

4. The Division of Taxation (the "Division") audited petitioners' 2002 return and, based upon information in the wage and tax statements attached to that return, recalculated petitioners' taxable income including their wages from their employment. The Division allowed petitioners a New York standard deduction and determined that their personal tax liability for 2002 was $4,396.51. After allowing for tax withheld less the voluntary gifts to charity designated on their return, petitioners' net tax liability was $441.55.

5. On November 17, 2003, the Division issued a Statement of Proposed Audit Changes to petitioners asserting additional New York State personal income tax due in the amount of $441.51 plus penalty and interest, for a current balance due of $685.31 for the year 2002. Penalty imposed consisted of the following: (i) negligence penalty of 5% pursuant to Tax Law § 685(b)(1); and (ii) "penalty interest" in an amount equal to 50% of any interest due on petitioners' deficiency on the basis of negligence or intentional disregard of the Tax Law pursuant to Tax Law § 685(b)(2). The computation section of this statement included the following response to the typed claims attached to petitioners' return:

> When an issue such as yours has been addressed in Federal Tax Court and Federal Appeals Court, the results have been that these kinds of protests were considered frivolous and without merit. New York State regards them in the same manner.

6. The Division issued a Notice of Deficiency dated January 12, 2004 against petitioners asserting additional tax due of $441.55 plus penalty and interest. This notice referenced the calculations detailed in the earlier Statement of Proposed Audit Changes.

7. On or about January 22, 2004, petitioners sent a letter with an attached copy of the first page of the Notice of Deficiency to the auditor, Sean O'Connor, who had conducted the desk

audit of their 2002 New York State income tax return. In this five-page letter, petitioners requested a conference and numerous documents that would demonstrate "any US or USA and/or state, and New York State . . . venue/jurisdiction/authority and all such interests in or over" their being or property. On or about February 27, 2004, petitioners sent letters to the auditor, assessments receivable and the Division's Office of Counsel. These letters requested a relevant response to their earlier letter of January 22, 2004.

8. On December 16, 2004, a Bureau of Conciliation and Mediation Services conciliation conference was conducted in Rochester, New York. The conference was audio recorded by the Division and petitioners. A Conciliation Order (CMS No. 202368) dated January 14, 2005 denied petitioners' request and sustained the Notice of Deficiency dated January 12, 2004.

9. On April 11, 2005, petitioners filed an Ex Parte Petition for Declaratory Judgment along with numerous documentary exhibits with the Division of Tax Appeals. In a letter dated April 14, 2005, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals requested that petitioners complete and return the included petition forms so that they could be associated with the correspondence already received. Petitioners failed to respond to that letter. By letter dated June 28, 2005, Chief Administrative Law Judge Andrew F. Marchese informed petitioners that he was returning their Ex Parte Petition for Declaratory Judgment because the Division of Tax Appeals is not authorized to issue declaratory judgments, and such an action would have to be brought in New York State Supreme Court. In this letter, Judge Marchese went on to explain that the Division of Tax Appeals was created to provide taxpayers with a relatively quick and simple way to resolve disputes with the Division, and if they wanted to challenge the Notice of Deficiency issued to them, they could do so by filing a petition challenging the notice. Judge Marchese further explained that since the Division of Tax Appeals

is not authorized to make declarations of citizen's constitutional rights, the determination of the administrative law judge would be limited to sustaining the Notice of Deficiency or cancelling it if it was erroneously issued. A petition form was included with Judge Marchese's letter.

10. On or about July 18, 2005, petitioners filed a petition challenging the Notice of Deficiency with the Division of Tax Appeals. In this petition, petitioners asserted, among other things, that they are natural born American citizens living in New York State who are not involved in any specified taxable activity within the limited jurisdiction of the Federal government. As such, they claim that there is no jurisdiction, venue or nexus with the Division because there is no jurisdiction, venue or nexus with the Internal Revenue Service. Included as part of and referenced in their petition was the Ex Parte Petition and the attached documentary exhibits previously filed on April 11, 2005.

11. In its answer filed September 28, 2005, the Division denied each and every allegation of fact and error contained in the petition with the exception that it admitted the allegation contained in the morass of documents attached to the petition that stated that petitioners are American citizens residing in New York State and that this tax matter has not been adjudicated. Further, the Division requested that the Division of Tax Appeals impose the maximum penalty for filing a frivolous petition pursuant to section 2018 of the Tax Law and 20 NYCRR 3000.21.

12. Attached to the Division's Notice of Motion for an order granting it summary determination is an affidavit from Kevin R. Law, the Division's representative. Attached to this affidavit as Exhibit "1" is an affidavit from Sean O'Connor, Tax Technician I, in the Audit Division, Personal Income Tax Unit. Mr. O'Connor's responsibilities include the review and processing of New York State personal income tax returns, conducting audits and resolving protests, including communicating with taxpayers and preparing administrative records, reports

and forms. Attached to Mr. O'Connor's affidavit are the following exhibits: a copy of petitioners' 2002 Form IT-201; a copy of the Statement of Proposed Audit Changes; and a copy of the Notice of Deficiency dated January 12, 2004.

13. All of the documents issued by the Division were sent to petitioners at 258 Princeton Road, Webster, New York 14580, the same address used in the filing of their 2002 New York State personal income tax return, as well as on their wage and tax statements (W-2s) for that tax year and the petition filed with the Division of Tax Appeals, which was signed by petitioner Anthony L. Montone.

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 determination 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, 441, 293 NYS2d 93, 94; ***Museums at Stony Brook v. Village of Pathogue Fire Dept.***, 146 AD2d 572, 573, 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, 382, 206 NYS2d 879, 881).

"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, 1067, 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).

B. In this matter, the Division submitted the affidavit of Sean O'Connor which established that wage income was received by petitioners in the year 2002; that petitioners reported "zero" wage income on the tax return they filed for the year 2002; and that the full tax on their wage income for the year 2002 was not paid. In their somewhat confusing response to the Division's motion, petitioners have not disputed any of these facts, but argue that the Division acted outside the scope of its jurisdiction when it determined that their wage income was subject to tax and issued a "secret default" against them. They also argue that they are not liable for Federal income tax because they are not residents of a "federal zone," i.e., the District of Columbia, federal territories and federal enclaves within New York State, and, therefore, they are not liable for New York State income tax.

C. Turning first to petitioners' argument that the Division issued a "secret default" against them, it is without merit. Tax Law § 681(a) authorizes the Division of Taxation to issue a notice of deficiency to a taxpayer where it has been determined that there is a deficiency of income tax. This section further provides that such a notice "shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state." After 90 days from the mailing of a Notice of Deficiency, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice . . . (Tax

Law § 681[b]). Pursuant to the provisions of Tax Law § 689, the burden of proof is on petitioners. Petitioners have neither alleged nor proven that the Division failed to comply with the provisions of Tax Law § 681 when it issued the notice to them, or that the tax was assessed in an untimely manner. Accordingly, the assessment and the amount of the liability have been established. A taxpayer may file a petition with the Division of Tax Appeals seeking redetermination of the deficiency, or alternatively, a request for a conciliation conference with BCMS, within 90 days of the mailing of the notice of deficiency (***see***, Tax Law § 689[b]; § 170[3-a][a]; 20 NYCRR 3000.3[c]). In this case, the statutory notice was sustained by a Conciliation Order dated January 14, 2005. Subsequently, petitioners filed the instant petition with the Division of Tax Appeals. Petitioners argue that the secret default by the Division resulted from its inaccurate assumption that they were subject to the Federal tax laws and, as a result, were also subject to the New York tax laws and its failure to afford them with a fair opportunity to challenge the legal validity of that assumption. Petitioners further argue that the secret default by the Division should be overturned to allow for "true due process and remedy by addressing the merits of this case." Clearly petitioners' challenge before this forum provides them with a fair opportunity to challenge the accuracy and legal validity of their tax obligation (***see***, Tax Law § 2000).

D. Petitioners assert that a determination in this matter should be held in abeyance until the Federal issues involved in this matter are resolved by the United States Court of Appeals (Second Circuit) and after all potential appeals at the Federal level are exhausted. Petitioners did not submit any documentation concerning the alleged pending Federal litigation. There is no reason to hold the instant matter in abeyance pending the outcome of petitioners' alleged pending Federal litigation.

E. 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 ("IRC") § 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 petitioners received wage income as reported on the W-2 wage and tax statements attached to their return, said wages should have been included in their Federal income and, derivatively, they are subject to New York State personal income tax (***see***, Tax Law § 611[a]; § 612[a]; IRC § 62).

Petitioners have not presented any cogent or credible evidence to substantiate their claim that the statutory notice is incorrect (***see***, Tax Law § 689[e]; 20 NYCRR 3000.15[d][5]). 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. Petitioners, claiming to be superior sovereigns, have made unclear references to constitutional challenges to the Federal government's authority to tax their wage income. The Division of Tax Appeals lacks jurisdiction over constitutional challenges to statutes presumed to be constitutional on their face. (***Matter of Geneva Pennysaver***, Tax Appeals Tribunal, September 11, 1989; ***Matter of Fourth Day Enters.***, Tax Appeals Tribunal, October 27, 1988). Therefore, these arguments will not be addressed herein.

G. Petitioners also argue that, regardless of their American and New York citizenship, they are not residents of any federal zone (the District of Columbia, federal territories and federal enclaves within New York State) and are therefore not subject to Federal tax laws. Petitioners'

argument is without merit. In fact, a similar argument was addressed and rejected as patently frivolous by the United States Court of Appeals in ***United States v. Mundt*** (29 F 3d 233, 237 [6th Cir]), wherein the court stated:

> [T]he Supreme Court has recognized that the sixteenth amendment authorizes a direct nonapportioned tax upon United States citizens throughout the nation, not just in federal enclaves, ***see Brushaber v. Union Pac. R.R.***, 240 US 1, 12-19, 36 S Ct 236, 239-42, 60 L Ed 493 (1916); efforts to argue otherwise have been sanctioned as frivolous . . . . ***United States v. Collins***, 920 F2d 619, 629 (10th Cir. 1990) (citations omitted), ***cert denied***, 500 US 920 111 S Ct 2022, 114 L Ed 2d 108 (1991).

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 the 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 the following as examples of frivolous positions:

> (a) that wages are not taxable as income;
>
> (b) that petitioner is not liable for income tax because petitioner has not exercised any privileges of government;
>
> (c) that the income tax system is based on voluntary compliance and petitioner therefore need not file a return;
>
> (d) that Federal Reserve Notes are not "legal tender" or "dollars," and petitioner therefore cannot measure his or her income; and
>
> (e) that only states can be billed and taxed directly.

I. Petitioners argument is merely a variation on the tax protestor argument that wages are not taxable as income. The facts and circumstances of this matter justify the imposition of the

frivolous petition penalty because of their similarity to those in ***United States v. Mundt*** (***supra***) where the court labeled the argument "without merit" and "patently frivolous."

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 (***see, Matter of Thomas***, Tax Appeals Tribunal, April 19, 2001). Therefore, it is determined that petitioners' position is frivolous and the penalty provided for in Tax Law § 2018 is imposed in the sum of $500.00.

J. Furthermore, negligence penalties asserted against petitioners, as noted in Finding of Fact "5," are also properly upheld against petitioners for their failure to pay income tax on their wages (***see, Matter of Lang***, Tax Appeals Tribunal, July 8, 1993 [wherein the Tribunal sustained the imposition of negligence penalties against taxpayers, who like petitioners, contended that their wages were not subject to New York State personal income tax]).

K. The Division of Taxation's motion for summary determination is granted; the petition of Anthony L. and Nicole H. Montone is denied; the Notice of Deficiency dated January 12, 2004 is sustained and additional penalty of $500.00 is imposed pursuant to Tax Law § 2018.

DATED: Troy, New York
March 9, 2006

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE