STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JAMES BROWN	:	DETERMINATION DTA NO. 820562
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 1997.	:	

Petitioner, James Brown, P.O. Box 740473, Rego Park, New York 11374, 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 1997.

On June 1, 2006, the Division of Taxation, by its representative, Mark F. Volk, Esq. (Justine Clarke Caplan, 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 affirmation with exhibits of Justine Clarke Caplan, Esq., sworn to June 1, 2006, in support of its motion. Petitioner failed to file a response to the motion. His response was due on July 3, 2006, 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. On or about December 19, 2002, pursuant to Internal Revenue Code § 6103(d), the Division of Taxation ("Division") received from the Internal Revenue Service an Income Tax Examination Changes form relating to petitioner's 1997 Federal income tax return. The form, indicated, in part, that the IRS had increased petitioner's Federal income by $33,359.00.

2. Petitioner, James Brown, filed his New York State Resident Income Tax Return for the year 1997 on August 13, 2003. Petitioner reported that his address was c/o P.O. Box 740473, Rego Park, New York. On this return, petitioner stated the amount of wage income to be $33,360.24. Petitioner's New York State income tax return included a wage and tax statement from St. John's Hospital which reported that the employer's address was 90-02 Queens Boulevard, Elmhurst, New York 11373. According to the statement, petitioner received wages from this employer in the amount of $18,391.73. Petitioner's New York State income tax return included a second wage and tax statement from Mount Sinai Hospital which reported the employer's address was Box 3500, 1 Gustave L. Levy Place, New York, New York 10029. According to the statement, petitioner received wages from this employer in the amount of $14,968.51. On both statements, petitioner's address is listed as 82-39 134th Street, Kew Gardens, New York. On the return, petitioner subtracted the income reported as wages in the

space corresponding to the box for "Other income." The modification was identified on the return as "Form 2555-EZ," which is entitled "Foreign Earned Income Exclusion."

3. The Division issued to petitioner, on January 22, 2004, a Statement of Proposed Audit Changes for the year 1997. The statement provided, in part, as follows:

> We have received your late filed 1997 New York State personal income tax return.
>
> We contacted the IRS and they did not accept the income reported on form 2555-EZ therefore it is disallowed . . . .

The statement further indicated that petitioner owed tax of $1,182.43, plus interest and a late filing penalty.

4. On the basis of the forgoing, the Division issued to petitioner a Notice of Deficiency, dated March 18, 2004, which asserted a deficiency of New York State and New York City personal income tax in the amount of $1,182.43 plus interest in the amount of $572.72 and penalty in the amount of $295.55 for a balance due of $2,050.70.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

> Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and 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]; ***see also***, Tax Law § 2006[6].)

B. In reviewing a motion for summary determination, an administrative law judge is initially guided by the following regulation:

> The motion shall 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. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. (20 NYCRR 3000.9[b][1]; ***see also*****,** Tax Law § 2006[6].)

Furthermore, a motion for summary determination made before the Division of Tax Appeals is "subject to the same provisions as 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 determination 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 determination 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).

"To obtain summary judgment 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 (***see,*** CPLR 3212[b]). Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (***Alvord & Swift v. Muller Constr. Co.***, 46 NY2d 276, 281, 413 NYS2d 309, 312).

C. Petitioner did not respond to the Division's motion for summary determination. Therefore, petitioner is deemed to have conceded that the facts as presented in the affirmation submitted by the Division are correct (***see, Kuehne & Nagel v. Baiden***, 36 NY2d 539, 544, 369 NYS2d 667, 671; ***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,*** 536 NYS2d at 179***; see also, Weiss v. Garfield***, 21 AD2d 156, 249 NYS2d 458, 461).

D. In this matter, the Division submitted petitioner's New York State resident income tax return which established that during the year 1997 petitioner resided in New York State and City and that petitioner received income from two employers located in New York State and City. Petitioner has not disputed any of these facts, but appears to argue that New York State is a foreign country and the income earned from his employers is foreign earned income not subject to New York State personal income tax.

E. 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, 577, 90 L Ed 326). Since the United States Congress is composed entirely of elected representatives and senators from all the states, petitioner's apparent position that New York State is a foreign country is without merit.

F. Further, the Tribunal in ***Matter of Nicholson*** (Tax Appeals Tribunal, October 30, 2003) rejected the argument that New York State is a foreign country based on the definition of the term "foreign country" found in 26 CFR 1.911-2(h). The Tribunal noted that 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].)

Thus, as defined above, New York State is not considered a foreign country.

G. 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." IRC § 62(a) defines federal adjusted gross income in the case of an individual, as "gross income minus [specified] deductions." IRC § 61(a) defines gross income generally as "all income from whatever source derived, including, but not limited to, compensation for services, interest, rents and royalties." (***See***, IRC § 61[a][1], [4], [5], [6].) The record indicates that petitioner had income and was subject to Federal income tax in 1997. Therefore, petitioner is subject to New York State personal income tax on the same amount (***see***, Tax Law § 611[a]; § 612[a]).

Petitioner has not presented any cogent or credible evidence to substantiate his 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.)

H. 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.

I. 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 1201, ***affd*** 42 F3d 1391; ***Matter of Nicholson***, ***supra***).

J. The Division of Taxation's motion for summary determination is granted; the petition of James Brown is denied; the Notice of Deficiency dated March 18, 2004 is sustained; and, in accordance with Conclusion of Law "I", a penalty of $500.00 is imposed for the filing of a frivolous petition.

DATED: Troy, New York
October 12, 2006

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE