STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROBERT WIACEK	:	DETERMINATION DTA NO. 820859
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 1998.	:	

Petitioner, Robert Wiacek, 4 De Camp Court, Stony Point, New York 10980, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 1998.

On March 8, 2006, the Division of Taxation, appearing by Christopher C. O'Brien, Esq. (Margaret T. Neri, Esq., of counsel), filed a motion for an order pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(a) and (b) granting summary determination to the Division of Taxation on the grounds that the petition fails to state a cause for relief and there exists no material issue of fact and imposing a penalty for the filing of a frivolous petition pursuant to Tax Law § 2018 and 20 NYCRR 3000.21. The Division of Taxation submitted the affirmation with exhibits of Margaret T. Neri, Esq., dated March 8, 2006 and the affidavit with exhibits of Bruce Pavloff, sworn to March 8, 2006, in support of its motion. Petitioner filed a timely response to the motion on April 5, 2006, which commenced the 90-day period for issuance of this determination. Based upon the motion papers and all the 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. On November 19, 2002, the Division of Taxation (the "Division") sent a letter to petitioner, Robert Wiacek, inquiring as to whether petitioner had filed a New York State personal income tax return for the year 1998. The letter stated that information obtained from the Internal Revenue Service indicated that petitioner may have been required to file a New York State personal income tax return for the year 1998. The letter further stated that the Division had no record of any return filed by petitioner for the year 1998 and requested petitioner to file the return or contact the Division to resolve the matter.

2. By letter dated December 2, 2002, petitioner acknowledged the Division's November 19, 2002 letter and conceded that he had not filed a New York State personal income tax return for the year 1998, but challenged the Division's legal authority to require him to file a personal income tax return and pay income taxes to New York State.

3. Information obtained from the Internal Revenue Service indicated that petitioner's Federal adjusted gross income for the year 1998 totaled $55,772.00, consisting of $47.00 in interest income, $106.00 in rent and royalty income, $2,281.00 in unemployment compensation and $53,338.00 in nonemployee compensation. From this information, the Division determined petitioner's 1998 New York adjusted gross income to be $55,772.00 and thereafter reduced same

by the standard deduction of $7,500.00, to arrive at New York taxable income of $48,272.00 and a New York State personal income tax liability for 1998 in the amount of $2,910.00.

4. On November 28, 2003, the Division issued a Statement of Proposed Audit Changes to petitioner for 1998 asserting New York State personal income tax due in the amount of $2,910.00, plus penalty and interest, for a current balance due of $5,480.18, based upon information it had obtained from the Internal Revenue Service with respect to petitioner's income for that year as noted above. Penalty imposed consisted of the following: (i) a penalty of 25% for not filing a New York State tax return within five months of its due date pursuant to Tax Law § 685(a)(1); (ii) negligence penalty of 5% pursuant to Tax Law § 685(b)(1); (iii) "penalty interest" in an amount equal to 50% of any interest due on petitioner's deficiency on the basis of negligence or intentional disregard of the Tax Law pursuant to Tax Law § 685(b)(2); and (iv) penalty for underestimation of New York State income tax pursuant to Tax Law § 685(c). The computation section included the following explanation:

> Section 61 of the Internal Revenue Code defines gross income as all income from whatever source derived, unless excluded by law. One of the more common types of 'gross income' enumerated by this section is compensation for services. All compensation received in exchange for personal service, no matter what the form of payment, must be included in 'gross income.'
>
> Compensation for services includes salaries and wages, bonuses, fees, commissions, fringe benefits, and similar items. Your compensation received as wages is therefore subject to the federal income tax. Since New York Tax Law conforms with the Internal Revenue Code, such wages are taxable for New York income tax purposes.
>
> 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.

5. By letter dated December 24, 2003, petitioner disagreed with the proposed audit changes. In that letter, petitioner asserted that "income" only applies to corporate profit. He

further asserted that since he was not engaged in corporate activity, he had no "income" in the "constitutional sense" and therefore was not subject to tax.

6. On January 22, 2004, the Division issued a Notice of Deficiency which asserted $2,910.00 in New York State income tax due, plus penalty and interest, for the year 1998.

7. A Bureau of Conciliation and Mediation Services ("BCMS") conciliation conference was scheduled for Wednesday, September 14, 2005. However, petitioner discontinued the BCMS conference proceeding because he was not going to be allowed to have a court reporter at the conciliation conference.

8. On December 9, 2005, petitioner filed a petition challenging the Notice of Deficiency with the Division of Tax Appeals. In this petition, petitioner questioned the authority of the Division personnel who handled the assessment of tax against him for the year 1998 as well as the authority of the Internal Revenue Service personnel who provided petitioner's information for the year 1998. This petition also raised vague issues concerning delegated authority and the meaning of income under New York State law and Federal law.

9. Attached to the Division's Notice of Motion for an order granting it summary determination is an affirmation from Margaret T. Neri, the Division's representative. Annexed to this affirmation is an affidavit of Bruce Pavloff, Tax Technician II, in the Audit Division, Personal Income Tax Unit. Mr. Pavloff'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. Pavloff's affidavit are the following exhibits: a copy of the Division's November 19, 2002 letter and petitioner's written response dated December 2, 2002; a copy of the information that the Division obtained from the Internal Revenue Service pertaining to

petitioner for the year 1998; a copy of the Statement of Proposed Audit Changes; and a copy of the Notice of Deficiency dated January 22, 2004.

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 Patchogue 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 (***Alvord & Swift v. Muller Constr. Co.***, 46 NY2d 276, 413 NYS2d 309).

B. In this matter, the Division submitted the affidavit of Bruce Pavloff which established that petitioner received income in 1998. In addition, petitioner failed to file a New York State personal income tax return for the year at issue and pay the full amount of income tax due on said income. Petitioner has not disputed any of these facts, but argues that Division personnel did not have authority to obtain information from the Internal Revenue Service and that the Notice of Deficiency is invalid because no one with delegated authority signed it. He also argues that since he did not engage in corporate activity in 1998, he did not have any income subject to tax .

C. Turning first to petitioner's argument that Division personnel did not have authority to obtain information from the Internal Revenue Service, it is without merit. Internal Revenue Code ("IRC") § 6103(d) allows the Division to obtain information from the Internal Revenue Service. Where, as here, a taxpayer fails to file an income tax return as required under Article 22 of the Tax Law, the Division is authorized to estimate the taxpayer's income tax liability "from any information in its possession" (***see***, Tax Law § 681[a]). Here, the information obtained from the Internal Revenue Service permitted the Division's calculation of New York State personal income taxes due for 1998. 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." Petitioner has neither alleged nor proven that the Division failed to comply with the provisions of Tax Law § 681 when it issued the notice to him (***see***, Tax Law § 689[e]; 20 NYCRR 3000.15[d][5]). As for petitioner's argument that the notice of deficiency is invalid because no one with delegated

authority signed it, it is without merit. There is no requirement in the Tax Law that a notice of deficiency be signed by any personnel of the Division, including the Commissioner.

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." 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].) IRC § 85(a) provides: "In the case of an individual, gross income includes unemployment compensation." The record indicates that petitioner had income and was subject to Federal income tax in 1998. 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.)

E. Petitioner asserts that the term "income" must have the same meaning as it does in the Corporation Excise Tax Act of 1909 and can only be derived from corporate activity, to wit, corporate profit. He maintains that his individual sources of income were not subject to taxation by New York State in 1998 because he was not engaged in corporate activity and had no corporate profit that year. Petitioner's argument is without merit. In ***Myrick v. United States*** (217 F Supp 2d 979, 2002-2 US Tax Cas ¶ 50,487, ***affd*** 70 Fed Appx 956 [9th Cir], 2003-2 US Tax Cas ¶ 50,641), the plaintiff made a similar argument, contending 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, 1418 (5th Cir. 1984)] (***Myrick v. United States***, ***supra***, at 985).

Petitioner's argument is no less frivolous in this forum.

F. 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 as an example of a frivolous position "that wages are not taxable as income."

Further, when a plaintiff raised the same argument petitioner raises herein before the United States Tax Court, it was rejected out of hand:

> In his petition and memorandum, petitioner makes tax protestor 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. (***Schroeder v. Commissioner***, 84 TCM 220, ***affd*** 63 Fed Appx 414 [9th Cir], 2003-1 US Tax Cas ¶ 50,511, ***cert denied*** 540 US 1220, 158 L Ed 2d 156).

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.

G. The Division of Taxation's motion for summary determination is granted; the petition of Robert Wiacek is denied; the Notice of Deficiency, dated January 22, 2004, is sustained; and an additional penalty of $500.00 is imposed pursuant to Tax Law § 2018.

DATED: Troy, New York
June 22, 2006

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE