STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALEXANDER HYATT	:	DETERMINATION DTA NO. 821862
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 2003.	:	

Petitioner, Alexander Hyatt, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 2003.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 28, 2008 at 10:30 AM. Petitioner appeared pro se. The Division of Taxation appeared by Daniel Smirlock, Esq. (Peter B. Ostwald, Esq., of counsel). All briefs were to be submitted by August 4, 2008, which date began the six-month period for the issuance of this determination.

ISSUES

I. Whether the Division of Taxation properly computed petitioner's tax liability for tax year 2003.

II. Whether a frivolous petition penalty should be imposed.

FINDINGS OF FACT

1. Petitioner, Alexander Hyatt, a New York City resident, did not file a New York State personal income tax return for the year 2003. During the year in issue, petitioner was employed by the New York City Transit Authority, which paid wages to him. He resided at 601 East 19th Street, #4L, Brooklyn, New York.

2. In accordance with Internal Revenue Code § 6103(d), the Division of Taxation (Division) received information from the Internal Revenue Service (IRS) that indicated that petitioner had New York income sufficient to require the filing of a New York State personal income tax return for tax year 2003. A search of the Division's records determined that petitioner failed to file such return.

3. The Division issued a Statement of Proposed Audit Changes dated May 19, 2006, setting forth the Division's calculations of petitioner's tax liability for 2003 and offering petitioner an opportunity to forward a copy of his 2003 return if filed or to provide additional information or an alternate explanation of filing, for example with another state. According to the Statement of Audit Changes, petitioner's federal adjusted gross income was $60,1214.00, upon which New York State and City tax was calculated to be $5,031.00. The calculation then permitted the tax to be offset by a City school tax credit ($62.00) and petitioner's tax withheld ($4,539.00) leaving a balance that is the subject of this case, $430.00. Petitioner does not dispute the amount of wages earned in 2003 or any of the Division's tax calculations.

4. On the basis of the forgoing adjustments, the Division issued a Notice of Deficiency, dated July 13, 2006, which asserted New York State and New York City personal income tax due in the amount of $430.00 plus interest and penalty.

SUMMARY OF THE PARTIES' POSITIONS

5. Petitioner maintains that the New York State taxing scheme does not impose tax on income but actually imposes a tax on those required to file returns. Petitioner further argues that the employer is required to deduct and withhold New York State personal income tax and file an employer's return of tax withheld. Petitioner submits that an employer is liable for the payment of New York State income tax whether or not it is collected from the employee by the employer. On the basis of the foregoing, petitioner concludes that, since he is an employee, he is not responsible for payment of the tax assessed and thus was not required to file a return.

6. The Division asserts that the statutory obligation to file a timely New York State personal income tax return and remit any liability due thereon falls solely to petitioner, and that an employer's responsibility to withhold and remit tax on behalf of an employee does not obviate the employee's obligation to file an appropriate tax return for the taxable year.

CONCLUSIONS OF LAW

A When the Division issues a notice of deficiency to a taxpayer, a presumption of correctness attaches to the notice, and the burden of proof is on the taxpayer to demonstrate by clear and convincing evidence that the deficiency is erroneous (***Matter of Atlantic & Hudson Ltd. Partnership,*** Tax Appeals Tribunal, January 30, 1992). In this matter, petitioner bears the burden of proving that his employer is the party liable for the tax assessed.

B. Petitioner does not dispute the amount of income received or the Division's calculation of tax. He merely asserts that he is not the party liable for the tax and thus was not required to file a return. In an attempt to meet this burden, petitioner relies upon Treas Reg § 31.3403-1 which states, in pertinent part:

> Every employer required to deduct and withhold the tax under section 3402 from the wages of an employee is liable for the payment of such tax whether or not it is collected from the employee by the employer. If, for example the employer deducts less than the correct amount of tax, or if he fails to deduct any part of the tax, he is nevertheless liable for the correct amount of the tax.

C. In ***Anderson v. Commissioner*** (TC Memo 2007-265 [2007]), the taxpayers made the same argument, also with reliance upon IRC § 3403, in an attempt to convince the court that the taxpayers' income tax liabilities were the responsibility of the employer under a skewed view of IRC § 3403. The Tax Court, in rejecting the petitioners' argument stated, in pertinent part:

> The obvious fallacy in petitioners' reasoning is that the income tax is petitioners' obligation in the first instance. An employer, on the other hand is an intermediary or collection agent who may be obligated to withhold amounts from an employee for the employee's future use as a credit or payment of any income tax liability.

In ***Roscoe v. Commissioner*** (48 TCM 1078 [1984]), the petitioners argued that withholding taxes (and FICA contributions) were not assessable against them, and as such could not create income to them. They contended that the withholding tax is a tax upon employers, separate and distinct from petitioners' income. The Tax Court rejected petitioners' arguments with the following explanation:

> The withholding tax imposed by section 3402 and the FICA tax imposed by section 3101 are clearly taxes upon the wages of the petitioners as employees. This is demonstrated by the fact that section 3402(a) and section 3102(a) require the taxes to be deducted from the wages being received. Thus, the burden of the taxes is placed upon the petitioners as employees and they are primarily liable for payment.
>
> Although the primary liability for the taxes is upon petitioners, their employers are responsible for collecting the taxes and remitting them to [the IRS] respondent (Sections 3102[a] and 3402[a]). In the event that the employers fail to discharge their responsibilities in this regard they are held liable for such taxes (Section 3102[b] and section 3402[d]). This result is not inconsistent with our conclusion that the taxes in question constitute liabilities of the petitioners (Section 3102[b] and 3402[d]). Section 3102(b) and 3402(d) merely provide a

> secondary source of collection in the event that an employer fails to fulfill his duties in collecting the tax from the employee.

D. In this case, petitioner does not offer any proof that his employer did not meet its statutory obligation to withhold and remit tax, but rather argues that any amount determined to be due and owing after the amount withheld (such as the assessment calculated herein) is the liability of his employer. Petitioner has simply misapplied the federal tax code provisions to justify nonfiling of his income tax return and nonpayment of the balance of his income taxes, an argument similarly made by tax protesters. Petitioner's arguments are rejected as having no merit. Accordingly, the Division correctly assessed petitioner for 2003.

E. 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.

F. Petitioner has appeared before the Division of Tax Appeals on another occasion making essentially the same arguments presented in this proceeding and did not prevail (***Matter of Hyatt***, Division of Tax Appeals, January 12, 2006). Independent from the prior matter, an evaluation of petitioner's arguments in this matter results in the same conclusion and petitioner's protest herein is deemed frivolous. 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***, Tax Appeals Tribunal, October 30, 2003).

G. The petition of Alexander Hyatt is denied and the Notice of Deficiency dated April 15, 2005 is sustained and, in accordance with Conclusion of Law F, a penalty of $500.00 is imposed for the filing of a frivolous petition.

DATED: Troy, New York
January 22, 2009

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE