STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WILLIAM H. DOURLAIN	:	DETERMINATION DTA NO. 823892
for Redetermination of Deficiencies or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2001 and 2003.	:	

Petitioner, William H. Dourlain, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 2001 and 2003.

On August 30, 2011 and September 6, 2011, respectively, petitioner, appearing pro se, and the Division of Taxation, appearing by Mark F. Volk, Esq. (David Gannon, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs to be submitted by January 24, 2012, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioner's wage income was subject to New York State income tax.

II. Whether a frivolous petition penalty should be imposed pursuant to Tax Law § 2018 and 20 NYCRR 3000.21.

FINDINGS OF FACT

1. On June 5, 2008, the Division of Taxation (Division) issued two statements of proposed audit changes to petitioner, William H. Dourlain. The first statement explained that the Division did not have a New York State personal income tax return filed under petitioner's name or social security number for the year 2001. The statement informed petitioner that the Division computed the amount of New York State tax due based on information obtained from the Internal Revenue Service showing that petitioner had wage income from Lockheed Martin Corp. and from PBN Acquisition Co., Inc., and that taxes were not withheld by either employer.[1] The statement also explained, among other things, that, if petitioner furnished a wage and tax statement, the Division would make an adjustment for taxes withheld. In addition to the asserted deficiency of taxes, the Division imposed interest and a penalty pursuant to Tax Law § 685(a)(1) for failure to file a return. The second statement set forth essentially the same explanation as the one offered in the first notice except that it pertained to the year 2003 and informed petitioner that the Division's records showed wages from Lockheed Martin Corp.

2. On July 6, 2009, the Division issued two notices of deficiency to petitioner, which asserted that personal income tax was due for the reasons set forth in the statements of audit changes. The first notice asserted that personal income tax was due for the year 2001 in the amount of $2,546.00 plus interest in the amount of $1,703.20 and penalty in the amount of $636.50 for a balance due of $4,885.70. The second notice stated that personal income tax was

[1] An affidavit provided by the Division shows that it also utilized information provided by petitioner's employer's wage reporting records.

due for the year 2003 in the amount of $2,797.00 plus interest in the amount of $1,343.30 and penalty in the amount of $699.25 for a balance due of $4,839.55.

3. Petitioner filed requests for a conciliation conference with the Bureau of Conciliation and Mediation Services, and in a Conciliation Order dated June 10, 2010, the requests were denied and the statutory notices were sustained.

4. Petitioner filed a petition and the Division filed an answer, which requested that the Division of Tax Appeals impose the maximum penalty pursuant to Tax Law § 2018 and 20 NYCRR 3000.21.

SUMMARY OF THE PARTIES' POSITIONS

5. In his petition, Mr. Dourlain cites IRC § 3401(a)(11), which provides:[2]

> (a) Wages. - - For purposes of this chapter, the term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term *shall not include remuneration paid* - -
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> * * *
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> (11) for services not in the course of the employer's trade or business, to the extent paid in any medium other than cash . . . . (emphasis added).

Relying upon the foregoing section, petitioner contends that not all wages are subject to withholding and that the exception set forth above is applicable to him. Petitioner submits that wages that are not subject to withholding are not included in gross income.

6. Petitioner also cites a number of provisions of the United States Code and the Code of Federal Regulations regarding sources of income. On the basis of the provisions cited, it appears

[2] IRC § 3401 was amended on several occasions during and after the years in issue. However, the amendments did not alter the portion quoted.

that petitioner takes the position that his income is not subject to tax because it is not from a source within the United States.

7. In response, the Division disagrees with petitioner's analysis and conclusions and cites a series of cases in support of its position that wages are subject to tax and the notices of deficiency were properly issued.

CONCLUSIONS OF LAW

A. Contrary to the position taken by petitioner, "[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. . . ." (Tax Law § 612[a]). 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 petitioner received wage income, said wages should have been included in his federal income and, derivatively, they are subject to New York State personal income tax (***see*** Tax Law § 611[a]; § 612[a]; IRC § 62).

B. The provisions of law relied upon by petitioner do not warrant a different result. The first statutory section relied upon by petitioner concerns whether certain remuneration is subject to wage withholding. This section does not govern whether wages are subject to tax and it is therefore irrelevant. Petitioner's reference to provisions of law that pertain to sources of income is also without merit because there is no evidence that the income in question was earned from sources outside of the United States.

C. 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(a) provides as an example of a frivolous position "that wages are not taxable as income. . . ."

D. 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). It is clear that wages are reportable income, and petitioner has offered no basis for his claim that the Division exceeded its authority in issuing the notices of deficiency. 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 (***Matter of Paulling***, Tax Appeals Tribunal, January 25, 2007; ***Matter of Thomas***).

E. The petition of William H. Dourlain is denied and the notices of deficiency, dated July 6, 2009, are sustained together with such penalty and interest as are lawfully due and, in accordance with Conclusion of Law D, a penalty of $500.00 is imposed for the filing of a frivolous petition.

DATED: Albany, New York
March 22, 2012

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE