STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOHN ADRIAN VAN ROSSEM	:	DECISION DTA NO. 826708
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2011.	:	

Petitioner, John Adrian van Rossem, filed an exception to the determination of the Administrative Law Judge issued on December 8, 2016. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Oral argument was not requested. The six-month period for the issuance of this decision began on April 24, 2017, the date that petitioner's reply brief was received.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner met his burden of proving that the notice of deficiency issued for tax year 2011 was improper or erroneous.

II. Whether a frivolous petition penalty should be imposed under the authority of Tax Law § 2018 and 20 NYCRR 3000.21.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact 2 and 4, which have been modified to more completely and clearly reflect the record. We have also made additional findings of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

1. During tax year 2011, petitioner, John Adrian van Rossem, was employed by the State University of New York at Binghamton (SUNY Binghamton).

2. Petitioner received compensation in 2011 from his employment with SUNY Binghamton.[1]

The Internal Revenue Service reported wage information regarding petitioner as follows:

Year	Wages, Tips and Other Compensation	Payer Name
2011	$52,133.00	State of New York

The New York State Office of the Comptroller reported wage and withholding information regarding petitioner as follows:

Year	Wages Subject to Withholding	NY Tax Withheld
2011	$52,133.26	$2,092.29

3. Petitioner did not file a New York State income tax return for tax year 2011.

4. On August 21, 2014, the Division of Taxation (Division) issued to petitioner a statement of proposed audit changes, which stated that information from the Internal Revenue Service indicated that petitioner had sufficient income to require the filing of a New York State

[1] The Internal Revenue Service also reported a separate "Social Security (FICA) Wages" amount and the New York State Office of the Comptroller also reported a separate "Wage Amount." As this information is not relevant to the current inquiry, we have not included the additional information in the findings of fact.

tax return for 2011. The statement also advised petitioner that the Division had no record of a tax return filed by petitioner for the year at issue and that, therefore, the Division computed his liability based on the information obtained. The statement detailed the Division's computations of tax due. Specifically, the statement shows that the Division determined petitioner's New York adjusted gross income in the amount of $52,133.00, and then subtracted the standard deduction of $7,500.00, resulting in New York taxable income in the amount of $44,633.00. The Division computed New York State tax on that taxable income in the amount of $2,660.00, and then subtracted the total tax withheld in the amount of $2,092.00, resulting in tax due of $568.00.[2] The amount of petitioner's New York State adjusted gross income was based on the information obtained from the Internal Revenue Service, while the amount of total tax withheld was based on the information obtained from the New York State Office of the Comptroller. The statement further advised petitioner that penalties were assessed pursuant to Tax Law § 685 (a) (1), (b) (1) and (2),[3] and interest was required pursuant to Tax Law § 684 (a). The statement explained that the Division had computed petitioner's tax as a New York State resident, and requested that documentation be provided if petitioner was a full or part-year resident of another state.

5. On October 7, 2014, the Division issued to petitioner a notice of deficiency, assessment number L-041790353-9, for the year 2011, asserting tax due in the amount of $568.00, plus interest in the amount of $116.07 and penalty in the amount of $333.03.

6. The petition filed specifically protested petitioner's personal income taxes for 2011.

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[2] The Division's computation rounds petitioner's actual wages subject to withholding and New York tax withheld (***see*** finding of fact 2) to the nearest dollar.

[3] As petitioner did not specifically address these penalties during any part of these proceedings, such penalties are not addressed separately in this decision.

The notice of deficiency listed in the petition was assessment number L-041790353-9, which covered the year 2011. A copy of this notice of deficiency was filed with the petition as the notice that was being protested.

7. It is uncontested that petitioner's correct address for 2011 was a Pennsylvania address and that he commuted from that Pennsylvania address to SUNY Binghamton during 2011.

8. Petitioner's brief filed with the Administrative Law Judge contained two sections, one entitled "Brief Regarding 'Wages'" and one entitled "Brief Regarding 26 USC § 83(a)." The argument in the first section is that wages are wages paid to federal employees and the term wages does not include wages, salaries or compensation earned in the private sector or from state or local governments.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

To assist in analyzing the issues, the Administrative Law Judge set forth the general scheme for the imposition of New York State income tax as follows: (1) tax is imposed on New York taxable income of residents and New York source income of nonresidents and part-year residents (collectively nonresidents) (Tax Law §§ 601, 601 [e]); (2) New York source income is based upon net amounts of items of income, gain, loss and deduction entering into a taxpayer's federal adjusted gross income derived from or connected to New York sources (Tax Law § 631); (3) New York source income includes income from a business, trade, profession or occupation carried on in New York (Tax Law § 631 [b] [1] [B]); (4) federal adjusted gross income is "gross income minus [specified] deductions" (IRC [26 USCA] § 62 [a]); and (5)"Compensation for services, including fees, commissions, fringe benefits, and similar items" are some of the items included as income for federal tax purposes (IRC [26 USCA] § 61 [a] [1]). Based on this

statutory scheme, the Administrative Law Judge concluded that as petitioner received compensation from SUNY Binghamton for 2011, such income was subject to New York State personal income tax on that compensation and petitioner was required by Tax Law § 651 to file a New York State income tax return for 2011 reporting such New York source income.

The Administrative Law Judge next addressed petitioner's arguments as to why his SUNY compensation was not subject to New York State personal income tax. The Administrative Law Judge discounted petitioner's argument that the compensation he received from SUNY Binghamton did not constitute wages subject to tax because only wages paid to federal employees are subject to tax, as a misinterpretation of the Internal Revenue Code. The Administrative Law Judge explained that the IRC [26 USCA] § 3401 (c) definition of employees includes state employees as well as federal employees and, in any event, that the Internal Revenue Code specifically provides that the use of the word "includes" does not limit a definition to only the specific things listed therein (IRC [26 USCA] § 7701 [c]). The Administrative Law Judge referenced numerous legal authorities for the proposition that courts have found petitioner's argument to be meritless and that the Internal Revenue Service had warned taxpayers that the argument was frivolous.

The Administrative Law Judge also discounted petitioner's argument that he was allowed to deduct the value of his labor from the amount of compensation he received pursuant to IRC [26 USCA] § 83 (a). The Administrative Law Judge again referenced numerous legal authorities for the proposition that this argument was frivolous and accordingly rejected the argument.

The Administrative Law Judge noted that despite the requirement of Tax Law § 651 that

petitioner file a return, he failed to do so and explained that the Division was accordingly authorized to determine petitioner's liability from the use of employer wage reporting information. The Administrative Law Judge also noted that petitioner presented no evidence indicating that the information the Division relied upon was erroneous. Thus, the Administrative Law Judge sustained the notice of deficiency.

Finally, the Administrative Law Judge imposed a frivolous petition penalty pursuant to Tax Law § 2018 against petitioner in the amount of $500.00 on the basis that (1) petitioner's argument that his wages are not subject to tax is essentially the same as "wages are not taxable income," which is specifically enumerated in the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) as an example of a frivolous position (20 NYCRR 3000.21 [a]); and (2) arguments similar to petitioner's have been previously found to be frivolous by a number of courts as noted previously in the determination.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner initially argues that this matter should be remanded to the Administrative Law Judge for a hearing on years other than 2011, with regard to certain enforcement actions taken by the Division against him. Furthermore, petitioner argues that the affidavit admitted into evidence on behalf of the Division should not have been admitted and that the Division's attorney was allowed to testify without being sworn at the hearing.

With regard to the substantive questions, petitioner apparently asserts that the determination of the Administrative Law Judge is incorrect in that he did not make an argument that the compensation he received from SUNY Binghamton did not constitute wages subject to tax. Petitioner, however, continues to argue on exception that IRC [26 USCA] § 83 (a) governs

how property received in exchange for services is to be taxed. Petitioner explains how this works by stating "[C]ost is excludable or deductible from gross income. Labor is property, all property is cost under the law; labor's value is cost, not profit" (petitioner's brief in support, p 10).

Finally, petitioner objects to the imposition of the frivolous petition penalty as his position regarding IRC 26 [USCA] § 83 (a) is not specifically set forth in the Rules as a frivolous position.

The Division asserts that petitioner is limited to a review of the tax year 2011 as set forth in his petition. In response to petitioner's objections to the introduction of affidavits in the hearing before the Administrative Law Judge, the Division notes that the reception of affidavits into evidence in Division of Tax Appeals hearings is allowed by the Rules.

The Division asserts that petitioner received New York source income subject to tax pursuant to the general scheme for the imposition of New York State income tax. The Division also asserts that its decision to utilize the information available to it as a basis for the assessment of tax against petitioner is supported by the Tax Law.

The Division did not respond to petitioner's assertion that he was not arguing that the compensation he received from SUNY Binghamton did not constitute wages subject to tax, but rather assumed that such was petitioner's position and asserted that such arguments have been held to be frivolous. The Division did not respond to petitioner's arguments regarding IRC [26 USCA] § 83 (a).

Finally, the Division argues that the frivolous petition penalty imposed by the Administrative Law Judge should be upheld based upon the rationale of the Administrative Law Judge that petitioner's positions in the present matter have previously been held to be frivolous by a number of courts.

OPINION

We will begin by addressing petitioner's procedural arguments. First, petitioner argues that this matter should be remanded to the Administrative Law Judge to address years other than 2011 with regard to certain enforcement actions taken by the Division against him. The petition in this matter sets forth 2011 as the year in issue. It also lists assessment number L-041790353-9 for the year 2011 as the notice of deficiency in issue. A copy of that same notice of deficiency was filed with the petition as the notice that was being protested. Accordingly, 2011 is the only year in issue before the Division of Tax Appeals and is the only year that will be addressed by this Tribunal.

Second, petitioner also objects to the introduction at the hearing of an affidavit of an employee of the Division. The Rules provide that: "[A]ffidavits as to relevant facts may be received, for whatever value they may have, in lieu of testimony of the persons making such affidavits" (20 NYCRR 3000.15 [d] [1]). Thus, the admission of the affidavit by the Administrative Law Judge does not constitute error. In any event, the affidavit served only as a means to introduce the evidence admitted with it and the opinion of the affiant on the application of the law to the evidence is not given any weight.

Third, petitioner also alleges that the Division's counsel was allowed to testify at the hearing without being sworn in. A review of the transcript of the hearing does not support petitioner's allegations. The Division's representative did not testify at the hearing as to any facts, but merely introduced the Division's exhibits and addressed the Division's legal arguments. It is true that petitioner was required to be sworn in, but that was because petitioner was appearing pro se and was presenting both factual evidence and legal argument during the hearing.

Prior to exploring the substantive issues, the Tribunal would like to clarify several points. We would note our disagreement with the Administrative Law Judge regarding the information utilized to calculate the tax due in this matter. In particular, the Administrative Law Judge indicates that the amount of tax due was based upon the wage and withholding information the Division received from the New York State Office of the Comptroller. However, the record, and in particular the statement of proposed audit changes, indicates that the amount of petitioner's New York adjusted gross income was based on the information obtained from the Internal Revenue Service, while the amount of total tax withheld was based on the information obtained from the New York State Office of the Comptroller.

Additionally, the treatment of petitioner as a resident or nonresident of New York in this matter should be clarified. The statement of proposed audit changes indicates that petitioner's tax calculations were based upon his being a New York resident and requested that petitioner submit information indicating his state of residency, if that was not the case. It appears that petitioner did not do this. However, it was uncontested throughout these proceedings that petitioner's address during 2011 was a Pennsylvania address and that he commuted from Pennsylvania to SUNY Binghamton during 2011. Furthermore, the parties and Administrative Law Judge have apparently treated petitioner as a nonresident during these proceedings. Accordingly, we will continue to treat petitioner as a nonresident for 2011, although, as all of the income in question was New York source income, the issue of residency does not have a substantive effect on the tax calculations.

We concur with the Administrative Law Judge's description of the general scheme for the imposition of New York State personal income tax, and the resulting conclusions that petitioner was required to file a New York State personal income tax return for 2011 reporting the

compensation he received from SUNY Binghamton. As the determination of the Administrative Law Judge dealt fully and correctly with this issue, we affirm for the reasons stated therein.

It is therefore incumbent upon petitioner to present evidence and arguments as to why such compensation was not subject to New York State personal income tax. We turn first to the argument that the compensation petitioner received from SUNY Binghamton did not constitute wages subject to New York State personal income tax. On exception, petitioner asserts that he did not make this argument before the Administrative Law Judge. There is no basis for this assertion. Petitioner's brief filed with the Administrative Law Judge contained two sections, one entitled "Brief Regarding 'Wages'" and one entitled "Brief Regarding 26 USC § 83(a)." The argument in the first section is that wages consist solely of those that are paid to federal employees and are exclusive of wages, salaries or compensation earned in the private sector or from state or local governments. Although petitioner is not now raising this argument on exception, because petitioner clearly made this argument before the Administrative Law Judge, we will briefly address it.

The argument is premised upon a convoluted and incorrect interpretation of various provisions of the Internal Revenue Code and is basically that wages are "for services performed by an employee for his employer" (IRC [26 USCA] § 3401 [a]) and an employee is defined by IRC [26 USCA] § 3401 (c) as an employee of the federal government only. The argument is that wages paid to an employee other than an employee of the federal government are not subject to personal income tax. This argument is spurious. Initially, IRC [26 USCA] § 3401 is the definitional section of the chapter of the Internal Revenue Code dealing with withholding, not with the imposition of tax on personal income. Furthermore, as noted by the Administrative Law Judge, IRC [26 USCA] § 3401 (c) does not say that an employee is only an employee of the

federal government, but also includes, as relevant here, an employee of a state. As petitioner was employed by SUNY Binghamton, he was an employee of the State of New York. As also pointed out by the Administrative Law Judge, the definition set forth in IRC [26 USCA] § 3401 (c) defines employee as including certain types of employees and is not an exclusive list. IRC [26 USCA] § 7701 (c), the Internal Revenue Code definition of the term "includes and including," specifically provides that it "shall not be deemed to exclude other things otherwise within the meaning of the term defined." Finally, the Administrative Law Judge correctly noted that such arguments have been held to be meritless by the courts and that the Internal Revenue Service has even warned taxpayers that it considers such arguments frivolous, relying on the following citations (***see*** Rev Rul 2006-15, 2006-1 CB 743; ***see also Taliaferro v Freeman***, 595 Fed Appx 961, 963 [11th Cir 2014] [rejecting as frivolous the taxpayer's argument that the federal income tax applies only to federal employees, the court ordered sanctions against the taxpayer up to and including double the government's costs]; ***Taliaferro v Commissioner***, 272 Fed Appx 831, 833 [11th Cir 2008] [rejecting the argument that income tax only applies to the federal government and its employees]; ***Motes v United States***, 785 F2d 928 [11th Cir 1986] [rejecting as frivolous a claim that only public servants are subject to tax liability]; ***Sullivan v United States***, 788 F2d 813 [1st Cir 1986] [finding taxpayer's argument that he did not receive "wages" because he was not an "employee" within the meaning of 26 USC § 3401(c) meritless, and noting that the word "includes" within that section does not limit withholding to the persons listed therein]; ***United States v Latham***, 754 F2d 747, 750 [7th Cir 1985] [holding that the district court did not err in refusing taxpayer's requested jury instructions that the term "employee" under 26 USC § 3401(c) does not include privately employed wage earners, the court found that such argument was "inane" and "a preposterous reading of the statute.' It is

obvious that within the context of [the statute], the word 'includes' is a term of enlargement not of limitation, and the reference to certain entities or categories is not intended to exclude all others"]; ***Waltner v Commissioner***, TC Memo 2014-35).

The Administrative Law Judge was also properly dismissive of petitioner's arguments that he was allowed to deduct the value of his labor from the amount of compensation he received pursuant to IRC [26 USCA] § 83 (a). IRC [26 USCA] § 83 (a) deals with the transference of property to a person, other than the person for whom services are performed, in connection with the provision of such services. In the present matter, petitioner's work for SUNY Binghamton constitutes a service performed for the university. Petitioner has presented no evidence that there was property transferred in connection with those services. While petitioner would apparently argue that his services constitute property, as correctly noted by the Administrative Law Judge, such arguments have been considered specious in the past, relying on the following citations (***see Sullivan v United States***, 788 F2d at 815 [stating that "[c]ourts uniformly have rejected as frivolous the arguments that money received in compensation for labor is not taxable income," the court held that the taxpayer's attempt to escape taxation by deducting as a "cost of labor" expense an amount virtually equal to his wages "had no basis in the Internal Revenue Code, and was equally frivolous."]; ***see also Hyslep v United States***, 765 F2d 1083 [11th Cir 1985] [rejecting as frivolous the taxpayer's arguments that he did not derive any taxable profits because wages received in compensation for labor are not taxable, the court held that "[t]here is no provision in the Internal Revenue Code permitting an individual wage earner to adjust his gross income by deducting a charge for the 'value of labor.' Thus, the argument that individual wage earners are not subject to income tax is completely frivolous and without merit."]; ***Lonsdale v Commissioner***, 661 F2d 71, 72 [5th Cir 1981] [rejecting as meritless the taxpayer's contention

that the "exchange of services for money is a zero-sum transaction"]). On exception, petitioner asserts that none of the citations relied upon by the Administrative Law Judge specifically reference IRC [26 USCA] § 83 (a). However, petitioner is relying on essentially the same argument addressed by each of these cases, that he should be allowed to deduct the value of his labor from his SUNY compensation in order to arrive at his New York State taxable income. Thus, it does not matter whether or not IRC [26 USCA] § 83 (a) is specifically discussed in the cases.

Based upon the discussion above, petitioner has clearly not met his burden of proving that the notice of deficiency for the year 2011 was improper or erroneous.

The imposition of the frivolous petition penalty pursuant to Tax Law § 2018 and 20 NYCRR 3000.21 by the Administrative Law Judge was proper. Furthermore, as the determination of the Administrative Law Judge dealt fully and correctly with this issue, we affirm for the reasons stated therein. On exception, petitioner asserts that because his position regarding IRC [26 USCA] § 83 (a) is not specifically listed in the Rules, it is inappropriate to impose the frivolous petition penalty in this case. Initially, we note that as we find in this decision that petitioner effectively argued before the Administrative Law Judge that his wages were not taxable as income, and such position is listed as an example of a frivolous position in 20 NYCRR 3000.21, the imposition of the frivolous petition penalty is proper on that basis alone. In any event, the penalty was properly imposed because the Rules specifically state that the list of frivolous positions set forth in 20 NYCRR 3000.21 is only a list of examples of frivolous positions and thus does not constitute an exclusive list of such positions.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of John Adrian van Rossem is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of John Adrian van Rossem is denied; and

4. The notice of deficiency dated October 7, 2014 is sustained.

DATED: Albany, New York
October 24, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner