STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN ADRIAN VAN ROSSEM	:	DETERMINATION 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 a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2011.

A hearing was held before Barbara J. Russo, Administrative Law Judge, at the offices of the Division of Tax Appeals in Albany, New York, on March 16, 2016 at 10:30 a.m., with all briefs due by June 20, 2016, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Alejandro Taylor, Esq., of counsel).

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

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

Year	Wage Amount	Wages Subject to Withholding	NY Tax Withheld
2011	$53,146.39	$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 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, less 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 in the amount of $2,660.00, less total tax withheld in the amount of $2,092.00, resulting in tax due of $568.00. The statement further advised petitioner that penalties were assessed pursuant to Tax Law § 685(a)(1); (b)(1) and (2), and interest was required pursuant to Tax Law § 684(a).

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.

SUMMARY OF THE PARTIES' POSITIONS

6. Petitioner argues that the compensation he earned from his employment at SUNY Binghamton is not taxable as wages under the Internal Revenue Code because he was not an employee of the federal government. Petitioner further argues that 26 USC § 83(a) provides for a deduction for the value of his labor from the amount of compensation received.

7. The Division asserts that the income petitioner received from SUNY Binghamton is taxable as New York source income, that petitioner failed to report this income and pay tax thereon, that the Notice of Deficiency should be sustained, and that a frivolous petition penalty should be imposed.

CONCLUSIONS OF LAW

A. Tax Law § 601 imposes personal income tax on New York taxable income of resident individuals. With regard to nonresidents and part-year residents, tax is imposed on taxable income that is derived from New York sources (Tax Law § 601[e]). New York source income of a nonresident is based on the net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, derived from or connected with New York sources (Tax Law § 631). Income from New York sources includes income from a business, trade, profession, or occupation carried on in New York (Tax Law § 631[b][1][B]).[1]

Internal Revenue Code § 62(a) defines federal adjusted gross income in the case of an individual, as "gross income minus [specified] deductions." "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 gross wages of

[1] It is noted that petitioner did not contest the Division's classification of all of his income from SUNY Binghamton as income derived from or connected with New York sources. There is no dispute that the compensation petitioner received in 2011 from SUNY Binghamton was for services performed in New York.

$53,146.39 and wages subject to withholding in the amount of $52,133.26, as indicated by the New York State Office of the Comptroller's reported wage and withholding information, said wages should have been included in his federal income and, consequently, he is subject to New York State personal income tax on the same reported wages (***see*** Tax Law § 631; IRC § 62). Moreover, petitioner was required to file a New York income tax return for the year at issue reporting said New York source income (Tax Law § 651).

B. While petitioner admits that he received compensation for his employment with SUNY Binghamton, he posits that such compensation is not taxable as wages. Petitioner's position is based on a lengthy and incorrect argument of semantics and a misinterpretation of the Internal Revenue Code. Petitioner argues that "wages" means wages paid by the federal government to federal employees only and does not mean wages, salaries or compensation earned in the private sector or from state and local governments. Petitioner's argument is based on a misinterpretation of the word "includes" in the Internal Revenue Code's definition of employee. Petitioner contends that the Code's use of the word "includes" in defining "employee" is restrictive and such definition only includes federal government employees. First, petitioner's argument ignores the plain language of IRC § 3401(c), which provides that the term "'employee' includes an officer, employee, or elected official of the United States, *a State*, or any political subdivision thereof . . . ." (emphasis added). There is no dispute that petitioner was a New York State employee, working for SUNY Binghamton. As such, his argument fails on that ground alone. Additionally fatal to petitioner's argument is IRC § 7701(c), which specifically provides that "the terms 'includes' and 'including' when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined." As such, petitioner's argument that the use of the word "includes" restricts the definition of employee to

only federal government employees is without merit. Courts have repeatedly rejected such argument as meritless and the Internal Revenue Service has warned taxpayers that such argument is considered frivolous (***see*** Rev Rul 2006-18, 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).

C. Petitioner's argument that the value of his labor is excluded from gross wages under 26 USC § 83(a) is likewise without merit and frivolous. While petitioner admits that in 2011 he received compensation for services rendered to his employer, SUNY Binghamton, he argues that 26 USC § 83(a) provides for a deduction for the value of his labor from the amount of

compensation received. The courts have repeatedly rejected similar arguments as frivolous (***see Sullivan v. US***, 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"]). Petitioner's argument herein is similarly frivolous and is accordingly rejected.

D. Petitioner failed to file a return for the year at issue despite being required by law to do so (Tax law § 651). Accordingly, the Division was authorized to determine petitioner's liability for the year at issue and to issue a notice of deficiency in respect of such liability (Tax Law § 681[a]). The use of employer wage reporting information is a reasonable and rational method of estimating income tax liability (***see Matter of Pettis***, Tax Appeals Tribunal, August 18, 2005). Petitioner offered no evidence (e.g., a W-2 form) to show that the information upon which the Division relied was in any way erroneous. The deficiency of tax for the year at issue is therefore sustained.

E. The Division moves for the imposition of a frivolous petition penalty pursuant to Tax Law § 2018 and 20 NYCRR 3000.21. Tax Law § 2018 authorizes the Tax Appeals Tribunal to impose such a penalty "[i]f 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." The maximum penalty allowable under this provision is $500.00 (Tax Law § 2018). Petitioner's argument is that the law does not make him liable to pay tax on his wages. This is essentially the same position as "wages are not taxable as income," specifically cited in the Rules of Practice and Procedure as a frivolous position (20 NYCRR 3000.21[a]). Furthermore, as noted above, arguments similar to petitioner's have been deemed frivolous by a number of court decisions (***see Taliaferro v. Freeman***; ***Taliaferro v. Comissioner***; ***Motes v. United States***; ***Sullivan v. United States***; ***United States v. Latham***; ***Waltner v. Commissioner***; ***Hyslep v. United States***; ***Lonsdale v. Commissioner***). Accordingly, a frivolous petition penalty in the amount of $500.00 is properly imposed.

F. The petition of John Adrian van Rossem is denied, the Notice of Deficiency dated October 7, 2014 is sustained and a frivolous petition penalty of $500.00 is imposed pursuant to Tax Law § 2018.

DATED: Albany, New York
December 8, 2016

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE