STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
REGINALD MARTHONE	:	DETERMINATION DTA NO. 827279
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2010 and 2012.	:	

Petitioner, Reginald Marthone, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 2010 and 2012.

On March 2, 2017, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Charles Fishbaum, Esq., of counsel), filed a motion for an order pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b) granting summary determination to the Division of Taxation on the ground that there exists no material issue of fact and imposing a penalty for the filing of a frivolous petition pursuant to Tax Law § 2018. The Division of Taxation submitted the affidavit of Charles Fishbaum, Esq., with exhibits, dated March 2, 2017, and the affidavit of Darrell Wright, with exhibits, sworn to February 27, 2017, in support of its motion. Petitioner did not respond to the motion. Accordingly, the 90-day period for the issuance of this order began on April 3, 2017, the due date for petitioner's response. Based upon the motion papers and all the pleadings and proceedings had herein, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly computed petitioner's tax liability for tax years 2010 and 2012.

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

FINDINGS OF FACT

1. On or about August 26, 2014, Reginald Marthone (petitioner), filed Form IT-201, Resident Income Tax Return, for the tax year 2010, on which he reported zero dollars for all items of income, including wages, and requested a refund of $4,295.98, the amount of the New York State and New York City tax withholding for 2010, by his employer, MTA New York City Transit.

2. On or about August 26, 2014, petitioner, filed Form IT-201, Resident Income Tax Return, for the tax year 2012, on which he reported zero dollars for all items of income, including wages, and requested a refund of $7,318.00, the amount of the New York State and New York City tax withholding for 2012, by his employer, MTA New York City Transit.

3. The Division of Taxation (Division) selected petitioner's 2010 income tax return for review, and pursuant to such examination, the Division issued to petitioner a statement of proposed audit changes for tax year 2010, dated October 31, 2014, adjusting petitioner's federal adjusted gross income for 2010 based on available wage information received from the Internal Revenue Service (IRS). Consistent with the information received from the IRS, petitioner's New York State historical wage reporting for 2010 listed wages subject to withholding in the amount of $71,554.14. Reflecting the wage information, the Division denied petitioner's request for a

refund and asserted $1,850.00 in tax due, plus penalty and interest.

4. The Division selected petitioner's 2012 income tax return for review, and pursuant to such examination, the Division issued to petitioner a statement of proposed audit changes for tax year 2012, dated October 31, 2014, adjusting petitioner's federal adjusted gross income for 2012 based on available wage information received from the IRS. Consistent with the information received from the IRS, petitioner's New York State historical wage reporting for 2012 listed wages subject to withholding in the amount of $101,821.89. Reflecting the wage information, the Division denied petitioner's request for a refund and asserted $1,765.26 in tax due, plus penalty and interest.

5. The Division issued to petitioner two notices of deficiency dated January 9, 2015, assessment L-042103035-9 for tax year 2010, asserting $1,850.00 in tax due plus penalty and interest, and assessment L-042103037-7 for tax year 2012, asserting $1,765.26 plus penalty and interest.

6. The affidavit of Darrell Wright, a Division employee in the position of a tax technician 3 since December 2014, who is responsible for reviewing personal income tax returns, among other functions, concluded that petitioner was not entitled to refunds for tax years 2010 and 2012, and that petitioner has failed to pay the correct amounts of New York State income tax for tax years 2010 and 2012.

7. Petitioner filed a substitute for Form W-2, Form 4852, with his income tax returns for 2010 and 2012, and identified the method used to determine the items of income reported on his returns as follows:

"Statutory language behind IRS sections 3401, 3121 and others. The company

> provided W-2 which erroneously alleged payment IRC section 3401, and 3121 wages hereby disputed."

8. Form 4852 also asked petitioner to explain his efforts to obtain Form W-2, Form 1099-R or Form W-2c, Corrected Wage and Tax Statement, for both tax years. He explained his efforts for both tax years as follows:

> "Did not ask company to Issue [sic] forms correctly listing payments of 'wages' as defined in 3401[a] and 3121[a] for fear of creating conflicted work environment. Nonetheless the amounts listed as withheld on the W-2 they submitted are correct."

9. On or about January 23, 2015, petitioner filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). The basis for petitioner's claim was stated by him as follows:

> "Tax imposed by NYS Dept. of Tax & Finance is inapplicable to me based on the factual setting and Financial [sic] transaction in question [sic] there is no regulation which [sic] makes me liable to pay the tax in question."

A conciliation conference was held on April 9, 2015, and the conciliation conferee issued a conciliation order dated July 17, 2015, sustaining the statutory notices.

10. On October 14, 2015, petitioner filed a petition in this matter alleging the following:

> "1. Conciliation Order in question is arbitrary, capricious, and does not afford Petitioner due process of law.
> 2. Conciliation Order fails to provide any findings of fact or conclusions of Law.
> 3. Conciliation Order fails to show the law which [sic] was used and/or relied upon by the Administrative Law Judge which makes Petitioner liable to pay the tax in question.
> 4. Based on the forgoing Conciliation Order should be vacated, with prejudice."

11. The Division's document submission, filed on March 2, 2017, included a request that a frivolous petition penalty be imposed against petitioner, pursuant to 20 NYCRR 3000.21, in the amount of $500.00.

SUMMARY OF THE DIVISION'S POSITION

12. The Division argues that as a matter of law, wages are compensation for services, unless specifically excluded by statute, and subject to tax. The Division asserts that petitioner has not demonstrated that the wages he received from his employer as compensation for his services were not taxable income, nor can he do so as a matter of law. Further, the Division maintains that the arguments raised by petitioner are deemed frivolous under Tax Law § 2018 and § 3000.21 of the Tax Appeals Tribunal Rules of Practice and Procedure, subjecting the same to a penalty of up to $500.00.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted, if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]). Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to Civil Practice Law and Rules § 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (***Winegrad v New York Univ. Med. Ctr***., 64 NY2d 851, 853 [1985], ***citing Zuckerman v City of New York***, 49 NY2d 557 [1980]). Inasmuch as summary judgment 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 v Tri-Pac Export Corp.***, 22

NY2d 439 [1968]; ***Museums at Stony Brook v Village of Patchogue Fire Dept.***, 146 AD2d 572 [1989]). 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 (***Gerard v. Inglese***, 11 AD2d 381 [2d Dept 1960]). "To defeat a motion for summary judgment, the opponent must . . . produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim'" (***Whelan v. GTE Sylvania***, 182 AD2d 446, 449 [1st Dept 1992] ***citing Zuckerman***).

Petitioner failed to file a response to the instant motion; therefore he is deemed to have conceded that no question of fact requiring a hearing exists (***see Kuehne & Nagel v. Baiden***, 36 NY2d 539 [1975]; ***John William Costello Assocs. v. Standard Metals Corp.***, 99 AD2d 227 [1984], ***lv dismissed*** 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts set forth in the Fishbaum and Wright affidavits; consequently, those facts may be deemed admitted (***see Kuehne & Nagel v. Baiden***; ***Whelan v. GTE Sylvania***).

B. When the Division issues a notice of deficiency to a taxpayer, "a presumption of correctness attaches to it and it is incumbent upon [the] petitioner to demonstrate that the notice was erroneous" (***Matter of Gilmartin***, Tax Appeals Tribunal, June 24, 2004, ***confirmed*** 31 AD3d 1008 [2006]).

C. Pursuant to Tax Law § 612(a), the New York adjusted gross income of a resident individual means, in pertinent part, "his federal adjusted gross income as defined in the laws of the United States for the taxable year . . . ." IRC § 62(a), in turn, generally defines adjusted gross income as gross income less certain enumerated deductions. The enumerated deductions do not include wage, salary or interest income.

D. IRC § 61(a) defines the term "gross income" as "all income from whatever source derived . . . ." This section also provides a nonexhaustive list of items that constitute gross income including, inter alia, "[c]ompensation for services, including fees, commissions, fringe benefits, and similar items" (IRC § 61[a][1]).

E. IRC § 3401(a) defines the term "wages," for purposes of income tax withholding, as:

> ". . . 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—[for services and pursuant to exceptions not applicable herein]."

F. IRC § 3121(a) defines "wages," for purposes of the federal insurance contributions act, as:

> ". . . all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except [for services and pursuant to exceptions not applicable herein]."

G. Petitioner has essentially maintained that his wages are not taxable as income for the years in question, but fails to support his position. Petitioner has offered no argument or proof that his income with respect to tax years 2010 and 2012 is exempt from income tax in accordance with any of the exceptions to the definition of "wages" contained in IRC § 3401(a). Nor has petitioner offered any proof that IRC § 3121 provides him any relief. Accordingly, the Division properly computed petitioner's tax liability for tax years 2010 and 2012.

H. Pursuant to Tax Law § 2018, if a petitioner's position in a proceeding before the Division of Tax Appeals is frivolous, the Tax Appeals Tribunal "may impose a penalty against such petitioner of not more than five hundred dollars . . . . 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."

I. The imposition of frivolous petition penalties was addressed by the Tribunal in ***Matter of Nelson*** (Tax Appeals Tribunal, April 21, 2011). There, the Tribunal affirmed the administrative law judge's imposition of such penalties, stating:

> "The Rules of Practice and Procedure of the Tax Appeals Tribunal for the Division of Tax Appeals (20 NYCRR 3000.21) provide, in part, that a frivolous position includes arguments alleging: '(a) that wages are not taxable as income.' We hold that petitioner's position in this proceeding that he is not liable for personal income tax on his wage income is patently frivolous (***see Matter of Solomon v. Commissioner***, TC Memo 1993-509, ***affd*** 42 F3d 1391 [1994]; ***see also***, ***Matter of Pettis***, Tax Appeals Tribunal, August 18, 2005; ***Matter of Nicholson***, Tax Appeals Tribunal, October 30, 2003). We find the remainder of petitioner 's arguments to be without merit and frivolous, as such arguments are similar to tax protestor rhetoric, which has long been rejected (***see Schiff v. Commissioner, TC Memo 1992-183).*** *In* ***Schiff***, the Tax Court considered allegations similar to those raised by petitioner herein and found them to be 'stale long discredited tax protester arguments' that were 'totally unfounded and without merit.' As such, the Administrative Law Judge properly imposed a frivolous petition penalty of $500.00 pursuant to Tax Law § 2018."

J. Based on the foregoing and in accordance with the finding in Conclusion of Law G that petitioner's substantive argument is without merit, 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.

K. The Division's motion for summary determination is granted; the petition of Reginald Marthone is denied; the two notices of deficiency, dated January 9, 2015, are sustained, and a penalty of $500.00 is imposed for the filing of a frivolous petition.

DATED: Albany, New York
June 29, 2017

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE