STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROGER DAIL	:	DETERMINATION DTA NO. 827818
for Redetermination of Deficiencies or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 2009 through 2012 and 2014.	:	

Petitioner, Roger Dail, filed a petition for redetermination of deficiencies or for refunds of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 2009 through 2012, and 2014.

On March 3, 2017, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Linda A. Jordan, Esq., of counsel), filed a motion seeking summary determination in its favor pursuant to 20 NYCRR 3000.5 and 3000.9(b). Accompanying the motion was the affidavit of Linda A. Jordan, Esq., dated March 2, 2017, together with an additional affidavit and annexed exhibits supporting the motion. Petitioner, appearing pro se, did not respond in opposition to the motion of the Division of Taxation. The 90-day period for issuance of this determination commenced on April 3, 2017 (20 NYCRR 3000.5[b]). After due consideration of the motion papers, attached affidavits and annexed exhibits, and all pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation has established that summary determination is warranted upon the basis that there are no material and triable issues of fact presented in this matter, such that, as a matter of law, a determination can be made in its favor.

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 the tax years 2009, 2010, 2011, 2012 and 2014 (years in issue), petitioner, Roger Dail, was employed by the National Railroad Passenger Corporation (NRPC). For each of such years in issue, petitioner filed a Resident Income Tax Return (Form IT-201). Petitioner listed his occupation for the years 2009 and 2010 as "block operator," and for the subsequent years as "train dispatcher." On each of his returns, petitioner reported $0.00 as "wages, salaries, tips, etc.", and also reported the amounts of tax withheld by his employer for each of such years, thus resulting in a claimed overpayment and refund due equal to the amounts so withheld for each of the respective years.

2. The filing dates for petitioner's returns, the amounts of wages petitioner's employer reported to the Division of Taxation (Division) as paid to petitioner, and the amounts of tax withheld therefrom by petitioner's employer, for each of the years in issue, are as follows:

Year	Date Return Filed	Wages Paid	Tax Amount Withheld
2009	04/07/2015	$43,210.00	$2,380.85
2010	03/28/2015	$57,579.00	$3,891.93
2011	03/23/2015	$62,744.00	$4,472.37
2012	03/21/2015	$74,952.00	$5,593.00

2014	03/17/2015	$93,341.00	$7,223.00

3. Wage and tax statements furnished to the Division and kept in the ordinary course of its business, show wages paid to petitioner by one employer (NRPC), and withholdings therefrom that match the foregoing amounts of withholding self-reported on petitioner's returns. Petitioner did not include a copy of Form W-2 (Wage and Tax Statement) from his employer with his returns, but rather included a self-prepared Form 4852.[1] The amounts shown as withheld on each Form 4852 likewise matched the amounts reported to the Division by petitioner's employer, and reported on the returns filed by petitioner.

4. Petitioner's choice to file his returns in the foregoing manner, i.e., by reporting $0.00 as wages, and by submitting Form 4852 (in lieu of Form W-2), was explained in corresponding annual letters, attached to his returns, stating in relevant part:

> "I am rebutting their claim of payments as 'wage' as defined in the Internal Revenue Code Sec. 3401(a) and 3121(a). I am a private sector citizen (non-federal employee) as defined in Sec. 3401(c)(d). I am not employed in a 'trade or business' nor am I an 'officer of a corporation.'"

5. The Division audited petitioner's returns for the years in issue. The Division calculated petitioner's New York State and New York City tax liability for each of the years in issue based on the amounts of wages reported by petitioner's employer. In turn, the Division reduced such amounts of liability by the withholdings reflected on the wage and tax statements, and by the New York School Tax Credit for such years. By this method the Division arrived at a net tax liability for each of the years in issue.

[1] Substitute for Form W-2, Wage and Tax Statement, or Form 1099R, Distributions from Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.

6. The Division issued to petitioner a statement of proposed audit changes for each of the years in issue (on June 18, 2015 for the years 2009 and 2010, and on June 12, 2015 for the years 2011, 2012 and 2014), setting forth its computation of petitioner's net tax liability for each of such years, plus interest, and including, for the years 2009 through 2012, the imposition of a penalty for late filing under Tax Law § 685(a).

7. The Division issued to petitioner a notice of deficiency for each of the years in issue. Each notice is dated September 16, 2015, and each asserts tax due for the year to which it pertains, as computed and set forth on the companion statements of audit changes described above, as follows:

Year	Assessment ID Number	Tax Amount
2009	L-043181480	$199.50
2010	L-043181481	$196.50
2011	L-043126942	$248.50
2012	L-043126943	$137.50
2014	L-043126944	$8,204.42

Each such notice of deficiency included the imposition of interest, and for the years 2009 through 2012, the imposition of a penalty for late filing under Tax Law § 685(a).

8. Petitioner challenged the foregoing notices by filing a request for conciliation conference (Request) with the Division's Bureau of Conciliation and Mediation Services (BCMS). A conciliation conference was scheduled for May 11, 2016.

9. Petitioner did not appear at the scheduled conciliation conference, and by a Conciliation Default Order (CMS No. 268813) dated June 3, 2016, BCMS dismissed petitioner's Request.

10. Petitioner challenged the Conciliation Default Order by filing a petition with the Division of Tax Appeals. Petitioner's challenge, as set forth at Item six of the petition, continues

to be that the payments he received from his employer do not constitute wages and are not subject to tax as such (***see*** Finding of Fact 4).

11. The Division filed its answer to the petition, denying all allegations of fact and error set forth in the petition, requesting that the notices of deficiency be sustained, and requesting that the maximum penalty be imposed against petitioner for the filing of a frivolous petition. Thereafter, the Division brought the subject motion, seeking summary determination upon the basis that there are no issues of fact presented in this matter, and that petitioner's position is based solely upon tax protester rhetoric and is meritless.

CONCLUSIONS OF LAW

A. This matter proceeds by way of a motion for summary determination under 20 NYCRR 3000.9(b). A motion for summary determination "shall 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" (20 NYCRR 3000.9[b][1]). Section 3000.9(c) of the Rules of Practice and Procedure provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 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, 562 [1980]). 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, 441 [1968]; ***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572, 573 [2d Dept 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*** at 562). Petitioner did not respond to the Division's motion, and as detailed hereafter, there exist no material and triable issues of fact, and the Division is entitled to summary determination in its favor.

B. Petitioner does not dispute that he received compensation for his employment with NPRC. Instead, he posits that such compensation does not constitute "wages," and hence is not taxable. Petitioner appears to argue that "wages" means compensation paid by the federal government to federal employees only, and does not mean wages, salaries or compensation earned in the private sector. Petitioner's position is based on a clearly incorrect argument of semantics, is a misinterpretation of the Internal Revenue Code (IRC), and has been rejected as such.

C. Pursuant to Tax Law § 612(a), "[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." IRC § 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]). None of the deductions listed in IRC § 62(a) include a deduction for wage, salary or interest income. Since petitioner received compensation income constituting wages, as indicated by the information provided by his employer, NPRC, said wage income should have been included in his federal income, and consequently he is

subject to New York State and New York City personal income tax on the same reported wage income (***see*** Tax Law §§ 611[a]; 612[a]; IRC §§ 61, 62). Accordingly, the Division's assertion of tax deficiencies for the years in issue upon such basis was proper, has not been refuted, and will be upheld.

D. The Division's motion seeks not only a determination upholding the notices of deficiency, but also seeks 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 (***see*** Tax Law § 2018).

E. 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, arguments similar to petitioner's have repeatedly been deemed meritless and frivolous by a number of court decisions, 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 as set forth above is not intended to exclude all others"]; ***Waltner v. Commissioner***, TC Memo 2014-35). Petitioner's argument in this case is similarly frivolous and is rejected. Accordingly, a frivolous petition penalty in the amount of $500.00 is properly imposed.

F. The Division's motion for summary determination is granted, the petition of Roger Dail is denied, the notices of deficiency dated September 16, 2015 are sustained, and a frivolous petition penalty of $500.00 is imposed pursuant to Tax Law § 2018.

DATED: Albany, New York
June 22, 2017

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE