STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARK S. OHBERG	:	DETERMINATION DTA NO. 828682
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2013.	: :	

Petitioner, Mark S. Ohberg, 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 2013.

On June 7, 2019, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Stephanie M. Lane, Esq., of counsel), brought a motion seeking summary determination in the above-referenced matter pursuant to section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal and imposing a penalty for the filing of a frivolous petition pursuant to Tax Law § 2018. The Division of Taxation submitted the affirmation of Stephanie M. Lane, Esq., dated June 7, 2019, along with the affidavit of Darrell Wright, sworn to June 5, 2019, with annexed exhibits, in support of its motion. On July 6, 2019, petitioner, appearing pro se, submitted a letter in opposition to the motion for summary determination. The 90-day period for issuance of this determination commenced on July 8, 2019. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Kevin R. Law, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether summary determination should be granted in favor of the Division of Taxation because there are no facts in dispute and, as a matter of law, the facts mandate a determination in favor of the Division.

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. Based upon information obtained from the Internal Revenue Service (IRS), the Division of Taxation (Division) began an audit of petitioner, Mark S. Ohberg, by sending him a letter dated December 8, 2016, which sought to determine if a personal income tax return for the year 2013 had been filed. The Division had no record of a return filed by petitioner for 2013.

2. Petitioner did not respond to the Division's December 8, 2016 correspondence.

3. The Division issued a statement of proposed audit changes to petitioner for the year 2013, dated October 3, 2017, based upon the information it had obtained from the IRS. The Division determined that petitioner had federal adjusted gross income of $99,610.00 in 2013. After an adjustment for the standard deduction this resulted in New York State tax of $5,632.00. After providing for New York State tax withheld, this resulted in tax due of $4,003.00 plus interest and penalties pursuant to Tax Law § 685 (a) (1); (b) (1) and (2).

4. By letter dated October 31, 2017, petitioner responded to the statement of proposed audit changes expressing his disagreement with the proposed deficiency. Petitioner did not deny receiving income but claimed he did not have "taxable income" and further claimed that he was

not subject to income tax under the Internal Revenue Code (IRC) and the United States Constitution.

5. The Division issued a notice of deficiency to petitioner, dated January 26, 2018, that asserted a deficiency of New York State personal income tax for 2013 in the sum of $4,003.00, penalty of $1,939.01, and interest of $1,313.32, for a balance due of $7,255.33.

6. On May 2, 2018, the Division of Tax Appeals received a timely petition from petitioner contesting the notice of deficiency. The petition claims that the notice of deficiency is a “fictitious obligation.” The petition generally asserts that petitioner is not a taxpayer and is not subject to taxation on his earnings.

7. In its answer filed on August 1, 2018, the Division denied all paragraphs in the petition and further requested that the Division of Tax Appeals impose the maximum penalty for filing a frivolous petition pursuant to section 2018 of the Tax Law and 20 NYCRR 3000.21.

8. Included with the Division’s motion papers is the affidavit of Darrell Wright, a Tax Technician 3 in Audit Group I in the Division’s income franchise desk audit bureau. Mr. Wright’s responsibilities include reviewing New York State personal income tax returns, supervising an audit group consisting of four teams and the review of files and documentation in the course of personal income tax audits, overseeing and providing assistance to the team members during the audit or protest resolution process, planning and managing the work of both audit teams, and audit selection.

9. As part of his duties, Mr. Wright reviewed the audit file and filing history of petitioner. Mr. Wright notes that petitioner had three sources of income during 2013, to wit: (i) wage income; (ii) unemployment income; and (iii) pension income. Upon review, Mr. Wright

determined that petitioner's wage income was incorrectly reported to the Division in 2013, which resulted in petitioner's wage income being counted twice by the Division when it issued the statement of proposed audit changes and subsequent notice of deficiency to petitioner. Mr. Wright therefore acknowledges that the tax as asserted in the notice of deficiency should be adjusted. This adjustment results in a revised federal adjusted gross income of $58,257.00, and revised tax due of $1,306.00, plus interest and penalties pursuant to Tax Law § 685 (a) (l), (b) (l), and (b) (2).

10. In its motion papers, the Division argues that there is no genuine issue of fact herein because petitioner has acknowledged that he received compensation but does not believe it was income within the meaning of the IRC. The Division contends that petitioner's arguments are meritless and urges that the Division of Tax Appeals sustain the notice of deficiency, as adjusted, and impose the maximum penalty for filing a frivolous petition pursuant to Tax Law § 2018 and 20 NYCRR 3000.21.

11. In opposition, petitioner takes no issue with the adjusted amount asserted due, but contends that he is not liable for tax because he has no taxable income as his wages are not taxable. Petitioner contends that it is unconstitutional to tax him on gain derived from labor and that no statute in the IRC makes him liable for tax.

CONCLUSIONS OF LAW

A. 20 NYCRR 3000.9 (b) (1) states the following:

> "[a]fter issue has been joined . . . , any party may move for summary determination. Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. The

> motion 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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party."

B. 20 NYCRR 3000.9 (C) 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, Inc. v Tri-Pac Export Corp.***, 22 NY2d 439, 441 [1968]; ***Museums at Stony Brook v Vil. of Patchogue Fire Dept.***, 146 AD2d 572 [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, 382 [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***).

C. The Division has established that there is no triable issue of fact. The Division submitted the affidavit of Darrell Wright setting forth the facts as found in the findings of fact that establish that income had been received. The information from the IRS permitted calculation of New York State personal income tax due. Petitioner does not dispute the amounts,

only his liability for personal income tax thereon. However, petitioner submitted no credible evidence which raised a material and triable issue of fact. For the reasons that follow, petitioner's arguments that he is not subject to income tax are rejected.

D. Tax Law § 601 imposes an income tax on the New York taxable income of its residents. Tax Law § 611 (a) defines New York taxable income as follows:

> "The New York taxable income of a resident individual shall be his New York adjusted gross income less his New York deduction and New York exemptions, as determined under this part."

Tax Law § 612 (a) defines New York adjusted gross income as follows:

> "The 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, with the modifications specified in this section."

In turn, 26 USC § 62 (a) defines federal adjusted gross income in the case of an individual, as "gross income minus the following deductions: . . . ." Gross income includes compensation for services, annuities and pensions (***see*** 26 USC § 61). Petitioner takes issue with whether the amounts received were taxable income and whether imposing tax is constitutionally permissible. On this score, petitioner has presented a "hodgepodge of unsupported assertions, irrelevant platitudes and legalistic gibberish" ***(Crain v Commr.***, 737 F2d 1417, 1418 [5th Cir 1984]). These arguments, and similar ones, have been universally rejected by the courts (***id.; see e.g. Brushaber v Union Pac. R.R.,*** 240 US 1, 19-20 [1916]; ***Ficalora v Commr.***, 751 F2d 85 [2nd Cir 1984]; ***Schiff v Commr.***, TC Memo 1992-183; ***Woods v Commr.***, 91 TC 88 [1988]).

E. 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 Division (***see*** 20 NYCRR 3000.21). The maximum penalty allowable under this provision is $500.00 (***see*** Tax Law § 2018). It has been held that 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). 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.

F. Based upon the foregoing, the Division of Taxation's motion for summary determination is granted; the petition of Mark S. Ohberg is denied; the notice of deficiency dated January 26, 2018, as modified by concession of the Division of Taxation, is sustained; and additional penalty of $500.00 is imposed pursuant to Tax Law § 2018.

DATED: Albany, New York
October 3, 2019

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE