

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
BERNARD THOMAS :
for Redetermination of a Deficiency or for Refund of New : DECISION
York State Personal Income Tax under Article 22 of the : DTA NO. 817135
Tax Law and New York City Personal Income Tax under :
the Administrative Code of the City of New York for the :
Year 1995. :

Petitioner Bernard Thomas, 708 Linwood Street, Brooklyn, New York 11208, filed an exception to the determination of the Administrative Law Judge issued on July 6, 2000.

Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was not requested.

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

ISSUES

I. Whether wages received by petitioner were properly held subject to New York State and New York City personal income tax.

II. Whether petitioner should be subject to a penalty for maintaining a position in this proceeding which is frivolous.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

During 1995, petitioner, Bernard Thomas, received wages from the New York City Transit Authority of \$42,848.15. His wage and tax statement (Form W-2) for 1995 shows that New York State income tax of \$2,697.66 and New York City income tax of \$1,514.86 were withheld from his wages.

On his New York State and City resident income tax return for 1995, petitioner claimed an overpayment of income tax of \$4,212.52, representing the total of the New York State income tax withheld of \$2,697.66 plus the New York City income tax withheld of \$1,514.86. On his 1995 tax return, petitioner sought a refund of \$4,212.52.

The Division of Taxation (“Division”) issued a Statement of Proposed Audit Changes dated August 15, 1996 against petitioner asserting additional New York City personal income tax due for 1995 of \$26.00 while crediting petitioner for the overpayment of New York State personal income tax in the amount of \$2.00. This minor adjustment was based on the following computation:

Wages	\$42,848.00
Taxable interest income	539.00
414 H	2,390.00
IRC H	<u>127.00</u>
Total New York income	\$45,904.00
New York standard deduction	<u>(6,600.00)</u>
New York taxable income	\$39,304.00

	<u>NY State</u>	<u>NY City</u>	<u>Net</u>
Tax on New York taxable income	\$2,696.00	\$1,541.00	
New York tax withheld	(2,698.00)	(1,515.00)	
Personal income tax due	\$ (2.00)	\$ 26.00	\$24.00

This Statement of Proposed Audit Changes also rejected petitioner's claim for refund of tax withheld with the following explanation:

The arguments that you are not subject to Income Tax have been addressed in the Federal Tax Court and Federal Appeals Court time and time again. The results have been that such arguments were considered frivolous and without merit. New York State also regards these arguments in the same manner.

The Division then issued a Notice of Deficiency dated April 7, 1997 against petitioner asserting additional tax due of \$24.00 plus interest.

Petitioner responded by filing a request for a conciliation conference before the Bureau of Conciliation and Mediation Services and a conciliation conference was conducted at petitioner's request. By a conciliation order dated February 26, 1999, petitioner's request was denied by the conciliation conferee. Petitioner's response was to file a petition dated May 16, 1999 in which he asserted the proposition that the 16th Amendment to the United States Constitution does not treat income as "the subject of the tax [but] is the basis for determining the amount of the tax." He also referenced certain rules for construing statutes dealing with taxation as set forth in McKinney's Consolidated Laws of NY, Book 1, Statutes.

By its answer dated July 29, 1999, the Division sought the imposition of the maximum penalty for filing a frivolous petition pursuant to 20 NYCRR 3000.21.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that the New York adjusted gross income of a resident individual is his Federal adjusted gross income for the taxable year (Tax Law § 612[a]¹). Federal adjusted gross income includes wages and salaries. Thus, the Administrative Law Judge soundly rejected as “gibberish” petitioner’s argument that pursuant to the Sixteenth Amendment to the Constitution of the United States his income may not be the subject of the income tax but rather may only be the subject of an excise tax. The Administrative Law Judge noted case law which held that the Sixteenth Amendment empowered Congress to levy income tax against any source of income, without any need to classify it as an excise tax applicable to specific categories of activities.

The Administrative Law Judge also rejected petitioner’s argument that his petition should be granted because the Division of Taxation refunded income taxes that had been withheld from his wages for 1998. The Administrative Law Judge found that a refund of taxes in 1998 was irrelevant to the matter at hand.

The Administrative Law Judge cited the regulations of the Tax Appeals Tribunal (20 NYCRR 3000.21[a]) which treat a taxpayer’s position that wages are not taxable as income as “frivolous” for purposes of Tax Law § 2018. That section allows the imposition of a penalty of not more than \$500.00 if a petitioner’s position in a proceeding is frivolous. Consequently, the Administrative Law Judge imposed a penalty of \$500.00 against petitioner on the grounds that petitioner’s position in this proceeding is frivolous.

¹ The New York City personal income tax imposed by Chapter 46, Title T of the Administrative Code is, by its own terms, tied into and contains essentially the same provisions as Article 22 of the Tax Law.

ARGUMENTS ON EXCEPTION

On exception, petitioner asserts that he is not liable for tax on his income. He argues that the taxation of income of private citizens by Congress is based upon power acquired by Congress through the Sixteenth Amendment to the United States Constitution. This amendment, petitioner maintains, was never properly ratified by the States as required by Article V of the Constitution. Petitioner asserts that the income tax depends for its validity on the Sixteenth Amendment because Congress is authorized to impose only two types of taxes: direct and indirect. Indirect taxes are subject to the regulation of uniformity while direct taxes are subject to the rule of apportionment. Petitioner maintains that an income tax is unconstitutional because it is a direct tax which has not been imposed via apportionment. Petitioner argues that since the Sixteenth Amendment is invalid, Congress had no power to enact legislation through which the incomes of private citizens could be taxed. Petitioner argues that a taxpayer's income may not be the subject of the income tax but rather may only be the subject of an excise tax. Petitioner believes that his position has merit and is not frivolous. As a result, he maintains that no penalty should be imposed for the filing of a frivolous petition.

The Division, in opposition, notes numerous Federal decisions upholding the validity of the Sixteenth Amendment to the Constitution and rejecting the specific arguments presented by petitioner herein. As a result, the Division argues that petitioner's position is frivolous and the determination of the Administrative Law Judge should be affirmed.

OPINION

The Tax Appeals Tribunal held in *Matter of Atlantic & Hudson Ltd. Partnership* (Tax Appeals Tribunal, January 30, 1992) that:

Although a determination of tax must have a rational basis in order to be sustained upon review (*see, Matter of Grecian Sq. v. New York State Tax Commn.*, 119 AD2d 948, 501 NYS2d 219), the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment (*see, Matter of Tavalacci v. State Tax Commn.*, 77 AD2d 759, 431 NYS2d 174; *Matter of Leogrande*, Tax Appeals Tribunal, July 18, 1991, *confirmed Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768, 589 NYS2d 383, *lv denied* 81 NY2d 704, 595 NYS2d 398).

Once a Notice of Deficiency was issued to petitioner, he bore the burden of proof to demonstrate that the basis for the assessment was unreasonable or that the amount of tax assessed was incorrect (*Matter of Micheli Contr. Corp. v. New York State Tax Commn.*, 109 AD2d 957, 486 NYS2d 448, *see also*, Tax Law § 689[e]; 20 NYCRR 3000.15[d][5]). However, petitioner introduced no evidence which would support either the unreasonableness of the assessment or the incorrectness of the tax assessed. Therefore, petitioner is deemed to have submitted to the presumption of correctness.

We note that the position petitioner has taken in this proceeding concerning the validity of the the Sixteenth Amendment to the Constitution of the United States has been soundly rejected by the Federal courts. Simply put, there is absolutely no basis for petitioner's assertion that a taxpayer's income is not subject to an income tax but can only be the subject of an excise tax (*see, United States v Thomas*, 788 F2d 1250, 86-1 USTC ¶ 9354, *cert denied* 479 US 853, 93 L Ed 2d 121). We agree with the Administrative Law Judge's conclusion that petitioner's position is without merit.

Tax Law § 2018 provides that:

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, then the tax appeals tribunal may impose a penalty against such petitioner of not more than five hundred dollars. The tax appeals tribunal shall promulgate rules and regulations as to what constitutes a frivolous petition.

The Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.21) provide, in part, that a frivolous position includes: "(a) that wages are not taxable as income." We find, as did the Administrative Law Judge, that petitioner's position in this proceeding that he is not liable for personal income tax on his wage income is patently frivolous and we affirm the imposition of the \$500.00 penalty against petitioner.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Bernard Thomas is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Bernard Thomas is denied;
4. The Notice of Deficiency dated April 7, 1997 is sustained; and

5. The penalty of \$500.00 imposed against petitioner for filing a frivolous petition is sustained.

DATED: Troy, New York
April 19, 2001

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner