STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JAMES E. ELLETT	:	DECISION DTA NO. 817420
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1995.	:	

Petitioner James E. Ellett, c/o 5171 Rt. 32, Catskill, New York 12414, filed an exception to the determination of the Administrative Law Judge issued on April 5, 2001. 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. Petitioner's request for oral argument was denied.

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

ISSUE

Whether petitioner's wage income was subject to New York State personal income tax.

FINDINGS OF FACT

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

Petitioner, James E. Ellett, filed a timely New York State resident income tax return (form IT-200) for the year 1995, with a filing status of married filing separate return. The return, as filed, reported taxable interest income in the sum of $193.29, but no wage income. Petitioner claimed the standard deduction of $5,400.00, which resulted in no taxable income and no tax due. Petitioner requested a refund of $3,253.09 which had been withheld from his wages. The wage and tax statement attached to the return showed that during 1995 petitioner was employed by Central Hudson Gas & Electric Corp. and earned wages of $52,441.10 from which New York State income tax was withheld in the sum of $3,253.09.

On June 6, 1996, the Division of Taxation ("Division") issued a notice and demand for the payment of tax due to petitioner for the year 1995, showing Federal adjusted gross income of $52,634.00 ($52,441.00 plus $193.00), and New York taxable income of $47,234.00 after allowance for the standard deduction. The amount of New York State income tax computed was $3,296.00, less the tax withheld of $3,253.09, leaving tax due of $42.91.

Petitioner signed and returned to the Division a Department of Taxation and Finance form dated July 9, 1996 wherein he indicated his disagreement with the amount of tax due and attached a written explanation of his reasoning. In his explanation petitioner distinguished between "gains and profits" which he stated were subject to income tax, and "compensation for labor" which, he contended, is not subject to income tax.

By notice of assessment resolution dated December 30, 1996, the Division responded to petitioner's correspondence, explaining that a person who receives wages for services rendered is required to pay income taxes on those wages. In his undated letter in response to the Division's

notice of assessment resolution, petitioner denied that he had a liability for income tax and penalties, arguing that one does not derive income by rendering services and charging for them.

On November 17, 1997 the Division sent to petitioner a collection notice and a consolidated statement of tax liabilities informing him that, in addition to the $42.91 tax item, he also owed penalty in the sum of $3.78 plus interest in the amount of $5.94 for a total of $52.63.

On January 9, 1998 petitioner mailed to the Division an unsigned form IT-201-X, Amended Resident Income Tax Return, wherein he changed the amount of the Federal adjusted gross income reported on line 1 by increasing said amount by $52,441.10 (the amount of his Central Hudson Gas & Electric Corp. wages) to $ 52,634.39. Petitioner then substituted an itemized deduction in the amount of $53,741.10 in place of the $5,400.00 standard deduction which served to reduce his New York State taxable income to zero. He then claimed a refund in the sum of $3,253.09, the amount of his New York State taxes withheld.

With his 1995 amended New York State return, petitioner included a copy of his 1995 form 1040-X, Amended U. S. Individual Income Tax Return, dated June 19, 1997, wherein he made the same adjustment to his Federal adjusted gross income as he made on his amended New York State return, and increased his itemized deduction from zero to $52,441.10, the amount of his wages. Petitioner then requested a refund of his Federal income tax withheld in the sum of $10,429.61. On his form 1040, schedule A, petitioner reported as a miscellaneous deduction the sum of $52,441.10, describing it as a "non-taxable compensation as per U.S. Constitution." Submitted with the form 1040-X was an Internal Revenue Service ("IRS") statement of account dated October 20, 1997 acknowledging a refund due to petitioner in the sum of $3,782.80.

On March 27, 1998 the Division issued to petitioner a notice of disallowance of refund, disallowing in full petitioner's claimed New York State income tax refund in the amount of $3,253.09. This document noted that the IRS statement of account does not reflect any changes in income or deductions, only that credit was given for Federal tax withheld.

Petitioner filed a petition for a refund on November 15, 1999 wherein he stated:

> The error made by the Commissioner of Taxation and Finance or, his representative in the Taxation department, was the disallowance of compensation for labor as an excemption [sic] from income in determining taxable income.
>
> I intend to prove that compensation for labor is, under the United States Constitution and Internal Revenue Code, not taxable income because it is an excemption [sic]. Also that New York State Tax Code follows the Internal Revenue Code, and therefore compensation for labor is an included excemption [sic] in the New York State Tax Code.

In its answer to the petition and at the hearing the Division, *inter alia*, requested that the Division of Tax Appeals impose the maximum penalty for filing a frivolous petition pursuant to Tax Law § 2018 and 20 NYCRR 3000.21.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In her determination, the Administrative Law Judge noted the starting point for calculating New York taxable income is Federal adjusted gross income. Pursuant to Internal Revenue Code ("IRC") § 61(a), "Compensation for services, including fees, commissions, fringe benefits, and similar items" is among the items included as income for Federal tax purposes. The Administrative Law Judge also noted that in ***Cardinalli v. Commissioner*** (T.C. Memo 1979-462, 39 TCM 514, ***affd*** 649 F2d 866), the United States Tax Court held "that the levying of an income tax on the salary received by petitioner for personal services is not unconstitutional for any

reason and does not violate due process of law" (***Cardinalli v. Commissioner***, ***supra***, 39 TCM, at 515). The Administrative Law Judge found that petitioner bears the burden of proof to show that the income received from his employer is not subject to income tax and petitioner failed to meet his burden.

The Administrative Law Judge rejected petitioner's argument that he is not a United States citizen and is, therefore, not subject to Federal or New York State income tax. The Administrative Law Judge found that petitioner was subject to New York State personal income tax on his wages.

The Administrative Law Judge found that the Division duly applied to the Division of Tax Appeals for a determination that petitioner has asserted a frivolous position in this proceeding and requested that, pursuant to section 3000.21 of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000 et seq.), a frivolous petition penalty be imposed. The Administrative Law Judge determined that a penalty of $250.00 was appropriate in that petitioner's position that wages are not taxable as income is specifically noted as being frivolous in section 3000.21 of our rules.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues, as he did before the Administrative Law Judge, that although wages are taxable, not all forms of income are taxable. Petitioner claims that he is not an employee; therefore, he does not "incur" (sic) wages. He receives compensation for his labor, which is property and, as such, an item of income. However, petitioner asserts that this income is not taxable by the Federal or state governments. Petitioner maintains that income may only be taxed by a direct tax, which must be apportioned among the states under the Federal

Constitution. The income tax imposed by the Sixteenth Amendment to the Constitution, however, is an indirect tax.

Petitioner also claims that he is not a United States citizen and is not subject to its jurisdiction. Therefore, petitioner states that he is not obligated to pay federal income tax. Since New York State income tax is calculated in reliance on federal income tax law, petitioner has no liability likewise for New York State personal income tax. Petitioner made no argument against imposition of the penalty imposed for maintaining a frivolous position.

The Division, in opposition, argues that the Administrative Law Judge correctly rejected petitioner's claim that he was not subject to tax on the income from his employer and properly imposed a penalty against petitioner for filing a frivolous petition. The Division maintains that petitioner's reliance on IRC § 3401(c) as support for his argument that he is not an employee is misplaced. The Division also asserts that petitioner is incorrect that he is constitutionally exempt from taxation on the compensation he received for his labor. Rather, the Division claims that the Sixteenth Amendment to the Constitution eliminated the prohibition against direct taxation without apportionment among the states. Finally, the Division argues that not only should the penalty imposed by the Administrative Law Judge for filing a frivolous petition be affirmed but it should be increased to the maximum amount allowed of $500.00.

OPINION

In general, a petitioner bears the burden of proof in matters asserted before the Division of Tax Appeals (***see***, 20 NYCRR 3000.15[d][5]) except as may otherwise be provided by law. Further, pursuant to Tax Law § 689(e), petitioner bears the burden of proof to demonstrate his entitlement to the claimed refund. Petitioner introduced no evidence which would support his

claim for refund. Rather than present evidence or arguments concerning the denial of refund at issue in this proceeding, petitioner presented arguments concerning his United States citizenship and the constitutionality of the Federal income taxing scheme. Petitioner has claimed that wages earned while a resident of New York State are not subject to taxation by New York State. Petitioner's citizenship status is not relevant to determining the taxability of these wages. Further, the jurisdiction of the Tax Appeals Tribunal (hereinafter the "Tribunal") is limited and does not encompass challenges to the constitutionality of statutes, which are presumed to be constitutional (***Matter of Geneva Pennysaver***, Tax Appeals Tribunal, September 11, 1989; ***Matter of Fourth Day Enters.***, Tax Appeals Tribunal, October 27, 1988).

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* (emphasis added).

In light of this statutory directive, the Rules of Practice and Procedure of the Tribunal (20 NYCRR 3000.21) provide that:

> If a petitioner commences or maintains a proceeding primarily for delay, or if the petitioner's position in a proceeding is frivolous, the *tribunal may, on its own motion or on the motion of the office of counsel*, impose a penalty against such petitioner of not more than $500 . . . . The following are examples of frivolous petitions:
>
> (a) that wages are not taxable as income; . . . (emphasis added).

Although Tax Law § 2018 and our Rules provide for the imposition of penalty by the "tribunal," Tax Law § 2010(1) provides that: "[t]he tax appeals tribunal shall appoint administrative law

judges who shall be authorized to conduct any hearing or motion procedure authorized to be held within the division of tax appeals . . . ." Similarly, section 3000.13(e) of our Rules provides that a small claims hearing "shall be conducted by a presiding officer with the same authorization provided an administrative law judge conducting a hearing . . . ." Thus, Administrative Law Judges and Presiding Officers, as well as the Tribunal, are authorized to impose a penalty against a petitioner for maintaining a frivolous position in an appropriate case.

In ***Matter of Lang*** (Tax Appeals Tribunal, July 8, 1993), the Tribunal denied a request by the Division for imposition of a penalty for maintaining a frivolous position in that proceeding. We found that the Division had failed to make a motion for penalty as required and had only raised the issue in its letter brief in opposition to the petitioner's exception. We held that the Division was required to follow the procedure set forth in the Rules of Practice and Procedure of the Tribunal relating to motion practice. We note that former section 3000.5 (Motion Practice) of our Rules required that all motions were to be made on notice to the adverse party and generally within 90 days after the service of a pleading. Further, all motions were required to be decided on the moving papers and answers submitted thereto. Section 3000.5 was amended in 1995 and, as presently constituted, contains no time limit for filing motions generally and provides for oral motions at hearing as well as for written motions.

In the instant matter, the Administrative Law Judge found that in "its answer to the petition and at the hearing the Division, *inter alia*, requested that the Division of Tax Appeals impose the maximum penalty for filing a frivolous petition pursuant to Tax Law § 2018 and 20 NYCRR 3000.21" (Determination, finding of fact "10"). The Administrative Law Judge concluded that the Division had duly applied to the Division of Tax Appeals for a determination that petitioner

has asserted a frivolous position in this proceeding and requested that, pursuant to section 3000.21 of our Rules (20 NYCRR 3000 *et seq.*), a frivolous petition penalty be imposed. In view of the amendments to our Rules concerning the procedure for bringing a motion generally, we agree with the Administrative Law Judge that the manner of application by the Division for imposition of a penalty in the present case was appropriate.

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. However, in light of our recent decision in ***Matter of Thomas*** (Tax Appeals Tribunal, April 19, 2001) and in view of our authority pursuant to section 3000.21 to impose a penalty on our own motion, we increase the amount of the penalty imposed by the Administrative Law Judge to $500.00. In ***Thomas***, the taxpayer maintained that he was not liable for tax on his income because 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, Thomas maintained, was never properly ratified by the States as required by Article V of the Constitution. Therefore, Congress had no power to enact legislation through which the incomes of private citizens could be taxed. This position is essentially similar to that maintained by petitioner herein and, we believe, calls for a similar penalty.

With this modification, we find that the Administrative Law Judge completely and adequately addressed the issues presented to her and correctly applied the Tax Law and relevant case law to the facts of this case. Petitioner has offered no evidence below, and no argument on exception, that would provide a basis for us to modify the determination in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of James E. Ellett is denied;

2. The determination of the Administrative Law Judge is modified to the extent that the frivolous petition penalty is increased to $500.00, but in all other respects is sustained;

3. The petition of James E. Ellett is denied; and

4. The notice of disallowance issued by the Division of Taxation disallowing petitioner's claim for refund is sustained, the notice and demand is sustained and the penalty for filing a frivolous petition, as modified by paragraph "2" above, is sustained.

DATED: Troy, New York
October 18, 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