

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>DENNIS J. KLEIN</b>	:	DECISION
	:	DTA NO. 819070
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 2000.	:	

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Petitioner Dennis J. Klein, 12332 Marcel Lake Estates, Dingmans Ferry, Pennsylvania 18328, filed an exception to the determination of the Administrative Law Judge issued on January 23, 2003. 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, at petitioner's request, was denied.

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

### ***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 the regulation at 20 NYCRR 3000.21.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for finding of fact “6” which has been modified. The Administrative Law Judge’s findings of fact and the modified finding of fact are set forth below

As a result of an audit of petitioner’s 2000 New York personal income tax return, the Division of Taxation (“Division”) issued a statement of proposed audit changes, dated June 21, 2001, to petitioner, Dennis R. Klein, which indicated that his New York State personal income tax return for the year 2000 had been recomputed, resulting in additional tax in the sum of \$180.00, penalty of \$134.49 and interest of \$1.59 for a total amount due of \$316.08.

On or about September 4, 2001, the Division issued a Notice of Deficiency to petitioner which set forth additional tax due of \$180.00, penalty of \$136.01 and interest of \$4.63 for a total amount due of \$320.24.

On or about September 10, 2001, petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services. A conference was held on May 22, 2002, after which an order was issued on June 28, 2002 sustaining the Notice of Deficiency in its entirety. Petitioner filed a petition with the Division of Tax Appeals on July 10, 2002, disputing the conciliation order on the basis of his belief that he has no obligation or duty to pay income taxes and that no authority exists which requires him to do so.

Petitioner filed a form IT-203, Nonresident and Part-Year Resident Income Tax Return, for the year 2000, which reported zero dollars (\$0.00) for all items of income and requested a refund of all withholding tax paid in the sum of \$2,493.04. Attached to the return was a Federal form 4852, Substitute for Form W-2, which set forth all taxes withheld from petitioner’s wages

for the year 2000, but failed to disclose petitioner's wage income. In addition, attached to petitioner's IT-203 was a four-page "tax statement" which set forth petitioner's reasons why he believed he was not liable for New York personal income tax. Although largely unintelligible, this statement contends that the filing of a tax return is voluntary, that it was filed under protest to avoid prosecution, and that no section of the Internal Revenue Code creates a tax liability based on his wage income for 2000, because the definition of income is derived from the Corporate Excise Tax of 1909, which the statement avers does not include wages.

Petitioner submitted a letter addressed to him from the Internal Revenue Service, dated August 1, 2002, which advised him that he had an overpayment in the sum of \$6,057.58 for the year 2000. A copy of a check to petitioner from the Treasury Department in the amount of \$6,605.70, dated August 9, 2002, was also submitted. The difference in these amounts was \$548.12 in interest credited to petitioner by the Internal Revenue Service. Neither the letter nor the check explains the reason the refund was issued.

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

The Division utilized the Federal adjusted gross income of \$51,307.00 as reported on petitioner's Federal return to calculate additional New York personal income tax due on his New York income. This additional tax is set forth both in the Statement of Proposed Audit Changes and the Notice of Deficiency. This amount has not been disputed by petitioner.<sup>1</sup>

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<sup>1</sup>We modified finding of fact "6" to more accurately reflect the record.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In his determination, the Administrative Law Judge noted the procedure for a party to follow in order to obtain summary determination and the standard for granting or denying summary determination. The Administrative Law Judge also noted that in order to defeat a motion for summary determination, the opponent must produce evidence in admissible form sufficient to raise an issue of fact requiring a trial.

The Administrative Law Judge found that the Division had presented sufficient evidence to establish that there was no triable issue of fact while petitioner submitted no credible evidence which raised a material and triable issue of fact. The Administrative Law Judge determined that petitioner was subject to Federal income tax on his 2000 wage income and paid Federal tax thereon. Therefore, petitioner was subject to New York State personal income tax on the same wage income. The Administrative Law Judge concluded that summary determination may be entered in favor of the Division as a matter of law.

The Administrative Law Judge rejected petitioner's constitutional challenges to the taxation of his wage income because the Division of Tax Appeals lacks jurisdiction over constitutional challenges to statutes presumed to be constitutional on their face. The Administrative Law Judge found that the remainder of petitioner's arguments were without merit and frivolous, relying on *Schiff v. Commissioner* (T.C. Memo 1992-183, 63 TCM 2572). In *Schiff*, the Tax Court considered allegations similar to those raised by petitioner herein and found them to be "stale and long discredited tax protester arguments" which were "totally unfounded and without merit." As a result, the Administrative Law Judge imposed a penalty of \$500.00 pursuant to Tax Law § 2018.

***ARGUMENTS ON EXCEPTION***

Petitioner argues on exception, as he did before the Administrative Law Judge, that his wage income is not subject to taxation by New York State because the definition of income is derived from the Corporate Excise Tax of 1909, which does not include wage income. Petitioner maintains that the Internal Revenue Service and the income tax itself are illegal and unconstitutional. Petitioner reasons that the money withheld by his employer was taken without legal authority and he demands its return. Further, petitioner asserts that the Administrative Law Judge had no authority to find that his petition was frivolous or to fine him \$500.00.

In opposition, the Division argues that petitioner's arguments are meritless rhetoric and that the determination of the Administrative Law Judge should be affirmed.

***OPINION***

We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and correctly applied the relevant 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. Thus, we affirm the determination of the Administrative Law Judge that petitioner's claims are without merit and frivolous and we also affirm the imposition of the \$500.00 penalty.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Dennis J. Klein is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Dennis J. Klein is denied;
4. The Notice of Deficiency dated September 4, 2001 is sustained; and

5. Penalty in the amount of \$500.00 imposed for filing a frivolous petition is sustained.

DATED: Troy, New York  
August 28, 2003

/s/Donald C. DeWitt

Donald C. DeWitt  
President

/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner