STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KEVIN A. GOOD	:	DETERMINATION DTA NOS. 817662 AND
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1997 and 1998, and the New York City Administrative Code for the Year 1997.	:	818396
	:	

Petitioner, Kevin A. Good, 139-50 35th Avenue, Flushing, New York 11354, filed petitions for redetermination of deficiencies or for refunds of personal income tax under Article 22 of the Tax Law for the years 1997 and 1998, and under the New York City Administrative Code for the year 1997.

On July 16, 2002, the Division of Taxation, by its representative, Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel) filed a motion for an order pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b) granting summary determination to the Division of Taxation on the ground that there exists no material issue of fact and imposing a penalty for the filing of a frivolous petition pursuant to Tax Law § 2018. On September 16, 2002, petitioner, appearing *pro se*, filed a motion for an order denying the Division of Taxation's motion for summary determination and seeking the granting of petitioner's cross-motion for summary determination pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b), on the ground that the State of New York has shown no proof of tax liability on the part of petitioner, and that petitioner is instead entitled to a refund for each of the tax years and reasonable costs. Petitioner's response on September 16, 2002 commenced the 90-day period for the issuance of this determination. Based

upon the Division of Taxation's motion papers, the affidavits and documents submitted therewith, petitioner's cross-motion papers and response to the Division's motion and all pleadings and documents submitted in connection with this matter, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation has shown entitlement to a determination granting summary determination in its favor on the ground that petitioner failed to establish that genuine issues of fact exist.

II. Whether petitioner has shown entitlement to a determination granting summary determination in his favor on the basis that the Division of Taxation has failed to prove the existence of a tax liability on the part of petitioner.

III. Whether, under the facts and circumstances herein, a penalty should be imposed upon petitioner, pursuant to Tax Law § 2018, for the filing of a frivolous petition.

FINDINGS OF FACT

DTA No. 817662

1. The Division of Taxation ("Division") issued a Statement of Proposed Audit Adjustment to Kevin A. Good ("petitioner"), dated June 1, 1998, which asserted New York State personal income tax due in the amount of $1,436.31, plus penalty and interest, for a total amount due of $1,596.36, and New York City income tax due in the amount of $1,035.09, plus penalty and interest, for a total amount due of $1,150.43, for tax year 1997. The Statement of Proposed Audit Adjustment was issued by the Division after petitioner filed a timely 1997 New York State personal income tax return with wage and tax statements and a Form 1099-R attached, but did not report any wages on Line 1 of the return, and did not report the pension distribution on Line

10 of the return. Petitioner requested a refund of all New York State and New York City income taxes withheld.

2. Petitioner protested the Statement of Audit Changes on or about June 7, 1998, claiming that the statement was mistaken when it stated that petitioner was subject to tax. Petitioner claims his pay comes from an excluded source and is therefore not subject to income tax.

3. The Division responded to petitioner's letter on or about August 10, 1998, stating that the assessment was considered correct as issued. The Division indicated that when like arguments were addressed in Federal Tax Court and Federal appeals courts, the results have been a determination that such protests were considered frivolous and without merit, which is how the Division views his position.

4. On or about September 4, 1998, the Division corresponded with petitioner as a follow up to a telephone conversation. Such correspondence indicated that an individual who receives wages for services rendered is the person required to pay taxes on those wages.

5. The Division issued a Notice of Deficiency dated October 5, 1998, asserting New York State and New York City personal income taxes due totaling $2,471.40, plus penalties and interest, for a total of $2,838.26. The penalties imposed were pursuant to Tax Law § 685(b)(1), (2), and (c).

6. On or about October 5, 1998, petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services on which he asserted that he had no liability for the tax in question. On December 1, 1999, a conciliation conference was held and BCMS issued a Conciliation Order (CMS No. 171102), dated February 18, 2000, which denied petitioner's request and sustained the statutory notice.

7. On May 1, 2000, the Division of Tax Appeals received a timely petition from petitioner contesting the Notice of Deficiency which asserted that the deficiency is incorrect as it illegally and erroneously misapplies tax liability to petitioner in violation of Federal and State tax laws.

8. In its answer filed on June 29, 2000, the Division denied all paragraphs in the petition insofar as such paragraphs did not state allegations of fact or error; except that the Division affirmatively stated that petitioner had a conciliation conference before BCMS. Further, the Division 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.

9. Attached to the Division's Notice of Motion for an order granting it summary determination is an affidavit from Kevin R. Law, the Division's representative. Attached to this affidavit, as Exhibit "1" is an affidavit from Leonard Slaveikis, Tax Technician I, in the Audit Division, Personal Income Tax Unit. Mr. Slaveikis's responsibilities include the review and processing of New York State personal income tax returns, conducting audits and resolving protests, including communicating with taxpayers and preparing administrative records, reports and forms. Attached to Mr. Slaveikis's affidavit are the following exhibits: Statement of Proposed Audit Changes; a copy of petitioner's 1997 Form It-201; items of correspondence between the Division and petitioner; the Notice of Deficiency dated October 5, 1998; the Request for Conciliation Conference; and the Conciliation Order.

10. Petitioner moved for an order denying the Division's motion for summary determination and filed a cross-motion, dated September 16, 2002, containing an affidavit sworn to and signed by petitioner, requesting a refund of $2,838.26 plus interest and reasonable costs.

11. All of the documents issued by the Division were sent to petitioner at 139-50 35th Avenue, Flushing, New York 11354, the same address used in the filing of his 1997 New York

State personal income tax return, as well as on his W-2 for that tax year and the petition filed before the Division of Tax Appeals, which was signed by petitioner.

DTA No. 818396

12. The Division issued a Statement of Proposed Audit Adjustment to petitioner, dated July 22, 1999, which asserted New York State personal income tax due in the amount of $3,083.00, plus penalty and interest, for a total amount due of $3,474.79, and New York City income tax due in the amount of $2,409.00, plus penalty and interest, for a total amount due of $2,697.14, for tax year 1998. The Statement of Proposed Audit Adjustment was issued by the Division after petitioner filed a timely 1998 New York State personal income tax return with wage and tax statements attached, but did not report any wages on Line 1 of the return. Petitioner requested a refund of all New York State and New York City income taxes withheld.

13. Petitioner protested the Statement of Audit Changes, claiming that the statement was mistaken when it stated that petitioner was subject to tax. Petitioner claims his pay comes from an excluded source and is therefore not subject to income tax.

14. The Division responded to petitioner's letter with a response to taxpayer inquiry dated September 14, 1999, stating that the assessment was considered correct as issued. The Division indicated that when like arguments were addressed in Federal Tax Court and Federal appeals courts, the results have been a determination that such protests were considered frivolous and without merit, which is how the Division also views his position.

15. The Division issued a Notice of Deficiency dated October 14, 1999, asserting New York State and New York City personal income taxes due totaling $5,492.00, plus penalties and interest, for a total of $6,308.23. The penalties imposed were pursuant to Tax Law § 685(b)(1), (2), and (c).

16. On or about November 5, 1999, petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services on which he asserted that he had not been assessed, that the amount of the deficiency was in error, and that he had no liability for the tax in question. On November 2, 2000, a conciliation conference was held and BCMS issued a Conciliation Order (CMS No. 178482), dated December 15, 2000, which denied petitioner's request and sustained the statutory notice.

17. On March 9, 2001, the Division of Tax Appeals received a timely petition from petitioner contesting the Notice of Deficiency which asserted that the deficiency is incorrect as it illegally and erroneously misapplies tax liability to petitioner in violation of Federal and State tax laws.

18. In its answer filed on May 17, 2001, the Division denied several paragraphs outright, denied other paragraphs in the petition insofar as such paragraphs did not state allegations of fact or error; except that in addressing petitioner's assertion of a lack of due process, the Division affirmatively stated that petitioner had a conciliation conference before BCMS. Further, the Division 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.

19. Attached to the Division's Notice of Motion for an order granting it summary determination is an affidavit from Kevin R. Law, the Division's representative. Attached to this affidavit, as Exhibit "1" is an affidavit from Sean O'Connor, Tax Technician I, in the Audit Division, Personal Income Tax Unit. Mr. O'Connnor's responsibilities include the review and processing of New York State personal income tax returns, conducting audits and resolving protests, including communicating with taxpayers and preparing administrative records, reports and forms. Attached to Mr. O'Connor's affidavit are the following exhibits: Statement of

Proposed Audit Changes; a copy of petitioner's 1998 Form It-201; items of correspondence between the Division and petitioner; the Notice of Deficiency dated October 14, 1999; the Request for Conciliation Conference; and the Conciliation Order.

20. Petitioner moved for an order denying the Division's motion for summary determination and filed a cross-motion, dated September 16, 2002, containing an affidavit sworn to and signed by petitioner, requesting a refund of $718.36 plus interest and reasonable costs.

21. All of the documents issued by the Division were sent to petitioner at 139-50 35th Avenue, Flushing, New York 11354, the same address used in the filing of his 1998 New York State personal income tax return, as well as on his W-2 for that tax year and the petition filed with the Division of Tax Appeals, which was signed by petitioner.

SUMMARY OF THE PARTIES' POSITIONS

22. Petitioner's cross-motions set forth the following challenges:

a. Petitioner challenges the personal jurisdiction and authority of both the New York State Department of Taxation and Finance and the Division of Tax Appeals over him, since petitioner argues that he is not a taxpayer.

b. Petitioner maintains there has never been an assessment made against him for the year or years in question, and since no assessment has been made, there is no tax owed and the statute of limitations has since expired.

c. Petitioner maintains there has been no underlying liability established.

d. Petitioner argues that there is no provision in the Internal Revenue Code of 1986 or in Article 22 of the New York State Tax Law that allows his return to be changed.

e. Petitioner argues there has been a denial of his due process rights because he has not been given a fair opportunity to challenge the accuracy and legal validity of his tax obligation, and provided a clear and certain remedy.

f. Petitioner argues that the phrase "gross income" does not include wages or salary.

g. Petitioner claims that the W-2s used by the Division to calculate the alleged tax owed have not been shown to be true and correct information, and the W-2s were submitted for the purpose of proving that the taxes withheld, upon which his claims for refund are being made, were the amounts shown as withheld taxes on the W-2s.

h. Petitioner further contends that any citation to Treasury Regulations should not have any bearing on petitioner's alleged tax liabilities, since such Regulations have no force and effect of law.

i. Petitioner argues he was compelled to prepare his New York State returns by reference to his Federal tax returns. Since he claims to have no Federal income tax liability, he claims he has no State tax liability.

j. Petitioner asserts that the Division's motion for summary determination must be denied because there are genuine issues of material fact and the Division has failed to refute petitioner's credible evidence. The issues of fact set forth by petitioner are that the Division has not established petitioner's liability, and secondly, that there is no lawful procedurally correct assessment attributed to petitioner. Thus, petitioner believes his cross-motions requesting refunds should be granted.

23. The Division maintains that petitioner's arguments are clearly frivolous inasmuch as petitioner is a resident of New York with taxable income reported on petitioner's W-2s and 1099-R, that went unreported for tax years 1997 and 1998. The Division asserts it is entitled to

the granting of its motion for summary determination, since no genuine issues of fact exist and petitioner's position is largely based upon tax protestor rhetoric. The Division requests the imposition of the maximum penalty pursuant to Tax Law § 2018 and 20 NYCRR 3000.21 for the filing of a frivolous petition.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

> 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 (20 NYCRR 3000.9[b][1]; ***see also***, Tax Law § 2006[6]).

In reviewing a motion for summary determination, an administrative law judge is constrained by the following guidelines:

> 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. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion (20 NYCRR 3000.9[b][1]; ***see also***, Tax Law § 2006 [6]).

A party moving for summary determination must show that there is no material issue of fact (20 NYCRR 3000.9[b][1]). Such a showing can be made by "tendering sufficient evidence to eliminate any material issue of fact from the case" (***Winegrad v. New York University Medical Center***, 64 NY2d 851, 487 NYS2d 316, 317, ***citing Zuckerman v. City of New York***, 49 NY2d 557, 562, 427 NYS2d 595). If material facts are in dispute, or if contrary inferences may

reasonably be drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (***see, Gerard v. Inglese***, 11 AD2d 381, 206 NYS2d 879, 881).

B. Petitioner first challenges whether the Division of Taxation has personal jurisdiction and authority over him. Due process of law requires that in order to obtain in personam jurisdiction, the one subjected to such jurisdiction be present or have minimum contacts with the forum, such that legal action does not offend traditional notions of fair play and substantial justice (***International Shoe Co. v. State of Washington,*** 326 US 310, 90 L Ed 95). Although clearly a defendant who is a New York domiciliary is amenable to the jurisdiction of the New York courts, no matter where served with process, the Court of Appeals has also indicated that a person's residence, perhaps without domicile, would also constitute the basis for personal jurisdiction (***Dobkin v. Chapman***, 21 NY2d 490, 289 NYS2d 161).

The evidence in this record indicates that, for the years at issue, petitioner was a New York resident, as is indicated by his filing of Form IT-201, a New York State Resident Income Tax Return, where it states "Queens" as his county of residence, and an address of 139-50 35th Ave., Flushing, New York. Petitioner received all the Division's correspondence and notices at the same address, and petitioner set forth the same address on his petition filed with the Division of Tax Appeals. Likewise, the W-2s for both tax years and the 1099-R for 1997 were issued to petitioner at his Flushing, New York address. Given the fact that petitioner had residency in the State and the aforementioned contacts with New York, the Division clearly had personal jurisdiction over petitioner.

C. Next addressing petitioner's challenge to the personal jurisdiction of the Division of Tax Appeals over petitioner, due process again looks to the contacts the person has with the challenged agency. A proceeding is commenced in the Division of Tax Appeals by the filing of

a petition, in this case, filed by petitioner himself and signed by him. As such, the Division of Tax Appeals acquired personal jurisdiction over petitioner by his own submission (***see, Matter of Levin***, Tax Appeals Tribunal, April 16, 1998).

D. Petitioner next argues that there has never been an assessment or underlying liability established against him. This argument is completely without merit. The issuance of statutory notices by the Division is governed by the provisions of Tax Law § 681 which provides that when there is a determination that there is a deficiency of income tax, a notice of deficiency shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of the State. After 90 days from the mailing of a notice of deficiency, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice . . . (Tax Law § 681[b]). Pursuant to the provisions of Tax Law § 689, the burden of proof is on petitioner. Petitioner has neither alleged nor proven that the Division failed to comply with the provisions of Tax Law § 681 when it issued the notice to him, or that the tax was assessed in an untimely manner (Tax Law § 683). Accordingly, the assessment and the amount of the liability have been established.

E. Petitioner maintains there is no statute, Federal or State, which allows his return to be changed. The Division has not changed petitioner's return as filed, but instead has issued an assessment as a result of its determination of a deficiency of income tax.

F. Petitioner claims his due process rights have been violated because he has not been provided a fair opportunity to challenge the accuracy and legal validity of his tax obligation. Clearly petitioner's challenge before this forum provides that opportunity and thus, this argument is rejected.

G. Petitioner asserts that "gross income" does not include wages or salary; that the Division has not shown petitioner's W-2s to be correct information; that Treasury Regulations have no force and effect; and since he has no Federal income tax liability, he can have no State liability.

Tax Law § 611(a) defines the New York taxable income of a resident individual 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) provides 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.

Federal gross income means all income from whatever source derived (***see***, IRC § 61[a]) unless specifically excluded.

Petitioner has claimed that wages earned while a resident of New York State are not subject to taxation by New York State. Petitioner maintains that the Division was under a duty to provide him with a valid Federal assessment before it could assert State income tax liability. No such duty exists under the Tax Law and, accordingly, this contention is without merit. So, too, is his assertion that there can be no New York State income tax due because no valid Federal assessment exists. Petitioner has the burden of proving that no valid Federal assessment exists and he has wholly failed to sustain this burden (Tax Law § 689[e]).

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. In this case, 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 the constitutionality of the Federal income taxing scheme. The jurisdiction of the Division of Tax Appeals 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).

All of petitioner's arguments fail to have merit. Similar, and other, arguments were addressed by the Tax Court in ***Schiff v. Commissioner*** (63 TCM 2572), wherein the Court stated:

> According to petitioner, no deficiency can exist, and, therefore, no valid notice of deficiency can be issued without and until a valid assessment has been made. Petitioner's basic premise is that no valid assessment can be made without a voluntarily filed tax return, which petitioner strenuously asserts is something that he has not done. Petitioner also argues that respondent cannot determine a tax on his income for which Congress has not made him liable; that he had no income within the meaning of the Internal Revenue Code; that respondent seeks to impose a tax not authorized by the taxing clauses of the United States Constitution; that this Court has no jurisdiction over petitioner. . .
>
> * * *
>
> These are stale and long discredited tax protester arguments that have been proffered to and rejected by this and other courts countless times [citations omitted]. . . . We will not countenance those who would continue to waste judicial resources by engaging in a detailed scholarly refutation of petitioner's specious claims [citation omitted]. Suffice it to say that they are totally unfounded and without merit.

H. Petitioner maintains the Division's motion for summary determination must be denied because there genuine issues of material fact and the Division has failed to refute petitioner's credible evidence. The issues of fact that petitioner claims exist are that the Division has not

established petitioner's liability and there is no procedurally correct assessment attributed to petitioner. As previously noted, a motion for summary determination shall be granted if it has been established sufficiently that there are no material and triable issues of fact. Based upon Conclusions of Law "B" through "G", it is hereby determined that the facts contained in this record mandate a determination in favor of the Division. Other than mere unsupported allegations, petitioner has set forth no material and triable facts which would require a hearing in this matter. Accordingly, the Division's motion for summary determination is hereby granted.

I. Petitioner has wholly failed to sustain his burden of proof that he is entitled to refunds for the tax years in issue, and therefore, petitioner's cross motion for summary determination is denied (Tax Law § 689[e]).

J. Tax Law § 2018 authorizes the imposition of a penalty for the filing of a frivolous petition and authorizes the Tax Appeals Tribunal to promulgate regulations as to what constitutes a frivolous position. NYCRR 3000.21, promulgated in accordance with this authority, provides as follows:

> 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. This penalty shall be in addition to any other penalty provided by law, and shall be collected and distributed in the same manner as the tax to which the penalty relates. The following are examples of frivolous positions:
>
> (a) that wages are not taxable as income. . .

In its answer, the Division requested that the Division of Tax Appeals impose the maximum penalty for filing a frivolous penalty, i.e., $500.00. As noted in Conclusion of Law "G," the Tax Court, in a case involving a petitioner who made similar claims as petitioner herein, categorized such claims as "specious" and a "waste of judicial resources" (***Schiff v.***

Commissioner, ***supra***). Likewise, the Tax Appeals Tribunal has found the same argument "patently frivolous" (***Matter of Thomas***, Tax Appeals Tribunal, April 19, 2001). Accordingly, it is hereby determined that petitioner's position herein is patently frivolous and a penalty in the amount of $500.00 is imposed pursuant to Tax Law § 2018 and 20 NYCRR 3000.21.

K. The motion of the Division of Taxation for summary determination is granted; the cross motion of petitioner for summary determination is denied; the petition of Kevin Good is denied; the notices of deficiency issued to petitioner dated October 5, 1998 and October 14, 1999, are sustained; and, in addition to other penalties imposed by the notices of deficiency, a penalty pursuant to Tax Law § 2018 and 20 NYCRR 3000.21 in the amount of $500.00 is hereby imposed.

DATED: Troy, New York
December 12, 2002

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE