STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DONALD MALONEY	:	DETERMINATION DTA NO. 818744
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1996.	:	

Petitioner, Donald Maloney, 6 Woodlawn Avenue, Port Chester, New York 10573, 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 1996.

On February 12, 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 February 13, 2002, petitioner, appearing *pro se*, filed a simultaneous motion for an order pursuant to 20 NYCRR 3000.9(b) granting summary determination to petitioner on the ground that the State of New York has shown no proof of tax liability on the part of petitioner. On March 12, 2002, petitioner filed a response to the Division of Taxation's motion, which date 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 motion papers and response to the Division's

motion and all pleadings and documents submitted in connection with this matter, Brian L. Friedman, 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 report to the Division of Taxation, changes to his Federal taxable income resulting from the sale of stocks and bonds which income, accordingly, was held to be subject to New York State personal income tax.

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

1. On June 23, 2000, the Division of Taxation ("Division") issued a Statement of Proposed Audit Adjustment to Donald Maloney ("petitioner") which asserted New York State personal income tax in the amount of $14,074.51, plus penalty and interest, for a total amount due of $23,826.34 for the year 1996. The Statement of Proposed Audit Adjustment was issued by the Division after it had been notified that petitioner had been audited by the Internal Revenue Service ("IRS") and that the IRS had asserted an additional liability for Federal income tax against petitioner.

Previously, on February 9, 1999, the IRS had issued a form 4549-CG (Income Tax Examination Changes) which asserted additional Federal income tax liability in the amount of $61,132.00, plus penalty and interest, for a total amount due of $92,801.00 for the year 1996.

This tax liability arose from the sale of stocks and bonds in the amount of $204,937.00. The Income Tax Examination Changes also stated that the IRS had no record of petitioner's having filed a tax return for 1996 and advised petitioner that his taxable income was based upon the income received from stock and bond sales. Petitioner was instructed to provide the IRS with the purchase price of the securities sold and, after such information was received, the amount of tax asserted would be reevaluated. It is unclear as to whether petitioner provided this information to the IRS; the record contains no evidence that this information was ever provided to the Division.

2. A search of the Division's records revealed that petitioner had not reported these Federal changes to the Division nor had petitioner filed a New York State personal income tax return for 1996. On August 17, 2000, the Division issued a Notice of Deficiency to petitioner in the amount of $14,074.51, plus penalty and interest, for a total amount due of $24,149.40 for the year 1996. On November 7, 2000, petitioner returned the Notice of Deficiency to the Division and wrote thereon, among other things, "unsigned, uncertified ------uttered" and "violates FRCP 9(b)."

3. On November 7, 2000, petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services on which he asserted, among other things, that no legal notice of deficiency had been sent but rather an uttered, unsigned, unverified letter and that there was no Federal tax liability, therefore, no New York liability. On June 1, 2001, BCMS issued a Conciliation Order (CMS No. 183519) which denied petitioner's request and sustained the statutory notice.

4. On August 27, 2001, the Division of Tax Appeals received a petition from this petitioner which asserted that: (a) the Division relied upon false information from the IRS; (b)

the Division relied upon unsigned information (form 4549-CG); (c) the Division relied upon a non-tax form (form 4549-CG) since only a form 1040 or form 1040-A is a form upon which an assessment can be made; (d) the Division repeatedly failed to provide petitioner with a valid Federal assessment; (e) since the New York State income tax is "piggybacked" on Federal assessments and no valid Federal assessment exists, there can be no New York State tax due; and (f) petitioner's due process had been repeatedly denied.

5. In its answer filed on November 15, 2001, the Division denied each and every allegation of fact or error contained in the petition and, in addition, 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.

6. In his reply to the Division's answer which was received by the Division of Tax Appeals on December 5, 2001, petitioner alleged that the Division failed to correctly answer his petition since, pursuant to 20 NYCRR 3000.4, it did not specifically deny each of the seven numbered items in the petition as required by this regulation which, petitioner asserts, is a further attempt to deny him his due process.

7. 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 Earl Tennyson, Tax Technician IV, in the Audit Division, Personal Income Tax Unit. Mr. Tennyson's responsibilities include the review and processing of audits and the supervision of tax technicians who review and process personal income tax returns. Along with the tax technicians, he also verifies if taxpayers file reports of Federal changes with the Division. Attached to Mr. Tennyson's affidavit are the following exhibits: Statement of Proposed Audit Changes; IRS form 4549-CG, Income Tax Examination

Changes; Notice of Deficiency with handwritten notations made by petitioner; Request for Conciliation Conference with a letter from petitioner to BCMS, dated November 7, 2000, attached thereto; a letter from petitioner to BCMS, dated January 17, 2001 which discusses the content of a letter to petitioner from the Audit Division, Income Tax Desk Audit dated December 29, 2000 (a copy of this letter and petitioner's response thereto were also attached); and the Conciliation Order.

8. Petitioner's motion, dated February 13, 2001, was signed by petitioner but contained no affidavit. The motion asserted as follows:

> Whereas: NYS Has shown no proof of liability, no document signed by a competent authority who can testify as per the Sixth Amendment to the Constitution of the United States that petitioner had such liability. That NYS cannot provide any such witness (es) to so swear under oath that petitioner having [sic]/had a liability. That NYS has no signed document by petitioner on ANY document [sic] that such liability was self-admitted/self-assessed. That NYS has had well over one year to provide petitioner with proof of any federal liability as frequently requested in previous communications including in the petition itself.
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> That NYS has submitted as its sole attempt to collect a 'tax' from petitioner an *unsigned* Form 4549-CG which is NOT admissible in any court of competent jurisdiction as it is unsigned and as such cannot be admitted as evidence. That NYS is in violation of Goldberg v. Kelly, 397 US 254 among others.

9. Apparently, after having received the Division's Notice of Motion dated February 12, 2002, petitioner sent to the Chief Administrative Law Judge, Division of Tax Appeals, three documents. The first is what he refers to as an affidavit of material fact (it is not an affidavit but is a document containing a series of unsworn allegations which is signed, at the end, by petitioner). The second is a copy of petitioner's motion for summary determination previously mailed to the Division of Tax Appeals on February 13, 2002 along with citations to the New York State Constitution, the United States Code and various court cases. Finally, petitioner

included what he refers to as a rebuttal to the affidavits of the Division's representative, Kevin R. Law, Esq. and of Earl Tennyson, Tax Technician IV. Among other things, petitioner contends that the Division is attempting to levy an excise tax on income from sales of intangible personal property which he contends violates Article 16, § 3 of the Constitution of the State of New York.

10. All of the documents issued by the Division were sent to petitioner at 6 Woodland Avenue, Port Chester, New York 10573. All of the documents sent by petitioner to the Division and to the Division of Tax Appeals contained the following return address: Donald Maloney, 6 Woodland Avenue, Port Chester, New York 10573. In paragraph "2" of the document referred to by petitioner as his affidavit of material fact, petitioner states that he is "a New York Citizen."

CONCLUSIONS OF LAW

A. In his reply to the Division's answer, petitioner alleges that the Division failed to properly answer his petition since, pursuant to 20 NYCRR 3000.4, it did not specifically deny each of the seven items in his petition. As a result, petitioner contends that he was denied his due process.

Paragraph "1" of the Division's answer states that it: "DENIES each and every allegation of fact and/or error contained in the petition." 20 NYCRR 3000.4(b)(2) provides, in pertinent part, as follows:

> The answer as drawn shall contain numbered paragraphs corresponding to the petition and shall fully and completely advise the petitioner and the Division of Tax Appeals of the defense. It shall contain:
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> (i) a specific admission or denial of each statement contained in the petition; however, if the Division of Taxation is without knowledge or information sufficient to form a belief as to the truth of a statement, then the answer shall so state, and such statements shall have the effect of a denial;

20 NYCRR 3000.4(a) sets forth the purpose of pleadings and states: "The purpose of the pleadings is to give the parties and the Division of Tax Appeals fair notice of the matters in

controversy and the basis for the parties' respective positions. All pleadings shall be liberally construed so as to do substantial justice."

While it is true that the Division's answer does not contain numbered paragraphs which correspond to the petition, there can be no doubt from a reading thereof, that the Division is denying "each and every allegation of fact and/or error contained in the petition." Accordingly, petitioner's contention that he was denied due process by virtue of the Division's failure to deny the contents of each paragraph in his petition, on a paragraph by paragraph basis, is rejected.

B. 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]).

In the present matter, the Division filed its motion for summary determination on February 12, 2002. Apparently, prior to receiving copies of the Division's motion papers, petitioner, on February 13, 2002, also filed a motion for summary determination. While

petitioner's motion was not supported by an affidavit (***see,*** Finding of Fact "8"), for purposes of this proceeding, it shall be deemed to be a cross-motion for summary determination.

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).

C. 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.

D. The evidence in this record indicates that, for the year at issue, petitioner was a New York resident.

E. 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.

F. Federal gross income means all income from whatever source derived (***see***, IRC § 61[a]) unless specifically excluded. Pursuant to IRC § 61(a) and Treas Reg § 1.61-6(a), gains derived from dealings in property (including stocks and bonds) are generally included in gross income, unless a specific exclusion applies.

G. Tax Law § 659 provides that if the amount of a taxpayer's Federal taxable income, is changed or corrected by the United States Internal Revenue Service, the taxpayer shall report such change or correction within 90 days after the final determination of such change or correction and shall concede the accuracy of such determination or state wherein it is erroneous. Clearly, in the present matter, petitioner has not conceded the accuracy of the Federal change; therefore, it must be determined whether this petitioner has stated where the Federal change was erroneous.

H. Nowhere in any of the documents submitted by petitioner does he deny receiving the income from the sale of the stocks and bonds during the 1996 tax year nor does he claim an exemption from the imposition of tax on the proceeds from the sale thereof.

I. Upon receipt of the Notice of Deficiency which was issued by the Division to petitioner on August 17, 2000, petitioner claimed that the notice was "unsigned, uncertified ----- uttered" which violated FRCP 9(b).[1] First, it must be noted that the issuance of statutory notices by the Division is governed by the provisions of the Tax Law, to wit, 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. 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. Moreover, there is no requirement in the Tax Law that such notice of deficiency must be signed or certified by any personnel of the Division.

[1] Rule 9(b) of the Federal Rules of Civil Procedure ("FRCP") requires that in all averments or assertions of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. As such, it has absolutely no relevance to this proceeding.

J. While petitioner alleges in his petition that the Division has relied upon false information from the IRS, as previously noted, he has offered no proof to substantiate this allegation. Petitioner claims that: (a) the Division relied upon false information; (b) relied upon unsigned information (form 4549-CG); (c) relied upon a non-tax form (form 4549-CG) since only a form 1040 or form 1040-A is a form upon which an assessment can be made; (d) repeatedly failed to provide him with a valid Federal assessment; (e) since the New York State income tax is "piggybacked" on Federal income tax and because no valid Federal assessment exists, there can be no New York State tax due; and (f) his due process has been repeatedly denied.

Before examining each of petitioner's contentions, it must be noted that pursuant to the provisions of Tax Law § 689, the burden of proof is on petitioner. Mere allegations are not sufficient to sustain his burden.

K. The Division received form 4549-CG (Income Tax Examination Changes) from the IRS which asserted a Federal income tax liability against petitioner in the amount of $61,132.00, plus penalty and interest, for a total amount due of $92,801.00 for the year 1996. The form indicated that this liability resulted from unreported income received from the sale of stocks and bonds. As previously noted, Tax Law § 659 requires that a taxpayer report a change made to his Federal taxable income by the IRS to the Division within 90 days after such change and, in addition, requires that the taxpayer concede the accuracy of the change made by the IRS or state where it was erroneous. Petitioner failed to report the Federal change and, other than to allege that the form provided to the Division was not a proper tax form, he failed to state where the Federal change was erroneous. Since the additional income was subject to Federal personal income tax, it was rational for the Division to rely on the Federal audit changes as a basis for

issuing the Notice of Deficiency at issue in this matter (***see***, ***Matter of Karayannides***, Tax Appeals Tribunal, March 13, 1997). Therefore, petitioner's statement that the Division relied upon false information from the IRS is unsupported by the record.

The language of Tax Law § 659 requires a taxpayer to report a change or correction to the Division of Taxation when the amount of such taxpayer's Federal taxable income is changed or corrected by the IRS. The statute does not require the IRS to change or correct the Federal taxable income by the issuance of any specific document (nor does the statute require that the document be signed by the IRS) before the provisions of Tax Law § 659 become applicable. The Income Tax Examination Changes were issued by the IRS to petitioner (his name and address are set forth thereon) and, apparently, a copy was sent to the Division as well. Therefore, petitioner's allegations that the Division relied upon unsigned information is totally irrelevant in this matter.

By asserting that only a form 1040 or form 1040-A is a form upon which an assessment can be made, it appears that petitioner is taking the position that since he never filed a Federal return (a form 1040 or form 1040-A) for the year at issue, the Division is precluded from assessing New York State income tax for that year. This argument is totally without merit. As the Division has correctly pointed out, a similar argument was 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.
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> 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.

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, pursuant to Tax Law § 689(e), that no valid Federal assessment exists and he has wholly failed to sustain this burden.

Finally, petitioner alleges that his due process has been repeatedly denied. Absent specificity as to due process violations by the Division's application of Tax Law § 659, that allegation is rejected since, at the administrative level, statutes are presumed to be constitutional (***see***, ***Matter of Wizard Corp.***, Tax Appeals Tribunal, January 12, 1989; ***Matter of Fourth Day Enterprises,*** Tax Appeals Tribunal, October 27, 1988).

L. As to petitioner's contention, in his "rebuttal" to the affidavits of the Division's representative, Kevin R. Law, Esq., and of Earl Tennyson, Tax Technician, that the Division is attempting to levy an excise tax on income from sales of intangible personal property (which he maintains is a violation of Article 16, § 3 of the Constitution of the State of New York[2]), this contention is also without merit. An "excise tax" is defined as "[a] tax on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege. . . . In current usage the term has been extended to include various license fees and practically every internal revenue tax

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[2] Article 16, § 3 of the Constitution of the State of New York provides that: "Intangible personal property shall not be taxed ad valorem nor shall any excise tax be levied solely because of the ownership or possession thereof, except that the income therefrom may be taken into consideration in computing any excise tax measured by income generally."

except the income tax." (Black's Law Dictionary, 506 [5th ed 1979].) Clearly, both the Federal and New York State tax deficiencies which are asserted by the IRS and the Division to be due from petitioner are income taxes, not excise taxes. Therefore, petitioner's contention that the Division violated the State Constitution is rejected.

M. As indicated in Finding of Fact "K", petitioner has the burden of proving, pursuant to Tax Law § 689(e), that no valid Federal assessment exists and that, accordingly, he was under no duty under Tax Law § 659 to report a Federal change to the Division. He has wholly failed to sustain his burden of proof and, therefore, petitioner's cross motion for summary determination is denied.

N. As previously noted, a motion for summary determination shall be granted if it has been established sufficiently that there is no material and triable issue of fact. Based upon Conclusions of Law "C" through "L", 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.

O. 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.

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 "K", the Tax Court, in a case involving a petitioner who made similar claims as the petitioner herein, categorized such claims as "specious" and a "waste of judicial resources" (***Schiff v. Commissioner***, ***supra***). Accordingly, it is hereby determined that petitioner's position is patently frivolous and a penalty in the amount of $500.00 is imposed pursuant to Tax Law § 2018.

P. 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 Donald Maloney is denied; the Notice of Deficiency issued to petitioner on August 17, 2000 is sustained; and, in addition to other penalties imposed by the Notice of Deficiency, a penalty pursuant to Tax Law § 2018 in the amount of $500.00 is hereby imposed.

DATED: Troy, New York
June 6, 2002

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE