STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DAVID GILMARTIN	:	DETERMINATION DTA NO. 819271
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1995 and 1996.	:	

Petitioner, David Gilmartin, 174 West 89th Street, New York, New York 10024, filed a petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1995 and 1996.

On May 13, 2003, 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. The Division of Taxation submitted the affidavit of Kevin R. Law, Esq., dated May 13, 2003, and the affidavit of Sean O'Connor, dated May 12, 2003, with annexed exhibits, in support of its motion. Petitioner filed a timely response to the motion on June 12, 2003. Based upon the motion papers and all the pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

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 20 NYCRR 3000.21.

FINDINGS OF FACT

1. Based upon information obtained from the Internal Revenue Service, the Division of Taxation began an audit of petitioner by sending him letters in February and June of 2001, which sought to determine if personal income tax returns for the years 1995 and 1996 had been filed. The Division had no record of any returns filed by petitioner for those years.

2. Petitioner responded by letter, dated August 8, 2001, in which he acknowledged receiving the Division's letters and conceded that he was compensated for work he performed, but denied receiving "income" because he contended that such term is not defined in either the Laws of New York or the Internal Revenue Code.

3. The Division issued two proposed statements of audit changes to petitioner for the years 1995 and 1996, dated October 15, 2001, based upon the information it had obtained from the Internal Revenue Service with respect to petitioner's income for those years. Primary among the information received from the Internal Revenue Service was a statement of income tax changes for the years 1995 and 1996, indicating petitioner's income as determined by the Service.

4. For the year 1995, the Division determined that petitioner had $80,675.00 in nonemployee compensation and $117.00 in interest income for a total income of $80,792.00.

After an adjustment for self-employment tax and the standard deduction this resulted in additional New York State tax due of $4,973.00, New York City tax of $2,867.00 and a total of $7,840.00.

For the year 1996, the Division determined that petitioner had $99,147.00 in nonemployee compensation and $93.00 in interest income for a total income of $99,240.00. After an adjustment for the self-employment tax and the standard deduction this income resulted in additional New York State income tax due of $5,911.00 and New York City tax of $3,681.00 for a total of $9,592.00.

In addition, the Division imposed interest and penalties pursuant to Tax Law § 685(a)(1); (b)(1) and (2).

5. The Division of Taxation issued two notices of deficiency to petitioner, dated December 31, 2001. The first asserted a deficiency of New York State and New York City personal income tax for 1995 in the sum of $7,839.36, penalty of $4,396.60, and interest of $4,089.70, for a balance due of $16,325.66. The second deficiency asserted additional tax due in the sum of $9,592.26, penalty of $4,832.66, and interest of $3,910.13, for a balance due of $18,335.05.

SUMMARY OF THE PARTIES' POSITIONS

6. Petitioner contends that the Commissioner of Taxation and his representatives are without authority to act since they have failed to take their oaths of office. He also maintains that the Division has not produced any evidence of income and, therefore, there can be no tax liability.

7. Petitioner argues further that there is no valid assessment of tax against him and that he has never received a notice and demand for payment of tax, which he asserts is required by the Internal Revenue Code.

8. Finally, petitioner contends that the tax asserted by the Division was based on information received from the Internal Revenue Service which he maintains was either erroneous or incorrectly interpreted by the Division.

9. The Division argues that there is no genuine issue of fact herein because petitioner has acknowledged that he received compensation but does not believe it was income within the meaning of the Internal Revenue Code. The Division contends that this argument is meritless and urges that the Division of Tax Appeals sustain the notices and impose the maximum penalty for filing a frivolous petition pursuant to Tax Law § 2018 and 20 NYCRR 3000.21.

CONCLUSIONS OF LAW

A. To obtain summary determination, the moving party must submit an affidavit, made by a person having knowledge of the facts, a copy of the pleadings and other available proof. The documents must 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]). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (***Glick & Dolleck, Inc. v. Tri-Pac Export Corp.***, 22 NY2d 439, 293 NYS2d 93, 94; ***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572, 536 NYS2d 177, 179). If material facts are in dispute, or if contrary inferences may be drawn reasonably 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).

"To obtain summary determination it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd. [b]), and he must do so by tender of evidentiary proof in admissible form" (***Friends of Animals v. Associated Fur Mfrs***., 46 NY2d 1065, 416 NYS2d 790, 791-792; ***see also***, 20 NYCRR 3000.9[b]). Generally, with exceptions not relevant here, to defeat a motion for summary judgment, the opponent must produce evidence in admissible form sufficient to raise an issue of fact requiring a trial (CPLR 3212[b]). Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (***Matter of Alvord & Swift v. Muller Constr. Co.,*** 46 NY2d 276, 413 NYS2d 309).

B. The Division has presented sufficient evidence to establish that there is no triable issue of fact. The Division's submission of petitioner's August 8, 2001 letter in which he admitted receiving compensation and the affidavit of Sean O'Connor (setting forth the facts as found in the Findings of Fact, ***supra***) establish that income had been received. The Statement of Income Tax Changes from the Internal Revenue Service permitted calculation of New York State and New York City personal income taxes due. Petitioner does not dispute the nonemployee compensation received, only his liability for personal income tax thereon. However, petitioner submitted no credible evidence which raised a material and triable issue of fact.

C. The question remaining is whether the Division has demonstrated that summary determination should be granted in its favor as a matter of law. Pursuant to Tax Law § 612(a), "[t]he 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." IRC § 62(a) defines federal adjusted gross income in the case of an individual, as "gross income minus [specified] deductions." "Compensation for services, including fees, commissions, fringe benefits, and

similar items" are among the items included as income for Federal tax purposes (IRC § 61[a][1]). The record indicates that petitioner had income and was subject to Federal income tax in 1995 and 1996. Therefore, petitioner is subject to New York State personal income tax on the same amount. (***See,*** Tax Law § 611[a]; § 612[a].)

D. In addition, once the Division issued a notice of deficiency, a presumption of correctness attached to it and it was incumbent upon petitioner to demonstrate that the notice was erroneous. As succinctly stated in ***Matter of Tavolacci v. State Tax Commn.*** (77 AD2d 759, 431 NYS2d 174):

> [Tax Law § 689(e)] makes it then incumbent upon the taxpayer to proceed to demonstrate the incorrectness of the deficiency, for the burden of proof is upon the taxpayer . . . . The petitioner, through his complete failure to present any proof as to the incorrectness of the statement of deficiency, has surrendered to the statutory presumption of correctness and the determination must be sustained (***Matter of Tavolacci v. State Tax Commn.***, ***supra***, 431 NYS2d, at 175; ***see also, Kourakos v. Tully***, 92 AD2d 1051, 461 NYS2d 540, ***appeal dismissed*** 59 NY2d 967, 466 NYS2d 1030, ***cert denied*** 464 US 1070, 79 L Ed 2d 215).

Petitioner has offered no proof to overcome the presumption of correctness, further supporting the propriety of granting the instant motion.

E. Petitioner's remaining arguments are without merit. The same arguments were addressed and rejected 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; and that the Tax Court is not a court anyway.
>
> These are stale and long discredited tax protester arguments that have been proffered to and rejected by this and other courts countless times. . . . 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. (***Id.*** at 2573-2574;emphasis added.)

F. Tax Law § 2018 authorizes the Tax Appeals Tribunal to impose a penalty "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." A penalty may be imposed on the Tribunal's own motion or on motion of the Office of Counsel of the Division of Taxation (20 NYCRR 3000.21). The maximum penalty allowable under this provision is $500.00 (Tax Law § 2018). The facts and circumstances of this matter justify the imposition of the frivolous petition penalty because of their similarity to those in ***Schiff (supra)*** where the court labeled the arguments "specious" and "a waste of judicial resources."

It has been held that where a position has been soundly rejected by the Federal courts and absolutely no basis for the assertion can be found, the frivolous position penalty is appropriate. (***Matter of Thomas,*** Tax Appeals Tribunal, April 19, 2001.) Therefore, it is determined that petitioner's position is frivolous and the penalty provided for in Tax Law § 2018 is imposed in the sum of $500.00.

G. The Division's motion for summary determination is granted; the petition of David Gilmartin is denied; the two notices of deficiency dated December 31, 2001 are sustained; and additional penalty of $500.00 is imposed pursuant to Tax Law § 2018.

DATED: Troy, New York
August 7, 2003

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE