STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARK J. CHMIEL	:	DETERMINATION DTA NO. 819405
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1997.	:	

Petitioner, Mark J. Chmiel, 6302 Old Beattie Road, Lockport, New York 14094, 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 1997.

The Division of Taxation, by its representative, Christopher C. O'Brien, Esq. (Justine Clarke Caplan, Esq., of counsel), brought a motion, dated April 22, 2005, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and 3000.9(b) on the ground that there exists no material issue of fact. The Division of Taxation submitted the Affirmation of Justine Clarke Caplan, Esq., dated April 22, 2005, with attached exhibits [1] and the Supplemental Affirmation of Attorney Caplan, dated May 12, 2005. Petitioner filed an unsworn response to the motion, dated May 24, 2005. Based upon the motion papers and all the pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

[1] Exhibits were labeled "A" through "K", but there was no Exhibit "C".

ISSUE

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.

FINDINGS OF FACT

1. In a previous matter in the Division of Tax Appeals, petitioner filed a petition, dated October 31, 2000, protesting a notice and demand for payment of tax due, assessment number L-018421683-7, dated August 11, 2000, which matter was finally decided by an administrative law judge who issued a determination on April 25, 2002 sustaining the notice.

2. On October 17, 2002, following receipt of a Consolidated Statement of Tax Liabilities, dated October 3, 2002, and issued after the final determination against him, petitioner filed the petition in this matter protesting the notice listed in the consolidated statement, assessment number L-018421683-7, the same notice protested in the prior matter, with updated penalty and interest. The petition stated that petitioner disagreed with the determination of the administrative law judge; that the Division of Taxation pursued the tax due from petitioner even though it knew he had filed for bankruptcy; and requested a new hearing before an impartial hearing officer outside the Division of Tax Appeals.

3. The Division of Taxation filed an answer to the petition, dated February 2, 2005, in which it alleged the Division of Tax Appeals did not have jurisdiction to hear this matter since it had already been finally determined by an administrative law judge and that any claim that the prior determination was void because petitioner was in bankruptcy was waived because the Division of Taxation was not listed as a creditor in petitioner's bankruptcy proceeding. In

addition, the Division of Taxation requested that a penalty be imposed on petitioner for filing a frivolous petition pursuant to Tax Law § 2018 and 20 NYCRR 3000.21.

4. In February 2003, four months after filing the instant petition, petitioner paid tax and interest of $55.61 under an amnesty program sponsored by the Division of Taxation.

5. Petitioner filed a voluntary petition in the U.S. Bankruptcy Court, Western District of New York, petition number 1-99-13321-MJK, pursuant to Chapter 13 of the U.S. Bankruptcy Code, on June 10, 1999. The case was closed on December 1, 2004. The New York State Department of Taxation and Finance was never listed as a creditor in any of the Bankruptcy Court documents. Further, petitioner did not disclose his pending bankruptcy case at the hearing in the first matter.

6. The notice and demand at issue in the prior matter and again herein was issued because of a mistake by petitioner in preparing his 1997 New York Resident Income Tax Return. On the return, petitioner mistakenly claimed two personal exemptions when he was entitled to only one pursuant to Tax Law § 616(a) and 20 NYCRR 116.1(a). This was evident because petitioner's Federal return for 1997 indicated one dependent child and three exemptions, two of which were petitioner and his spouse. The Federal return was filed jointly as well. Since New York does not allow exemptions for the filer and the filer's spouse, petitioner was entitled to only one exemption. Petitioner's only defense in the first action was that the Division of Taxation did not find and report his mistake to him more quickly. The administrative law judge rejected this assertion, noting the Division had notified him of the error within the time required to do so by Tax Law § 683(a).

SUMMARY OF THE PARTIES' POSITIONS

7. The Division of Taxation contends that the petition has not stated a cause for relief or a material issue of fact to be decided and, therefore, summary determination in its favor is warranted. The Division of Taxation further argues that petitioner fully litigated this matter in the prior case and that this matter is barred by the doctrine of res judicata.

8. The Division of Taxation notes also that there was no defense to the error petitioner made on his 1997 return, either in the prior matter or herein.

9. The Division of Taxation acknowledges that petitioner was in bankruptcy at the time of issuance of the notice and demand and hearing in the prior matter, and that an automatic stay usually prohibits all collection action. However, the Division of Taxation contends that petitioner unreasonably withheld notice of the stay and his bankruptcy and may not now raise the stay as a shield to avoid an unfavorable result.

10. Finally, the Division of Taxation argues that petitioner's payment of the tax and interest due under the amnesty program in February 2003 was an admission that he owed the tax and he should have withdrawn his petition at that time. Since the tax and interest has been paid in full and a refund is prohibited by law, there is no issue left for determination.

11. Petitioner's response to the motion for summary determination states that he had to inform the Division of Taxation that the tax had been paid and that the Division had attempted to collect the tax from his spouse, Mrs. Deborah M. Chmiel, as well. Petitioner also asserts in his response to the motion that this matter must be referred to the New York Attorney General for an impartial hearing, since the Division of Tax Appeals (the agency to which petitioner has applied for relief) has "violated laws, regulations and statutes of the State of New York."

CONCLUSIONS OF LAW

A. The first issue to be determined is the effect of petitioner's pending bankruptcy on the prior proceeding before the Division of Tax Appeals which culminated in a final determination, dated April 25, 2002.

United States Bankruptcy Code § 362(c) (11 USC § 362[c]) provides that the automatic stay imposed upon the commencement of a bankruptcy proceeding is in effect until the case is closed or dismissed. As disclosed in the facts, the period in this matter began on petitioner's filing on June 10, 1999 and ended with the closing of the case on December 1, 2004. While it is noted that U.S. Bankruptcy Code § 362(b)(9)(A) provides that the filing of a petition in bankruptcy does not stay an audit by a governmental unit to determine tax liability or the issuance of a notice (11 USC § 362[b][9][D], it does prohibit the commencement or continuation of a judicial, administrative or other action or proceeding against the debtor. (11 USC § 362[a][1].)

Therefore, the Division of Taxation and the Division of Tax Appeals were prohibited from taking further action against petitioner after the issuance of the notice and demand on August 11, 2000. It is of no moment that petitioner failed to list the Department of Taxation and Finance as a creditor in his bankruptcy proceeding or to mention his bankruptcy at any time during his proceedings or pleadings before the Division of Tax Appeals between October 31, 2000, when he prepared his petition in the prior action, and April 25, 2002, when the determination was issued.

The Division of Taxation argues that petitioner should be barred from using the automatic stay as a shield from an unfavorable result, since it was petitioner who withheld notice of his bankruptcy from it and this forum. However, under the circumstances at hand, and in light of

petitioner's status as a *pro se* litigant, it is difficult to determine if the omission was intentional. By contrast, the directive to this forum and the Division of Taxation by the United States Bankruptcy Code concerning the automatic stay is unambiguous, as is the paramount interest of protecting debtors' estates.

B. Having established that the previous action was barred by the automatic stay, it is concluded that petitioner was justified in bringing the instant proceeding with the filing of his petition on October 21, 2002. When petitioner's bankruptcy case was closed on December 1, 2004, the automatic stay expired and the Division of Taxation was free to pursue collection action. Therefore, this matter was not barred by petitioner's bankruptcy and the Division's answer, filed on February 3, 2005, was valid.

Consistent with this conclusion, the Division of Taxation's argument that the Division of Tax Appeals lacks jurisdiction to hear this matter based on the doctrine of res judicata must be rejected.

C. There is no dispute with respect to petitioner's liability for the tax in the instant matter. Petitioner conceded that an error was made in the preparation of his 1997 New York Resident Income Tax Return whereby he mistakenly claimed two personal exemptions when he was entitled to only one pursuant to Tax Law § 616(a) and 20 NYCRR 116.1(a).

D. Petitioner and the Division of Taxation also agree that the tax in issue has been paid, along with reduced interest which accrued to the date of payment. The payment was made as part of the Division's amnesty program in February 2003 pursuant to a provision added to the Tax Law in 2002 (L 2002, ch 85, Part R, § 1). However, it is evident that the statutory mandates were not followed by the Division of Taxation or petitioner. Subsection (f) of Laws of 2002

(ch 85, Pt. R) specifically stated that amnesty "shall not be granted" if the applicant for amnesty was a party to an administrative proceeding where part of the action was with respect to the penalty for which amnesty was being applied, unless the applicant withdrew from the proceeding prior to amnesty being granted. Clearly, petitioner has never withdrawn his petition herein and amnesty should not have been granted, and petitioner's application was void. Therefore, the penalty and abated interest are still due and owing from petitioner. With respect to the amount paid by petitioner, it should be applied to any amount still due and owing on assessment number L-018421683-7.

E. Petitioner argues that the Division of Taxation has sought to collect more than the amount due here because it sought to collect from his spouse as well. However, petitioner carefully stated in his response to the motion that demands for the full amount due were sent to both taxpayers listed on the joint return, not that the Division had collected more than the total tax, penalty and interest due. The Division of Taxation was well within its rights to seek payment of the assessment from either taxpayer. Tax Law § 651(b)(2) provides that if the Federal income tax liabilities of a husband and wife are determined on a joint Federal return, then the couple must file a joint New York return and their tax liabilities are joint and several, with specific exceptions not relevant herein. As long as the Division of Taxation did not attempt to collect more than the tax, penalty and interest due, and there is no evidence in the record to demonstrate that that occurred, it was within its authority to seek the amount due from both spouses. (***See generally, Matter of Phillips***, Tax Appeals Tribunal, May 11, 1995 [where the Tribunal held that liability for penalty under Tax Law § 685(g) is joint and several, provided the Division is not attempting to collect more than the total amount of tax owed for the periods in issue].)

F. The Division of Taxation requested in its answer that penalty be imposed herein for the filing of a frivolous petition pursuant to Tax Law § 2018 and 20 NYCRR 3000.21. The statute and regulation provide that a penalty of up to $500.00 may be imposed for filing and maintaining an action in which the petitioner's position is "frivolous." That term, by definition, includes maintaining a proceeding primarily for delay. Since petitioner has never raised a valid or plausible defense in this action, it is concluded that his prosecution of this matter has been primarily for delay and the penalty of $250.00 is appropriate.

G. 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).

Petitioner has introduced no evidence of the existence of either a triable issue or a material issue of fact. He has consistently admitted that he made an error and that he owed the tax, while simultaneously raising no defense for his nonpayment.

H. Finally, petitioner's request that this matter be transferred to the New York Attorney General's Office for further proceedings is denied. This forum lacks statutory or regulatory authority to effectuate such a transfer.

I. The petition of Mark Chmiel is denied and the Notice and Demand for Payment of Tax Due, assessment number L-018421683-7, dated August 11, 2000 and restated on the Consolidated Statement of Tax Liabilities, dated October 3, 2002, is sustained in full, with no allowance for reductions which may have been received in accordance with petitioner's application for amnesty (***see*** Conclusion of Law "E") In addition, the frivolous petition penalty pursuant to Tax Law § 2018 is imposed in the sum of $250.00.

DATED: Troy, New York
June 23, 2005

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