STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GARY JOSEPH	:	SMALL CLAIMS DETERMINATION DTA NO. 819598
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1998, 1999, 2000 and 2001.	:	:

Petitioner, Gary Joseph, 535 Pine Street, Brooklyn, New York 11208, filed a petition 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 1998, 1999, 2000 and 2001.

A small claims hearing was held before Gary R. Palmer, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on November 3, 2004 at 10:30 A.M. Petitioner appeared by Garry: Webb: Bey. Mr. Bey was granted special permission to represent petitioner in this matter *nunc pro tunc* by the Secretary to the Tax Appeals Tribunal in accordance with section 3000.2(b) of the Tax Appeals Tribunal Rules of Practice and Procedure. The Division of Taxation appeared by Christopher C. O'Brien, Esq., (Susan Parker). All briefs were to be submitted by February 1, 2005, which date began the three month period for the issuance of this determination.

ISSUES

I. Whether the Division of Taxation properly disallowed petitioner's claims for refund of New York State and New York City personal income tax for the years 1998, 1999, 2000 and 2001.

II. Whether Tax Law § 675 renders petitioner's employer liable to the Division for the income tax deficiencies determined to be due for the years at issue.

III. Whether the request of the Division of Taxation for the imposition of the frivolous petition penalty pursuant to 20 NYCRR 3000.21 should be granted.

FINDINGS OF FACT

1. On or about June 18, 2002, petitioner filed New York State and City of New York resident income tax returns for the years 1998, 1999, 2000 and 2001 with the Division of Taxation ("Division").[1]

2. The Division issued notices and demands for payment of tax due for each year at issue to petitioner, asserting tax plus penalty and interest as set forth below. In each instance, the penalty was based on late filed returns and late payment of tax due pursuant to Tax Law § 685 (a)(1) and (2).

Tax Year	Notice #	Date	Tax Due	Penalty	Interest	Total
1998	L021756567	11/12/02	$ 4,084.00	$1,954.96	$1,142.91	$ 7,181.87
1999	L021347009	08/01/02	$ 553.00	$ 201.73	$ 95.14	$ 849.87
2000	L021315923	07/18/02	$ 2,669.00	$ 900.99	$ 214.05	$ 3,784.04
2001	L021366909	08/08/02	$ 3,501.00	$ 668.65	$ 66.22	$ 4,235.87
Totals			$10,807.00	$3,726.33	$1,518.32	$16,051.65

3. During April and July of 2003, petitioner filed amended New York State and City of New York resident income tax returns for 1998, 1999 and 2001. The record includes no

[1]Although the petition and answer each include 2002 in their captions, because no statutory notice or income tax return for that year is part of the record, 2002 has been excluded from consideration in this determination.

amended income tax return for 2000. In each amended return petitioner reduced his reported Federal adjusted gross income and New York State and City adjusted gross income to zero by claiming the Internal Revenue Code ("IRC") § 911 foreign earned income exclusion for all of his wage income.

4. On August 7, 2003 petitioner filed a petition for redetermination of a deficiency or for refund with the Division of Tax Appeals, wherein he requested a hearing in the Small Claims Unit.

5. During the years at issue, petitioner resided and worked within New York State and New York City.

6. At a point in time following the issuance by the Division of the statutory notices, the Division levied on funds in petitioner's bank account, which funds were applied in full satisfaction of the balance of petitioner's income tax liabilities for 1998 and 1999.

7. During her testimony the Division's witness requested that the frivolous petition penalty be imposed.

SUMMARY OF THE PARTIES' POSITIONS

8. Petitioner, through his representative, maintains that his original returns for 1998 through 2001 were filed in error due to his misunderstanding of the law; that all of his income for the years at issue is subject to the foreign earned income exclusion of IRC § 911 because the government of New York State is separate from the United States government, and as such, and in relation to the United States government, New York State is a foreign country. Petitioner objects to the Division's use of the term "wages," preferring instead the term "remuneration" in describing the source of petitioner's income. Petitioner's representative explained that pursuant

to IRC § 3401(a)(8)(A)(i), remuneration for services performed for an employer by a United States citizen which is subject to the exclusion provided under IRC § 911 is excluded from the definition of wages. In addition, petitioner asserts that Tax Law § 675 renders his employer responsible for the payment of his New York State personal income tax, and petitioner is entitled to the refund of all income tax withheld from his wages for the years at issue and all monies seized from his bank account pursuant to the Division's levy. Petitioner next argues that ***Matter of Nicholson*** (Tax Appeals Tribunal, October 30, 2003) is not controlling because it was determined in an arbitrary and perfunctory manner. Finally, petitioner contends that there is no basis to impose the frivolous petition penalty.

9. The Division argues that petitioner's refund claim for 1998 is barred by the statute of limitations (Tax Law § 687[a]) because petitioner's 1998 amended personal income tax return requesting the refund was filed more than two years after the tax was paid or three years after the original income tax return was filed. The Division next contends that petitioner's claim, that he is entitled to the foreign earned income exclusion on the theory that New York State is a foreign country, is both erroneous and frivolous. The Division maintains that petitioner's claims for refund should be denied, the notices and demands sustained, and the frivolous petition penalty provided for in Tax Law § 2018 should be imposed for each year at issue.

CONCLUSIONS OF LAW

A. In matters pending before the Division of Tax Appeals, the burden of proof is on petitioner unless otherwise provided by law (20 NYCRR 3000.15[d][5]). In the matter here under review, petitioner has the burden to prove that the wage income he reported on his late filed income tax returns in June 2002 was, in fact, foreign earned income that was subject to the foreign earned income exclusion from gross income of IRC § 911.

B. Petitioner purports to meet his burden by claiming that New York State is a foreign country and, as a person residing and working in New York State, he is entitled to the benefit of the foreign earned income exclusion. As acknowledged by petitioner in his brief, the Tax Appeals Tribunal in ***Matter of Nicholson (supra)*** rejected this very argument based on the definition of the term "foreign country" found in 26 CFR § 1.911-2(h). Petitioner has not distinguished the facts of ***Nicholson*** from the facts in the instant proceeding. He simply chose to ignore ***Nicholson***. An Administrative Law Judge is not at liberty to ignore binding precedent and petitioner does so at his peril. In order for a taxpayer to be eligible to claim the foreign earned income exclusion, he or she must be a United States citizen (***see***, IRC § 911[d][1][A]), and, in accordance with section 1 of the Fourteenth Amendment to the United States Constitution, United States citizens residing in the United States are also citizens of the state wherein they reside and entitled to all privileges and immunities of citizens of the several states (US Const, art IV, § 2). These principles make clear that the United States government is the government of all the states (***New York v. United States***, 326 US 572, 90 L Ed 326), and because the United States Congress is composed entirely of elected representatives and senators from all the states, petitioner's argument that New York State is a foreign country is without merit.

C. With respect to the Division's assertion that petitioner's 1998 refund claim is barred by the statute of limitations, Tax Law § 687(a) required petitioner to file his claim for refund within the later of three years from the time his 1998 income tax return was filed or two years from the time the tax for 1998 was deemed to have been paid. Under Tax Law § 687(i) the income tax withheld from petitioner's wages in 1998 was deemed to have been paid on April 15, 1999. Although petitioner did not file the amended 1998 income tax return within two years of the

April 15, 1999 payment date of the tax withheld, the July 11, 2003 filing date of the 1998 amended return was within the required three-year period of the June 2002 filing date of the original 1998 income tax return. Accordingly, petitioner's request for refund of so much of his 1998 New York State and City of New York income tax liability that was withheld from his wages for that year is timely. Further, because the balance of his 1998 income tax liability was paid by levy upon petitioner's bank account at some point in time after the issuance of the notice and demand, dated November 12, 2002, and before the November 3, 2004 date of this hearing, petitioner's requests for refund set forth in his petition and expressed at the hearing are both timely made. However, the amount of refund allowable is limited by Tax Law § 687(a). Moreover, notwithstanding the timeliness of petitioner's 1998 refund claims, said claims were properly denied by the Division because, as indicated in Conclusion of Law "B," the basis of the claims are without merit.

D. Tax Law § 675 does not relieve petitioner of his obligation to pay personal income tax on his wages. The purpose of section 675 is to hold the employer answerable for income tax due from its employees in the event the employer fails in its obligation to properly withhold and pay over to the Division the income taxes due in compliance with Tax Law § 671.

E. 20 NYCRR 3000.21 reads, in part, 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 Division's representative requested, during the course of her testimony, that the penalty for the filing of a frivolous petition be imposed. Petitioner's representative, Mr. Bey, testified that petitioner's reliance on the foreign earned income exclusion was not frivolous. In ***Matter of Nicholson (supra)*** the Tax Appeals Tribunal stated in its October 30, 2003 decision the following:

> We find that petitioner's position in this proceeding that she is not liable for personal income tax on her wage income because it was earned in a foreign country (i.e., New York State) is patently frivolous.

The Tax Appeals Tribunal in ***Nicholson*** imposed a frivolous petition penalty of $500.00. It is difficult to imagine a case more directly on point respecting the question of what constitutes a frivolous position than ***Nicholson***. Further review of the history of ***Nicholson*** reveals that a power of attorney purporting to appoint Garry: Webb: Bey as Ms. Nicholson's representative was filed with the Division of Tax Appeals on September 6, 2002.

F. The United States Tax Court in ***Solomon v. Commissioner*** (66 TCM 1201), a matter wherein the taxpayer argued that the state of Illinois was not part of the United States, defined a frivolous petition in these terms:

> A petition to the Tax Court is frivolous if it is contrary to established law and unsupported by a reasoned, colorable argument for change in the law.

There is no question that petitioner's claim, as promoted by his representative, that New York State is a foreign country is unsupported by established legal principles, and was undertaken to delay and frustrate the collection of petitioner's self assessed New York State and City of New York income tax. The hearing in this matter and the subsequent proceedings in the Division of Tax Appeals served to delay the hearings of other taxpayers with genuine

controversies. A penalty of $500.00 is herewith imposed pursuant to Tax Law § 2018 and 20 NYCRR 3000.21 for maintaining a position that is clearly frivolous.

G. The petition of Gary Joseph is denied and the notices and demands dated July 18, 2002; August 1, 2002; August 8, 2002 and November 12, 2002 are sustained and, in accordance with conclusion of law "F," a penalty of $500.00 is imposed for the filing of a frivolous petition.

DATED: Troy, New York
March 31, 2005

/s/ Gary R. Palmer
PRESIDING OFFICER