STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RICHARD ULLOA	:	
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1999 and 2002.	:	DETERMINATION DTA NO. 820136

Petitioner, Richard Ulloa, 22 Ridge Mountain Road, Stone Ridge, New York 12484, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 1999 and 2002.

On December 17, 2004, the Division of Taxation, by its representative, Christopher C. O'Brien, Esq. (Michele W. Milavec, 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 with exhibits of Michele W. Milavec, Esq., sworn to December 16, 2004, and the affidavit with exhibits of Sean O'Connor, sworn to December 16, 2004, in support of its motion. Petitioner filed an affidavit with attached statement and exhibits in opposition to the motion, sworn to January 6, 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.

ISSUES

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 pursuant to Tax Law § 2018 and 20 NYCRR 3000.21.

FINDINGS OF FACT

1. The affidavit of Sean O'Connor, a tax technician in the Audit Division, sworn to December 16, 2004, was submitted with the motion in order to establish the facts upon which the Division based its notice of deficiency, many of which are incorporated in the findings below.

2. On February 3, 2003, petitioner, Richard Ulloa, was issued a Statement of Proposed Audit Changes disallowing the claimed resident tax credit for taxes allegedly paid to the State of New Jersey in 1999 in the sum of $3,013.00 plus interest. The Division of Taxation ("Division") concluded the tax had not been paid pursuant to information received from the State of New Jersey under a reciprocal tax agreement.

3. On March 31, 2003, the Division issued a Notice of Deficiency, notice number L-021996448, to petitioner which asserted $3,013.00 in additional tax plus interest due for the year 1999. Petitioner did not file a timely request for a conciliation conference or a petition for a hearing with regard to the Notice of Deficiency issued for 1999. Instead, petitioner first protested the Notice of Deficiency for 1999 in the petition filed with the Division of Tax Appeals on August 16, 2004, which also included the year 2002.

4. On April 7, 2003, petitioner filed an amended resident income tax return for the year 1999, dated March 30, 2003, which set forth $0.00 for all items of income and requested a refund of $3,158.00, representing withholding tax paid in 1999.

Coincidentally, petitioner mailed by certified mail an additional item to the Division at approximately the same time which bore the certified number 7002 0510 0001 9952 5154. Although petitioner claimed this mailing was a petition filed in response to the Notice of Deficiency for 1999, he never produced a copy of the petition.

Petitioner stated on the 1999 amended return in Part III, Summary of federal changes, that his corrected Federal adjusted gross income was $0.00 and that the corrected Federal tax was $0.00. In addition, petitioner stated on the return that "adjustments made to conform with amended 1040X for 1999 - which contains -0- deductions. See 1040X. 1040X has been accepted." Attached to the 1040X was a two-page, preprinted document which purported to explain why petitioner was not liable for taxes on his wage income.

Subsequently, the Division returned this amended return for 1999 to petitioner, requesting additional documentation for the changes made on the amended return.

5. On or before April 15, 2003, petitioner filed a 2002 Resident Income Tax Return which reported $0.00 in income, notwithstanding an attached W-2 issued by Candle Corporation of El Segundo, California which listed wages paid to petitioner in the sum of $108,913.26, and requested a refund of $6,516.20. Attached to the return were copies of petitioner's 2002 Federal income tax return and a two-page, preprinted document which purported to explain why petitioner owed no taxes on his wage income.

6. Based on the information in the wage and tax statement attached to petitioner's 2002 return, the Division determined that his personal income tax liability for 2002 was $6,620.58. On September 26, 2003, the Division issued to petitioner a Statement of Proposed Audit Adjustment which set forth additional tax due of $104.38, plus penalty under Tax Law § 685(b)(1) and (5) and interest, for a total amount due of $439.67.

7. On December 29, 2003, the Division issued to petitioner a Notice of Deficiency which set forth additional tax, penalty and interest due for the year 2002 in the sum of $442.17.

8. Petitioner timely requested a conciliation conference with respect to the notice for 2002 on or about January 12, 2004. After a conference, an order was issued which denied the relief sought and sustained the Notice of Deficiency issued for 2002.

9. Petitioner filed the instant petition on August 16, 2004, protesting the notices of deficiency for both 1999 and 2002.

SUMMARY OF THE PARTIES' POSITIONS

10. Petitioner contends that he timely protested the Notice of Deficiency for 1999 by certified mail on April 7, 2003, despite the fact that he has presented no evidence of a petition in the voluminous documentation submitted herein.

11. Petitioner argues that because the New York Tax Law defines New York adjusted gross income as Federal adjusted gross income, his New York income must be $0.00 because his Federal income for 1999 and 2002 was $0.00. Petitioner relied on an internal memorandum of the United States Department of the Treasury, dated June 16, 2001, which stated that a Form 1040 which reports zeroes on each line and is signed by the taxpayer without any deletions, modifications or additions to

the attestation statement constitutes a return for the purposes of Internal Revenue Code ("IRC") §§ 6501 and 6511. Petitioner reasoned that since the "zero" Federal return he filed was a valid return, his "zero" New York return was also valid.

12. The Division of Taxation argues that petitioner had wage income during the years in issue which was subject to New York income tax; that petitioner reported income on his original return for 1999, then reported no wage income on his amended return for 1999 and reported receiving no income for 2002; and that petitioner failed to pay the total income tax due on said income in both 1999 and 2002. Further, the Division urges this forum to impose the maximum penalty allowable for filing a frivolous petition.

CONCLUSIONS OF LAW

A. Prior to addressing the Division's motion, it is necessary to ascertain if this forum has jurisdiction over that portion of the petition which pertains to the year 1999. Petitioner asserts that he filed a protest in response to the Notice of Deficiency for 1999, sent by certified mail (certified number 7002 0510 0001 9952 5154) and received by the Division on April 7, 2003. Although petitioner may have sent something by certified mail to the Division, there is no copy of the purported protest for the year 1999 in the record. Therefore, petitioner has failed to meet his burden of proof and his contention that he filed a protest of the Notice of Deficiency for 1999 is rejected. (Tax Law § 689[e].) That portion of the tax due for the year 1999 covered by the notice, notice number L-021996448, $3,013.00 plus penalty and interest, was fixed and final 90 days after the notice was issued (Tax Law § 681[b]), and the Division of Tax Appeals does not have jurisdiction to entertain a petition with

respect to the tax, penalty or interest assessed thereunder. (***Matter of Tavolacci v. State Tax Commission***, 77 AD2d 759, 431 NYS2d 174.)

However, petitioner established that he filed an amended return for 1999 on April 7, 2003, which requested a refund of $3,158.00.[1] This amount represents the amount withheld from petitioner's salary less a refund of $2,058.00. Since the original return was filed on November 13, 2000 and the refund request was received on April 7, 2003, the request was timely. (Tax Law § 687.) There is no evidence in the record which demonstrates that the Division acted on the refund application, and it was, therefore, deemed denied six months from the date it was filed, or October 7, 2003. (Tax Law § 689[c][3][A].) Although the Division sent the return back to petitioner for more information, it never established when it sent it to him. Hence, petitioner timely protested the denial within two years of the denial on August 16, 2004. (Tax Law § 689[c].) Therefore, the Division of Tax Appeals has jurisdiction over the petition with respect to the refund request for the year 1999 as contained in the amended return.

B. 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***

[1]Petitoner made a mathematical error. The amount should have been $3,150.00 as stated on his original IT-201.

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).

In this matter, the Division submitted the affidavit of Sean O'Connor which established that wage income was received by petitioner in the years 1999 and 2002; that petitioner filed a "zero" tax return for the year 2002; that petitioner filed a New York personal income tax return for 1999 that declared income then filed an amended return for the same year that claimed he had no income; and that the full tax on the wage income for both years was not paid. Petitioner has not disputed these facts, but only raised an argument that because he reported no taxable income on his Federal return for the years in issue, he had no reportable income for New York personal income tax purposes.

C. "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).

D. 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." Internal Revenue Code § 62(a) defines Federal adjusted gross income in the case of an individual, as "gross income minus [specified] deductions." None of the deductions listed in IRC § 62(a) include wage, salary or interest income. "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].) Since petitioner received wage income as reported on the W-2 wage and tax statements attached to his returns, said wages should have been included in his Federal income and, derivatively, he is subject to New York State personal income tax on the same reported wages. Further, every other item of income received by petitioner in both 1999 and 2002 is includible in Federal adjusted gross income and is likewise subject to New York personal income tax. (***See,*** Tax Law § 611[a]; § 612[a]; IRC § 62.)

Petitioner has not presented any cogent or credible evidence to substantiate his claim that the statutory notice for 2002 is incorrect or that his claim for refund for the year 1999 is valid. (***See***, Tax Law § 689[e]; 20 NYCRR 3000.15[d][5].) Petitioner's attempt to claim that he had no income for 1999 and 2002 is disingenuous and based on his mistaken belief that he is not liable for income tax. Accordingly, the facts are undisputed and a determination may be entered in favor of the Division as a matter of law. (***See, Matter of Klein***, Tax Appeals Tribunal, August 28, 2003.)

E. From petitioner's response to the Division's motion, it appears he is arguing that there is no provision in the Internal Revenue Code which makes him liable for income taxes. Petitioner argues that neither the State nor Federal government has produced a statute which confers liability for income taxes. Petitioner cites IRC §§ 6001 and 6011 in support of his contention.

However, petitioner is overlooking the obvious. Internal Revenue Code § 1(c) provides that "there is hereby imposed on the taxable income of every individual . . . a tax determined in accordance with the following table . . . ." Taxable income is defined in IRC § 63(a) as gross income less certain specified deductions. As discussed, gross income includes wages, income from business, interest, dividends, royalties, rents, annuities, alimony, pensions, gains from the sale of real property, etc. (IRC § 61[a].) Petitioner's arguments do not explain why he is not subject to these sections of the Internal Revenue Code.

When a taxpayer maintained an equally frivolous argument in ***Myrick v. United States of America*** (217 F Supp 2d 979, 2002-2 US TaxCas ¶50,487 [where the plaintiff contended that he had no taxable income since the term "income," when used in the Income Tax Acts of Congress, must have the same meaning as it does in the Corporation Excise Tax Act of 1909, and can only be derived from corporate activities]), the Court flatly rejected the argument as meritless, noting that plaintiff's pension income was "expressly and unambiguously" included in the definition of income in IRC § 61(a). On the frivolous nature of Myrick's argument the court said:

> . . . [T]ax protestor claims such as Plaintiff's are nothing more than a hodgepodge of unsupported assertions, irrelevant platitudes, and legalistic gibberish. The Government should not have been put to the trouble of responding to such spurious arguments, nor this court to the trouble of 'adjudicating' this meritless appeal [citing ***Crain v. Commissioner of Internal Revenue***, 737 F2d 1417].

Petitioner's argument is no less frivolous in this forum.

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 regulation at 20 NYCRR 3000.21 provides as examples of a frivolous position "that wages are not taxable as income."

Further, when the same argument was raised before the United States Tax Court, it was rejected out of hand:

> In his petition and memorandum, petitioner makes tax protester arguments that have been repeatedly rejected by this Court and others, including the Court of Appeals for the Ninth Circuit . . . as inapplicable or without merit [including, that wages are not reportable income]. (***Schroeder v. Commissioner***, 84 TCM 220.)

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 in its favor is granted; the petition of Richard Ulloa is denied; the Notice of Deficiency, dated December 29, 2003, is sustained; the Division of Taxation's denials of petitioner's refund applications for 1999 and 2002 are sustained; and an additional penalty of $500.00 is imposed pursuant to Tax Law § 2018.

DATED: Troy, New York

February 17, 2005

Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE