STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RONALD L. BONACCORSO	:	DETERMINATION DTA NO. 820482
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 2000.	: :	

Petitioner, Ronald L. Bonaccorso, 1228 Woodhull Road, Webster, New York 14580, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 2000.

On September 27, 2005, the Division of Taxation ("Division"), by its representative, Christopher C. O'Brien, Esq. (Margaret T. Neri, Esq., of counsel), filed a motion for an order pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(a) and (b) granting summary determination to the Division on the grounds that the petition fails to state a cause for relief and there exists no material issue of fact and imposing a penalty for the filing of a frivolous petition pursuant to Tax Law § 2018 and 20 NYCRR 3000.21. The Division submitted the affirmation of Margaret T. Neri, Esq., dated September 27, 2005 and the affidavit with exhibits of Sean O'Connor, sworn to September 26, 2005, in support of its motion. Petitioner failed to file a response to the motion. His response was due on October 27, 2005, which date commenced the 90-day period for the issuance of this determination. Based upon the motion papers and all the pleadings and proceedings had herein, Frank W. Barrie, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether wages received by petitioner were properly held subject to New York State personal income tax.

II. Whether petitioner's position in this proceeding is frivolous so that a penalty should be imposed against him.

FINDINGS OF FACT

1. During 2000, petitioner, Ronald L. Bonaccorso, received wages from Frontier Telephone of Rochester in the amount of $91,192.54. His wage and tax statement (Form W-2) for 2000 shows Federal income tax of $1,716.57 and New York income tax of $3,337.81 were withheld from his wages.

2. On his New York State resident income tax return for 2000 which was filed late on June 3, 2003, petitioner claimed an overpayment of New York State personal income tax of $3,337.81 and sought a refund of such amount.

3. The Division of Taxation ("Division") issued a Statement of Proposed Audit Changes dated January 9, 2004 against petitioner asserting additional New York State personal income tax due for 2000 of $2,067.19 plus penalty and interest. The Division allowed petitioner a New York standard deduction and credit for taxes withheld as shown on his Form W-2. Penalty imposed consisted of the following: (i) penalty of 25% for not filing a state tax return within five months of its due date pursuant to Tax Law § 685(a)(1); (ii) negligence penalty of 5% pursuant to Tax Law § 685(b)(1)[1]; and (iii) "penalty interest" in an amount equal to 50% of any interest

[1] Pursuant to Tax Law § 685(m), this penalty was applied to the total correct tax before prepayments, rather than the balance due, because petitioner did not file a timely return.

due on petitioner's deficiency on the basis of negligence or intentional disregard of the Tax Law pursuant to Tax Law § 685(b)(2).

4. Petitioner included a typed and single-spaced statement with his tax return, which appears to be a form on which petitioner hand-wrote the year at issue. It makes many nonsensical claims including a contention that petitioner had "zero" income because income that is subject to Federal income tax (and presumably State personal income tax as well) is restricted to "income" as defined "under the Corporation Excise Tax Act of 1909." In the Statement of Proposed Audit Changes dated January 9, 2004, the Division responded to petitioner's claims as follows:

> When an issue such as yours has been addressed in Federal Tax Court and Federal Appeals Court, the results have been that these kinds of protests were considered frivolous and without merit. New York State regards them in the same manner.

5. The Division then issued a Notice of Deficiency dated March 4, 2004 against petitioner asserting additional tax due of $2,067.19 plus penalty and interest. This notice referenced the calculations detailed in the earlier Statement of Proposed Audit Changes.

6. Petitioner filed a request for a conciliation conference before the Bureau of Conciliation and Mediation Services, and a conciliation conference was conducted at petitioner's request in Rochester on December 16, 2004. A Conciliation Order dated January 14, 2005 denied petitioner's request and sustained the Notice of Deficiency dated March 4, 2004. Petitioner responded by filing a petition dated April 10, 2005 in which he asserted the proposition that wages are not subject to tax.

CONCLUSIONS OF LAW

A. Tax Law § 612(a) provides that:

> 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 . . . .

B. 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 wages, salary or interest income. Rather, "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 statement attached to his return, such 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. Petitioner's suggestion that the Corporation Excise Tax Act of 1909 somehow superceded these relevant sections of the IRC is without merit. It is observed that the Sixteenth Amendment to the United States Constitution empowered Congress to levy income tax against any source of income (***see, Parker v. Commr***, 724 F2d 469, 84-1 US Tax Cas ¶ 9209 [5th Cir] [the court, affirming a Tax Court decision, noted that the Sixteenth Amendment empowered Congress to levy income tax against any source of income, without any need to classify it as excise tax applicable to specific categories of activities]).

C. Furthermore, since petitioner has failed to produce evidence in admissible form sufficient to raise an issue of fact requiring a hearing, the Division's motion for summary determination is properly granted. The documents submitted by the Division, which included an attorney's affirmation and an affidavit of an income tax technician with relevant knowledge of this matter, established the presumption of correctness raised by the issuance of the assessment

itself (***see, Matter of May***, Tax Appeals Tribunal, November 17, 2005). Petitioner may therefore be "deemed to have submitted to the presumption of correctness" (***Matter of Thomas***, Tax Appeals Tribunal, April 19, 2001) as a result of his failure to respond to the Division's motion by introducing any evidence to support either the unreasonableness of the income tax assessment or the incorrectness of the tax assessed.

D. Tax Law § 2018 provides that:

> 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, then the tax appeals tribunal may impose a penalty against such petitioner of not more than five hundred dollars. The tax appeals tribunal shall promulgate rules and regulations as to what constitutes a frivolous petition.

The Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.21) provide, in part, that a frivolous position includes: "(a) that wages are not taxable as income." Consequently, a penalty of $500.00 is hereby imposed against petitioner on the grounds that his position in this proceeding is frivolous (***see, Matter of Thomas, supra***).

E. The petition of Ronald L. Bonaccorso is denied, the Notice of Deficiency dated March 4, 2004 is sustained, and a penalty of $500.00 is imposed against petitioner for filing a frivolous petition.

DATED: Troy, New York
December 29, 2005

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE