STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DAVID F. MARTIN	:	DETERMINATION DTA NO. 821333
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 2001.	:	

Petitioner, David F. Martin, P.O. Box 93098, Rochester, New York 14692, 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 2001.

Pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b), by a motion dated March 6, 2007, the Division of Taxation ("Division"), appearing by Daniel Smirlock, Esq. (Barbara J. Russo, Esq., of counsel), moved for summary determination on the grounds that there were no material issues of fact and the undisputed facts mandated a finding in the Division's favor. Answering papers due by April 5, 2007 were never filed, and such due date commenced the 90-day period for issuance of this determination. After due consideration of the record, Frank W. Barrie, Administrative Law Judge, hereby renders the following determination.

ISSUES

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

II. Whether the Division's request for the imposition of a penalty against petitioner under Tax Law § 2018 for the filing of a frivolous petition should be granted.

FINDINGS OF FACT

1. Petitioner, David F. Martin, did not file a New York income tax return for 2001. Rather, the Division received a notification dated April 7, 2004 from the Internal Revenue Service ("IRS"), pursuant to the Federal/State information exchange program, of "income tax examination changes" to petitioner's Federal income tax liability for tax year 2001. This notification showed that for tax year 2001 petitioner received wage income in the amount of $44,678.00, interest income in the amount of $149.00, and had a prior year refund of New York income tax in the amount of $245.00. It also disclosed a New York address for petitioner of 65 Wildflower Dr. in Rochester.

2. The Division issued a Statement of Proposed Audit Changes dated April 27, 2006 to petitioner asserting personal income tax due of $2,150.00, plus penalty and interest, computed as follows:

Wages	$44,678.00
Taxable Interest Income	149.00
Taxable State & Local Income Tax Refunds	245.00
Federal Adjusted Gross Income	45,072.00
Taxable State & Local Income Tax Refunds	(245.00)
New York Adjusted Gross Income	44,827.00
Standard New York Deduction	(7,500.00)
New York Taxable Income	37,327.00
New York State Tax	2,160.00
New York State Tax Withheld	(10.00)
Personal Income Tax Due	$ 2,150.00

This statement included the following explanation:

> Information from the Internal Revenue Service . . . indicates you had sufficient income to require the filing of a New York State income tax return.
>
> A search of our files fails to show a New York State income tax return filed under your name or social security number. Therefore, your New York State income tax is estimated as allowed by New York State Income Tax Law.

> We have recomputed your 2001 New York State tax based on information obtained from the Internal Revenue Service under authorization of federal law . . . .
>
> Under section 683(c) of the New York State Tax Law, tax may be assessed at any time if no return is filed.
>
> Your New York taxable income has been corrected to include the unreported income and/or deductions.
>
> Unreported wage income has been corrected based on information provided by the Internal Revenue Service.
>
> You have been allowed credit for taxes withheld based on information present in our withholding tax records. If you furnish wage and tax statement(s) showing a larger amount of withholding, we will allow the additional withholding tax.[1]
>
> * * *
>
> You have been allowed the appropriate New York standard deduction.
>
> * * *
>
> Penalty of 25% for not filing a state tax return within five months of its due date has been applied. (section 685(a)(1) of the New York State Tax Law)
>
> Interest is due for late payment or underpayment at the applicable rate. Interest is required under the New York State Tax Law.

5. The Division then issued a Notice of Deficiency dated June 22, 2006 against petitioner asserting additional tax due of $2,150.00, plus penalty and interest. This notice referenced the earlier statement dated April 27, 2006 described above for a "detailed computation of the additional amount due."

[1] As noted at the start of this determination, petitioner did not file any answering papers to the Division's motion. Consequently, as discussed in the Conclusions of Law, the facts as set forth by the Division in its motion papers are accepted including the amount of withholding it allowed of $10.00 as noted above. Petitioner offered no proof of a higher amount of withholding. In fact, the record does not include a copy of the relevant withholding tax form (W-2) or even the name of petitioner's employer.

6. Petitioner's response was to file a petition dated October 20, 2006 to which he attached a memo consisting of five pages claiming that the Notice of Deficiency dated June 22, 2006 was a "naked assessment" lacking "*prima facie* evidence" to support its issuance.

7. By its answer dated October 15, 2003, the Division requested that the Division of Tax Appeals "impose the maximum penalty for filing a frivolous petition pursuant to section 2018 of the Tax Law and 20 NYCRR 3000.21."

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted,

> [I]f, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

Here, petitioner did not respond to the Division's motion, and he is therefore deemed to have conceded that no question of fact exists which would require a hearing to resolve (***see, Kuehne & Nagel v. Baiden***, 36 NY2d 539, 544, 369 NYS2d 667, 671; ***Costello v. Standard Metals***, 99 AD2d 227, 472 NYS2d 325, ***appeal dismissed*** 62 NY2d 942). Consequently, the relevant facts are not in dispute: Petitioner, a resident of New York, had wage income and some interest income during 2001 that he failed to report on a New York income tax return for 2001.

B. Petitioner's contention that the Notice of Deficiency dated June 22, 2006 was a "naked assessment" without an evidentiary basis is rejected. Rather, when the Division issues a Notice of Deficiency to a taxpayer, a presumption of correctness attaches to the notice, and the burden of proof is on the taxpayer to demonstrate that the deficiency is erroneous by clear and convincing evidence (***Matter of O'Reilly***, Tax Appeals Tribunal, May 17, 2004). Here, petitioner has failed to introduce any evidence to establish any error on the part of the Division in issuing the Notice of Deficiency under review.

C. 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 . . . .

D. Federal adjusted gross income includes wages and salaries since the definition of "federal adjusted gross income" in Internal Revenue Code § 62(a) encompasses an individual's wage or salary income, as well as interest income (***see, Matter of Thomas***, Tax Appeals Tribunal, April 19, 2001). Consequently, the Division's calculation of petitioner's New York taxable income, as detailed in Finding of Fact "2" was proper.

E. The Division is correct that the regulations of the Tax Appeals Tribunal at 20 NYCRR 3000.21(a) treat a taxpayer's position that wages are not taxable as income as "frivolous" for purposes of the imposition of a penalty for the filing of a frivolous petition under Tax Law § 2018. Here, however, petitioner has not explicitly taken such position but rather has based his petition on a serious misunderstanding of his burden of proof and a claim that the Division in calculating his deficiency "plucked numbers out of the air" and issued a "naked assessment," which is contradicted by the evidentiary record as detailed in Finding of Fact "1." Since petitioner's claim is completely without merit, it lends support to the conclusion that he commenced this proceeding "primarily for delay." Further, his failure to file any answering papers to the Division's motion setting forth any merit to his position also supports this conclusion that the petition was filed merely to delay the day of reckoning when petitioner would be compelled to pay his New York income taxes for 2001, now more than five years late. Since under 20 NYCRR 3000.21, maintaining "a proceeding primarily for delay" also provides a basis for the imposition of a penalty for the filing of a frivolous petition, a penalty of $500.00 is imposed (***see***, ***Matter of Hirschfeld***, Tax Appeals Tribunal, April 5, 2007).

F. The petition of David F. Martin is denied, the Notice of Deficiency dated June 22, 2006 is sustained, and a penalty of $500.00 for maintaining a frivolous petition is imposed.

DATED: Troy, New York
June 14, 2007

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE