STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CRAIG CHANG	:	DETERMINATION DTA NO. 822199
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 Year 2001.	:	

Petitioner, Craig Chang, 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 year 2001.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (Kevin R. Law, Esq., of counsel), brought a motion dated June 18, 2008 seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner was granted an extension of time to August 29, 2008 to file a response to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination began on August 29, 2008, the due date for petitioner's response. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUES

I Whether the Division of Taxation is entitled to summary determination in this matter 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. Joseph Caywood is a Tax Technician III in the Division of Taxation (Division), Personal Income Tax Unit. He has been employed by the Division since 1978 and has been a Tax Technician III since 1998.

2. Mr. Caywood's responsibilities include reviewing and processing New York State personal income tax returns, conducting audits and resolving protests, including communicating with taxpayers and preparing administrative records, reports and forms. An affidavit of Mr. Caywood submitted by the Division is based upon his personal knowledge of the facts in this matter and upon a review of the Division's official records which are kept in the ordinary course of business.

3. The Division was notified by the Internal Revenue Service that Mr. Chang had sufficient income in 2001 to require the filing of a personal income tax return. A search of the Division's records indicated that petitioner did not file a New York State personal income tax return for the year 2001.

4. The Division's Wage and Reporting System was referenced to verify the information provided to the Division by the Internal Revenue Service. The Division's Wage and Reporting System is an electronic database wherein information required to be submitted by New York

State employers pursuant to Tax Law § 171-a and 20 NYCRR 2380 is maintained and stored. The Wage and Reporting System provides the name, social security number and gross wages paid to each employee who resides or is employed in New York State. The employer is identified by its employer identification number.

5. A review of the Wage and Reporting System cross-referenced against petitioner's social security number indicated that four employers reported paying him wages totaling $47,152.00 in the 2001 tax year.

6. On August 25, 2006, the Division issued to petitioner a Statement of Proposed Audit Changes indicating tax due of $3,440.50, plus penalty and interest. The statement provided, in part, as follows:

> Information from the Internal Revenue Service (section 6103[d] of the Internal Revenue Code) indicates that 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.
>
> 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.
>
> Interest and/or dividend income has been corrected based on information provided by the Internal Revenue Service.
>
> Non-employee compensation has been corrected to include the IRS adjustment.
>
> You have been allowed the appropriate adjustment to income for the self-employment tax paid.

You have been allowed the appropriate New York standard deduction.

7. On December 26, 2006, the Division issued to petitioner a Notice of Deficiency of personal income tax due in the amount of $3,440.50, plus interest and penalty. Penalties were imposed pursuant to Tax Law § 685(a)(1) and (3).

8. Petitioner's petition states, in part, that the commissioner's actions in this matter are "arbitrary, capricious, and not in accordance with the duties prescribed under the applicable laws," and that "[t]he facts in this matter are not in dispute."

CONCLUSIONS OF LAW

A. 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, 440, 293 NYS2d 93, 94 [1968]; ***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572, 573, 536 NYS2d 177, 179 [1989]). 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 [1960]).

B. In this matter, the Division submitted the affidavit of Joseph Caywood which established that petitioner received wage income of $47,152.00 in the year 2001; that petitioner did not file a personal income tax return for the year 2001; and that the full tax on the wage income was not paid. Petitioner has not disputed these facts, but only raised the arguments that

the actions of the Commissioner of Taxation and Finance in this matter are arbitrary, capricious, and not in accordance with the duties prescribed under the applicable laws; that wages are not income and that only the employer is responsible for the personal income tax imposed on its employees.

C. 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 [1978]).

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." "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 indicated by the Division's Wage Reporting System of $47,152.00, said wages should have been included in his federal income and, consequently, 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 2001 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.)

E. Petitioner has not presented any cogent or credible evidence to substantiate his claim that the statutory notice is incorrect. (***See*** Tax Law § 689[e]; 20 NYCRR 3000.15[d][5].)

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.)

F. From petitioner's petition and response to the Division's motion for summary determination, it appears he is arguing that there is no provision in the Internal Revenue Code or the New York State Tax Law which makes him liable for income taxes. Petitioner relies on the position that income can only be derived from corporate activities and only the entity withholding an employee's income tax is responsible for the personal income tax due on such wages.

It appears that 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].) 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. Clearly, his wage income is subject to both New York and federal personal income taxes. Petitioner's position does not explain why he is not subject to these sections of the Internal Revenue Code and the New York State Tax Law.

G. When a taxpayer maintained the identical frivolous argument in ***Myrick v. United States of America*** (217 F Supp 2d 979, 2002-2 US Tax Cas ¶ 50,487 [D Ariz 2002] [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 (5th Cir 1984)].

Petitioner's arguments are no less frivolous in this forum.

H. 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 an example 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 [2002].)

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). It is clear that wages are reportable income, and petitioner has offered no basis for his claim that the Commissioner of Taxation and Finance exceeded his statutory authority in issuing the Notice of Deficiency. 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 (***Matter of Paulling***, Tax Appeals Tribunal, January 25, 2007).

I. The Division's motion for summary determination in its favor is granted; the petition of Craig Chang is denied; the Notice of Deficiency, dated December 26, 2006, is sustained; and an additional penalty of $500.00 is imposed pursuant to Tax Law § 2018.

DATED: Troy, New York
November 20, 2008

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE