STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KYLE D. NELSON	:	DETERMINATION DTA NO. 822547
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2001 through 2003.	:	

Petitioner, Kyle D. Nelson, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 2001 through 2003.

A hearing was held before Timothy Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on September 14, 2009 at 10:30 A.M., with all briefs due by December 14, 2009, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Daniel Smirlock, Esq. (Sarah Dasenbrock, Esq., of counsel).

ISSUES

I. Whether petitioner may be represented at a hearing before an administrative law judge by an individual who does not meet any of the qualifications listed in Tax Law § 2014(1).

II. Whether additional tax due as asserted in three notices of deficiency should be sustained.

III. Whether fraud penalties imposed under Tax Law § 685(e) should be sustained.

IV. Whether a frivolous petition penalty should be imposed under the authority of Tax Law § 2018 and 20 NYCRR 3000.21.

FINDINGS OF FACT

1. On February 22, 2005, the Division of Taxation (Division) issued to petitioner, Kyle D. Nelson, three notices of deficiency for the years 2001 through 2003 asserting additional income tax due as follows:

2001	2002	2003
$1,229.00	$3,324.00	$3,227.00

2. Each of the notices of deficiency also asserted fraud penalty under Tax Law § 685(e) and interest.

3. During the three years at issue, petitioner was employed by the New York City Transit Authority.

4. Petitioner did not file any New York State income tax returns with respect to any of the years at issue.

5. The Division calculated the subject tax deficiencies using wage and withholding tax information reported to the Division by petitioner's employer. Such information indicates that petitioner received wages and had New York tax withheld for the years at issue as follows:

Year	Wages	NY Tax Withheld
2001	$68,147.00	$2,633.00
2002	$60,230.00	$0
2003	$66,548.00	$419.00

6. On December 27, 2004, the Division issued to petitioner three statements of proposed audit changes, which advised petitioner of the proposed liabilities indicated above in Findings of Fact 1 and 2. The statements also advised petitioner that the Division had no record of tax returns filed by petitioner for the years at issue and that therefore petitioner's liability had been

estimated. The statements also detailed the Division's computations of tax due. Specifically, the statements show that the Division computed petitioner's liability as a nonresident individual with 100 percent of his wage income from the New York City Transit Authority deemed New York source income and allowed petitioner a standard deduction.

7. By letter dated July 6, 2005, petitioner requested an explanation of the outstanding deficiencies. The Division responded by letter dated August 15, 2005 explaining that it had reviewed information provided by petitioner's employer indicating wages paid to petitioner during the years at issue; that such wages were subject to New York income tax; and that petitioner did not file any New York tax returns for the years in question.

8. On April 15, 2004, following a nonjury trial in Supreme Court, New York County, petitioner was convicted of 3rd degree grand larceny in connection with his New York income tax returns for the years 1998 through 2000. Petitioner's conviction was premised on the Court's finding that, with larcenous intent, he filed fraudulent tax returns for those years by which he requested and obtained refunds. Specifically, petitioner claimed a foreign earned income exclusion equal to his wages to evade tax and to obtain refunds. Petitioner was employed by the New York City Transit Authority during the 1998-2000 period.

9. Throughout this proceeding petitioner sought to be represented by Mr. Garry Webb Bey. By correspondence dated October 7, 2008, the Division of Tax Appeals advised petitioner that, because Mr. Bey was neither an attorney, certified public accountant, public accountant nor enrolled agent as required under the Rules of Practice and Procedure (20 NYCRR 3000.2), Mr. Bey would not be permitted to represent petitioner in a proceeding before an administrative law judge. At the hearing in this matter, petitioner reiterated his request that Mr. Bey be allowed to represent him. The administrative law judge denied this request.

SUMMARY OF THE PARTIES' POSITIONS

10. Petitioner asserts that the Division of Tax Appeals may not restrict his right to the representative of his choice in this proceeding. Petitioner cites the Division's regulation in respect of powers of attorney (20 NYCRR 2390.1) in support of this contention.

11. Petitioner further contends that the Division has failed to provide an accounting of funds taken "by distraint" and the year to which such funds were applied, from "1998 to the present."

12. Petitioner also complains that the Division failed to show petitioner the method by which the Division determined the tax liability asserted against him and the law upon which the Division relied in determining such liability.

13. As to the substantive merits of the subject deficiencies, petitioner argues that while his wages may constitute "gross income" under Internal Revenue Code (IRC) § 61, whether income tax may be imposed on such gross income depends on whether petitioner was required to file a return under the IRC. Citing IRC § 6011, petitioner asserts that IRC regulations must be consulted to determine whether he was required to file a return. Petitioner does not, however, cite any regulations purporting to relieve him of his obligation to file a federal return. Petitioner further asserts that there must also be a "liability statute" making him liable for the tax and a regulation instructing him to file a return. Petitioner cites the Division's regulations with respect to withholding tax to show that the employer is liable for taxes in the "employer-employee transaction" and that petitioner, as an employee, "is not the party required to file or made liable to pay the tax." Petitioner also cites Labor Law § 518 to show that not all of the remuneration he received from his employer during the years at issue constituted wages. In summarizing his position, petitioner asserts that as an employee, the law does not make him liable to pay tax on

wages. Accordingly, he was not required to file a return or to pay any such tax and therefore did not do so.

14. The Division asserts that the notices of deficiency and the fraud penalties should be sustained and that a frivolous petition penalty should be imposed.

CONCLUSIONS OF LAW

Issue I

A. Petitioner is not entitled to be represented in a proceeding before an administrative law judge in the Division of Tax Appeals by whomever he chooses. Tax Law § 2014(1) expressly restricts such representation to attorneys, certified public accountants, public accountants and enrolled agents (***see also*** 20 NYCRR 3000.2[a]). "Such a limitation promotes and encourages a high level of professional competence in tax proceedings and thereby *protects taxpayers* in the quasi-judicial setting of the Division of Tax Appeals" (***Matter of New York State Society of Enrolled Agents v. New York State Division of Tax Appeals***, 161 AD2d 1, 559 NYS2d 906, 910-911 [2d Dept 1990]; emphasis added). Petitioner's proposed representative, Mr. Bey, is unqualified under Tax Law § 2014(1). Furthermore, the regulation cited by petitioner in support of his position (20 NYCRR 2390.1) is not pertinent, as that regulation sets forth rules regarding the requirement of a power of attorney by the Division of Taxation, not the Division of Tax Appeals.

Issue II

B. As a nonresident individual with New York source income, as determined pursuant to Tax Law § 631,[1] and New York adjusted gross income, as determined pursuant to Tax Law §

[1] It is noted that petitioner did not contest the Division's classification of all of his income from the New York City Transit Authority as income "derived from or connected with New York sources" (***see*** Finding of Fact 6; Tax Law § 631[a]).

612, in excess of his New York standard deduction (***see*** Findings of Fact 5 and 6), petitioner was required to file a New York nonresident return for each of the years at issue (Tax Law § 651[a][3]).

C. Petitioner failed to file any returns for the years at issue. Accordingly, the Division was authorized to determine petitioner's liability for those years and to issue notices of deficiency in respect of such liability (Tax Law § 681[a]). The use of employer wage reporting information is a reasonable and rational method of estimating income tax liability (***see Matter of Pettis***, Tax Appeals Tribunal, August 18, 2005). Petitioner offered no evidence (e.g., a W-2 form) to show that the information upon which the Division relied was in any way erroneous. The deficiencies of tax for the years at issue are therefore sustained (***see Matter of Hyatt***, Tax Appeals Tribunal, November 12, 2009; Tax Law § 689[e]).

D. As to petitioner's contention seeking an accounting of payments, petitioner has the burden to show that the notices of deficiency are in error (Tax Law § 689[e]). It was therefore petitioner's burden, and not the Division's, to show payments on the subject deficiencies. Petitioner presented no evidence of any such payments. Furthermore, the Division of Tax Appeals has jurisdiction over only those years which are the subject of the statutory notices under petition, i.e., 2001, 2002 and 2003 (***see*** Tax Law § 2008; ***Matter of Dreisinger***, Tax Appeals Tribunal, July 20, 1989). There are no notices of deficiency in the record in respect of 1998-2000 or 2004-present and the petition does not purport to protest any such other notices. Consequently, any payment issues in respect of other years is beyond the jurisdiction of the Division of Tax Appeals.

E. With respect to petitioner's complaint that the Division failed to explain its position and the law upon which it relied, it is noted, first, that a presumption of correctness attaches to a

notice of deficiency upon its issuance and petitioner bears the burden of proof to show that the basis for the assessment was unreasonable or that the amount of the assessment was in error (***see Matter of Hyatt***; Tax Law § 689[e]). Second, this complaint is refuted by the facts. The Division explained its position in this matter and its calculation of the deficiencies in the statements of proposed audit changes, as well as its letter to petitioner dated August 15, 2005 (***see*** Findings of Fact 6 and 7). If petitioner found such explanations to be incomplete or unsatisfactory, that is unfortunate, but not a reason to cancel the statutory notices.

F. Regarding petitioner's contentions as set forth in paragraph 13, it is observed that, first, "[c]ompensation for services" is among the listed examples of the expansively defined "gross income" in IRC § 61(a)(1). Petitioner's wages from his employer obviously fall within this definition. Such wage income, less certain adjustments, equals federal adjusted gross income (***see*** IRC § 62[a]). Federal adjusted gross income less deductions and exemptions is federal taxable income (***see*** IRC § 63[a]). IRC § 1 imposes federal income tax on taxable income. IRC § 6012 sets forth requirements for the filing of a federal return.

With respect to petitioner's New York liability, as noted previously, as a nonresident individual with New York source income and New York adjusted gross income in excess of his New York standard deduction, petitioner was required to file a New York nonresident return for each of the years at issue (Tax Law § 651[a][3]). New York adjusted gross income equals federal adjusted gross income with certain modifications (***see*** Tax Law § 612). Hence, petitioner's wage income, which as noted, is includible in his federal adjusted gross income, is also includible in his New York adjusted gross income. As also noted, petitioner did not object to the classification of his wages as New York source income.

Labor Law § 518, cited by petitioner in support of his contention that not all of the remuneration he received from his employer constituted wages, contains a definition of "wages" for purposes of the Unemployment Insurance Law (***see*** Labor Law § 510). Such definition clearly has no application to the Tax Law and thus no relevance herein.

Issue III

G. The subject notices of deficiency in this matter assert fraud penalty pursuant to Tax Law § 685(e). The Division bears the burden of proof with respect to fraud (Tax Law 689[e][1]). The Tax Appeals Tribunal has explained the standard for the imposition of the fraud penalty under Tax Law § 685(e) as follows:

> For the Division to establish fraud by a taxpayer, it must produce "clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing" (***Matter of Sener***, Tax Appeals Tribunal, May 5, 1988; ***see also***, ***Schaffer v. Commissioner***, 779 F2d 849, 86-1 USTC ¶ 9132 [2nd Cir. 1985]; ***Matter of Cousins Serv. Sta.***, Tax Appeals Tribunal, August 11, 1988).
>
> The Division need not establish fraud by direct evidence, but can establish it by circumstantial evidence by surveying the taxpayer's entire course of conduct in the context of the events in question and drawing reasonable inferences therefrom (***Plunkett v. Commissioner***, 465 F2d 299, 72-2 USTC ¶ 9541 [7th Cir. 1972]; ***Biggs v. Commissioner***, 440 F2d 1, 71-1 USTC ¶ 9306 [6th Cir. 1971]; ***Matter of Cinelli***, Tax Appeals Tribunal, September 14, 1989, citing ***Korecky v. Commissioner***, 781 F2d 1566, 86-1 USTC ¶ 9232 [11th Cir. 1986]).
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> Among the factors that have been considered in finding fraudulent intent are consistent and substantial understatement of taxes (***Foster v. Commissioner***, 391 F2d 727, 68-1 USTC ¶ 9256 [4th Cir. 1968]; ***Merritt v. Commissioner***, 301 F2d 484, 62-1 USTC ¶ 9408 [5th Cir. 1962]). Understatement alone is not sufficient to prove fraudulent intent but, where other factors indicate fraudulent intent, the size and frequency of the omissions are to be considered in determining fraud (***see***, ***Foster v. Commissioner***, ***supra***). (***Matter of Ellett***, Tax Appeals Tribunal, December 18, 2003.)

Proof of "willfulness" for purposes of the fraud penalty does not require proof of an evil or bad purpose. "An act is done 'willfully' if done voluntarily and intentionally, and with the specific intent to do something the law forbids" (***United States v. Malinowski***, 472 F2d 850, 853, 73-1 US Tax Cas ¶ 9199[1973], ***cert denied*** 411 US 970[1973]).

H. The Division has established that the imposition of fraud penalty with respect to the subject deficiencies is appropriate. Petitioner knowingly filed false New York income tax returns for the years 1998 through 2000 upon which he made the bogus claim of a foreign income exclusion in the amount of his wages. He was convicted of grand larceny as a result of these fraudulent filings on April 15, 2004. His criminal conviction was emphatic notice that, given his employment with the New York City Transit Authority, he was subject to New York income tax (***cf***. ***Matter of Ellett***, Tax Appeals Tribunal, December 18, 2003). His criminal conviction notwithstanding, petitioner did not, at any time, file any New York returns for the years 2001 through 2003. Petitioner has thus consistently and substantially underreported, in its entirety, his income for the six-year period comprising the 1998-2003 tax years. Considering that petitioner knowingly lied on his returns for the earlier years, that he knew through his criminal conviction that he was subject to New York income tax, and considering the absence of any colorable reason for his failure to file returns for the years at issue - indeed considering the presence only of a frivolous reason for such failure (***see*** Conclusion of Law J), compels the reasonable inference that petitioner's decision not to file New York nonresident returns for the years at issue, properly report his New York income and pay the tax due thereon was willfully and deliberately done with intent to evade tax.

Issue IV

I. In accordance with 20 NYCRR 3000.21, the Division moved for the imposition of a frivolous petition penalty. Tax Law § 2018 authorizes the Tax Appeals Tribunal to impose such 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." The maximum penalty allowable under this provision is $500.00 (Tax Law § 2018).

J. Although presented in a somewhat convoluted manner, petitioner's argument is that the law does not make him liable to pay tax on his wages. This is essentially the same position as "wages are not taxable as income," specifically cited in the Rules of Practice and Procedure as a frivolous position (20 NYCRR 3000.21[a]). Furthermore, petitioner's assertion that his employer is liable for income tax and that he, as an employee, is not liable has been deemed a frivolous position (***see Matter of Hyatt***). Accordingly, a frivolous petition penalty in the amount of $500.00 is properly imposed.

K. The petition of Kyle D. Nelson is denied, the notices of deficiency dated February 22, 2005 are sustained and a frivolous petition penalty of $500.00 is imposed pursuant to Tax Law § 2018.

DATED: Troy, New York
June 3, 2010

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE