STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WILLIAM H. DOURLAIN	:	DETERMINATION DTA NO. 823601
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 2002.	:	

Petitioner, William H. Dourlain, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2002.

On June 2, 2011 and June 8, 2011, respectively, the Division of Taxation, appearing by Mark F. Volk, Esq. (David Gannon, Esq., of counsel) and petitioner, appearing pro se, waived a hearing and agreed to submit this matter for determination based on documents and briefs to be submitted by November 2, 2011, which date commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly computed petitioner's tax liability for the year 2002.

II. Whether a frivolous petition penalty should be imposed pursuant to Tax Law § 2018 and 20 NYCRR 3000.21.

FINDINGS OF FACT

1. In December 2004, the Division of Taxation (Division) commenced a personal income tax audit of petitioner, William H. Dourlain, for the year 2002. In doing so, the Division discovered information in its wage and withholding records accounting for wages paid to petitioner in 2002 by State Street Retiree Services and Lockheed Martin Corp. However, the Division was unable to locate a New York personal income tax return filed by petitioner for such year.

2. On June 2, 2008, the Division issued a statement of proposed audit changes (the statement) to petitioner for the year 2002. The statement explained, in pertinent part:

> We do not have a New York State personal income tax return filed under your name(s) or social security number(s).
>
> Information furnished by the Internal Revenue Service shows your address for the tax year 2002 was Manlius, New York.
>
> We have computed your New York tax based on information obtained from our Wage Reporting file. Our records indicate wages were earned in New York State. Employers include STATE STREET RETIREE SERVICES, earnings of $5,000.00 and employer LOCKHEED MARTIN CORP., earnings of $52,442.00. However, no state tax was withheld from either employer.
>
> * * *
>
> This notice reflects the amount of unpaid tax.

The statement also explained that the Division would make an adjustment for taxes withheld if petitioner furnished an employer-provided wage and tax statement showing wages earned and taxes withheld. In addition, the statement informed petitioner that the Division imposed a penalty of 25% pursuant to Tax Law § 685(a)(1) "for not filing a state tax return within five months of its due date," and that interest was also due.

3. Based on petitioner's filing status of single, the computation section of the statement determined petitioner's income and the tax due thereon as follows:

Return Line Description	**Amount**
Federal adjusted gross income	$57,442.00
New York adjusted gross income	$57,442.00
New York deduction	$7,500.00
Dependent exemptions	0
New York taxable income	$49,942.00
New York State tax	$3,023.00
Total New York State tax	$3,023.00

The statement advised petitioner that collection proceedings would be commenced by the issuance of a notice of deficiency unless petitioner responded to the statement by July 2, 2008.

4. The Division issued to petitioner a Notice of Deficiency, Assessment No. L-030168810, dated May 26, 2009, asserting tax due in the amount of $3,023.00, plus interest and penalty, for the year 2002. The notice referenced the "detailed computation of the additional amount due" contained in the statement (i.e., the computation set forth in Finding of Fact 3).

5. The Division's document submission, filed on July 13, 2011, included a motion requesting a frivolous petition penalty be imposed against petitioner, pursuant to 20 NYCRR 3000.5 and 20 NYCRR 3000.21, in the amount of $500.00

SUMMARY OF THE PARTIES' POSITIONS

6. In an affidavit annexed to his petition, dated April 21, 2010, petitioner asserts that he does not "have wages subject to withholding of income tax," specifically noting that his "wages

received from Lockheed Martin[1] are exempt by law from withholding of income tax."[2] Instead, petitioner believes that the Division's assessment of tax on such wages was erroneous because this income is exempt from tax in accordance with the exception to the definition of "wages" contained in section 3401(a)(8)(A)(i) of the Internal Revenue Code (IRC).

7. Petitioner's brief reiterates his position that the assessment here at issue was erroneously issued. In addition, petitioner's brief asks a series of questions regarding the propriety of the Division's assessment of tax on his income. He notes that he has "provided laws, regulations, publications and affidavits but have not had any of my questions answered or provided a law to counter my points." In addition to the IRC sections petitioner relies upon in his petition (***see*** Finding of Fact 8), he cites various publications of the Internal Revenue Service (IRS) in support of his position.

8. Petitioner opposes the Division's July 13, 2011 motion to impose a frivolous petition penalty against him. In support, petitioner cites IRC §§ 3401 and 911 and notes that "[f]or something to be frivolous it must lack legal merit."

9. The Division disagrees with petitioner's analysis and conclusions and posits that the assessment was proper in light of sections 651 and 612 of the Tax Law.

10. The Division offers a lengthy quote from an article, "The Truth About Frivolous Tax Arguments," extracted from the IRS website, which cites several decisions of the U.S. Supreme

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[1] While the assessment here at issue, which was challenged in its entirety, asserts tax due on petitioner's income from both Lockheed Martin Corp. and State Street Retiree Services (***see*** Findings of Fact 1 and 2), the petition and petitioner's brief addressed only the income received from Lockheed Martin Corp.

[2] The same language is repeated in a substantially similar affidavit, dated March 28, 2011, which was annexed to petitioner's brief in this matter dated August 23, 2011.

Court, circuit courts, and Tax Court it believes support its position that the imposition of a frivolous petition penalty is warranted in this matter.

CONCLUSIONS OF LAW

A. When the Division issues a notice of deficiency to a taxpayer, "a presumption of correctness attaches to it and it is incumbent upon [the] petitioner to demonstrate that the notice was erroneous" (***Matter of Gilmartin***, Tax Appeals Tribunal, June 24, 2004, ***confirmed*** 31 AD3d 1008 [2006]).

B. Pursuant to Tax Law § 612(a), the New York adjusted gross income of a resident individual means, in pertinent part, "his federal adjusted gross income as defined in the laws of the United States for the taxable year . . . ." IRC § 62(a), in turn, generally defines adjusted gross income as gross income less certain enumerated deductions. The enumerated deductions do not include wage, salary or interest income.

C. IRC § 61(a) defines the term "gross income" as "all income from whatever source derived . . . ." This section also provides a nonexhaustive list of items that constitute gross income including, inter alia, "[c]ompensation for services, including fees, commissions, fringe benefits, and similar items" (IRC § 61[a][1]).

D. IRC § 3401(a)(8)(A)(i) defines the term "wages" as

> all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include remuneration paid . . . for services for an employer . . . performed by a citizen of the United States if, at the time of the payment of such remuneration, it is reasonable to believe that such remuneration will be excluded from gross income under [IRC § 911].

E. IRC § 911, which applies only to individuals who are United States citizens and residents living abroad, provides for the exclusion from gross income of "foreign earned income" (IRC § 911[a][1]) as well as "the housing cost amount of such individual" (IRC § 911 [a][2]).

F. Petitioner does not assert and the record is without any evidence that petitioner lived abroad during the year 2002. Further, petitioner has not advanced any explanation or basis to suggest that at the time he received the income here at issue, it would have been reasonable for him to believe that the income would be excluded from his gross income on the basis of the income having been earned during a period when he lived abroad. Therefore, petitioner's argument that his income with respect to the year 2002 is exempt from income tax in accordance with the definition of "wages" contained in IRC § 3401(a)(8)(A)(i) is without merit.

G. Pursuant to Tax Law § 2018, if a petitioner's position in a proceeding before the Division of Tax Appeals is frivolous, the Tax Appeals Tribunal

> may impose a penalty against such petitioner of not more than five hundred dollars . . . . This penalty shall be in addition to any other penalty provided by law and shall be collected and distributed in the same manner as the tax to which the penalty relates.

H. The imposition of frivolous petition penalties was recently addressed by the Tribunal in ***Matter of Nelson*** (Tax Appeals Tribunal, April 21, 2011). There, the Tribunal affirmed the administrative law judge's imposition of such penalties, stating:

> The Rules of Practice and Procedure of the Tax Appeals Tribunal for the Division of Tax Appeals (20 NYCRR 3000.21) provide, in part, that a frivolous position includes arguments alleging: '(a) that wages are not taxable as income.' We hold that petitioner's position in this proceeding that he is not liable for personal income tax on his wage income is patently frivolous (***see Matter of Solomon v. Commissioner***, TC Memo 1993-509, ***affd*** 42 F3d 1391 [1994]; ***see also***, ***Matter of Pettis***, Tax Appeals Tribunal, August 18, 2005; ***Matter of Nicholson***, Tax Appeals Tribunal, October 30, 2003). We find the remainder of petitioner ' s arguments to be without merit and frivolous, as such arguments are similar to tax

protestor rhetoric, which has long been rejected (***see Schiff v. Commissioner***, TC Memo 1992-183). In ***Schiff***, the Tax Court considered allegations similar to those raised by petitioner herein and found them to be "stale and long discredited tax protester arguments" that were "totally unfounded and without merit." As such, the Administrative Law Judge properly imposed a frivolous petition penalty of $500.00 pursuant to Tax Law § 2018.

I. Based on the foregoing and in accordance with the finding in Conclusion of Law F that petitioner's substantive argument is without merit, 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.

J. The petition of William H. Dourlain is denied and the Notice of Deficiency dated May 26, 2009 is sustained together with such penalty and interest as are lawfully due and in accordance with Conclusion of Law I, a penalty of $500.00 is imposed for the filing of a frivolous petition.

DATED: Albany, New York
April 12, 2012

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE