

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MARK S. OHBERG	:	DECISION
for Redetermination of a Deficiency or for Refund	:	DTA NO. 828682
of Personal Income Tax under Article 22 of the Tax	:	
Law for the Year 2013.	:	

Petitioner, Mark S. Ohberg, filed an exception to the determination of the Administrative Law Judge issued on October 3, 2019. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Stephanie M. Lane, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Oral argument was not requested. The six-month period for issuance of this decision began on February 24, 2020, the date on which the Division's comments on the submission of additional evidence were received.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether summary determination should be granted in favor of the Division of Taxation 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 under the authority of Tax Law § 2018 and 20 NYCRR 3000.21.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified finding of fact 8 to more fully describe the procedural history of this matter and we have not restated findings of fact 10 and 11 as those findings summarize the parties' legal arguments below. As so modified, the Administrative Law Judge's findings of fact appear below.

1. Based upon information obtained from the Internal Revenue Service (IRS), the Division of Taxation (Division) began an audit of petitioner, Mark S. Ohberg, by sending him a letter dated December 8, 2016, which sought to determine if a personal income tax return for the year 2013 had been filed. The Division had no record of a return filed by petitioner for 2013.

2. Petitioner did not respond to the Division's December 8, 2016 correspondence.

3. The Division issued a statement of proposed audit changes to petitioner for the year 2013, dated October 3, 2017, based upon information it had obtained from the IRS. The Division determined that petitioner had federal adjusted gross income of \$99,610.00 in 2013. After an adjustment for the standard deduction, this resulted in New York State tax of \$5,632.00. After providing for New York State tax withheld, this resulted in tax due of \$4,003.00 plus interest and penalties pursuant to Tax Law § 685 (a) (1); (b) (1) and (2).

4. By letter dated October 31, 2017, petitioner responded to the statement of proposed audit changes expressing his disagreement with the proposed deficiency. Petitioner did not deny receiving income but claimed he did not have "taxable income" and further claimed that he was not subject to income tax under the Internal Revenue Code and the United States Constitution.

5. The Division issued a notice of deficiency to petitioner, dated January 26, 2018, that asserted a deficiency of New York State personal income tax for 2013 in the sum of \$4,003.00, penalty of \$1,939.01, and interest of \$1,313.32, for a balance due of \$7,255.33.

6. On May 2, 2018, the Division of Tax Appeals received a timely petition from petitioner contesting the notice of deficiency. The petition claims that the notice of deficiency is a “fictitious obligation.” The petition generally asserts that petitioner is not a taxpayer and is not subject to taxation on his earnings.

7. In its answer filed on August 1, 2018, the Division denied all paragraphs in the petition and further requested that the Division of Tax Appeals impose the maximum penalty for filing a frivolous petition pursuant to Tax Law § 2018 and 20 NYCRR 3000.21.

8. On June 7, 2019, the Division brought a motion seeking summary determination in the present matter pursuant to section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal and imposing a penalty for the filing of a frivolous petition pursuant to Tax Law § 2018. Included with the Division’s motion papers is the affidavit of Darrell Wright, a Tax Technician 3 in Audit Group I in the Division’s income franchise desk audit bureau, and attached exhibits. Mr. Wright’s responsibilities include reviewing New York State personal income tax returns, supervising an audit group consisting of four teams and the review of files and documentation in the course of personal income tax audits, overseeing and providing assistance to the team members during the audit or protest resolution process, planning and managing the work of both audit teams, and audit selection.

9. As part of his duties, Mr. Wright reviewed the audit file and filing history of petitioner. Mr. Wright notes that petitioner had three sources of income during 2013, to wit: (i) wage

income; (ii) unemployment income; and (iii) pension income. Upon review, Mr. Wright determined that petitioner's wage income was incorrectly reported to the Division in 2013, which resulted in petitioner's wage income being counted twice by the Division when it issued the statement of proposed audit changes and subsequent notice of deficiency to petitioner. Mr. Wright therefore acknowledges that the tax as asserted in the notice of deficiency should be adjusted. This adjustment results in a revised federal adjusted gross income of \$58,257.00, and revised tax due of \$1,306.00, plus interest and penalties pursuant to Tax Law § 685 (a) (1), (b) (1), and (b) (2).

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that the present matter was before him on a summary determination motion and that the granting of such a motion is contingent on a finding that there are no triable issues of fact. The Administrative Law Judge determined that there were no such factual issues and that the Division established that it was entitled to a determination in its favor as a matter of law. The Administrative Law Judge rejected petitioner's legal argument that wages are not taxable income. The Administrative Law Judge also imposed a frivolous petition penalty upon petitioner, as he found no basis for petitioner's position and that similar arguments have been soundly rejected by federal courts.

ARGUMENTS ON EXCEPTION

Petitioner continues to contend that his wages are not taxable income for purposes of the Internal Revenue Code. This contention is premised on petitioner's claim that his earnings from his labor are not income under the Internal Revenue Code or the Sixteenth Amendment.

Relatedly, petitioner also contends that he was not an employee as defined in Internal Revenue Code (IRC) (26 USC) § 3401 (c) and therefore did not receive wages as defined in IRC (26 USC) § 3401 (a). Petitioner asserts that the Division has the burden to prove that his wages are taxable income. Petitioner further asserts that whether his wages may be classified as income is a question of fact.

Petitioner also contends that neither the IRS nor the Division followed proper procedures in the disclosure of his federal tax information pursuant to IRC (26 USC) § 6103 (d). Petitioner asserts that the Division must establish that it followed proper procedures through documentary evidence. Petitioner contends that by its failure to provide such evidence, the Division has admitted that it did not comply with such procedures. Petitioner contends that, consequently, the federal tax information obtained from the IRS should not be allowed in the record.

Petitioner also contends that he was not given the chance to rebut the affidavit of Darrell Wright or to cross examine Mr. Wright and was thus denied his right to due process.

Petitioner submitted documents with his exception and with his reply brief on exception that were not part of the record before the Administrative Law Judge. Petitioner was advised by the Secretary to the Tax Appeals Tribunal that this Tribunal generally does not consider documents that were not part of the record before the Administrative Law Judge.

The Division asserts that the Administrative Law Judge properly granted its motion for summary determination and sustained the notice of deficiency. The Division notes that the definition of income in the Internal Revenue Code is very broad and that it plainly encompasses petitioner's wage income. The Division further asserts that the Administrative Law Judge properly imposed a frivolous petition penalty. The Division contends that petitioner's

arguments have been rejected by the federal courts and that there is no legal basis for those arguments.

The Division also asserts that documents submitted by petitioner with his exception and his reply brief on exception should not be considered by this Tribunal in accordance with established precedent.

OPINION

We note first that petitioner's claim that he was denied due process is without merit. The Division brought a motion for summary determination under 20 NYCRR 3000.9 (b) and for a frivolous petition penalty under 20 NYCRR 3000.21. Under our Rules of Practice and Procedure, petitioner had the opportunity to respond to the Division's motion (*see* 20 NYCRR 3000.5 [b]). As the Division brought a motion, there was no witness testimony and thus no right for petitioner to cross examine witnesses (*cf.* 20 NYCRR 3000.15 [d] [1]).

A motion for summary determination "shall be granted if, 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" (20 NYCRR 3000.9 [b] [1]). Such a motion is subject to the rules for summary judgment motions brought under CPLR § 3212 (20 NYCRR 3000.9 [c]).

"On a motion for summary judgment [or determination], facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation omitted]). To prevail on such a motion, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient

evidence to eliminate any material issues of fact from the case (citations omitted)” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). To defeat such a motion, the non-moving party “must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992] quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Tax Law § 651 (a) (1) requires a New York resident individual to file a New York income tax return for any year if she is required to file a federal tax return for that year; if her federal adjusted gross income plus New York addition modifications (as listed in Tax Law § 612 [b]) exceeds either \$4,000.00 or the amount of her New York standard deduction; or if she receives a lump sum distribution subject to tax under Tax Law § 603.

If a taxpayer fails to file a return as so required, the Division may estimate her New York tax liability and may issue a notice of deficiency to her (Tax Law § 681 [a]). Such a notice requires a rational basis (*Matter of Mayo*, Tax Appeals Tribunal, March 9, 2017).

Here, the affidavit of Mr. Wright and attached exhibits show that the Division obtained information from the IRS indicating that petitioner, a New York resident, had federal adjusted gross income of \$99,610.00 in 2013. Such information provides a rational basis to conclude that petitioner was required to file a New York income tax return for that year (*Matter of Clifton*, Tax Appeals Tribunal, January 4, 2018). The Division’s records show that petitioner did not so file. Accordingly, the Division exercised its authority under Tax Law § 681 (a) to estimate petitioner’s New York tax liability using the federal information and to issue a notice of

deficiency to him. The Division's use of IRS tax reporting information as the basis for the issuance of the notice of deficiency was rational (*id.*). That the information contained a computational error with respect to petitioner's wage income that required a subsequent correction by the Division (*see* finding of fact 9) does not undermine the validity of the notice. Where, as here, a notice of deficiency has a rational basis, a presumption of correctness attaches to it and the petitioner has the burden to prove it erroneous (*Matter of Gilmartin v Tax Appeals Trib.*, 31 AD3d 1008, 1010 [3d Dept 2006]).

In opposition, petitioner has offered no evidence to refute the facts offered by the Division in support of the notice of deficiency. Instead, petitioner relies on his contention that the money paid to him for his labor was not income. Petitioner wrongly contends that this is a question of fact. This is a legal question regarding the tax consequences of the payments to petitioner for his labor. Moreover, it is a legal question with a clear answer. The Internal Revenue Code expressly includes "compensation for services" in its expansive definition of gross income ("all income from whatever source derived") (*see* IRC [26 USC] § 61 [a] [1]).¹ Petitioner's remuneration for his labor plainly falls within this definition. Furthermore, courts have uniformly rejected and deemed frivolous the argument that money received in compensation for labor is not income subject to tax (*see e.g. Sullivan v United States*, 788 F2d 813, 815 [1st Cir 1986]); *Mahfood v Post*, 1994 WL 675086 [E.D.N.Y. 1994], *affd* 50 F3d 3 [2d Cir 1995]).

Petitioner's related argument, that he was not an employee as defined in IRC (26 USC)

¹ Federal gross income is the starting point in determining New York taxable income for a New York resident (*see* IRC [26 USC] § 62 [a] [federal adjusted gross income]; Tax Law §§ 612 [New York adjusted gross income] and 611 [New York taxable income]).

§ 3401 (c) and therefore did not receive wages as defined under IRC (26 USC) § 3401 (a), is a “gross misreading of the Internal Revenue Code that has been emphatically rejected by various federal courts” (*Matter of Clifton*). As we explained in *Matter of Clifton*, IRC (26 USC) § 3401 (c), which relates to income tax withholding, states that the definition of employee for withholding tax purposes, *includes* government officers and employees, elected officials, and corporate officers. Contrary to petitioner’s erroneous interpretation, that statute does not purport to exclude from the definition persons not listed therein (*see also* IRC [26 USC] § 7701 [c] [“the terms ‘includes’ and ‘including’ when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined”]). This “section 3401” argument is a variant of the “payments for labor are not income” argument and, like that other argument, has also been deemed frivolous (*Matter of van Rossem*, Tax Appeals Tribunal, October 24, 2017).

Petitioner has offered no evidence, and there is no evidence in the record, to support his contention that neither the Division nor the IRS followed proper procedures in the disclosure of his federal tax information pursuant to IRC (26 USC) § 6103 (d). This speculative claim thus may not rise to the level of an issue of material fact. As noted previously, unsubstantiated allegations are insufficient to defeat a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d at 562).

Pursuant to the foregoing discussion, we find that the Division has made a prima facie showing of entitlement to judgment as a matter of law and that petitioner has failed to establish the existence of any issue of material fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at

853). Accordingly, the Administrative Law Judge properly granted the Division's motion for summary determination.

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." Such a penalty may be imposed on the Division's motion (20 NYCRR 3000.21). The maximum penalty allowable under this provision is \$500.00 (Tax Law § 2018).

The frivolous petition penalty is properly imposed where the position taken in a petition has been soundly rejected by the federal courts and there is absolutely no basis for it (*Matter of Thomas*, Tax Appeals Tribunal, April 19, 2001). Here, as noted, petitioner's position that payments for his labor are not income has been deemed frivolous (*Sullivan v United States*, 788 F2d at 815), as has petitioner's contention that he was not an employee under IRC (26 USC) § 3401 (c) (*Matter of van Rossem*). Furthermore, these positions are essentially the same as the argument "that wages are not taxable as income," which is an example of a frivolous position in our Rules of Practice and Procedure (20 NYCRR 3000.21 [a]). We conclude, therefore, that the Administrative Law Judge properly granted the Division's motion for a frivolous petition penalty.

Finally, we note that we have not received into the record and have not considered the documents submitted with petitioner's exception and reply brief. In order to "maintain an administrative hearing process that is 'defined and final' and, thus, 'fair and efficient,'" it has long been the policy of this Tribunal to decline to consider evidence that was not included in the

record below (*Matter of Stanton*, Tax Appeals Tribunal, March 12, 2020, quoting *Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Mark S. Ohberg is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Mark S. Ohberg is denied;
4. The notice of deficiency dated January 26, 2018, as modified in accordance with finding of fact 9, is sustained; and
5. The penalty of \$500.00 imposed against petitioner for filing a frivolous petition is sustained.

DATED: Albany, New York
August 24, 2020

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner