STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RALIM SALAHUDIYN EL	:	DETERMINATION DTA NO. 825085
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 2007.	:	

Petitioner, Ralim Salahudiyn El, 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 2007.

On May 27, 2013 and June 6, 2013, respectively, petitioner appearing pro se, and the Division of Taxation, appearing by Amanda Hiller, Esq. (Michelle M. Helm, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs to be submitted by October 21, 2013, 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 assessed petitioner's tax liability for the year 2007.

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

FINDINGS OF FACT

1. Petitioner, Salim Salahudiyn El, whose address is located in New York, New York, did not file a New York State personal income tax return for the year 2007. During the year in issue, petitioner was employed by the State of New York in the Department of Mental Health at the Manhattan Psychiatric Center.

2. In accordance with Internal Revenue Code § 6103(d), the Division of Taxation (Division) received information from the Internal Revenue Service (IRS) indicating that petitioner had New York income sufficient to require the filing of a New York State personal income tax return for 2007. A federal transcript of petitioner's account showed that he did not file a federal return, so the IRS computed the federal tax due on this form as a substitute for the return. The same information was used to compute the tax due to New York.

3. The Division issued a Statement of Proposed Audit Changes (Statement) to petitioner for tax year 2007, indicating that did he not file a New York State income tax return and that the federal information obtained from the IRS was being used to compute his tax liability for 2007 as a New York State resident. The Statement also indicated that since the address on petitioner's federal record showed a New York City address, the Division also computed a New York City resident tax. Further, the Statement explained the Division's imposition of penalties and interest, along with instructions as to the steps petitioner must take if he disagreed with the Division's findings. In pertinent part, the computation of tax was set forth as follows:

New York Adjusted Gross Income	$42,717.00
NYS Itemized or Standard Deduction	$ 7,500.00
New York Taxable Income	$35,217.00
Tax on New York Taxable Income	$ 2,016.00
City of New York Resident Tax	$ 1,175.00
Total NYS, NYC and Yonkers Tax	$ 3,191.00

City of New York School Tax Credit	$ 145.00
Total Tax Withheld	$ 2,530.00
Total Payments	$ 2,675.00
Tax Due	$ 516.00

Penalties and interest were calculated on this amount. Petitioner does not dispute the amount of wages earned in 2007 or any of the Division's calculations.

4. Petitioner did not respond to the Statement; thus, on the basis of the foregoing adjustments, the Division issued a Notice of Deficiency dated June 6, 2011, asserting additional personal income tax due in the amount of $516.00 plus penalties and interest.

5. Petitioner disagreed with the Notice of Deficiency and requested a conciliation conference, which was held on February 22, 2012. A Conciliation Order dated April 13, 2012, sustained the Notice of Deficiency in full. Petitioner timely filed a petition with the Division of Tax Appeals protesting the conciliation order, alleging that his income was not taxable, and that the conciliation order was arbitrary, capricious and perfunctory.

6. The Division submitted the affidavit of Sally Ostrander, a Tax Technician III, whose responsibilities include reviewing New York State personal income tax returns, conducting audits, supervising tax technicians in the Federal State Tape Match Unit, and resolving protests. Her affidavit established that wage income was received by petitioner in 2007 from a New York State employer, that petitioner failed to file a tax return for 2007, and that the total tax due on the income for 2007 was not paid.

7. A review of the Division's records indicated that petitioner did not subsequently file a New York State income tax return for tax year 2007, and the Division's evidence included a Certification of nonfiling of petitioner's return for that year.

SUMMARY OF THE PARTIES' POSITIONS

8. Petitioner argues that "the State has not demonstrated in its Affidavit and Document filing, that it has duly followed and/or met the guidelines and requirements prescribed and proscribed by the applicable law to establish a valid tax assessment and/or liability against Petitioner, for the year in question." Further, petitioner maintains that the New York State taxing scheme does not impose tax on income but actually imposes a tax on those required to file returns. Petitioner further argues that the employer is required to deduct and withhold New York State personal income tax and file an employer's return of tax withheld. Petitioner submits that an employer is liable for the payment of New York State income tax whether or not it is collected from the employee by the employer. On the basis of the foregoing, petitioner concludes that, since he is an employee, he is not responsible for payment of the tax assessed and thus was not required to file a return.

9. The Division maintains that since petitioner, as a resident individual, received income as reported on his substitute federal income tax return, he is also subject to New York State personal income tax on the same income.

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]). In this matter, petitioner bears the burden of proving that his employer is the party liable for the tax assessed.

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 . . . ." Internal Revenue Code (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) 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 . . . .

E. Petitioner does not dispute the amount of income received or the Division's calculation of tax. He merely asserts that he is not the party liable for the tax, and thus, was not required to file a return. In an attempt to meet this burden, petitioner relies upon 26 CFR 31.3403, which states the following, in pertinent part:

> Every employer required to deduct and withhold the tax under section 3402 from the wages of an employee is liable for the payment of such tax whether or not it is collected from the employee by the employer. If, for example the employer deducts less than the correct amount of tax, or if he fails to deduct any part of the tax, he is nevertheless liable for the correct amount of the tax.

F. In ***Anderson v. Commissioner*** (94 TCM 257 [2007]), the taxpayers made the same argument, also with reliance upon IRC § 3403, in an attempt to convince the court that the taxpayers' income tax liabilities were the responsibility of the employer under a skewed view of IRC § 3403. The Tax Court, in rejecting the petitioners' argument stated, in pertinent part:

> The obvious fallacy in petitioners' reasoning is that the income tax is petitioners' obligation in the first instance. An employer, on the other hand is an intermediary or collection agent who may be obligated to withhold amounts from an employee for the employee's future use as a credit or payment of any income tax liability.

In ***Roscoe v. Commissioner*** (48 TCM 1078 [1984]), the petitioners argued that withholding taxes (and FICA contributions) were not assessable against them, and as such could not create income to them. They contended that the withholding tax is a tax upon employers, separate and distinct from petitioners' income. The Tax Court rejected petitioners' arguments with the following explanation:

> The withholding tax imposed by section 3402 and the FICA tax imposed by section 3101 are clearly taxes upon the wages of the petitioners as employees. This is demonstrated by the fact that section 3402(a) and section 3102(a) require the taxes to be deducted from the wages being received. Thus, the burden of the taxes is placed upon the petitioners as employees and they are primarily liable for payment.
>
> Although the primary liability for the taxes is upon petitioners, their employers are responsible for collecting the taxes and remitting them to [the IRS] respondent (Sections 3102[a] and 3402[a]). In the event that the employers fail to discharge their responsibilities in this regard they are held liable for such taxes (Section 3102[b] and section 3402[d]). This result is not inconsistent with our conclusion that the taxes in question constitute liabilities of the petitioners. Section 3102(b) and 3402(d) merely provide a secondary source of collection in the event that an employer fails to fulfill his duties in collecting the tax from the employee.

The same arguments and reasoning were addressed by the Tax Appeals Tribunal in ***Matter of Hyatt*** (November 12, 2009) and ***Matter of Nelson*** (April 21, 2011), and were found to have no merit. In rejecting the taxpayers' identical arguments that the taxpayers' income tax liabilities were the responsibility of their employers, the Tax Appeals Tribunal cited to both ***Anderson*** and ***Roscoe***.

G. In this case, petitioner does not offer any proof that his employer did not meet its statutory obligation to withhold and remit tax, but rather argues that any amount determined to be due and owing after the amount withheld (such as the assessment calculated herein) is the liability of his employer. Petitioner has simply misapplied the federal tax code provisions to justify nonfiling of his income tax return and nonpayment of the balance of his income taxes, an argument similarly made by tax protesters. Petitioner's arguments are rejected as having no merit. Accordingly, the Division correctly assessed petitioner for 2007.

H. 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. Specifically, 20 NYCRR 3000.21 provides, in part, as follows:

> If a petitioner commences or maintains a proceeding primarily for delay, or if the petitioner's position in a proceeding is frivolous, the tribunal may, on its own motion or on the motion of the office of counsel, impose a penalty against such petitioner of not more than $500. 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.

I. The imposition of frivolous petition penalties was 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.

J. Based on the foregoing and in accordance with the finding in Conclusion of Law G 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 (***see Solomon v. Commissioner***, 66 TCM 1201 [1993], ***affd*** 42 F3d 1391 [1994]; ***Matter of Nicholson***, Tax Appeals Tribunal, October 30, 2003).

K. The petition of Ralim Salahudiyn EL is denied and the Notice of Deficiency dated June 6, 2011, is sustained and, in accordance with Conclusion of Law J, a penalty of $500.00 is imposed for the filing of a frivolous petition.

DATED: Albany, New York
April 17, 2014

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE