STATE OF NEW YORK

DIVISION OF TAX APPEALS

| | | |
|---|---|---|
| In the Matter of the Petition | : | |
| of | : | |
| **DAVID AND TARCIA RANDLE** | : | DETERMINATION<br>DTA NO. 827696 |
| 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 2012. | : | |

Petitioners, David and Tarcia Randle, filed a petition 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 2012.

On October 25, 2017, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Charles Fishbaum, Esq., of counsel), filed a motion seeking summary determination in its favor pursuant to 20 NYCRR 3000.5 and 3000.9 (b). Accompanying the motion was the affirmation of Charles Fishbaum, Esq., dated October 25, 2017, together with an additional affidavit and annexed exhibits supporting the motion. On November 9, 2017, petitioners, appearing pro se, filed papers in opposition. The 90-day period for issuance of this determination commenced on November 24, 2017 (20 NYCRR 3000.5 [b]). After due consideration of the motion papers, attached affidavits and annexed exhibits, and all pleadings and proceedings had herein, Kevin R. Law, Administrative Law Judge, renders the following determination.

## *ISSUES*

I. Whether the Division of Taxation has established that summary determination is warranted upon the basis that there are no material and triable issues of fact presented in this matter, such that, as a matter of law, a determination can be made in its favor.

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

## *FINDINGS OF FACT*

1. On or about March 4, 2013, petitioners, David and Tarcia Randle, filed a joint New York Resident Income Tax Return (form IT-201), for the tax year 2012. On said return, petitioners reported $2,724.00 in wage income, $100.00 in taxable interest income, $13,995.00 in taxable social security benefits, and $38,606.00 in income from a discharge of student loan indebtedness.

2. On or about April 28, 2014, petitioners filed a joint Amended Resident Income Tax Return, Form IT-201-X, for the tax year 2012 and claimed a New York subtraction of $11,100.00 on line 30 of the amended return for contribution to New York's 529 college savings program (529 Program), and requested a tax refund of $560.00.

3. Subsequent to the filing of the amended return, the Division of Taxation (Division) selected petitioners' 2012 income tax filing for review. The auditor assigned submitted an audit program request with the 529 Program for tax year 2012. This audit program compares all contributions made to the 529 Program for the given tax year to all taxpayers' claims of contributions to the 529 Program on their tax filings for the given tax year. The result of the

completed audit program indicates that neither petitioner made contributions to the 529 Program in tax year 2012 or held a 529 Program account.

4. On January 13, 2016, the Division issued a notice of deficiency (notice number L-043960727) to petitioners for the year 2012, asserting $480.00 in additional tax due, plus interest, based upon the disallowance of the 529 Program contribution claimed on the amended return.

5. Following a conciliation conference in the Division's Bureau of Conciliation and Mediation Services, a conciliation order was issued on June 3, 2016 sustaining the notice of deficiency.

6. On June 15, 2016, petitioners filed the instant petition with the Division of Tax Appeals which alleged as follows:

> "There is no law requiring me to pay taxes. Therefore I do not have a debt. Please grant ($1,500) for the years of inconvenience."

7. Following the filing of the Division's answer to the petition, the Division filed the aforementioned motion for summary determination. The Division argues that petitioners' arguments are without merit, noting that the Internal Revenue Code and the Tax Law impose tax on the taxable income of New York residents. The Division asserts that the notice of deficiency was proper because petitioners did not make contributions to a 529 Program, and petitioners' argument that they do not owe tax is frivolous and justifies imposition of a penalty pursuant to Tax Law § 2018.

8. In response to the Division's motion, petitioners allege that the there is no law imposing an income tax on them and claim that the notice of deficiency is an illegal debt. Petitioners also attached copies of HJR 192 and a copy of the 13th Amendment to the United States Constitution. Petitioners do not attempt to explain how either of these documents are relevant to this

proceeding or how these authorities affect their tax liability. Petitioners do not challenge the disallowance of the claimed 529 Program contribution.

***CONCLUSIONS OF LAW***

A. This matter proceeds by way of the Division's motion for summary determination under 20 NYCRR 3000.9 (b). 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]). Section 3000.9 (c) of the Rules of Practice and Procedure provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion 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" (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853 [1985], citing ***Zuckerman v City of New York***, 49 NY2d 557, 562 [1980]). 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 v Tri-Pac Export Corp.***, 22 NY2d 439, 441 [1968]; ***Museums at Stony Brook v Village of Patchogue Fire Dept.***, 146 AD2d 572, 573 [2d Dept 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 (***Gerard v Inglese***, 11 AD2d 381 [2d Dept 1960]). "To defeat a motion for summary judgment, the opponent must . . . produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim'" (***Whelan v GTE Sylvania***, 182 AD2d 446, 449 [1st Dept 1992], citing

***Zuckerman*** at 562). Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (***Matter of Alvord & Swift v Muller Constr. Co.***, 46 NY2d 276 [1978]).

B. The Division has presented sufficient evidence to establish that there are no triable issues of fact. The Division's motion papers establish that the Division disallowed the 529 Program contribution and the reason therefor, and assessed tax accordingly. Petitioners submitted no credible evidence that raised a material and triable issue of fact to dispute the facts as set forth in the Division's papers.

C. The question remaining is whether the Division has demonstrated that summary determination should be granted in its favor as a matter of law. In opposition to the Division's motion, petitioners contend that there is no law requiring them to pay income taxes.[1] Stated simply, petitioners are incorrect.

D. Tax Law § 601 imposes an income tax on the New York taxable income of its residents. Tax Law § 611 (a) defines New York taxable income as follows:

> "The New York taxable income of a resident individual shall be his New York adjusted gross income less his New York deduction and New York exemptions, as determined under this part."

E. Tax Law § 612 (a) defines New York adjusted gross income as follows:

> "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, with the modifications specified in this section."

F. In turn, IRC § 62 (a) defines federal adjusted gross income in the case of an individual, as "gross income minus the following deductions: . . . ." Gross income includes compensation

---

[1] Petitioner also submitted a copy of HJR 192 and a copy of the 13th Amendment to the United States Consitution. HJR 192 is the House Joint Resolution that took the United States off the gold standard in 1933 and the 13th Amendment abolished slavery. Petitioners have offered no explanation as to how these documents relate to the present proceeding nor is their relevance readily apparent.

for services, interest income, income from discharge of indebtedness, and taxable social security income (IRC §§ 61; 86). Thus, contrary to petitioners' arguments, there are laws making them liable for income tax and petitioners are liable for the tax as asserted in the January 13, 2016 notice of deficiency.

G. The Division's motion seeks not only a determination upholding the notice of deficiency, but also seeks the imposition of a frivolous petition penalty pursuant to Tax Law § 2018. Tax Law § 2018 authorizes the Tax Appeals Tribunal to impose such a penalty "[i]f 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 (***see*** Tax Law § 2018).

H. Petitioners' argument that the law does not make them liable to pay income tax is patently frivolous. Similar arguments have repeatedly been deemed meritless and frivolous by a number of court decisions. The facts and circumstances of this matter justify the imposition of the frivolous position penalty because of their similarity to those in ***Schiff v Commissioner*** (63 TCM 2572), where the court labeled similar arguments "specious" and "a waste of judicial resources (***id.*** at 2574)." 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). Therefore, the penalty provided for in Tax Law § 2018 is imposed in the sum of $500.00.

I. The Division's motion for summary determination is granted, the petition of David and Tarcia Randle is denied, the notice of deficiency dated January 13, 2016 is sustained, and a frivolous petition penalty of $500.00 is imposed pursuant to Tax Law § 2018.

DATED: Albany, New York
February 22, 2018

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE