STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition

of

ANN MARIE PETTIS

DECISION
DTA NO. 819921

for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the years 1998, 1999 and 2000.

Petitioner Ann Marie Pettis, 2 Lochnavar Parkway, Pittsford, New York 14534, filed an exception to the determination
of the Administrative Law Judge issued on November 18, 2004. Petitioner appeared by Joseph Bascom. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Kevin R. Law, Esq., of counsel).

Petitioner filed a brief in support of her exception and the Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner filed a reply brief. Oral argument was not requested.

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

ISSUES

I. Whether the Administrative Law Judge properly granted the Division of Taxation's motion for summary determination.

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

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. We have also made an additional finding of fact. The Administrative Law Judge's findings of facts and the additional finding of fact are set forth below.

The affidavit of Leonard Slaveikis, a tax technician in the Audit Division, sworn to August 10, 2004, was submitted with the motion in order to establish the facts upon which the Division based its notice of deficiency, most of which are incorporated in the findings below.

In the ordinary course of business, during the years in issue, 1998, 1999 and 2000, the Division of Taxation ("Division") maintained an electronic database known as the Wage Reporting System, which contained information submitted by employers pursuant to Tax Law § 171-a and 20 NYCRR part 2380. The information included the employer and the name, social security number and gross wages paid to each employee residing in New York State.

A review of the wage reporting system information for the years 1998, 1999 and 2000, when cross-referenced with petitioner's social security number, revealed that Highland Hospital of Rochester had paid petitioner wages of $50,255.00 in 1998, $51,168.00 in 1999 and $50,957.54 in 2000.

After a review of its records, the Division determined that it had no record of petitioner's filing personal income

tax returns with New York State for any of the years in issue.

On November 14, 2002, the Division issued three statements of proposed audit changes to petitioner, each of which contained the following explanation:

> Under section 61 of the Internal Revenue Code, compensation received as wages is subject to tax. Since New York State Tax Law conforms with the Internal Revenue Code, your wages are taxable for New York State tax purposes.
>
> A search of our files fails to show a New York State income tax return filed under your name or social security number. Therefore, your New York State income tax is estimated as allowed by New York State law.
>
> You have been allowed the appropriate [$7,500.00] New York standard deduction.
>
> Penalty for late filing has been applied at 5% per month up to a maximum of 25% (section 685(a)(1)
> of the New York State Tax Law).
>
> Section 685(b) penalty has been imposed due to your negligence and/or intentional disregard of the Tax Law or Regulations.
>
> Interest is required by section 684(a) of the New York State Tax Law.

In addition, petitioner was credited for tax withheld for each of the years in issue: $1,916.00 in 1998; $1,979.00 in 1999; and $1,965.04 in 2000.

After allowance for the standard deduction, tax was computed and a credit was applied for tax withheld. Additional personal income tax was determined to be due in the following amounts: $617.00 in 1998; $616.00 in 1999; and $616.00 in 2000.
As set forth in the explanation on each of the statements, penalties and interest were also asserted.

On January 10, 2003, the Division issued to petitioner three notices of deficiency, based upon the statements of proposed
audit changes, which set forth the following additional tax, penalties and interest due:

Period Ended	Tax	Interest	Penalty	Total
12-31-98	$617.00	$180.37	$371.08	$1,168.45
12-31-99	$616.00	$125.95	$346.72	$1,088.67
12-31-00	$616.00	$69.20	$317.64	$1,002.84

We find the following additional finding of fact.

> On August 11, 2004, the Division of Taxation, by its representative, Christopher C. O'Brien, Esq. (Kevin R. Law, Esq., of counsel), filed a motion for an order pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b) seeking summary determination on the ground that there exists no material issue of fact and the imposition of a penalty for the filing of a frivolous petition pursuant to Tax Law
> § 2018. The Division of Taxation submitted the affidavit of Kevin R. Law, Esq., dated August 10, 2004, and the affidavit of Leonard Slaveikis, dated August 10, 2004, with annexed exhibits, in support of its motion. Petitioner filed a timely response to the motion on September 13, 2004.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that 20 NYCRR 3000.9(b)(1) provides that in order to obtain summary determination, the moving party must submit an affidavit, made by a person having knowledge of the facts, which demonstrates that there is no material issue of fact and that the facts mandate a determination in the moving party's favor.

The Administrative Law Judge found that the Division had presented sufficient evidence to establish that there was no triable issue of fact in this proceeding based on the affidavit of Leonard Slaveikis which established that wage income had been received by petitioner for the years at issue and that petitioner had failed to file New York State income tax returns for those years or to pay the full amount of income tax due on said income. The Administrative Law Judge noted that petitioner did not dispute these facts but only raised a vague argument that her income was not derived from an "excise taxable activity." The Administrative Law Judge observed that to defeat a motion for summary judgment, the opponent must produce evidence in admissible form sufficient to raise an issue of fact requiring a trial and that unsubstantiated allegations or assertions are insufficient to raise an issue of fact. The Administrative Law Judge found petitioner's argument to be a meritless legal argument which did not raise an issue of fact.

Relying on applicable provisions of the Internal Revenue Code and the Tax Law, the Administrative Law Judge concluded that petitioner had wage income which was subject to New York State personal income tax. The Administrative Law Judge soundly rejected as meritless and frivolous petitioner's argument that wage income is not subject to taxation by New York State because the definition of income is derived from the Corporate Excise Tax of 1909, which does not include wage income.

The Administrative Law Judge considered the Division's request for the imposition of a penalty of $500.00 pursuant to Tax Law § 2018 for maintaining a position in a proceeding that was frivolous. The Administrative Law Judge found that petitioner's arguments were without merit and were similar to those raised and rejected by the Tax Court in ***Schroeder v. Commissioner*** (T.C. Memo 2002-211, 84 TCM 220, ***affd*** 63 Fed Appx 414, 2003-1 USTC ¶ 50,511, ***cert denied*** 540 US 1220 158 L Ed 2d 156). The Administrative Law Judge noted 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. Therefore, he concluded that petitioner's position was frivolous and imposed the penalty provided for in Tax Law § 2018 in the sum of $500.00.

ARGUMENTS ON EXCEPTION

Petitioner contends that the New York State income tax is an excise tax, inapplicable to petitioner's wages. Petitioner reasons that since the Division does not agree that the income tax is an excise tax there is a material and triable issue of fact warranting the denial of its motion.

The Division of Taxation argues that summary determination was properly granted to the Division as there is no factual question that petitioner had wage income during the years in issue which was subject to New York income tax; that petitioner failed to file tax returns for any of the years in issue and failed to pay the total income tax due on said income.

OPINION

The Tax Appeals Tribunal held in ***Matter of Atlantic & Hudson Ltd. Partnership*** (Tax Appeals Tribunal, January 30, 1992) that:

> Although a determination of tax must have a rational basis in order to be sustained upon review (***see***, ***Matter of Grecian Sq. v. New York State Tax Commn.***, 119 AD2d 948, 501 NYS2d 219), the presumption
>
> of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment (***see***, ***Matter of Tavolacci v. State Tax Commn.***, 77 AD2d 759, 431 NYS2d 174; ***Matter of Leogrande***, Tax Appeals Tribunal, July 18, 1991, ***confirmed***

Matter of Leogrande v. Tax Appeals Tribunal, 187 AD2d 768, 589 NYS2d 383, ***lv denied*** 81 NY2d
704, 595 NYS2d 398).

Once a Notice of Deficiency was issued to petitioner, she bore the burden of proof to demonstrate that the basis for the assessment was unreasonable or that the amount of tax assessed was incorrect (***Matter of Micheli Contr. Corp. v. New York State Tax Commn.***, 109 AD2d 957, 486 NYS2d 448, ***see also,*** Tax Law § 689[e]; 20 NYCRR 3000.15[d][5]). However, petitioner introduced no evidence which would support either the unreasonableness of the assessment or the incorrectness of the tax assessed. Therefore, petitioner is deemed to have submitted to the presumption of correctness.

Tax Law § 2018 provides that:

> 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, then the tax appeals tribunal may impose a
> penalty against such petitioner of not more than five hundred dollars. The tax appeals tribunal shall promulgate rules and regulations as to what constitutes a frivolous position.

The Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.21) provide, in part, that a frivolous position includes: "(a) that wages are not taxable as income." We hold, as did the Administrative Law Judge, that petitioner's position in this proceeding that she is not liable for personal income tax on her wage income is patently frivolous.

We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and correctly applied the relevant law to the facts of this case. Petitioner has offered no evidence below, and no argument on exception, that would provide a basis for us to modify the determination in any respect. Thus, we affirm the determination of the Administrative Law Judge granting the Division's motion for summary determination and we also affirm the imposition of the $500.00 penalty.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ann Marie Pettis is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Ann Marie Pettis is denied;

4. The notices of deficiency dated January 10, 2003 are sustained; and

5. Penalty in the amount of $500.00 imposed for filing a frivolous petition is sustained.

DATED: Troy, New York
August 18, 2005

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott
Robert J. McDermott
Commissioner

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