



Publication 101
**Frivolous Positions Under
The Personal Income Tax**

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Introduction

New York State personal income tax

This publication provides information relating to some of the more common frivolous arguments made by individuals and groups who oppose compliance with federal and New York State tax laws.

For federal information regarding frivolous tax arguments, visit the Internal Revenue Service (IRS) Web site (www.irs.gov).

In general, Article 22 (Personal Income Tax) of the New York State Tax Law conforms to the provisions of the federal Internal Revenue Code relating to personal income tax concepts.

Section 601 of Article 22 imposes a personal income tax on the income from all sources of resident individuals, estates and trusts. Nonresident individuals, estates, and trusts are subject to tax in relation to income derived from or connected with New York sources. Section 651 of the Tax Law sets forth the requirements for the filing of New York State income tax returns.

Failure to comply with these and other provisions of the Tax Law may result in civil and/or criminal penalties being imposed against a taxpayer. Penalties may also be imposed for the filing of frivolous income tax returns or certain other documents.

Section 685(q) of the Tax Law imposes a penalty of up to \$5,000 for the filing of an income tax return which reports an amount of tax due based on a frivolous position. A position is frivolous when it so lacks validity that it is unworthy of serious attention. Frivolous positions include, but are not limited to, positions identified as frivolous by the Commissioner of Taxation and Finance, and positions reflecting an intent to delay or impede the administration of the Tax Law.

Section 685(q) also imposes a penalty of \$5,000 for specified frivolous submissions that are based on a position the commissioner has identified as frivolous, or that reflect a desire to delay or impede the administration of the Tax Law.

Specified submission means one of the following documents:

- Request for conciliation conference
- Petition to the Division of Tax Appeals
- Application for an installment payment agreement
- Offer in Compromise

The filing of any of these documents based on a frivolous position will subject the taxpayer to penalties under section 685(q).

Positions identified as frivolous by the Commissioner of Taxation and Finance

The following provides a general overview of clearly frivolous positions commonly taken by taxpayers as an excuse for not paying taxes. This list does not by any means include every possible frivolous position. The Commissioner will periodically update the list of positions identified as frivolous.

Federal conformity

Position: A taxpayer has no New York State tax liability because he or she claims to have no federal tax liability based on a frivolous argument.

Any position based on the argument that a taxpayer has no New York State tax liability because he or she has no federal tax liability and New York conforms with federal tax law will be considered frivolous where the taxpayer's characterization of his or her federal taxable status is based on a frivolous federal position.

New York State Tax Appeals Tribunal

Under the rules of the New York State Tax Appeals Tribunal relating to petitions (20 NYCRR 3000.21), certain positions are designated as frivolous.

Position: Any of the following positions, designated as frivolous under 20 NYCRR 3000.21, will also be considered frivolous for purposes of section 685(q):

- Wages are not taxable as income;
- An individual is not liable for income tax because he or she has not exercised any privileges of government;
- The income tax system is based on voluntary compliance and an individual therefore need not file a return;
- Federal reserve notes are not “legal tender” or “dollars” and an individual therefore cannot measure his or her income; and
- Only states can be billed and taxed directly.

Constitutional amendment claims

Many frivolous positions are grounded in distorted interpretations of the various Amendments to the United States Constitution. The following is a summary of some of the more common of these claims. All have been identified as frivolous by the Internal Revenue Service and rejected by the federal courts.

Position: Taxpayers can refuse to pay income taxes on religious or moral grounds by invoking the First Amendment.

The First Amendment does not provide a right to refuse to pay income taxes on religious or moral grounds, or because taxes are used to fund government programs opposed by the taxpayer. Jenkins v. Comm’r of Internal Revenue, 483 F3d 90, 92 (2d Cir 2007).

Position: Income taxes constitute a “taking” of property without due process of law, violating the Fifth or Fourteenth Amendment.

The U.S. Supreme Court has made it clear that “the Constitution does not conflict with itself by conferring upon the one hand a taxing power, and taking the same power away on the other by limitations of the due process clause.” Brushaber v. Union Pacific R.R., 240 U.S. 1, 24 (1916).

Position: Taxpayers do not have to file returns or provide financial information because of the protection against self-incrimination found in the Fifth Amendment.

There is no constitutional right to refuse to file an income tax return on the ground that it violates the Fifth Amendment privilege against self-incrimination. US v. Sullivan, 274 U.S. 259 (1927).

Position: Compelled compliance with the income tax laws is a form of involuntary servitude in violation of the Thirteenth Amendment.

Courts have consistently found arguments that taxation constitutes a form of involuntary servitude to be frivolous. Porth v. Brodrick, 214 F2d 925, 926 (10th Cir 1984).

Position: The Sixteenth Amendment to the United States Constitution was not properly ratified, thus the federal income tax laws are unconstitutional.

This argument is based on the premise that all federal income tax laws are unconstitutional because the Sixteenth Amendment was not officially ratified, or because the State of Ohio was not properly a state at the time of ratification. The U.S. Supreme Court has upheld the constitutionality of the income tax laws enacted subsequent to ratification of the Sixteenth Amendment. Brushaber v. Union Pacific R.R., 240 U.S. 1 (1916). The courts have since consistently upheld the constitutionality of the federal income tax.

Position: The Sixteenth Amendment does not authorize a direct non-apportioned federal income tax on United States citizens.

The constitutionality of the Sixteenth Amendment has invariably been upheld when challenged, and numerous courts have both implicitly and explicitly recognized that the Sixteenth Amendment authorizes a non-apportioned direct income tax on United States citizens and that the federal tax laws as applied are valid. United States v. Collins, 920 F2d 619 (10th Cir 1990), cert denied, 500 U.S. 920 (1991); Brushaber v. Union Pacific RR, 240 U.S. 1 (1916).

Miscellaneous frivolous positions

The following is a list of assorted frivolous positions commonly argued by taxpayers attempting to avoid tax. All have been identified as frivolous by either the Internal Revenue Service or the New York State Tax Appeals Tribunal and rejected by federal or New York State courts.

Position: The “United States” consists only of the District of Columbia, federal territories, and federal enclaves. Therefore, because federal adjusted gross income is the starting point for determining New York State taxable income, individuals are not subject to State tax.

The Internal Revenue Code imposes a federal income tax upon all United States citizens and residents, not just those who reside in the District of Columbia, federal territories, and federal enclaves.

Position: New York State is a foreign country and a person residing and working in New York State is entitled to the benefit of the foreign earned income exclusion.

In order for a taxpayer to be eligible to claim the foreign earned income exclusion, he or she must be a United States citizen (*see*, IRC section 911[d][1][A]), and in accordance with section 1 of the Fourteenth Amendment to the United States Constitution, United States citizens residing in the United States are also citizens of the state wherein they reside and entitled to all privileges and immunities of citizens of the several states (US Const, article IV, section 2). The United States government is the government of all the states, and because the United States Congress is composed entirely of elected representatives and senators from all the states, any argument that New York State is a foreign country is without merit. Matter of Nicholson, Tax Appeals Tribunal, October 30, 2003.

Position: The taxpayer is not a “person” as defined by the Internal Revenue Code, and thus is not subject to the federal income tax laws.

This argument is based on a tortured misreading of the Internal Revenue Code, which clearly and broadly defines “person.” IRC section 7701.

Position: The only “employees” subject to federal income tax are employees of the federal government.

Some argue that the federal government can tax only employees of the federal government; therefore, employees in the private sector are immune from federal income tax liability. This argument is based on a misinterpretation of section 3401 of the Internal Revenue Code, which imposes responsibilities to withhold tax from “wages.” Revenue Ruling 2006-18, 2006-1 C.B. 743, warns taxpayers of the consequences of making this frivolous argument. Any position claiming that an individual has no New York State tax liability on the basis that the

individual has no federal taxable income because the federal government can only tax federal employees is frivolous.

Position: African Americans can claim a special tax credit as reparations for slavery and other oppressive treatment.

Proponents of this contention assert that African Americans can claim a so-called “Black Tax Credit” on their federal income tax returns as reparations for slavery and other oppressive treatment suffered by African Americans. A similar frivolous argument has been made that Native Americans are entitled to a credit on their federal income tax returns as a form of reparations for past oppressive treatment.

There is no provision of federal or New York State law which allows taxpayers to claim a “Black Tax Credit” or a credit for Native American reparations. It is a well settled principle of law that deductions and credits are a matter of legislative grace. See, e.g., Wilson v. Commissioner, T.C. Memo. 2001-139, 81 T.C.M. (CCH) 1745 (2001). Unless specifically provided for in the Internal Revenue Code or New York State Tax Law, no deduction or credit may be allowed.

Position: Taxpayers are entitled to a refund of the Social Security taxes paid over their lifetime.

Proponents of this contention encourage individuals to file claims for refund of the Social Security taxes paid during their lifetime, on the basis that the claimants have sought to waive all rights to their Social Security benefits. There is no provision in the Internal Revenue Code, or any other provision of law, which allows for a refund of Social Security taxes paid on the grounds asserted above. Revenue Ruling 2005-17, 2005-1 C.B. 823 discusses this frivolous argument in more detail, warning taxpayers of the consequences of attempting to pursue a claim on these grounds. Any position regarding New York State tax liability derived from a similar claim will be considered frivolous.

Position: An “untaxing” package or trust provides a way of legally and permanently avoiding the obligation to file federal income tax returns and pay federal income taxes.

Advocates of this idea claim that an “untaxing” package or trust provides a way of legally and permanently “untaxing” oneself so that a person is no longer required to file federal income tax returns and pay federal income taxes. Promoters who sell such tax evasion plans and willful taxpayers have been subjected to criminal penalties for their actions. Taxpayers who have purchased and followed these “untaxing” plans have also been subjected to civil penalties for failure to timely file a federal income tax return and failure to pay federal income taxes.

Revenue Ruling 2006-19, 2006-1 C.B. 749, warns that taxpayers may not eliminate their federal income tax liability by attributing income to a trust and claiming expense deductions related to that trust.

Position: A “corporation sole” can be established and used for the purpose of avoiding income taxes.

Advocates of this idea claim they can reduce their federal tax liability by taking the position that the taxpayer’s income belongs to a “corporation sole,” an entity associated with a single individual and created for the purpose of avoiding taxes. A valid corporation sole is a corporate form that enables religious leaders to hold property and conduct business for the religious entity. Participants in this scheme apply for incorporation under the pretext of being an official of a church or other religious organization and contend that their income is exempt from taxation because the income allegedly belongs to the corporation sole, which is claimed to be a tax exempt organization described in IRC section 501(c)(3).

A taxpayer cannot avoid income tax or other financial responsibilities by purporting to be a religious leader and forming a corporation sole for tax avoidance purposes. The claims that such a corporation sole is described in section 501(c)(3) and that assignment of income and transfer of assets to such an entity will exempt an individual from income tax are meritless. Courts have repeatedly rejected similar arguments as frivolous, imposed penalties for making such arguments, and upheld criminal tax evasion convictions against those making or promoting the use of such arguments.

The IRS issued Revenue Ruling 2004-27, 2004-1 C.B. 625, which discusses this frivolous argument in more detail, warning taxpayers of the consequences of attempting to use this scheme.

Position: Issuance of refunds constitutes an acceptance or endorsement of a frivolous position that the taxpayer is not subject to federal income tax and is therefore not subject to New York State income tax, since the starting point for determining New York State taxable income is federal adjusted gross income.

Issuance of a state or federal refund does not constitute an endorsement of the taxpayer’s position.

Position: 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.

An employer’s obligation to withhold and remit tax under sections 671 and 675 of the Tax Law does not relieve the employee-taxpayer of the

obligation to pay the personal income tax due on his or her wages.
Matter of Hyatt, Tax Appeals Tribunal, November 12, 2009; Anderson
v. Commissioner (TC Memo 2007-265).

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Telephone assistance

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To order forms and publications: (518) 457-5431



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