

SYNOPSIS

PERSONAL INCOME TAX -- BURDEN OF PROOF NOT MET --
Petitioner, who has held and presently holds only a West Virginia driver's license listing a West Virginia address and from which a petition for reassessment was mailed, and who supports a wife and children in this state whom he visits here, and whose employer withholds West Virginia personal income tax from his salary, is considered domiciled in and to be a resident of the State of West Virginia for West Virginia personal income tax purposes as set forth in W. Va. Code § 11-21-7(a)(1).

REVISED FINAL DECISION ON REMAND

On July 30, 2004, Administrative Law Judge George V. Piper issued an administrative decision finding Petitioner liable for a personal income tax assessment for the years 1999, 2000, 2001 and 2002, for tax, interest through March 11, 2004, and additions to tax.

In due course, Petitioner appealed said decision to the County Circuit Court, West Virginia.

On February 28, 2005, the Honorable Circuit Court Judge in this case ruled in his "Order Granting Reconsideration" that the decision be vacated and remanded back to this tribunal [again] "to make findings of fact and conclusions of law as to whether Petitioner is a West Virginia resident."

FINDINGS OF FACT

1. The petition for reassessment contained uncorroborated affidavits from both Petitioner's mother and from his estranged wife asserting that Petitioner had not been a resident of West Virginia since 1996 when he left the state to go to out-of-state to find work; that the West Virginia address listed in his West Virginia Motor Vehicle operator's license is only used to receive mail; that when the Petitioner is not on the road (Petitioner is a long haul-trucker), he resides in another state; and that Petitioner visits his children twice a year at the West Virginia address.

2. Petitioner's only driver's license is a renewed West Virginia commercial driver's license issued on March 27, 2000 which lists his address as West Virginia. Petitioner admitted at hearing that he held the same type of West Virginia driver's license from 1996 to 2000.

3. Petitioner's assessment was prompted by the fact that his present employer has been withholding West Virginia personal income tax from his salary based upon Petitioner presently having a West Virginia driver's license.

4. Petitioner admits that his wife and children, whom he financially supports, all live in the State of West Virginia and that he makes visits to West Virginia to see them.

5. All other "findings of fact" included in the aforementioned administrative decision issued on July 30, 2004, are incorporated by reference.

CONCLUSIONS OF LAW

Based upon all of the above it is **HELD** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment the burden of proof is upon a petitioner-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

2. Said burden of proof as to whether the Petitioner is or is not a West Virginia resident rests totally with the Petitioner and not the Respondent.

3. Because Petitioner's only driver's license, which he voluntarily produced at the hearing, is a renewed West Virginia commercial driver's license which lists his address as West Virginia, is proof of West Virginia residency.

4. Although Petitioner stated at hearing that he resides out-of-state, because no evidence whatsoever was produced to prove same such as an out-of-state driver's license, etc., no proof of out-of-state residency was shown.

5. Because Petitioner's filed petition for reassessment was mailed from the same West Virginia address as set forth in his West Virginia commercial driver's license is further proof of West Virginia residency regardless of whether the same was prepared by his mother with his permission.

6. Petitioner having admitted at hearing that his estranged wife and children, whom he financially supports, all live in the State of West Virginia and that he visits them in the State of West Virginia is more proof of West Virginia residency.

7. The fact that Petitioner has held one or more West Virginia driver's licenses and no others since at least 1996 when he claimed that he left for good is proof of West Virginia residency.

8. The fact that Petitioner's present employer withholds West Virginia personal income tax from his salary based upon Petitioner's carrying a valid West Virginia driver's license is further proof of West Virginia residency.

9. The Petitioner-taxpayer in this matter, although given ample opportunity to do so at hearing, has, therefore, failed to carry the burden of proof with respect to his contention that he is not domiciled in and a resident of the State of West Virginia for West Virginia personal income tax purposes because of his myriad of contacts with the State of West Virginia; to-wit: presently holds West Virginia driver's license; has no out-of-state driver's license; all legal dependents whom he supports and visits live in West Virginia; the West Virginia address is used for the filing of papers such as the petition for reassessment, not just to receive mail; and Petitioner's employer withholds West Virginia personal income taxes based upon Petitioner's having a valid West Virginia driver's license.

This tribunal afforded the Petitioner the opportunity to present all evidence relevant to the issue of residency. The Petitioner chose not to do so. The law does not permit him to receive an open-ended number of evidentiary hearings or to present any new evidence on appeal. Syl. pt. 3, Frymier-Halloran v. Paige, 193 W.Va., 687, 458 S.E.2d 780 (1995).

DISPOSITION

WHEREFORE, it is the **REVISED FINAL DECISION ON REMAND** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the personal income tax assessment issued against the Petitioner for the years 1999, 2000, 2001 and 2002, for tax, interest, and additions to tax, should be and is hereby **AFFIRMED**.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on this personal income tax assessment until this liability is fully paid.