

**SANITIZED DEC. 04-395 P -- BY ROBERT W. KIEFER, JR. -- SUBMITTED FOR
DECISION ON SEPTEMBER 16, 2004 -- ISSUED ON 11/03/04**

SYNOPSIS

PERSONAL INCOME TAX -- The inability of a taxpayer to pay the amount of tax, interest, additions to tax and estimated tax penalties is irrelevant to the validity of the assessment and, in the absence of evidence that the assessment is erroneous, unlawful, void or otherwise substantively invalid, the assessment will be affirmed.

PERSONAL INCOME TAX -- TAXPAYERS' FAILURE TO CARRY BURDEN OF PROOF -- The failure of taxpayers to articulate adequate grounds in their petition for reassessment justifying their claim, combined with their failure to appear at a hearing and to present any evidence respecting their claim, will result in a denial of relief to the taxpayers. *See* W. Va. Code § 11-10A-10(e) [2002]; 121 C.S.R. 1, §§ 63.1 and 69.2 (Apr. 20, 2003).

FINAL DECISION

The Internal Auditing Division of the West Virginia State Tax Commissioner's Office issued an assessment for personal income tax against the Petitioners. This assessment was issued pursuant to the authorization of the State Tax Commissioner under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code. The assessment was for calendar year 2002, for tax, interest, through May 31, 2004, and additions to tax, for a total assessed liability. Written notice of the assessment was served on the Petitioners.

Thereafter, by mail received in the offices of the West Virginia Office of Tax Appeals, on June 18, 2004, the Petitioners timely filed a petition for reassessment. With their petition for reassessment, the Petitioners paid the tax portion of the assessment.

Thereafter, by letter dated July 13, 2004, and sent via certified mail, return receipt requested, the Petitioners were given notice of the prehearing conference and the evidentiary hearing in this matter. The Petitioners received the notice, as evidenced by United States Postal

Service Form “PS Form 3811, August 2001, Domestic Return Receipt” which was personally signed for by one of the Petitioners in July, 2004.

At the time scheduled for convening the evidentiary hearing, there was no appearance on behalf of the Petitioners. The evidentiary hearing was held, however, without an appearance on behalf of the Petitioners, in accordance with the provisions of W. Va. Code § 11-10A-10(a) [2002] and 121 C.S.R. 1, § 69.1 (Apr. 20, 2003).

FINDINGS OF FACT

1. In their petition for reassessment, the Petitioners asserted that they did not have the ability to pay the estimated tax penalties (and presumably interest and additions to tax) at that time.

2. The grounds articulated by the Petitioners are inadequate to show that the assessment, or any of its individual components, were erroneously or unlawfully assessed, or are void or otherwise invalid.

3. The Petitioners were provided with notice that they were required to appear at the evidentiary hearing and present evidence respecting the reasons he believed that the assessment was erroneous, unlawful, void or otherwise invalid.

4. The Petitioners did not appear at the time and place of the hearing and presented no evidence to justify waiving the additions to tax or estimated tax penalties, or any part thereof.

5. The Respondent presented “State’s Exhibit No. 2,” a copy of the Petitioners’ West Virginia personal income tax return, Form WVIT-140, which shows that the Petitioners had federal adjusted gross income for calendar year 2002 referencing a certain amount.

6. By presenting “States Exhibit No. 2,” the Respondent is attempting rebut the Petitioners’ contention that they did not have the ability to pay any additions to tax or penalties, by showing that the Petitioners had substantial income during calendar year 2002.

CONCLUSIONS OF LAW

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

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioners to show that any assessment of tax against them is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; 121 C.S.R. 1, §§ 63.1 and 69.2 (Apr. 20, 2003).

2. The Petitioners in this matter have failed to carry their burden of proving that any assessment of taxes against them are erroneous, unlawful, void or otherwise invalid.

3. The ability of the Petitioners to pay interest, additions to tax or estimated tax penalties is irrelevant to the issue of whether or not those items are properly assessed by the Tax Commissioner.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the personal income tax assessment issued against the Petitioners for calendar year 2002, for tax, interest, computed through May 31, 2004, additions to tax and estimated tax penalty, for a total assessed liability, should be and is hereby **MODIFIED**, to reflect payment of the tax portion of the assessment, leaving interest, computed through May 31, 2004, additions to tax and estimated tax penalty, for a total modified liability.

