

**SANITIZED DEC. 05-026 P – BY GEORGE V. PIPER – SUBMITTED FOR
DECISION 04/05/05 – ISSUED 04/14/05**

SYNOPSIS

PERSONAL INCOME TAX -- BURDEN OF PROOF MET IN PART --
Because Petitioners' original tax filing was incorrect, Petitioners were allowed post-hearing to file tax returns which correctly reflect their tax filing status.

FINAL DECISION

The Internal Auditing Division of the West Virginia State Tax Commissioner's Office issued a personal income tax assessment 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 the year 2003, for tax, interest, through, December 30, 2004, and additions to tax, for a total assessed liability. Written notice of this assessment was served on the Petitioners.

Thereafter, by mail postmarked January 13, 2005, the Petitioners timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment *See* W. Va. Code § 11-10A-8(1) [2002].

Subsequently, notice of a hearing on the petition was sent to the Petitioners and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and 121 C.S.R. 1, § 61.3.3 (Apr. 20, 2003).

FINDINGS OF FACT

1. Petitioners had erroneously deducted, from their 2003 West Virginia resident income tax return, income which Petitioner, husband, received while working in a surrounding state.

2. Petitioners had erroneously deducted from their 2003 West Virginia resident income tax return personal income tax paid to the surrounding state.

3. Petitioner, husband, worked in the surrounding state until June, 2003 and then moved to West Virginia to join his wife.

4. Petitioner, wife, resided in the State of West Virginia during the entire tax year of 2003.

5. Because Petitioners could not lawfully file a joint resident West Virginia income tax return for tax year 2003, Petitioner, wife, agreed at the hearing to allow the Division to prepare for her alone a West Virginia resident income tax return for her signature, and her husband agreed to the preparation of a West Virginia nonresident/part-year resident income tax return for his signature.

6. In due course said returns were sent to Petitioner for their signatures.

DISCUSSION

The only issue is whether the Petitioners have shown that the assessment is incorrect and contrary to law, in whole or in part.

In this case, Petitioners had filed the wrong personal income tax returns for tax year 2003, and both parties agreed that each of the Petitioners would have to file a separate return to correctly reflect the proper residency requirement.

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. The Petitioners-taxpayers in this matter have failed to carry the burden of proof with respect to their contention that their original tax filing was correct. *See* 121 C.S.R. 1, § 69.2 (Apr. 20, 2003).

On the other hand, the Petitioners were given the opportunity post-hearing to file the correct tax returns for the year 2003 and did so file.

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 the year 2003, should be and is hereby **MODIFIED** in accordance with the above Conclusions of Law for **revised tax** and **interest**, on the **revised tax**, for a **total revised liability**; the additions to tax are, however, **VACATED** in full.