

**REDACTED DECISION -- 07-100 P -- BY R. MICHAEL REED, CHIEF
ALJ -- SUBMITTED for DECISION on JUNE 8, 2007 -- ISSUED on JUNE 29, 2007**

SYNOPSIS

PERSONAL INCOME TAX -- ADDITIONS TO TAX FOR UNDERPAYMENT OF ESTIMATED INCOME TAX -- REASONABLY UNEXPECTED SUBSTANTIAL INCREASE IN CERTAIN TYPES OF TAXABLE INCOME NOT GROUND FOR WAIVER AS "CASUALTY, DISASTER, OR OTHER UNUSUAL CIRCUMSTANCES" -- A reasonably unexpected substantial increase in certain types of taxable income does not constitute the type of "unusual circumstance" authorizing the waiver of the additions to tax (sometimes referred to as an underpayment "penalty") imposed for the underpayment of West Virginia estimated personal income tax, within the meaning of the statute which authorizes such a waiver for "casualty, disaster or other unusual circumstances [such that] the imposition of such addition[s] to tax would be against equity and good conscience." W. Va. Code § 11-10-18a(e)(3) (first enacted in 1993). *See also* I.R.C. § 6654(e)(3)(A) (first enacted in 1984) and *Christian v. Comm'r*, No. 6:04-23323-HFF-WMC, 2006 U.S. Dist. LEXIS 54777, 13-15 (D.S.C. June 22, 2006), *magistrate's recommendation adopted by court*, 2007 U.S. Dist. LEXIS 10778, 99 A.F.T.R.2d (RIA) 1183 (D.S.C. Feb. 06, 2007).

PERSONAL INCOME TAX -- UNEXPLAINED DETERMINATION BY INTERNAL REVENUE SERVICE WAIVING FEDERAL ESTIMATED INCOME TAX UNDERPAYMENT ADDITIONS NOT BINDING ON STATE TAX AUTHORITIES -- The West Virginia State Tax Commissioner and the independent West Virginia Office of Tax Appeals are not bound by an unexplained determination by the Internal Revenue Service waiving the federal estimated income tax underpayment additions to tax. Such a determination does not have precedential value.

FINAL DECISION

On January 04, 2007, the Unit Manager of the Accounts Monitoring Unit of the Internal Auditing "Division" of the West Virginia State Tax Commissioner's Office ("the Commissioner" or "the Respondent") issued a West Virginia 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 calendar and tax year 2005, for tax, interest, “regular” additions to tax (for late payment), and “special” additions to tax (“penalty”) for underpayment of estimated income tax -- less payment (for all of the tax itself and the assessed interest) -- for a “net” total assessed West Virginia personal income tax liability. Written notice of this assessment was served on the Petitioner on a date not specified in the record.

Thereafter, by mail addressed improperly, on the envelope, to the Commissioner and forwarded by him to this totally independent tribunal, the West Virginia Office of Tax Appeals, on February 06, 2007, the Petitioners-taxpayers timely filed a petition for reassessment. *See* W. Va. Code §§ 11-10A-8(1) [2002] and 11-10A-9(a)-(b) [2005].

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

The post-hearing briefing schedule concluded on June 08, 2007.

FINDINGS OF FACT

The following findings of material fact are based upon the joint exhibits and the findings of fact proposed by the Petitioners-taxpayers in their initial brief, with respect to which the Respondent State Tax Commissioner in his brief has not indicated any substantive disagreement:

1. While the Petitioners-taxpayers' total taxable income decreased from the tax year 2004 to the year 2005, certain types of their taxable income not subject to withholding substantially increased, such as a 10% increase in rental income and a 14.7% increase in Schedule "K-1" income. The Petitioners-taxpayers reasonably could not have expected such increases.

2. On the other hand, for the year 2005 (the year in question), the Petitioners-taxpayers remitted less than ½ of the total amount of West Virginia estimated personal income tax than they had remitted for the year 2004.

3. The Internal Revenue Service ultimately waived, without any explanation, the federal estimated income tax underpayment additions to tax.

4. The record does not indicate whether the Petitioners-taxpayers often underpay their West Virginia estimated personal income taxes.

DISCUSSION

The first issue is whether the West Virginia estimated personal income tax underpayment additions to tax for the year 2005 should be waived, pursuant to the provisions of W. Va. Code § 11-10-18a(e)(3), as amended, due to "casualty, disaster, or other unusual circumstances [such that] imposition of such addition[s] to tax would be against equity and good conscience." Based upon the few federal and other precedents on point, this tribunal holds in the negative.

For tax years ending prior to July 01, 1993, the West Virginia estimated personal income tax underpayment additions to tax could not be "waived" for any reason. Instead, that type of additions to tax could be avoided then only by complying with certain types

of computational (mathematical) or “timing” mechanisms provided by various other parts of this statute. Effective for tax years on or after July 01, 1993, this type of additions to tax could be waived “if and to the extent the [state] tax commissioner determines that by reason of casualty, disaster or other circumstances the imposition of such addition to tax would be against equity and good conscience.” W. Va. Code § 11-10-18a(e)(3). This statute was virtually identical to its source, section 6654(e)(3)(A) of the Internal Revenue Code, which was first enacted in the year 1984.

Accordingly, precedents decided by federal tax tribunals on this point would be very persuasive. Research by this tribunal discloses few such precedents on point, involving a similar set of material facts. A recent precedent which does involve greatly fluctuating and highly unpredictable taxable income amounts is *Christian v. Comm’r*, No. 6:04-23323-HFF-WMC, 2006 U.S. Dist. LEXIS 54777, 13-15 (D.S.C. June 22, 2006), *magistrate’s recommendation adopted by court*, 2007 U.S. Dist. LEXIS 10778, 99 A.F.T.R.2d (RIA) 1183 (D.S.C. Feb. 06, 2007). That federal district court in South Carolina ruled that such unpredictability (for capital gains from numerous corporate stock sales) did not constitute the type of “unusual circumstance,” within the meaning of I.R.C. § 6654(e)(3)(A), and upheld the federal estimated income tax underpayment additions to tax.

In contrast, what does constitute such an “unusual circumstance” is addressed generally in *Ruffe v. Dep’t of Revenue*, No. TC-MD 050735C, 2005 Ore. Tax LEXIS 224 (Or. T.C. Nov. 09, 2005). There, the Oregon Tax Court upheld and applied the state tax agency’s administrative rule implementing an Oregon statute authorizing the waiver of interest on that state’s estimated income tax underpayments. The Oregon statute was

virtually identical to W. Va. Code § 11-10-18a(e)(3). The administrative rule illustrated the meaning of such “unusual circumstances” as follows:

“The following are examples of situations that will be accepted by the department as unusual circumstances for not imposing interest.

"(a) Where the failure to make the necessary estimated tax payment was caused by death or serious illness of the taxpayer, or death or serious illness of the taxpayer's immediate family.

"(b) Where the taxpayer's books and records are destroyed by fire, flood or other natural disaster and therefore, the taxpayer is unable to determine the correct estimated tax payment.

"(c) Where the disaster is so overwhelming that the taxpayer neglects to make the necessary estimated tax payment.

"(d) Where the failure to make the necessary estimated tax payment was caused by the unavoidable and unforeseen absence of the taxpayer from the state immediately prior to the due date of the estimated tax payment."

This tribunal believes that these are valid examples, too, for purposes of W. Va. Code § 11-10-18a(e)(3). Noticeably absent, explicitly and implicitly: highly unpredictable taxable income amounts.

The second issue is whether the unexplained waiver of the federal estimated income tax underpayment additions to tax by the Internal Revenue Service here is binding or should be followed by the Respondent State Tax Commissioner and this independent state tax tribunal. This tribunal holds in the negative.

Due to the lack of any explanation as to why this determination was reached by the Internal Revenue Service, it appears that the same was the result of the exercise of

discretion in an executive, rather than a quasi-judicial, capacity and apparently was done on an *ad hoc*, non-precedential basis.

CONCLUSIONS OF LAW

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

1. A reasonably unexpected substantial increase in certain types of taxable income does not constitute the type of “unusual circumstance” authorizing the waiver of the additions to tax (sometimes referred to as an underpayment “penalty”) imposed for the underpayment of West Virginia estimated personal income tax, within the meaning of the statute which authorizes such a waiver for “casualty, disaster or other unusual circumstances [such that] the imposition of such addition[s] to tax would be against equity and good conscience.” W. Va. Code § 11-10-18a(e)(3) (first enacted in 1993). *See also* I.R.C. § 6654(e)(3)(A) (first enacted in 1984) and *Christian v. Comm’r*, No. 6:04-23323-HFF-WMC, 2006 U.S. Dist. LEXIS 54777, 13-15 (D.S.C. June 22, 2006), *magistrate’s recommendation adopted by court*, 2007 U.S. Dist. LEXIS 10778, 99 A.F.T.R.2d (RIA) 1183 (D.S.C. Feb. 06, 2007).

2. On the other hand, the taxpayer can avoid imposition of the estimated income tax underpayment additions to tax (“penalty”) -- no matter how substantial the unexpected increase in a type of taxable income is -- by, for example, timely remitting, for the tax year in question, all of the estimated income tax installment payments in a total amount of not less than 100% of the tax liability shown on the annual West Virginia

personal income tax return for the immediately preceding 12-month tax year. W. Va. Code § 11-10-18a(d)(1) [1998].

3. Similarly, the taxpayer can avoid imposition of the estimated income tax underpayment additions to tax (“penalty”) -- no matter how substantial the unexpected increase in a type of taxable income is -- by filing the annual West Virginia personal income tax return for the tax year in question, and therewith remitting any balance of tax due, by no later than the last day of the first month of the immediately succeeding year (that is, for a calendar year taxpayer, by no later than January 31st of the next year). W. Va. Code § 11-10-18a(i) [1998].

4. Because these commonly utilized mechanisms were available, essentially “in advance,” for entirely avoiding the imposition of the West Virginia estimated income tax underpayment additions to tax, it is not “against equity and good conscience” to affirm the non-waiver of the relatively sizeable -- but calculated according to the statute -- West Virginia estimated income tax underpayment additions to tax. *See, e.g., Ruffe v. Dep’t of Revenue*, No. TC-MD 050735C, 2005 Ore. Tax LEXIS 224 (Or. T.C. Nov. 09, 2005).

5. The West Virginia State Tax Commissioner and the independent West Virginia Office of Tax Appeals are not bound by an unexplained determination by the Internal Revenue Service waiving the federal estimated income tax underpayment additions to tax. Such a determination does not have precedential value.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the West Virginia personal income tax assessment issued against the Petitioners for the calendar and tax year 2005, for “net” tax of \$, “net” interest of \$, “regular” additions to tax (for late payment) of \$, and “special” additions to tax (“penalty”) for underpayment of estimated income tax of \$, totaling \$, must be and is hereby **AFFIRMED**, by this independent, quasi-judicial tribunal, ruling, as it must, on the issue of law presented (as this tribunal, unlike the Respondent State Tax Commissioner or the Internal Revenue Service, does not have the authority to exercise sound “executive” “discretion” in the matter).