

**REDACTED DECISION – DOCKET NUMBER 10-043 P - BY – GEORGE V. PIPER,  
ADMINISTRATIVE LAW JUDGE – SUBMITTED FOR DECISION ON AUGUST 25,  
2011 – ISSUED ON FEBRUARY 16, 2012**

**SYNOPSIS**

**TAX ADMINISTRATION -- DUTIES OF TAX COMMISSIONER --** It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

**PERSONAL INCOME TAX -- BURDEN OF PROOF --** In a hearing before the West Virginia Office of Tax Appeals, on a petition for reassessment, the burden of proof is on the Petitioner to show that any assessment of tax against him is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003).

**PERSONAL INCOME TAX -- RESIDENT INDIVIDUAL --** Pursuant to West Virginia Code Section 11-21-7(a) to be considered a resident individual an individual must be domiciled in this State unless he maintains no permanent place of abode in this State, maintains a permanent place of abode elsewhere and spends in the aggregate not more than thirty days of the taxable year in this State or is not domiciled in this State, but maintains a permanent place of abode in this State and spends in the aggregate more than one hundred eighty three days of the taxable year in this State.

**PERSONAL INCOME TAX -- BURDEN OF PROOF MET --** The Petitioner in this matter has carried his burden of proof by submitting a W-2 for tax year 2005 with a Virginia address along with stamped Virginia resident income tax return for that same year, which showed that Petitioner, being a resident of the State of Virginia for tax year 2005, could not therefore, be a resident individual of West Virginia for tax year 2005 because he would be considered a nonresident for that year.

**FINAL DECISION**

On November 20, 2009, the Tax Unit Supervisor of the Compliance Division (the Division) of the West Virginia State Tax Commissioner's Office (Tax Commissioner or Respondent) issued a personal income tax assessment against Petitioner. 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 2005, for tax in the amount of \$\_\_\_\_\_, interest in the amount of \$\_\_\_\_\_, computed through the

date of the assessment and additions to tax of \$\_\_\_\_\_, for a total assessed tax liability of \$\_\_\_\_\_. Written notice of this assessment was served on Petitioner as required by law.

Thereafter, by mail postmarked January 25, 2010, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code §§ 11-10A-8(1) and 11-10A-9(a)-(b) (West 2010).

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of West Virginia Code Section 11-10A-10.

### **FINDINGS OF FACT**

1. As a result of the federal tape match program, it was revealed that Petitioner had not filed a 2005 West Virginia resident personal income tax return.

2. The assessment issued to Petitioner reflected the amount of gross income reported on his federal tax return, as well as information from other sources.

3. During prior telephonic status conferences between Petitioner, Respondent's counsel and this Tribunal, Respondent's counsel stated that if Petitioner could submit documentary proof from the State of Virginia that he has filed a Virginia resident income tax return for 2005, then the Respondent would vacate the outstanding West Virginia income tax assessment for the same year.

4. At the outset of the evidentiary hearing, Petitioner submitted his W-2 for tax year 2005 showing his address in the State of Virginia, as well as a stamped Virginia resident income tax return for 2005 which Respondent's counsel accepted without objection (Petitioner's Exhibit No. 1).

## **DISCUSSION**

The sole issue for determination is whether the Petitioner was a resident individual or a nonresident individual for West Virginia personal income tax purposes for tax year 2005.

To be a resident individual West Virginia Code Section 11-21-7 states as follows:

- (a) Resident individual. – Resident individual means an individual:
  - (1) Who is domiciled in this State, unless he maintains no permanent place of abode in this State, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this State, or
  - (2) Who is not domiciled in this State but maintains a permanent place of abode in this State and spends in the aggregate more than one hundred eighty-three days of the taxable year in this State.
- (b) Nonresident individual. – A nonresident individual means an individual who is not a resident.

W. Va. Code Ann. § 11-21-7 (West 2010)

A cursory reading of the statute makes clear that to be a resident individual means someone who is domiciled in this State unless that person maintains a permanent abode elsewhere and spends in the aggregate not more than thirty days of the taxable year in this State or is not domiciled in this State, but maintains a permanent abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this State. Subsection (b) provides that a nonresident individual is an individual who is not a resident.

In this instance, Petitioner submitted a W-2 for tax year 2005 evidencing a Virginia address as well as a stamped Virginia resident income tax return for that same year. The evidence clearly showed that Petitioner, being a resident of the State of Virginia for tax year

2005 could not therefore be a resident individual of West Virginia for tax year 2005 because he would be considered a nonresident that year.

### CONCLUSIONS OF LAW

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

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

2. In a hearing before the West Virginia Office of Tax Appeals, on a petition for reassessment, the burden of proof is on the Petitioner to show that any assessment of tax against him is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003).

3. Pursuant to West Virginia Code Section 11-21-7(a) to be considered a resident individual an individual must be domiciled in this State unless he maintains no permanent place of abode in this State, maintains a permanent place of abode elsewhere and spends in the aggregate not more than thirty days of the taxable year in this State or is not domiciled in this State, but maintains a permanent place of abode in this State and spends in the aggregate more than one hundred eighty three days of the taxable year in this State.

4. The Petitioner in this matter has carried his burden of proof by submitting a W-2 for tax year 2005 with a Virginia address along with stamped Virginia resident income tax return for that same year, which showed that Petitioner, being a resident of the State of Virginia for tax

year 2005, could not therefore, be a resident individual of West Virginia for tax year 2005 because he would be considered a nonresident for that year.

### **DISPOSITION**

**WHEREFORE**, it is the final decision of the West Virginia Office of Tax Appeals that the personal income tax assessment issued against the Petitioner for the year 2005, for tax in the amount of \$\_\_\_\_\_, interest in the amount of \$\_\_\_\_\_ and additions to tax in the amount of \$\_\_\_\_\_, for a total assessed tax liability of \$\_\_\_\_\_, should be and is hereby **VACATED**, and the Petitioner owes no further tax liability for the period in question.

**WEST VIRGINIA OFFICE OF TAX APPEALS**