

**REDACTED DECISION—10-057 P—BY GEORGE V. PIPER, ALJ—  
SUBMITTED FOR DECISION on JUNE 15, 2010 —ISSUED on DECEMBER 1,  
2010.**

## **SYNOPSIS**

**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 upon the petitioner to show that any assessment against him is erroneous, unlawful, void or otherwise invalid. *See* W.Va. Code § 11-10A-10(e) [2002]; W.Va. Code St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

**PERSONAL INCOME TAX -- BURDEN OF PROOF FOR WAIVER OF ADDITIONS TO TAX NOT MET BY PETITIONER** -- Because W.Va. Code § 11-21-51(a) mandates that every resident individual required to file a federal income tax return for the taxable year or having West Virginia adjusted gross income for the taxable year in excess of the sum of exemptions must file an income tax return on or before the fifteenth day of the fourth month following the taxable year failure to do so constitutes willful neglect, and, therefore the failure is not due to reasonable cause as set forth in W.Va. Code § 11-10-18 (a)(2).

**PERSONAL INCOME TAX -- TAXPAYER'S FAILURE TO CARRY BURDEN OF PROOF** -- The failure of the taxpayer to articulate adequate grounds in his petition for reassessment justifying his claim will result in a denial of relief to the taxpayer. *See* W.Va. Code § 11-10A-10(e) [2002]; W.Va. Code St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003)

## **FINAL DECISION**

On February 15, 2010, a supervisor of the Compliance Division of the West Virginia State Tax Commissioner's Office ("the respondent") issued a personal income tax assessment against the 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 2008, for tax in the amount of \$\_\_\_\_, interest in the amount of \$\_\_\_\_, and additions to tax of

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

Thereafter, by mail postmarked February 24, 2010, the petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. W.Va. Code §§ 11-10A-8(1) [2007] and 11-10A-9 [2005].

At the time scheduled for convening the evidentiary hearing, there was no appearance on behalf of the petitioner.<sup>1</sup> The evidentiary hearing was held in accordance with the provisions of W.Va. Code § 11-10A-10(a) [2002] and W.Va. Code St. R. § 121-1-69.1 (Apr. 20, 2003).

#### **FINDINGS OF FACT**

1. In his petition for reassessment, Petitioner states that he paid his 2008 West Virginia taxes on April 17, 2009. He does not dispute the fact that the taxes were due on April 15, 2009.

2. He states that he paid the taxes on April 17, 2009 because that is the same day that he received a refund from the State of Virginia. He related that he filed for the Virginia refund as soon as he received his W-2's from his Virginia employer, but that the refund was delayed because of Virginia's economic cutbacks.

3. He further states that he had advised his employer that his West Virginia taxes should be paid to West Virginia because he lives in West Virginia, but his employer

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<sup>1</sup> The day before the scheduled hearing a telephonic conference was held between the parties and this tribunal during which Petitioner relayed that he now lives in Florida and would not be attending the hearing. He asked that his petition for reassessment be placed into the record at hearing, and stated that he had nothing further to present.

advised him that his taxes are paid to Virginia because his work location is Virginia and taxes are withheld based upon work location.

4. He states that he encountered this situation in 2009 for tax year 2007 and that he requested and received a waiver of the additions to tax. He further states that he was unable to understand why another waiver could not be granted since the tax code does not prohibit future waivers and he is personally powerless to change these circumstances.

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

6. Petitioner did not appear at the time and place of the hearing and presented no evidence, except as outlined above, respecting any of his allegations.

## **DISCUSSION**

The sole issue is whether the petitioner has shown reasonable cause for waiver of the additions to tax imposed with respect to the personal income tax assessment.

W.Va. Code § 11-10-18(a)(2) requires that additions to tax be added to the amount of tax shown as the tax on the return if the requested return is not filed on or before the due date unless the failure to do so results from reasonable cause and not from willful neglect.

The Tax Department form “Schedule E-Instructions” contains a list of states for which West Virginia taxpayers may claim credit for state income tax paid as a non-resident on the West Virginia Resident Income Tax Return. West Virginia residents are not taxed as nonresidents on wages or salaries earned in Virginia; therefore, in order for

Petitioner to receive a refund of any erroneously withheld or paid tax to Virginia, he must have filed a return with the State of Virginia. He did so.

However, W.Va. Code § 11-21-51(a) provides that all resident individuals required to file a federal income tax return for the taxable year or having West Virginia adjusted gross income for the taxable year in excess of the sum of exemptions must file on or before the fifteenth day of the fourth month following the close of the taxable year.

In his correspondence to the Tax Commissioner, Petitioner states that the circumstances were beyond his control, as they were in 2007, and that nothing in the State tax code prohibits another waiver being granted for the same reason.

Respondent's counsel argued that any decision to waive additions to tax for the preceding year was not precedent to waive additions to tax for any future years because there was always a statutory requirement to file his West Virginia tax return by April 15.

This is correct. Further, in Petitioner's waiver denial letter for 2008 it specifically said that the waiver does not constitute precedent for subsequent periods for this on any other taxes.

Each taxable year is considered separately for purposes of waiver of additions to tax and failure to comply with the statute constitutes willful neglect and, therefore cannot constitute reasonable cause for waiver of additions to tax as set forth in W.Va. Code § 11-10-18 (a)(2).

#### **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 on the petitioner to show that any tax assessment

against him is erroneous, unlawful, void or otherwise invalid. See W.Va. Code § 11-10A-10(e) [2002]; W.Va. Code St. R. §§ 121-1-63.1 and 69.2 (Apr 20, 2003).

2. The petitioner in this matter has failed to carry the burden of proving that the additions to tax resulted from reasonable cause and not from willful neglect.

### **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 tax year 2008, 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 **AFFIRMED**.

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