

SYNOPSIS

PERSONAL INCOME TAX – “INNOCENT SPOUSE” – EFFECT OF PROOF – A concession by the State Tax Commissioner that a taxpayer is entitled to innocent spouse status, consistent with the granting of innocent spouse status by the Internal Revenue Service, will result in the abatement of a personal income tax assessment as to that taxpayer, but not as to the taxpayer’s former spouse.

PERSONAL INCOME TAX – “INNOCENT SPOUSE” – PRESUMPTION OF JOINT PETITION – Where notice of a personal income tax assessment, based on an increase in the taxpayers’ joint federal adjusted gross income, is given to a taxpayer’s former spouse, and the former spouse files a petition for reassessment, the petition can reasonably be deemed to have been filed on behalf of the both the taxpayer and the former spouse.

PERSONAL INCOME TAX – TAXPAYER’S FAILURE TO CARRY BURDEN OF PROOF – Where a personal income tax assessment is based on an increase in the taxpayers’ federal adjusted gross income, the failure of a taxpayer to appear at a hearing and to present any evidence to show that he has undertaken to reduce, eliminate or otherwise successfully challenge the federal adjustments, will result in a denial of relief to the taxpayer. *See* W. Va. Code § 11-10A-10(e) [2002]; 121 C.S.R. 1, §§ 63.1 and 69.2 (Apr. 20, 2003).

PERSONAL INCOME TAX – “INNOCENT SPOUSE” – WEST VIRGINIA OFFICE OF TAX APPEAL’S DECISION PRESUMPTIVELY BINDING ON OTHER SPOUSE – Where notice of a hearing on a petition for reassessment against a taxpayer is given to the taxpayer’s former spouse and the taxpayer does not appear at the evidentiary hearing, the assessment is presumed to be valid. However, the taxpayer may file a motion for reconsideration of the final decision and for a new hearing, pursuant to 121 C.S.R. 1, § 79 or § 80 (Apr. 20, 2003), provided that he has adequate grounds, including showing that he has successfully challenged changes increasing his federal adjusted gross income.

FINAL DECISION

On May 20, 2004, the Unit Manager of the Accounts Monitoring Unit of the Internal Auditing Division of the West Virginia State Tax Commissioner’s Office issued an assessment for personal income tax against the Petitioners, who were husband and wife during the year in question. 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 2000, for tax, interest, and additions to tax, for a total assessed liability of \$. Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked June 9, 2004, received in the offices of this tribunal, the West Virginia Office of Tax Appeals, on June 10, 2004, the Petitioner former wife filed a petition for reassessment.

At the time scheduled for convening the evidentiary hearing, there was no appearance on behalf of either of the Petitioners. The hearing was held, however, without an appearance on behalf of either 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. According to the “Findings of Fact, Conclusions of Law, and Final Order” in a certain civil action in a certain circuit court in this State -- which circuit court order is contained in the record as an exhibit to the petition for reassessment -- the address of the Petitioner former wife is [address deleted here].

2. According to that circuit court order, the address of the former husband is [different from the address of the Petitioner former wife.]

3. The notice of assessment was sent to both Petitioners at the former wife’s address set forth in the circuit court order.

4. There is no evidence in the record to show that the notice of assessment was sent to the address of the former husband identified in the circuit court order.

5. There is no evidence in the record to show that the State Tax Commissioner or this tribunal -- at the time the assessment here was issued or at the time the notice of hearing here was mailed -- had any actual knowledge or any reason to know the address of both of the Petitioners as set forth in the circuit court order.

6. The notice of hearing was sent to both Petitioners at the former wife's address set forth in the circuit court's order.

7. The notice of hearing was not sent to the address of the former husband set forth in the circuit court order.

8. In her petition for reassessment respecting personal income tax for the year 2000, the Petitioner former wife asserts that she is an innocent spouse, and that it was her ex-husband who earned all joint income, failed to properly report the income, and to see that personal income tax was properly paid thereon.

9. The Petitioner applied for innocent spouse status with the Internal Revenue Service, pursuant to 26 U.S.C. § 6015.

10. The Petitioner asserts that the additional income giving rise to the tax liability was as the result of an audit of the Petitioners' joint tax return filed for the year 2000.

11. In her applications for innocent spouse status, the Petitioner asserted, *inter alia*:

- a. The Petitioner was a full-time homemaker and was not employed outside of the home;
- b. All of the income giving rise to the tax liability was earned by the Petitioner's former spouse;
- c. That the additional tax liability arose as the result of incorrect deductions or credits, all of which were attributable to the Petitioner's former spouse;
- d. The Petitioner's former spouse was responsible for handling their joint financial matters, including writing checks, paying bills, reviewing monthly bank statements, hiring the accountant who prepared their tax return, and compiling information furnished to the accountant for preparation of their joint tax return;
- e. That the Petitioner did not participate in the preparation of their return filed for the year 2000;
- f. At the time that the return was prepared and filed, the Petitioner did not know and had no reason to know that an understatement of tax existed;
- g. The Petitioner and her former husband are presently divorced and that there were no assets transferred between them as part of any scheme to defraud the Internal Revenue Service; and
- h. Pursuant to the divorce decree, the Petitioner's ex-husband has the duty to pay the tax liability and, at the time that she entered into the divorce decree, that the Petitioner had no reason to know that her ex-husband would not pay the liability.

12. Based on the applications, the Petitioner former wife was granted innocent spouse status by the Internal Revenue Service.

13. In recognition of the Internal Revenue Service granting innocent spouse status to the Petitioner former wife, the State Tax Commissioner, by counsel, agreed that the Petitioner former wife was entitled to innocent spouse status for tax year 2000 for the tax liability that is the subject of the underlying assessment.

14. The former husband did not file a separate petition for reassessment respecting his liability for the personal income tax assessment for tax year 2000.

15. Because the petition for reassessment filed by the Petitioner former wife could reasonably be deemed a petition filed on behalf of both Petitioners, under the known circumstances, the State Tax Commissioner pursued the assessment with respect to the former husband, for the purpose of establishing liability for the increased income.

16. The former husband did not appear at the time and place of the hearing and presented no evidence which would show that the assessment against him is erroneous, unlawful, void, or otherwise invalid.

DISCUSSION

The Petitioner former wife applied for and received “innocent spouse” status from the Internal Revenue Service. Because the Internal Revenue Service granted the Petitioner former wife “innocent spouse” status, the State Tax Commissioner also granted her innocent spouse status. The State Tax Commissioner also agreed that, by reason of her status as an innocent spouse, the Petitioner would not be liable for the taxes assessed against her.

On the other hand, the former husband has taken no action to show that the assessment is erroneous, unlawful, void, or otherwise invalid. He has not filed a separate petition for reassessment. He did not appear at the hearing to present any evidence to refute the assessment, or

the underlying changes resulting from the audit conducted by the Internal Revenue Service, and the consequent increase in his West Virginia taxable income. In a situation where the former husband clearly had notice of the assessment and the proceedings, or where, as here (apparently), there was an adequate attempt to provide him with notice and he refused or avoided such notice, the former husband's failure to file a separate petition or to appear at the hearing and present evidence to refute the assessment would constitute, in effect, a failure to satisfy his burden of proof. This would unequivocally necessitate affirmation of the assessment.

However, in light of all of the aforesaid circumstances, it is unclear whether the former husband received technically proper notice of either the assessment or of the hearing. He has the right to challenge the basis of the assessment against him and his ex-wife, the exercise of which is predicated on his receipt of proper notice of the assessment and his right to a hearing. If, upon receipt of this decision, the former husband determines that there are sufficient grounds to challenge the assessment and can demonstrate that he did not receive notice of the assessment or of the hearing, then he should file a motion challenging the assessment within twenty (20) days, pursuant to 121 C.S.R. 1, § 79 or § 80 (Apr. 20, 2003), if he so chooses.

On the other hand, because the assessment is predicated on changes initiated by the Internal Revenue Service, the former husband will likely prevail only if he can show that the changes made by the Internal Revenue Service are incorrect, either in whole or in part. W. Va. Code § 11-21-12(a) provides that West Virginia adjusted gross income means federal adjusted gross income, as determined by the laws of the United States, subject to certain modifications. The Internal Revenue Service's changes primarily increase the former husband's Schedule C income, thereby increasing federal adjusted gross income. *See* State's Exhibit No. 3. This increase in federal adjusted gross income results in a corresponding increase in West Virginia adjusted gross income. Thus, unless the Internal Revenue Service is incorrect, or absent an applicable modification identified in W. Va.

Code § 11-21-12(c) which reduces federal adjusted gross income in arriving at West Virginia adjusted gross income, the assessment is correct. It would be incumbent on the former husband to convince the Internal Revenue Service that its changes are incorrect, thereby reducing his West Virginia adjusted gross income, or demonstrate that there is some other reason why his West Virginia adjusted gross income should be less than the federal adjusted gross income. This may be a burden that he is unable or unwilling to satisfy.

Consequently, this Office does hereby abate the assessment as to the Petitioner former wife, and affirm the assessment as to the former husband, subject to his right to file a motion for reconsideration or for a new hearing, pursuant to 121 C.S.R. 1, § 79 or § 80 (Apr. 20, 2003), if he so chooses.

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 him 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 Petitioner, having been granted “innocent spouse” status by the State Tax Commissioner, is entitled to relief from the assessment.

3. The former husband, having failed to file a separate petition for reassessment on his own behalf and having failed to appear at the evidentiary hearing and present evidence in his own behalf, has failed to carry the burden of proving that any assessment of taxes against him is erroneous, unlawful, void, or otherwise invalid.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the personal income tax assessment, as issued against the Petitioner former wife, for the year 2000, for tax, interest, and additions to tax, totaling \$, should be and is hereby **ABATED** as to her.

However, it is also the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the personal income tax assessment, insofar as it was issued against the former husband, for the year 2000, for tax, interest, and additions to tax, totaling \$, should be and is hereby **AFFIRMED** as to him.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on this personal income tax assessment until this liability is fully paid.