

**SANITIZED DECISION – DOCKET NO. 06-024 RP – BY R. MICHAEL REED,
CHIEF ALJ – SUBMITTED for DECISION on APRIL 6, 2006 – ISSUED on
APRIL 11, 2006**

SYNOPSIS

PERSONAL INCOME TAX -- DISMISSAL OF UNTIMELY FILED PETITION FOR REFUND -- Under the explicit wording of W. Va. Code § 11-10A-9(a)-(b) [2002], the West Virginia Office of Tax Appeals does not have the authority to hear a petition for refund that, as here, was untimely filed, that is, the petition for refund was filed with the West Virginia Office of Tax Appeals more than 60 days after the State Tax Commissioner served notice (in effect, here) that the underlying claim for refund had been denied, *see* W. Va. Code § 11-10-14(d)(1) [2002, 2003]. Accordingly, the West Virginia Office of Tax Appeals will dismiss from its docket a petition for refund which, as here, is determined to have been filed untimely, based upon a closer examination of the record.

FINAL DECISION

This matter has a very unusual procedural background and arrives before this tribunal in a most unusual current posture. Both parties have failed to follow normal procedures, thereby causing some unnecessary problems. As a limited-jurisdiction, executive-branch tribunal, the West Virginia Office of Tax Appeals does not have the broad, legal or equitable powers of a general-jurisdiction, judicial-branch tribunal to address or to solve the existing problems in this matter.

FINDINGS OF FACT

1. On or about February 18, 2002, the Petitioner, by an attachment to the then delinquently filed West Virginia personal income tax returns for the years 1999 and 2000, filed, in essence, an improper, anticipatory claim for refund of West Virginia personal income tax -- for anticipated assessment of interest and additions to tax for late filing and late payment -- for those two (2) tax years. The Petitioner explained in this attachment to the delinquently filed returns -- which attachment was entitled, “Request for Waiver of Penalty” -- that the delinquency was due to the severe financial, emotional, and disabled-

sibling-care problems resulting from the December, 1998 death of the Petitioner's remaining parent.

2. According to the record before this tribunal, the applicable Unit of the West Virginia State Tax Commissioner's Office ("the Commissioner" or the "Respondent") did not, however, ever issue a notice of assessment of interest and additions to tax for the delinquent filing by the Petitioner of the 1999 and 2000 West Virginia personal income tax returns.

3. Also, the Commissioner's applicable Unit did not ever issue any response or ruling on the aforementioned anticipatory claim for refund of interest and additions.

4. The Petitioner did not file, with the then operating predecessor to this tribunal, a petition for refund within sixty (60) days after the expiration of the six (6)-month time period within which the Commissioner's Office is to rule on a claim for refund of personal income tax, *see* W. Va. Code § 11-10-14(d)(1) [2002, 2003].

5. Without having ever issued an assessment of interest and additions to tax for the Petitioner's delinquently filed and paid 1999 and 2000 West Virginia personal income tax, the Commissioner, on a date not specified in the record, improperly filed a notice of a state tax lien for the interest of \$ and additions to tax of \$, totaling \$, and subsequently, by a letter dated December 01, 2005, notified the Petitioner that the Commissioner had levied against a certain bank account owned by the Petitioner, to fully satisfy the (prematurely filed) state tax lien for the interest and additions to tax.

6. By a letter dated December 13, 2005, the Petitioner responded to the December 01, 2005 notice of levy, by requesting waiver and refund of the then recently collected interest and additions, supported by referring to the fact that the Internal Revenue Service had, in January, 2004, waived additions to tax (imposed by the IRS in

May, 2003) for the delinquently filed 1999 and 2000 federal income tax returns, for the same reasons stated in the attachment to the delinquently filed 1999 and 2000 West Virginia personal income tax returns.

7. On December 13, 2005, the Commissioner's Compliance staff in writing denied the request for refund of the collected lien, on the ground that the request had not been timely made.

8. By letter dated December 14, 2005, the Petitioner replied to the Commissioner's denial of December 13, 2005, by stressing that the Petitioner had initially requested waiver of the (anticipated) interest and additions in the February, 2002 attachment to the then filed 1999 and 2000 West Virginia personal income tax returns.

9. On December 14, 2005, the Commissioner's Compliance staff again denied in writing the request for waiver and refund of interest and additions collected by the December 01, 2005 levy against the Petitioner's bank account; this denial indicated that the request had been reviewed by a supervisor.

10. Thereafter, by mail postmarked January 10, 2006, the Petitioner filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for refund. *See* W. Va. Code §§ 11-10A-8(2) [2002] and 11-10A-9(a)-(b) [2002]. The petition was docketed, pending a closer examination of this unusual matter.

11. Subsequently, notice of a hearing on the petition was sent to the Petitioner 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). With this tribunal's approval, both parties subsequently decided, however, to submit the matter for a regular (non- small claim) decision on documents only, without an evidentiary hearing in person. *See* W. Va. Code St. R. § 121-1-53.1 (Apr. 20, 2003).

DISCUSSION

The only issue that it is appropriate for this tribunal to decide on this record is whether the petition for refund was timely filed with this tribunal.

Under W. Va. Code § 11-10-14(d)(1) [2002, 2003], *see also* W. Va. Code § 11-10A-9(b) [2002], if the Commissioner does not issue a ruling within six (6) months on a timely filed claim for refund of personal income tax, that failure to issue a ruling within that time period is, in effect, the service of notice of a denial of the claim for refund, and the taxpayer has sixty (60) days after the expiration of that six (6)-month ruling period to file a petition for refund with the West Virginia Office of Tax Appeals. In addition, W. Va. Code §§ 11-10-14(d)(1) [2002, 2003], 11-10A-9(a) [2002], and 11-10A-9(b) [2002] explicitly provide that any petition for refund must be filed “timely,” that is, no more than sixty (60) days after service of notice of denial of the claim for refund.

In this matter the six (6)-month period for the Commissioner to issue a ruling on the Petitioner’s February 18, 2002 anticipatory claim for refund of interest and additions to tax expired on or about August 18, 2002, but the Petitioner did not file a petition for refund within sixty (60) days after that latter date. Accordingly, the denial of the anticipatory refund claim became final and not subject to any administrative or judicial review on or about October 17, 2002, long before the January 10, 2006 filing of the petition for refund in this matter.

The sixty (60)-day period to file with this tribunal a petition for refund of the (post-lien) state tax collection in this matter clearly did not commence with the post-lien, notice of levy correspondence from the Commissioner’s Compliance staff. Because the Commissioner did not issue the required notice of assessment of the interest and

additions to tax, the lien that was filed in this matter was issued prematurely and, therefore, the Petitioner's bank account was levied against prematurely. This limited-jurisdiction, executive-branch tribunal, though, does not have the subject-matter jurisdiction to review or to interfere with state tax liens or collection processes thereon. An appropriate circuit court would have that jurisdiction.

CONCLUSIONS OF LAW

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

1. Under W. Va. Code § 11-10-14(d)(1) [2002, 2003], *see also* W. Va. Code § 11-10A-9(b) [2002], if the Commissioner does not issue a ruling within six (6) months on a timely filed claim for refund of personal income tax, that failure to issue a ruling within that time period is, in effect, the service of notice of a denial of the claim for refund, and the taxpayer has sixty (60) days after the expiration of that six (6)-month ruling period to file a petition for refund with the West Virginia Office of Tax Appeals.

2. Under the explicit wording of W. Va. Code § 11-10A-9(a)-(b) [2002], the West Virginia Office of Tax Appeals does not have the authority to hear a petition for refund that, as here, was untimely filed, that is, the petition for refund was filed with the West Virginia Office of Tax Appeals more than 60 days after the State Tax Commissioner served notice (in effect, here) that the underlying claim for refund had been denied, *see* W. Va. Code § 11-10-14(d)(1) [2002, 2003].

3. The West Virginia Office of Tax Appeals will dismiss from its docket, as improvidently docketed, a petition for refund which, as here, is determined to have been filed untimely, based upon a closer examination of the record.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the Petitioner's petition for refund of \$ of West Virginia personal income tax (\$ interest and \$ additions to tax), for the tax years 1999 and 2000, must be and is hereby **DISMISSED**, as untimely filed and improvidently docketed.