

**REDACTED DECISION—10-090 P—BY MICHELE DUNCAN BISHOP, CALJ—  
SUBMITTED FOR DECISION on JUNE 4, 2010 —ISSUED on DECEMBER 23, 2010.**

**FINAL DECISION**

**SYNOPSIS**

A person who fails to submit his tax returns or remit state personal income tax within the statutorily prescribed period, or within allowed periods of extension, based on his personal accountant's inability to prepare the return, where the individual did not consult his accountant until approximately two weeks prior to the expiration of the extension period, has not shown "reasonable cause" sufficient for the vacation of additions to tax.

**OVERVIEW**

The Office of Tax Appeals received, on February 23, 2010, a petition for reassessment on behalf of Petitioner, seeking relief from a notice of assessment dated December 21, 2009, for additions to tax in the amount of \$\_\_\_\_, which assessment addressed the tax years 2007 and 2008. He also requested a refund of \$\_\_\_\_ for the tax year 2007. The respondent, State Tax Commissioner Christopher G. Morris, filed his answer on March 26, 2010, asserting only that he was without sufficient information to affirm or deny the allegations contained in the petition.

Prior to the evidentiary hearing the parties reached agreement with respect to the 2008 amount, and both agreed at the hearing that only the 2007 amount, consisting entirely of additions to tax, remained in dispute. The amount shown on the notice of assessment for 2007 is \$\_\_\_\_; however, the petitioner claims entitlement to a \$\_\_\_\_ refund due for additions previously paid.

An evidentiary hearing was conducted on June 24, 2010, at which the respondent was represented by counsel and the petitioner appeared *pro se*, and the matter was submitted for decision at the conclusion of that hearing. The matter is considered on the existing record.

### **FINDINGS OF FACT**

1. The petitioner purchased commercial property in Central America in 2007.
2. On April 15, 2008, the petitioner sought an extension of time to file his 2007 West Virginia personal income tax return.
3. At some point, the petitioner sought a second extension of time to file his West Virginia personal income tax return.
4. The petitioner tendered the documents necessary for the completion of his personal income tax return preparation to his accountant approximately two weeks prior to the October 15, 2008 deadline for filing his return. At that time, the petitioner's accountant advised petitioner that the accountant would not prepare a tax return involving income earned in another country.
5. The petitioner's accountant assisted him with finding an accountant who would prepare a return involving foreign income.
6. The petitioner remitted a check in the amount of \$\_\_\_\_\_ to the State Tax Department, together with a letter dated April 15, 2009, for his 2007 personal income tax liability. That letter is stamped "received" by the State Tax Department Accounts Monitoring Unit on May 15, 2009. The April 15<sup>th</sup> letter indicates that the 2007 return would be filed at a later date.
7. The petitioner's 2007 West Virginia personal income tax return is signed by the preparer with a date of May 15, 2009.

8. The petitioner's undisputed 2007 West Virginia personal income tax liability is \$\_\_\_\_. He was credited for tax withheld and estimated payments made in the amount of \$\_\_\_\_.
9. Though Petitioner's return, line 21, shows penalty due in the amount of \$\_\_\_\_, the amount was adjusted to \$\_\_\_\_.
10. The petitioner paid \$\_\_\_\_ in interest.
11. The petitioner remitted a check to the State Tax Department in April 2009 in the amount of \$\_\_\_\_.
12. Prior to the preparation of his 2007 return, the petitioner believed that he would not owe personal income tax to the State of West Virginia based on the state of his foreign investment.

### **DISCUSSION**

Pursuant to W.Va. Code § 11-21-57(a), the State Tax Commissioner has the authority to “grant a reasonable extension of time for payment of tax or estimated tax (or any installment), or for filing any return, declaration, statement, or other document required. . . . Except for a taxpayer who is outside the United States, no such extension shall exceed six months.” Even after receiving grants of extension, then, the petitioner's 2007 personal income tax return and accompanying payments should have been filed, at the latest, by October 15, 2008. The petitioner does not dispute that the 2007 return was approximately six months late, but argues that extenuating circumstances – primarily, his not learning until around October 1, 2007, that his regular accountant would not prepare a return involving foreign income and his subsequent search for an accountant who would prepare such a return – should mitigate the additions assessed.

The State Tax Commissioner is directed to make “additions to tax” for failure to file a tax return or to pay tax due “unless it is shown that such failure is due to reasonable cause and not due to willful neglect[.]” W.Va. Code § 11-10-18 (a).

Little guidance is available as to what may constitute “reasonable cause” under this section. The West Virginia Supreme Court has held that additions to tax should be vacated, even if the tax itself is affirmed, if a “required tax return is not filed on a required tax is not paid due to a good-faith challenge to the validity of such requirement(s)...” Tony P. Sellitti Construction Company v. Caryl, 408 S.E.2d 336.346, 185 W.Va. 584, 594 (1991) cert. den. 112 S. Ct. 969, 502 U.S. 1073, 117 L.Ed.2d 135. Likewise, the court has found reasonable cause where a taxpayer showed it believed certain items were not subject to a previous use tax statute. Pennsylvania and West Virginia Supply Corp. v. Rose, 368 SE 2d 101, 171 W.Va. 317 (1988).

The petitioner herein, however, has not challenged the assessment or the applicability of the personal income tax statute. Rather, by his own admission, the petitioner simply waited too long to consult his accountant. In fact, the petitioner presented no evidence of having made any overture toward the preparation of his tax return until approximately October 1, 2009, about two weeks prior to the expiration of his final extension period. Even then, there is no evidence that he filed his return or remitted his payment until about seven months later, about thirteen months past the initial statutory deadline which, as the respondent’s counsel pointed out, “everybody knows” about.

While the undersigned is sympathetic to the petitioner’s unusual tax situation and the relative newness of his position as an owner of foreign property, it is difficult to find reasonable cause for the delay. There simply is no reason that the petitioner could not file a timely return apart from his own failure to consult his tax adviser within a reasonable time.

## CONCLUSION

It is accordingly HELD:

1. Petitioner has not carried the burden of proof in this matter.
2. A person who fails to submit his tax returns or remit state personal income tax within the statutorily prescribed period, or within allowed periods of extension, based on his personal accountant's inability to prepare the return, where the individual did not consult his accountant until approximately two weeks prior to the expiration of the extension period, has not shown "reasonable cause" sufficient for the vacation of additions to tax.
3. The December 21, 2009 assessment, except that portion as to which the parties reached agreement as described in the "overview" above, is accordingly AFFIRMED.