

SYNOPSIS

TAXATION

SUPERVISION

GENERAL DUTIES AND POWERS OF COMMISSIONER; APPRAISERS

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. § 11-10-2 (West 2010).

TAXATION

**WEST VIRGINIA OFFICE OF TAX APPEALS
HEARING PROCEDURES**

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 of tax against it 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).

TAXATION

**WEST VIRGINIA TAX PROCEDURE AND ADMINISTRATION ACT
ADDITIONS TO TAX FOR FAILURE TO PAY ESTIMATED INCOME OR
BUSINESS FRANCHISE TAX**

Additions to tax are to be imposed under West Virginia Code Section 11-10-18(a)(1) for failure to timely file and under West Virginia Code Section 11-10-18(a)(2) for failure to timely pay unless a showing is made that such failures were due to reasonable cause and not willful neglect.

TAXATION

**WEST VIRGINIA TAX PROCEDURE AND ADMINISTRATION ACT
ADDITIONS TO TAX FOR FAILURE TO PAY ESTIMATED INCOME OR
BUSINESS FRANCHISE TAX**

Petitioners' failure to prove that their 2008 tax return with payment was timely filed or timely received by the Respondent; coupled with their admissions that the tax check was never cashed and that they were unaware that the tax amount was never deducted from their joint checking account for three years constitutes willful neglect and not reasonable cause. *See* W. Va. Code Ann. § 11-10-18(a)(1) and 18(a)(2) (West 2010).

TAXATION

**PERSONAL INCOME TAX
DECLARATION OF ESTIMATED TAX**

In accordance with West Virginia Code Section 11-21-55(a), every resident and nonresident individual on or before the fifteenth day of April of the taxable year should make a declaration of his or her estimated tax for the taxable year if the West Virginia adjusted gross

FILED
2014 FEB 17 PM 2
OFFICE WEST VIRGINIA
SECRETARY OF STATE

income, other than wages subject to withholding, can reasonably be expected to exceed four hundred dollars plus the sum of West Virginia personal exemptions. *See* W. Va. Code § 11-21-55(a) (West 2010).

TAXATION

**PERSONAL INCOME TAX
PAYMENTS OF ESTIMATED TAX**

West Virginia Code Section 11-21-56(a) provides that if the declaration is filed the estimated tax shall be paid quarterly and in equal installments with the first installment to be paid at the time of the filing of the declaration. *See* W. Va. Code Ann. § 11-21-56(a) (West 2010).

TAXATION

**WEST VIRGINIA TAX PROCEDURE AND ADMINISTRATION ACT
ADDITIONS TO TAX FOR FAILURE TO PAY ESTIMATED INCOME OR
BUSINESS FRANCHISE TAX**

Pursuant to West Virginia Code Section 11-10-18a(a), the Tax Commissioner shall add additions to tax in the case of an underpayment of estimated tax under Article twenty-one of Chapter 11 of the West Virginia Code. *See* W. Va. Code Ann. 11-10-18a(a) (West 2010).

TAXATION

**PERSONAL INCOME TAX
EXTENSIONS OF TIME**

The Tax Commissioner is given authority under West Virginia Code Section 11-21-57(a) to grant an extension of time not to exceed six months for the payment of tax or estimated tax or the filing of a return on such terms and conditions as he may require. *See* W. Va. Code Ann. § 11-21-57(a) (West 2010).

TAXATION

**WEST VIRGINIA TAX PROCEDURE AND ADMINISTRATION ACT
ADDITIONS TO TAX FOR FAILURE TO PAY ESTIMATED INCOME OR
BUSINESS FRANCHISE TAX**

Additions to tax are not to be imposed under subsection (a) of Section 18a with respect to any underpayment if the Tax Commissioner determines that by reason of casualty, disaster or other unusual circumstances the imposition of the additions to tax would be against equity and good conscience. *See* W. Va. Code Ann. § 11-10-18a(e)(3) (West 2010).

TAXATION

**WEST VIRGINIA TAX PROCEDURE AND ADMINISTRATION ACT
ADDITIONS TO TAX FOR FAILURE TO PAY ESTIMATED INCOME OR
BUSINESS FRANCHISE TAX**

Petitioners' failure to comply with the estimated tax statute for a period of five years after the income was received does not constitute failure to do so by reason of casualty, disaster or other unusual circumstances the imposition of which would be against equity and good conscience. *See* W. Va. Code Ann. § 11-10-18a(e)(3) (West 2010).

FINAL DECISION

On September 20, 2012, the Compliance Division of the West Virginia State Tax Commissioner's Office (Tax Commissioner or Respondent) issued an estimated assessment for personal income tax against the Petitioners. The 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 amount was for 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 \$____. Written notice of the assessment was served on the Petitioners as required by law.

Thereafter on September 24, 2012, the Petitioners timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code Ann. 11-10A-8(1) and 11-10A-9(a)-(b) (West 2010).

On January 7, 2013, Respondent sent a return change letter to Petitioners showing that they were now being given credit for West Virginia withholding tax in the amount of \$____ as per their recently filed 2008 return which then reduced their adjusted balance of tax due to the sum of \$____. The revised tax amount, in that letter, did not include accrued interest or additions to tax for late filing and late payment.

The return change letter also reflected that based upon the filed tax return Petitioners' also owed an underpayment of estimated tax penalty in the amount of \$____. This penalty was calculated upon income received by Petitioners, which was not subject to withholding, but was subject to the payment of estimated tax.

At the time that the Respondent filed its prehearing statement on April 12, 2013, it reflected that because the balance of tax due had yet to be paid, additions to tax for late filing of

\$____ and late payment of \$____ had accrued as of that date, as well as interest of \$____ from April 16, 2009 through December 20, 2012.

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

FINDINGS OF FACT

1. Petitioners are residents of a West Virginia city, in a County of West Virginia.
2. Petitioners' 2008 West Virginia personal income tax return, with payment, was not received by the Respondent on or before the due date of April 15, 2009.
3. Petitioners never filed an extension for tax year 2008.
4. Petitioners' 2008 West Virginia personal income tax return with W-2's was not received by the Respondent until January 2013.
5. Petitioners had failed to timely file their personal income tax returns for tax years 2004, 2007, and 2009.
6. Petitioners never filed extensions for tax years 2004, 2007, and 2009.
7. As of the date of the hearing, Petitioners had failed to pay the revised tax sum of \$____.
8. Petitioners paid no estimated tax for tax year 2008.

DISCUSSION

The first issue for determination concerns the additions to tax for failing to timely file the 2008 tax return and for failing to timely pay the tax amount owed.

The statutory provisions regarding additions to tax are contained in West Virginia Code Section 11-10-18.

(a) *Failure to file tax return or pay tax due.* --

(1) In the case of failure to file a required return of any tax administered under this article on or before the date prescribed for filing such return (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return five percent of the amount of such tax if the failure is for not more than one month, an additional five percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate: *Provided*, That this addition to tax shall be imposed only on the net amount of tax due;

(2) In the case of failure to pay the amount shown as tax, on any required return of any tax administered under this article on or before the date prescribed for payment of such tax (determined with regard to any extension of time for payment), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount shown as tax on such return one half of one percent of the amount of such tax if the failure is for not more than one month, with an additional one half of one percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate: *Provided*, That the addition to tax shall be imposed only on the net amount of tax due;

W. Va. Code Ann. § 11-10-18(a) (West 2013).

The test in both statutes is that a showing must be made by Petitioners that the failure to timely file and/or timely pay was due to reasonable cause and not due to willful neglect.

Petitioners testified that they had timely filed their 2008 personal income tax return with a check in the amount of \$____, although they had no proof that the mailing ever took place or that Respondent timely received that mailing. Petitioners admit that the tax check was never cashed.

Petitioners concede that neither one of them was keeping a close watch on their joint checking account balance or other related financial matters until this tax matter became known to

them by Respondent in 2012. Petitioners also concede that they were unaware that the sum of \$____ had never been deducted from their joint checking account for a period of three years.

Respondent's evidence showed that Petitioners were also late in filing their personal income tax returns for tax years 2004, 2007 and 2009, and had never filed for extensions for any of those years.

The evidence in this case clearly showed that Petitioners had a history of late filed personal income tax returns. Further, Petitioners failed to prove that their 2008 tax return was timely filed or timely received by the Respondent. This fact, coupled with their admissions that the tax check was never cashed and that they were unaware that the tax amount was never deducted from their joint checking account for three years, constitutes willful neglect and not reasonable cause.

It is therefore determined that Petitioners did not meet their burden of proof for waiver of additions to tax pursuant to West Virginia Code Section § 11-10-18(a)(1)-(2).

The remaining issue for determination is whether the Petitioners have met their burden of proof by showing that the additions to tax imposed by the Tax Commissioner because of their failure to pay a sufficient amount of estimated tax for tax year 2008 should be waived under West Virginia Code Section 11-10-18(e)(3).

The starting point for this inquiry is West Virginia Code Section 11-21-55(a), which states:

Requirement of declaration. -- Every resident and nonresident shall make a declaration of his estimated tax for the taxable year, containing such information as the tax commissioner may prescribe by regulations or instructions, if his West Virginia adjusted gross income, other than from wages on which tax is withheld under this article, can reasonably be expected to exceed

four hundred dollars plus the sum of the West Virginia personal exemptions to which he is entitled.

West Virginia Code Ann. § 11-21-55(a) (West 2010).

Petitioners do not dispute that their West Virginia adjusted gross income, other than from wages on which tax was withheld exceeded four hundred dollars for tax year 2008, and that they were therefore required to pay estimated tax for that year. Nor do the Petitioners dispute that they did not make any estimated tax payments during tax year 2008.

West Virginia Code Section § 11-10-18a(a) requires that in cases where there has been an underpayment of estimated tax, the Tax Commissioner shall add to the tax due for the taxable year additions to tax. *See* W. Va. Code Ann. § 11-10-18a(a) (West 2010).

Petitioners do not take dispute that West Virginia Code Section 11-10-18a(a) requires the Tax Commissioner to impose additions to tax in cases where there is an underpayment of estimated tax, under Article twenty-one, of Chapter Eleven of the West Virginia Code.

Petitioners' sole argument for waiver of the estimated tax penalty is that the issue arose as the result of a mistake made by Petitioners' previous employer by cashing out his 401K account instead of rolling it over, tax free, to his new employer.

West Virginia Code Section 11-10-18a(e)(3) states as follows:

Waiver in certain cases -- No addition to tax shall be imposed under subsection (a) of this section with request to any underpayment if and to the extent the tax commissioner determines that by reason of casualty, disaster or other unusual circumstances the imposition of such addition to tax would be against equity and good conscience.

Petitioners' argument would be more persuasive if it had been made known to Respondent either when it happened or within a reasonable time thereafter, but not five (5) years later and not for the first time at the evidentiary hearing.

Accordingly, Petitioners' failure to comply with the estimated tax statute for a period of five years after the income subject to estimated tax was received does not constitute failure to do so by reason of casualty, disaster, or other unusual circumstances so that the imposition of which would be against equity and good conscience.

Therefore it is determined that Petitioners did not meet their burden of proof for waiver of additions to tax pursuant to West Virginia Code Section 11-10-18(e)(3).

CONCLUSIONS OF LAW

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 upon the Petitioner to show that any assessment of tax against it 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. Additions to tax are to be imposed under West Virginia Code Section 11-10-18(a)(1) for failure to timely file and under West Virginia Code Section 11-10-18(a)(2) for failure to timely pay unless a showing is made that such failures were due to reasonable cause and not willful neglect.

4. Petitioners failure to prove that their 2008 tax return, with payment, was timely filed or timely received by the Respondent; coupled with their admissions that the tax check was never cashed and that they were unaware that the tax amount was never deducted from their joint checking account for three years constitutes willful neglect and not reasonable cause. *See* W. Va. Code Ann. § 11-10-18(a)(1) and 18(a)(2) (West 2010).

5. In accordance with West Virginia Code Section 11-21-55(a), every resident and nonresident individual, on or before the fifteenth day of April of the taxable year, should make a declaration of his or her estimated tax for the taxable year if the West Virginia adjusted gross income, other than wages subject to withholding, can reasonably be expected to exceed four hundred dollars plus the sum of West Virginia personal exemptions. *See* W. Va. Code § 11-21-55(a) (West 2010).

6. West Virginia Code Section 11-21-56(a) provides that if the declaration is filed the estimated tax shall be paid quarterly and in equal installments with the first installment to be paid at the time of the filing of the declaration. *See* W. Va. Code Ann. § 11-21-56(a) (West 2010).

7. Pursuant to West Virginia Code Section 11-10-18a(a), the Tax Commissioner shall add additions to tax in the case of an underpayment of estimated tax under Article twenty-one of Chapter 11 of the West Virginia Code. *See* W. Va. Code Ann. 11-10-18a(a) (West 2010).

8. The Tax Commissioner is given authority under West Virginia Code Section 11-21-57(a) to grant an extension of time not to exceed six months for the payment of tax or estimated tax or the filing of a return on such terms and conditions as he may require. *See* W. Va. Code Ann. § 11-21-57(a) (West 2010).

9. Additions to tax are not to be imposed under subsection (a) of Section 18a with respect to any underpayment if the Tax Commissioner determines that by reason of casualty, disaster or other unusual circumstances the imposition of the additions to tax would be against equity and good conscience. *See* W. Va. Code Ann. § 11-10-18a(e)(3) (West 2010).

10. Petitioners failure to comply with the estimated tax statute for a period of five years after the income was received does not constitute failure to do so by reason of casualty,

disaster or other unusual circumstances the imposition of which would be against equity and good conscience. *See* W. Va. Code Ann. § 11-10-18a(e)(3) (West 2010).

DISPOSITION

Wherefore, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals, that the personal income tax assessment issued against the Petitioners, for the tax year 2008 should be and is hereby **MODIFIED** to reflect tax due and owing of \$____; interest of \$____ and additions to tax for late filing and for late payment in the combined amount of \$____ for a total liability of \$____. The additions to tax were calculated through December 20, 2012.

Pursuant to West Virginia Code Section 11-10-17(a), interest continues to accrue on this unpaid tax until the liability is fully paid.

It is also the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the estimated tax penalty issued against the Petitioners for tax year 2008 in the amount of \$____, should be and is hereby **AFFIRMED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
George V. Piper
Administrative Law Judge

Date Entered