

**SANITIZED DEC. 03-274 P – BY GEORGE V. PIPER – SUBMITTED FOR  
DECISION ON 06/15/04 -- ISSUED 07/01/04**

**SYNOPSIS**

**PERSONAL INCOME TAX -- PETITIONERS DOMICILED IN  
(RESIDENT OF) WEST VIRGINIA** – Husband who worked and lived out-of-state during the week, lived with his wife on the weekends in West Virginia on property owned by them, and sporadically went out-of-state to cut grass and answer the telephone at their federal tax return preparer's residence, did not establish a residence (domicile) out-of-state because, pursuant to W. Va. Code § 11-21-7, they did in the aggregate spend more than thirty (30) days of the taxable year in the State of West Virginia and because the out-of-state address was not in fact their permanent place of abode.

**FINAL DECISION**

On April 9, 2003, the Compliance Division of the West Virginia State Tax Commissioner's Office issued a personal income tax assessment against the Petitioners.

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, through April 9, 2003, and additions to tax, for a total assessed liability. Written notice of this assessment was served on the Petitioners.

Also, the Commissioner (by the Division) issued a personal income tax assessment against the Petitioners, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code, for the years 1997, 1998, 1999 and 2001 for tax, interest,

through April 9, 2003, and additions to tax, for a total assessed liability. Written notice of this assessment was served on the Petitioners.

Thereafter, by mail postmarked April 21, 2003, the Petitioners timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code § 11-10A-8(1) [2002].

Subsequently, notice of a hearing on the petition was sent to the Petitioners and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and 121 C.S.R. 1, § 61.3.3 (Apr. 20, 2003).

### **FINDINGS OF FACT**

1. Petitioner, husband, is a mechanic/truck driver, working virtually always outside West Virginia, and during the work week maintains an apartment out-of-state.

2. At the hearing, Commissioner's counsel placed into the record an Internal Revenue Service ("IRS") report indicating that itemized deductions, which the Petitioners had sought on their federal personal income tax returns, had been disallowed by the IRS, culminating in an IRS summary which stated as follows:

As you are aware, I am closing out the case of Petitioner for tax years 1999, 2000 and 2001. This case was a transfer case from one out-of-state office to WV. I believe the following information should be forwarded to the State of West Virginia Tax Department for them to follow up.

The Petitioners purchased property/residence in West Virginia in August 1986. They are deducting mortgage interest on their tax return for each year for what I believe is that property. Petitioner, husband, is a full time employee of an out-of-state government office.. His title is an Auto Mechanic II. Their records according to the Human Resources Department list Mr. White's permanent address WV.

Petitioner doesn't have out-of-state state taxes withheld from his pay. I believe that the Petitioners are not paying state income tax to West Virginia, their state of residence. I believe this for the following reasons:

a. The preparer is a known "problem preparer" in the out-of-state area. At the present time Criminal Investigation Division has a numbered of cass against her.

b. The preparer has used her business address as the [purported] home address of the Petitioners. I believe this was done since that state (out-of-state) is one of nine states that do not have a state income tax.

c. By filing a federal return with the out-of-state address, they avoid West Virginia taxes all together. The information that is exchanged between the federal and state would be circumvented in this situation.

d. Petitioner, husband, has a West Virginia drivers license, automobiles are registered in West Virginia and their personal residence is here. I believe that the West Virginia State Tax Department should review their records to confirm a state return has not been filed and to make a determination if delinquent returns are due. I have attached a copy of the examination report for 1999, 2000 and 2001.

e. I have enclosed their names, addresses and SSN.

3. Petitioner, husband, normally spends the weekends at a home located in West Virginia.

4. Petitioners also own another home or residence in West Virginia.

5. Petitioner, husband, testified that he obtained an out-of-state driver's license four (4) years ago and that prior to that he had a West Virginia driver's license.

6. Petitioners' children, by Petitioner's testimony, inhabit the two (homes) that Petitioners own in West Virginia.

7. Petitioner testified that in his opinion he lives out-of-state at a residence owned by his tax preparer and that occasionally he stays and works there for her (once or sometimes twice a month for a day or two) and for which she pays him.

8. Petitioner contends that he was a resident of West Virginia prior to 2000.

9. Petitioners have three (3) motor vehicles licensed in the State of West Virginia and one (1) licensed out-of-state.

10. Petitioner, wife, spends almost all of her time in one (1) of the Petitioners' West Virginia residences.

11. According to his work record, the husband's permanent residence address is listed as WV according to the out-of-state personnel office. He uses this address to receive reimbursement for any mileage, lodging and meals which he would claim.

## **DISCUSSION**

The sole issue to be determined is whether the Petitioners have proven that they are domiciled out-of-state, instead of in the State of West Virginia as contended by Tax Commissioner's counsel.

W. Va. Code § 11-21-7, "Resident Defined," states in pertinent part that a resident individual is one, who is domiciled in this state, unless he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty (30) days of the taxable year in this state.

Petitioners' arguments in support of their position, namely, that they were both domiciled in and residents out-of-state during the years 1997, 1998, 1999, 2000 and 2001 are truly preposterous.

First, Petitioner, husband, testified that in his opinion he was a resident of West Virginia before the year 2000, which runs counter to their argument that they were not domiciled in West Virginia at all.

Second, husband's job does not take him out of the out-of-state county, and he admitted that he lives there during the week, usually going to West Virginia to spend his weekends. He also testified that he owns properties in West Virginia and that he and his wife have three (3) of their four (4) vehicles titled in West Virginia.

Third, wife indicated that she spends almost all of her time in West Virginia at one of their residences.

Fourth, husband's out-of-state contact, by his own testimony, shows no real habitation there. "Once a month, maybe more," he cuts the grass at his federal tax return preparer's home. Such visits cannot be considered as making that state their permanent place of abode, and clearly Petitioners spend more than thirty (30) days of the taxable year in the State of West Virginia.

What is clear is that Petitioners and their federal tax return preparer have concocted a scheme to establish an out-of-state domicile, which does not have personal income tax, so as to avoid their real domicile in the State of West Virginia, which does have a personal income tax.

This tribunal is aware of the fact that the two states (out-of-state) referenced are over one thousand (1000) miles apart, which makes Petitioner's (husband's) argument that going to cut the grass and answer the telephone each month for his federal tax return preparer at her residence outside West Virginia makes him a permanent resident of that state preposterous in every respect.

### **CONCLUSIONS OF LAW**

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

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for

reassessment, the burden of proof is upon a petitioner-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

2. In light of the foregoing discussion, the Petitioners-taxpayers in this matter have failed to carry the burden of proof with respect to their contention that they are really out-of-state residents. *See* 121 C.S.R. 1, § 69.2 (Apr. 20, 2003).

### **DISPOSITION**

**WHEREFORE**, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the West Virginia personal income tax assessment issued against the Petitioners for the year 2000, for tax, interest, and additions to tax, should be and is hereby **AFFIRMED**.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the West Virginia personal income tax assessment issued against the Petitioners for the years 1997, 1998, 1999, and 2001, for tax, interest, and additions to tax, should be and is hereby **AFFIRMED**.