

REDACTED DECISION – DK# 13-438 RP

**BY: GEORGE V. PIPER, ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON OCTOBER 6, 2014
ISSUED ON JANUARY 29, 2015**

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

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 § 11-1-2 (West 2010).

TAXATION

PERSONAL INCOME TAX

REPORT OF CHANGE IN FEDERAL TAXABLE INCOME

“If the amount of a taxpayer’s federal taxable income reported on his federal income tax return for any taxable year is changed or corrected by the United States internal revenue service . . . the taxpayer shall report such change or correction in federal taxable income whether ninety days after the final determination of such change, correction . . . and shall concede the accuracy of such determination or state wherein it is erroneous. Any taxpayer filing an amended federal income tax return shall also file within ninety days thereafter an amended return under this article, and shall give such information as the tax commissioner shall require . . .” W. Va. Code § 11-21-59 (West 2010).

TAXATION

WEST VIRGINIA TAX PROCEDURE AND ADMINISTRATION ACT

FINALITY OF ASSESSMENT

The amount of an assessment shall become due and payable the day following the date that the assessment becomes final. Payment of the assessed amount within sixty days after service of the notice of assessment does not prohibit or bar a taxpayer from filing a claim for refund or credit under the provisions of section fourteen of Article 10 within the time prescribed for the filing of a claim for refund or credit. *See* W. Va. Code Ann. § 11-10-8(b) (West 2010).

OFFICE OF TAX APPEALS

CONCLUSION OF LAW

If the Petitioner had complied with West Virginia Code Section § 11-10-8(b) in that the assessment was timely paid and did not become due and payable after the statutory sixty day period he would not have been prohibited from filing a claim for refund under Section 14 of Article 10 of the West Virginia Code.

OFFICE OF TAX APPEALS

CONCLUSION OF LAW

Section 59 of Article 21 merely represents a statutory process by which a taxpayer makes the Tax Commissioner aware of any changes made to his federal taxable income including the

supplying of any required information but it is not a substitute procedure to obtain a tax refund without regard to Article 10.

TAXATION

**WEST VIRGINIA TAX AND ADMINISTRATION ACT
REFUNDS OR CREDITS OF OVERPAYMENTS**

In the case of any overpayment of any tax, additions to tax or interest the overpayment of that refund amount is subject to the provisions of Article 10. W. Va. Code § 11-10-14(a) (West 2010).

TAXATION

**WEST VIRGINIA TAX AND ADMINISTRATION ACT
OVERPAYMENT OF FEDERAL TAX**

In the event of a final determination by the internal revenue service as to the overpayment of a taxpayer's final income tax liability the period of limitation shall not expire until six months after that final determination. W. Va. Code Ann. § 11-10-14(l)(4) (West 2010).

TAXATION

**WEST VIRGINIA TAX AND ADMINISTRATION ACT
CLAIMS FOR REFUND OR CREDIT**

"A person against whom an assessment or administrative decision has become final is not entitled to file a claim for refund or credit with the Tax Commissioner as prescribed therein." W. Va. Code Ann. § 11-10-14(c) (West 2010).

TAXATION

**WEST VIRGINIA TAX AND ADMINISTRATION ACT
REMEDY EXCLUSIVE**

The procedure set for in Section 14 of Article 10 is the sole method of obtaining any tax refund. It being the intent of the Legislature that this procedure be in lieu of any other remedy. W. Va. Code Ann. § 11-10-14(i).

**OFFICE OF TAX APPEALS
CONCLUSION OF LAW**

Timely payment of a tax assessment is one of the procedure requirements provided for in Section 14 of Article 10.

**OFFICE OF TAX APPEALS
CONCLUSION OF LAW**

Failure of the Petitioner to comply with West Virginia Code § 11-10-8(b) in that the assessment became due and payable prohibits him from receiving a refund under Section 14 of Article 10 of the West Virginia Code.

TAXATION

**WEST VIRGINIA TAX AND ADMINISTRATION ACT
FINALITY OF ASSESSMENT**

Applying Section 14 of Article 10 to the facts of this case does not produce an absurd result because any reduction in Petitioner's federal taxable income pursuant to W. Va. Code § 11-

21-59 would have allowed Petitioner to file a claim for refund under section 14 of Article 10 except for the fact that he allowed his 2003 tax assessment to become final which then barred his filing of a refund claim as per W. Va. Code § 11-10-8(b).

TAXATION

OFFICE OF TAX APPEALS

HEARING PROCEDURES

In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon the Petitioner to show that he is entitled to a refund. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003).

TAXATION

OFFICE OF TAX APPEALS

HEARING PROCEDURES

Petitioner has failed to carry his burden of showing that he is entitled to his refund claim. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. § 121-1-63.1 and 69.2 (2003).

FINAL DECISION

On August 14, 2013, the Petitioner filed a claim for refund for personal income tax in the amount of \$_____, for tax year 1998. By letter dated September 19, 2013, the Compliance Division (The Division) of the West Virginia State Tax Department (The Commissioner or Respondent), denied the refund claim.

Thereafter, on October 2, 2013, Petitioner timely filed a petition for refund with this Tribunal. *See* W. Va. Code §§ 11-10A-8(2) and 11-10A-9(a-b) (West 2010).

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. During tax year 1998, the Petitioner was a resident a West Virginia county.
2. On June 18, 1999, Petitioner timely filed his West Virginia resident income tax return for tax year 1998, which reflected no West Virginia taxable income with one exemption as

married, filing separately. Petitioner's federal individual tax return for that same year also showed no taxable income.

3. Also, for 1998, Petitioner filed a U.S. Income Tax Return for Estates and Trusts in the name of Asset Management Company, which reflected a loss of \$_____.

4. As a result of information received from the Internal Revenue Service, Respondent issued a personal income tax assessment for tax year 1998 against the Petitioner on April 22, 2003, for tax, interest and additions to tax totaling \$_____. The assessment advised that if the Petitioner failed to pay or appeal within sixty days of its receipt the assessment would become final and a notice of tax lien would be issued. (Respondent's Exhibit No. 2). Petitioner neither paid nor appealed the tax assessment within the sixty days.

5. On September 20, 2003, a tax lien for the assessed amount was filed against the Petitioner, which was followed by a distress warrant for collection on January 22, 2004. In June 2006, Petitioner's bank accounts were levied upon by Respondent. Thereafter, the balance of the tax liability was paid during 2006 and 2007 pursuant to the terms of an agreed-to payment plan. The West Virginia state tax lien was released on December 18, 2007. (Respondent's Exhibit No. 2).

6. In May 2013, the IRS agreed to accept Petitioner's recalculated federal adjusted gross income for tax year 1998; thereby, reducing the amount from \$_____ to \$_____. This finding resulted from the Internal Revenue Service's decision that Petitioner was a sole proprietor and not a corporation as contended by Petitioner. (Petitioner's Exhibit No. 1).

7. After the IRS modified his adjusted gross income, the Petitioner sent a "bill" to the Tax Commissioner for tax year 1998 which the Tax Commissioner refused to pay. By letter dated

September 19, 2013, the Tax Commissioner refused to reduce or change Petitioner's 1998 tax liability.

8. In his petition for refund, Petitioner is seeking to recoup all of the taxes, interest and additions to tax which Respondent received from the issuance of its 2003 personal income tax assessment. In addition, he wants Respondent to pay him interest for the use of his monies from final payment in 2007 until the present. (Petitioner's Exhibit No. 1).

DISCUSSION

The primary issue to be decided is whether Petitioner is correct that his refund claim is totally dependent upon West Virginia Code Section 11-21-59 or whether Respondent is correct that all such claims must also comply with the refund provisions of Article 10, Section 14 of the West Virginia Code. Of course, the burden of proof rests with the Petitioner to show that he is entitled to that refund (W. Va. Code Section 11-10A-10(e)).

W. Va. Code § 11-21-59 states as follows:

If the amount of a taxpayer's federal taxable income reported on his federal income tax return for any taxable year is changed or corrected by the United States internal revenue service or other competent authority, or as the result of a renegotiation of a contract or subcontract with the United States, the taxpayer shall report such change or correction in federal taxable income within ninety days after the final determination of such change, correction or renegotiation, or as otherwise required by the tax commissioner, and shall concede the accuracy of such determination or state wherein it is erroneous. Any taxpayer filing an amended federal income tax return shall also file within ninety days thereafter an amended return under this article, and shall give such information as the tax commissioner may require. The tax commissioner may by regulation prescribe such exceptions to the requirements of this section as he deems appropriate.

W. Va. Code Ann. §11-21-59 (West 2010).

There is no dispute that the Petitioner's federal adjusted gross income was indeed changed or otherwise corrected by the Internal Revenue Service. There is no dispute that within ninety

days of that ruling, Petitioner noted this change in his federal income to Respondent and that an amended return was also filed within the ninety days.

Petitioner has argued that the language of West Virginia Code Section 11-21-59 is sacrosanct without regard to any other statute pertaining to the issue. He has further argued that, based upon prior administrative decisions¹ issued by this Tribunal, we have also agreed with his position concerning changes to federal adjusted gross income.

The problem with the Petitioner's argument is that based upon the other undisputed facts in the record we do not find that the outcome is decided only by West Virginia Code Section 11-21-59 nor by our prior rulings wherein we agreed that changes in federal adjusted gross income were to be recognized by the State of West Virginia.

Our starting point is W. Va. Code § 11-10-8(b) which provides:

(b) *Finality of Assessment.*- The amount of an assessment or amended or supplemental assessment shall be due and payable on the day following the date upon which the assessment or amended or supplemental assessment becomes final. Payment of the amount of the assessment, or amended or supplemental assessment, as provided in subdivision (2) subsection (a) of the section, within sixty days after service of notice of the assessment does not prohibit or otherwise bar the taxpayer from filing a claim for refund or credit under the provisions of section fourteen of this article within the time prescribed wherein for the filing of a claim for refund or credit.

W. Va. Code Ann § 11-10-8(b) (West 2010).

It is undisputed that the Petitioner did not pay the April 22, 2003 tax assessment that he received from the Respondent within the required sixty-day period, and that it became due and payable. He also did not appeal the tax assessment to the West Virginia Office of Tax Appeals within that same time frame. These two requirements were clearly set forth in the assessment which Petitioner received in April, 2003. (See again Respondent's Exhibit No. 2).

¹ West Virginia Office of Tax Appeals Decisions, Docket Nos. 05-097 P, 05-407 P, 05-431 P.

Conversely, if any taxpayer, including the Petitioner, had made payment of the assessment within sixty days after service thereof, he or she could not be prohibited or barred from filing a claim for refund or credit under Section 14 of Article 10. *See* W. Va. Code § 11-10-8(b). This reference makes clear that once payment is made within the sixty days, the provisions in Section 14 of Article 10 come into play as to the filing of a claim for refund or credit.

As to West Virginia Code Section 11-21-59, there is simply no language authorizing the Tax Commissioner to pay a tax refund, and in what amount, without reference to the requirements of Section 14 of Article 10. Section 59 of Article 21 merely states that the taxpayer shall report such change in federal taxable income and that he or she should concede the accuracy of that determination or state if it is erroneous. In addition to filing an amended return, a taxpayer must give such information that the Tax Commissioner may require. Note: There is no language in Section 59 requiring that the Tax Commissioner treat the amended return as a claim for refund.

Accordingly, Section 59 of Article 21 is not a substitute method to obtain a tax refund in the absence of Article 10.

As to West Virginia Code Section 11-10-14(a), it provides that in the case of any overpayment of any tax, additions to tax or interest, the overpayment of that refund amount is “subject to the provisions of Article 10.”

In West Virginia Code Section 11-10-14(l)(4) it states that in the event of a final determination by the internal revenue service as to the overpayment of a taxpayer’s federal income tax liability the period of limitation shall not expire until six months after that final determination. This language makes clear that, as to the matter of timeliness, any such refund claim is to be controlled by that subsection without any reliance upon Section 59 of Article 21.

The above then leads to the Petitioner's absolute disqualification as set forth in West Virginia Code Section 11-10-14(c) wherein it states that a person against whom an assessment has become final cannot file a claim for refund as prescribed by Section 14. This means that once Petitioner allowed his 2003 personal income tax assessment to become final and therefore due and payable, he cannot, by statute, file a claim for refund for that particular year.

Finally, in addition to these subsections of Section 14 of Article 10 concerning refunds, credits, etc. there is subsection 14(i) mandating that the procedure in that section, "constitutes the sole method of obtaining any refund, credit or any tax (or fee) administered under this article, it being the intent of the Legislature that the procedure set forth in this article is in lieu of any other remedy...."

This means, in no uncertain terms, that the West Virginia Legislature has provided that the procedure in Article 10 must be complied with if a taxpayer is seeking a tax refund or credit.

In summary, it is determined that Petitioner is barred from obtaining a refund for tax year 1998 solely because he allowed Respondent's 2003 personal income tax assessment to become final, due and payable, by neither paying it within the required sixty-day period nor by filing a timely petition for reassessment.² This failure to comply with either West Virginia Code Section 11-10-8(b) or Section 11-10-8(c) means that Section 14 of Article 10 is not available to him for the purpose of filing a claim for refund for that year.

Furthermore, the West Virginia Legislature has provided in subsection 14(i) of Article 10 that the procedure contained in Section 14 is the sole method to obtain any such tax refund and that that procedure is in lieu of any other remedy. Consequently, Section 59 of Article 21 is not,

² Under West Virginia Code Section 11-10-8(c), if a taxpayer files a timely petition for reassessment, his payment under protest of the assessed amount is to be treated for all purposes as a petition for refund.

therefore, another method or a “remedy” to obtain a tax refund unless the procedure requirements of Section 14 are followed.

The remaining issue for determination is whether the disallowance of Petitioner’s refund claim has, in fact, created an absurd result in that an increase in his federal taxable income, pursuant to West Virginia Code Section 11-21-59, would most likely have resulted in an assessment; however, a decrease in that same income did not result in a refund.

The reason there is no absurd result in this case is because the reduction of Petitioner’s taxable income would have allowed him to file a claim for refund under Section 14 of Article 10 except for the fact that he allowed his 2003 tax assessment to become final. Therefore, this ruling is totally based upon the particular facts of this case which when applied to statutory law prohibits the granting of Petitioner’s tax refund.

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 § 11-1-2 (West 2010).

2. “If the amount of a taxpayer’s federal taxable income reported on his federal income tax return for any taxable year is changed or corrected by the United States internal revenue service . . . the taxpayer shall report such change or correction in federal taxable income within ninety days after the final determination of such change, correction . . . and shall concede the accuracy of such determination or state wherein it is erroneous. Any taxpayer filing an amended federal income tax return shall also file within ninety days thereafter an amended return under this article, and shall give such information as the tax commissioner shall require . . .” W. Va. Code § 11-21-59 (West 2010).

3. The amount of an assessment shall become due and payable the day following the date that the assessment becomes final. Payment of the assessed amount within sixty days after service of notice of the notice of assessment does not prohibit or bar a taxpayer from filing a claim for refund or credit under the provisions of section fourteen of Article 10 within the time prescribed for the filing of a claim for refund or credit. *See* W. Va. Code Ann. § 11-10-8(b) (West 2010).

4. If the Petitioner had complied with West Virginia Code Section § 11-10-8(b) in that the assessment was timely paid and did not become due and payable after the statutory sixty day period he would not have been prohibited from filing a claim for refund under Section 14 of Article 10 of the West Virginia Code.

5. Section 59 of Article 21 merely represents a statutory process by which a taxpayer makes the Tax Commissioner aware of any changes made to his federal taxable income including the supplying of any required information but it is not a substitute procedure to obtain a tax refund without regard to Article 10.

6. In the case of any overpayment of any tax, additions to tax or interest the overpayment of that refund amount is subject to the provisions of Article 10. W. Va. Code § 11-10-14(a) (West 2010).

7. In the event of a final determination by the internal revenue service as to the overpayment of a taxpayer's final income tax liability the period of limitations shall not expire until six months after that final determination. W. Va. Code Ann. § 11-10-14(l)(4) (West 2010).

8. "A person against whom an assessment or administrative decision has become final is not entitled to file a claim for refund or credit with the Tax Commissioner as prescribed therein." W. Va. Code Ann. § 11-10-14(c) (West 2010).

9. The procedure set for in Section 14 of Article 10 is the sole method of obtaining any tax refund. It being the intent of the Legislature that this procedure be in lieu of any other remedy. W. Va. Code Ann. § 11-10-14(i).

10. Timely payment of a tax assessment is one of the procedure requirements provided for in Section 14 of Article 10.

11. Failure of the Petitioner to comply with West Virginia Code § 11-10-8(b) in that the assessment became due and payable prohibits him from receiving a refund under Section 14 of Article 10 of the West Virginia Code.

12. Applying Section 14 of Article 10 to the facts of this case does not produce an absurd result because any reduction in Petitioner's federal taxable income pursuant to W. Va. Code § 11-21-59 would have allowed Petitioner to file a claim for refund under section 14 of Article 10 except for the fact that he allowed his 2003 tax assessment to become final which then barred his filing of a refund claim as per W. Va. Code § 11-10-8(b).

13. In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon the Petitioner to show that he is entitled to a refund. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003). 14.

Petitioner has failed to carry his burden of showing that he is entitled to his refund claim. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010), W. Va. Code R. § 121-1-63.1 and 69.2 (2003).

DISPOSITION

Wherefore, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that Petitioner's petition for refund for personal income tax for tax year 1998, should be and is hereby **DENIED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

By:

George V. Piper
Administrative Law Judge

Date Entered