

REDACTED DECISION – DOCKET #S 14-050 RP-M, 14-126 RP-M, 14-127 RP-M, 14-128 RP-M

**HEATHER G. HARLAN, CHIEF ADMINISTRATIVE LAW JUDGE- SUBMITTED
FOR DECISION on FEBRUARY 25, 2015
ISSUED ON AUGUST 20, 2015**

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

SYNOPSIS

TAXATION

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

In a hearing before this Tribunal, it is well settled that the taxpayer has the burden of proof. *See* W. Va. Code §11-10A-10(e); *RGIS Inventory Specialists v. Palmer*, 209 W. Va.154, 544 S.E.2d 79 (2001).

TAXATION

**WEST VIRGINIA TAX PROCEDURES AND ADMINISTRATION ACT
ASSESSMENT**

This Court finds that the governing statute and legislative rules clearly grant the Respondent the power to investigate and to make changes to an individual's accounts or returns as well as to make appropriate assessments for non-payment of taxes when necessary. *See* W. Va. Code §11-10-7; W. Va. Code §11-21-12 *et seq*; 110 Code of State Regulations 21, §59.

UNITED STATES SUPREME COURT OF APPEALS

CASE LAW

It is black letter law that where a taxpayer has no capital gains in the tax year involved, no capital loss is allowable. *Nordvloom Associates, Inc. v. CIR* (U.S. Tax Court 1950).

FINAL DECISION

On February 3, 2014, Petitioner (the "Petitioner") filed his petition for reassessment (the "Petition") with this Tribunal, the West Virginia Office of Tax Appeals (the "OTA"). The Petition was filed in response to that certain Notice of Assessment (the "Assessment"), issued on December 20, 2013, by the West Virginia State Tax Department (the "Respondent").

This matter was heard in accordance with the provisions of West Virginia Code Section 11-10A-10.

FINDINGS OF FACT

1. The Petitioner is a married individual residing in a West Virginia city, West Virginia.
2. Petitioner has been a practicing accountant since 1977.
3. The Assessment was issued for the tax year 2012 and includes tax in the amount of \$ _____, interest in the amount of \$ _____ and penalties in the amount of \$ _____, for a total assessed liability of \$ _____. Subsequent to the filing of the Petition, the Petitioner filed petitions for refund for the years 2009, 2010, and 2011 (the "Refund Petitions").
4. The Refund Petitions were consolidated into the above-styled action. At or around the same time that the Petitioner filed the Refund Petitions, he also filed amended West Virginia personal income tax returns for years 2009, 2010, 2011 and 2012. With respect to tax year 2012, the Petitioner's amended tax return showed a decrease in West Virginia taxable income in the amount of \$ _____.
5. An evidentiary hearing in this matter was held on August 27, 2014, in Martinsburg, West Virginia (the "First Hearing").

6. The Petitioner is *pro se* and appeared in person at the First Hearing.

7. After approximately three and one-half hours, the First Hearing was continued for the express purpose of allowing the Petitioner additional time to purportedly produce new evidence in support of a position Petitioner raised for the first time at the First Hearing.

8. On November 13, 2014, the First Hearing was reconvened (the “Second Hearing”). The Second Hearing was conducted by telephone for the convenience of Petitioner so that he would not have to travel from Martinsburg, West Virginia to Charleston, West Virginia.

9. Petitioner chose not to participate in the Second Hearing, stating that there was a telephone malfunction even though Petitioner was on hold with the OTA just minutes prior to the Second Hearing. After numerous attempts by the OTA to reach the Petitioner, this Tribunal proceeded with the Second Hearing.

10. The Petitioner then sent a letter, dated November 14, 2014, to the then Chief Administrative Law Judge of the OTA, namely A.M. “Fenway” Pollack¹, in which the Petitioner again stated that his failure to participate in the Second Hearing was due to an equipment “malfunction.” In response to this letter, Chief Administrative Law Judge Pollack sent a letter to Petitioner, dated December 18, 2014 (“OTA’s December 18, 2014 Letter”), which was enclosed with an order setting the briefing schedule in this matter and ceasing further pleadings in this matter other than the post-hearing briefs.

¹ Chief Administrative Law Judge, A. M. “Fenway” Pollack, heard this matter; however, he is no longer with the West Virginia Office of Tax Appeals. Chief Administrative Law Judge Heather G. Harlan was appointed subsequent to the evidentiary hearing on this matter and wrote this decision.

11. During the time in which Petitioner filed his First Petition and the First Hearing, Petitioner filed nearly one hundred (100) motions, letters and other documents with the OTA. Ignoring Judge Pollack's directive not to file any additional documents between the First Hearing and the Second Hearing, the Petitioner filed seventeen (17) new pleadings.

12. As of the date of the OTA's December 18, 2014 Letter, the Petitioner filed one hundred seventeen (117) pleadings totaling nearly five hundred (500) pages.²

13. Due to the nature and extent of the Petitioner's perceived grievances, this Tribunal has cited relevant portions of the OTA's December 18, 2014 letter which states, in pertinent part,:

First, you sent me a letter on November 14, 2014. In that letter you suggest that my secretary indicated that you were unable to participate in the continuation of your evidentiary hearing because of an equipment "malfunction." There was no malfunction, as you well know. In your December 11, 2014, letter to Mr. Lee you admit that you hung up, stating that "No one should be expected to hold a silent phone for more than ten minutes." To be clear, **I did expect you to hold a silent phone on November 13, 2014, until such time as we were ready to begin your continued hearing.** I wrote that last sentence in bold so there is no confusion. The reason I expected you to "hold the phone" and to participate in the continuation of your evidentiary hearing is precisely because it was your hearing. Let me remind you that during your initial evidentiary hearing on August 27, 2014, I allowed the record to remain open so that you could present additional evidence. OTA's December 18, 2014 letter goes on to state that: "Next, when we concluded on August 27, 2014, I stated that I was keeping the record open for one purpose only: to allow you to present evidence of your trading losses."

² Among the documents that Petitioner filed include numerous emails, faxes, letters to this Tribunal and to several elected officials, a writ of mandamus, an interlocutory appeal to the a West Virginia County Circuit Court and multiple ethics complaints to the West Virginia Office of Lawyer Disciplinary Council that were summarily dismissed.

In an effort to further accommodate Petitioner, Chief Administrative Law Judge Pollack explained that:

The order enclosed does allow you to file a post-hearing brief. I am allowing you to do so in yet another attempt to ensure that you receive a fair hearing. Notwithstanding, your decision not to participate in the continuation of your own hearing, the Tax Commissioner advanced a legal argument on November 13th that I am willing to allow you to respond to. Moreover, despite the fact that we never provide transcripts to parties free of charge, I am willing to make an exception this one time. We will provide you with the transcript of the November 13, 2014 conclusion of your evidentiary hearing and then you will have thirty days to file **ONE** written response.

DISCUSSION

In a hearing before this Tribunal, it is well settled that the taxpayer has the burden of proof. *See* W. Va. Code §11-10A-10(e); *RGIS Inventory Specialists v. Palmer*, 209 W. Va.154, 544 S.E.2d 79 (2001). Based upon review of the entire record of these proceedings, it is clear that the Petitioner failed to meet his burden of proof here.

In the First Hearing, the Petitioner argued that the Respondent had no power to issue the Assessment since the Internal Revenue Service (the "IRS") processed the Petitioner's amended 2012 personal income tax return³. Petitioner has presented no evidence to support this assertion, nor could he. As then Chief Judge Pollack ruled at the First Hearing, the Respondent is not required to accept an amended personal income tax return simply because the IRS processed a corresponding federal income tax return. The governing statute and legislative rules clearly grant the Respondent the power to investigate and to make changes to an individual's

³ At the First Hearing, this Tribunal properly ruled that the Refund Claims presented no appealable issues. Thus, the only year at issue in this case is tax year 2012.

accounts or returns as well as to make appropriate assessments for non-payment of taxes when necessary. See W. Va. Code §11-10-7; W. Va. Code §11-21-12 *et seq*; 110 Code of State Regulations 21, §59. Thus, the Court finds that Petitioner's argument in this regard without merit.

As stated previously, Petitioner originally listed \$ _____ as taxable income for 2012 and then filed an amended return showing only \$ _____ of West Virginia taxable income. At the First Hearing, Petitioner for the first time stated that the reason for this decrease in income is because he allegedly sustained capital losses from selling precious metals. Upon cross-examination at the First Hearing, the Petitioner admitted those losses were originally claimed on his 2011 federal income tax return and then \$ _____ of those losses were carried forward to his amended 2012 income tax return to offset income received from a retirement distribution in 2012.⁴

Based upon review of the voluminous and convoluted record in this matter, it is apparent that at no time during the course of this case has Petitioner ever fully addressed, advanced or substantiated the only seemingly relevant legal issue, to wit: whether Petitioner is entitled to offset his 2012 ordinary income received from distribution of a retirement account in the amount of over \$ _____ against trading losses that occurred between 2010 and 2012 and that are capital in nature. Well settled federal and state statutes and case law dictate that he may not. Importantly, the governing federal statute provides that:

⁴ Petitioner also argues that he is entitled to relief here because he erroneously received a 1099-G for 2012. The record shows that the improperly issued 1099-G was addressed by Respondent in subsequent correspondence when the Respondent sent the Petitioner a certified letter notifying him of such error. Further, the Respondent's agent testified under oath that the statement was erroneously issued. Thus, Petitioner's argument in this regard is likewise without merit.

(b) Other taxpayers. In the case of a taxpayer other than a corporation, losses from sales or exchanges of capital assets shall be allowed only to the extent of the gains from such sales or exchanges, plus (if such losses exceed such gains) the lower of—

(1) \$3,000 (\$1,500 in the case of a married individual filing a separate return), or

(2) the excess of such losses over such gains.

26 U.S.C. §1211

As a CPA and practicing accountant for more than thirty (30) years, Petitioner should be well aware of the rules governing capital gains and capital losses. Nevertheless, the IRS published a guide to aid taxpayers entitled “Ten Important Facts About Capital Gains and Losses,” which is republished here for purposes of this decision:

1. Almost everything you own and use for personal purposes, pleasure or investment is a capital asset.
2. When you sell a capital asset, the difference between the amount you sell it for and your basis – which is usually what you paid for it – is a capital gain or a capital loss.
3. You must report all capital gains.
4. You may deduct capital losses only on investment property, not on property held for personal use.
5. Capital gains and losses are classified as long-term or short-term, depending on how long you hold the property before you sell it. If you hold it more than one year, your capital gain or loss is long-term. If you hold it for one year or less, your capital gain or loss is short-term.
6. If you have long-term gains in excess of your long-term losses, you have a net capital gain to the extent your net long-term capital gain is more than your net short-term capital loss, if any.
7. The tax rates that apply to the net capital gain are generally lower than the tax rates that apply to other income
8. If your capital losses exceed your capital gains, the excess can be deducted on your tax return and used to reduce other income, such as wages, up to an annual limit of \$3,000.00, or \$1,500 if you are married filing separately.

9. If your total net capital loss is more than the yearly limit on capital loss deductions, you can carry over the unused part to the next year and treat it as if you incurred it in that next year.
10. Capital gains and losses are reported on Schedule D, Capital Gains and Losses, and then transferred to line 13 of Form 1040.

IRS Tax Tip 2011-35, February 18, 2011 at www.irs.gov

Here, Petitioner claims that he should be permitted to offset the approximately \$ _____ in losses that he purportedly incurred selling precious metals in years 2010 through 2012 against ordinary income that he received in 2012. It is black letter law that where a taxpayer has no capital gains in the tax year involved, no capital loss is allowable. *Nordvloom Associates, Inc. v. CIR* (U.S. Tax Court 1950). Moreover 26 U.S.C. §1211 provides that excess capital losses are limited to \$3,000.00.

Because even a cursory reading of the law applicable to this issue provides that capital gains may only be offset by capital losses and that any excess capital gains are limited to three thousand dollars (\$3,000.00), this Tribunal may not grant the Petitioner his requested relief. In short, Petitioner has not met his burden of proof in this matter.

CONCLUSIONS OF LAW

1. In a hearing before this Tribunal, it is well settled that the taxpayer has the burden of proof. *See* W. Va. Code §11-10A-10(e); *RGIS Inventory Specialists v. Palmer*, 209 W. Va.154, 544 S.E.2d 79 (2001).

2. This Court finds that the governing statute and legislative rules clearly grant the Respondent the power to investigate and to make changes to an individual's accounts or returns as well as to make appropriate assessments for non-payment of taxes when necessary. *See* W. Va. Code §11-10-7; W. Va. Code §11-21-12 *et seq*; 110 Code of State Regulations 21, §59.

3. It is black letter law that where a taxpayer has no capital gains in the tax year involved, no capital loss is allowable. *Nordvloom Associates, Inc. v. CIR* (U.S. Tax Court 1950).

DISPOSITION

Based upon the applicable case and statutory law and review of the entire record in this matter, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the assessment issued against the Petitioner on December 20, 2013, for personal income tax for the tax year ending December 31, 2012, for tax in the amount of \$_____, interest in the amount of \$_____ and penalties in the amount of \$_____, for a total assessed tax liability of \$_____ should be and hereby is **AFFIRMED**.

Interest continues to accrue on this unpaid tax until this liability is fully paid. W. Va. Code §11-10-17(a).

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
Heather G. Harlan
Chief Administrative Law Judge

Date Entered