

**REDACTED DECISION – DK# 19-421**

**BY: CRYSTAL S. FLANIGAN, DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE  
SUBMITTED FOR DECISION ON JANUARY 25, 2023  
ISSUED ON DECEMBER JULY 24, 2023**

**FINAL DECISION**

On June 21, 2019, the Compliance Division of the West Virginia State Tax Commissioner's Office (hereinafter "Tax Department" or "Respondent") issued an Assessment against the Petitioners, AAA (hereinafter "Petitioners"). This assessment was issued pursuant to the authority of the State Tax Commissioner, granted to him by the provisions of Chapter 11, Article 10 *et seq*, of the West Virginia Code. The Petitioners were originally assessed for personal income taxes, interest, and penalties/additions for tax years 2009, 2016 & 2017.<sup>1</sup> The Petitioners were assessed only penalties/additions for tax years 2010-2014 and 2018. The original underlying tax assessment was in the amount of \$x,xxx.xx, interest in the amount of \$x,xxx.xx, additions and/or penalties in the amount of \$x,xxx.xx, for a total personal income tax assessment of \$ x,xxx.xx, and was for the period from 2009 through 2018. On September 15, 2022, the Respondent issued amended balances for a total of \$ x,xxx.xx, as the parties resolved the 2016 tax year.<sup>2</sup>

In the Petition for Reassessment, the Petitioners indicated that they received a copy of the assessment at issue on June 27, 2019. The Petitioners timely filed their Petition for Appeal with this Tribunal on August 26, 2019. Subsequently, notice of a hearing on the petition was sent to the parties and in accordance with the provisions of West Virginia Code Section 11-10A-10, a hearing was held on September 15, 2022. Thereafter, the parties submitted briefs containing

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<sup>1</sup>For the purposes of clarity, the 2015 tax year was never part of this assessment. The parties have resolved the 2016 tax year in its entirety, and it is no longer an issue in this matter. The Petitioners concede that the underlying tax for 2017 is correct and are only protesting the penalties and additions.

<sup>2</sup> The parties have agreed that the \$ x,xxx.xx is the current amount at issue. The letter describing these tax years and amounts still at issue was admitted into evidence as Respondent's exhibit number six.

proposed findings of fact and conclusions of law, the evidence closed on January 25, 2023, and the matter became ripe for decision at that time.

### **FINDINGS OF FACT**

1. The Petitioners are West Virginia residents as that term is defined in West Virginia Code Section 11-21-7. As such, they pay West Virginia income taxes. Tr. 25.

2. BBB is a partner/member of Company A and as such, pays estimated taxes, and has done so since at least 2009. Tr. 6, 32.

3. CCC is a retired schoolteacher and was previously employed by the West Virginia County Board of Education and received a W-2. Tr. 5, 32.

4. The Petitioners have been using a Certified Public Accountant to prepare their income tax returns and estimated tax payments for the years 2009 through 2018. Tr. 35.

5. Tax years 2009, 2010, 2011, 2012, 2013, 2014, 2017, and 2018 are at issue for penalties and additions. Tax year 2009 is at issue for the underlying tax. Tr. 16-21, 50.

6. Tax year 2016 has been resolved in its entirety between the parties and is no longer at issue. Tr. 3-6, 24.

7. The Petitioners are not contesting the underlying tax for tax year 2017 but are requesting a penalty and addition waiver. Tr. 1-2.

8. The Petitioners claim that the assessment is devoid of a reason why penalties and additions were included. Respondent's Ex. No. 2.

9. The Petitioners have requested and received penalties and additions waivers in the past. Tr. 47, Respondent's Ex. No. 3.

10. The Petitioners' handwritten letter to the Respondent shows knowledge of assessments, underpayments of estimated taxes, penalties/additions, and waivers. Tr. 2-17, 34.

## DISCUSSION

The parties agree that the issues to be decided in this matter are whether the Petitioners are liable for the underlying tax for tax year 2009 and whether they are liable for penalties and additions for tax years 2009-2014 and 2017-2018.

The Petitioners argue that the Respondent's assessment failed to inform them with particularity as to why they were being assessed penalties and additions pursuant to West Virginia Code 11-10-18(a). The Petitioners contend that they were "without an ability to contest the penalty." Petitioners' Brief, p. 4.

The Respondent argues that the Notice of Assessment clearly states the reasons for the penalties, which were underpayment of estimated taxes and late payment of taxes. The Respondent also points to a handwritten letter by BBB that shows clear knowledge of personal income tax assessments, underpayment of estimated taxes, penalties, additions, and waivers. Respondent's Ex. No. 3. The Respondent further shows a waiver request approval as designated in Respondent's Ex. No. 3.

Both parties agree that the controlling law in this case is West Virginia Code Section 11-10-18(a) and neither party argues that it is ambiguous. West Virginia Code Section 11-10-18(a) provides:

(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;

(3) In the case of failure to pay any amount in respect to any tax required to be shown on a return specified in paragraph (1) which is not so shown within fifteen days of the date of notice and demand therefore, 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 of tax stated in such notice and demand one half of one percent of the amount of each 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 this addition to tax shall be imposed only on the net amount of tax due.

W. Va. Code § 11-10-18(a).

The Petitioners first argue that the accounting firm that they had engaged for approximately fifty years underpaid their personal income taxes. Interestingly, BBB testified that he wasn't trying to blame his accountants for the underpayments. Furthermore, the Petitioners fail to cite any statutory or regulatory authority that provides them the ability to prevail based on this argument. In addition to not citing any legal authority, the Petitioners have had underpayment issues for many years and failed to correct this issue with their accountants.

The Petitioners dispute the underlying taxes for the 2009 tax year and the penalties and additions associated with them. The Petitioners argue that they assumed that they had a refund from 2008 that should have been applied to their 2009 return. However, the Respondent argues that the 2008 overpayment was applied to a preexisting tax debt for the 2005 tax year and that the Petitioners were notified of this by letter dated November 16, 2009. BBB testified that he either

does not recall or that he may not have received this letter.<sup>3</sup> Despite this, BBB does not dispute that the 2008 overpayment may have been applied to the 2005 tax year and that he may have received the November 16, 2009 letter. He conceded that if he owed the tax then he would pay the tax. *See* Hearing Transcript pgs. 56-57. Additionally, on October 25, 2010, the Respondent issued a return change letter for the 2009 tax year showing that the Petitioners had underestimated the tax due along with an underpayment of estimated penalty due for their 2009 personal income tax return. *See* Respondent's Ex. No. 2. Even if the Petitioners didn't receive the November 16, 2009 letter, the return change letter should have triggered the Petitioners to inquire with the Respondent. Based on the above, this Tribunal finds that the 2009 tax is due along with interest and penalties.

The Petitioners are not contesting the underlying tax for the 2017 tax year but do contest the penalties/additions for 2017. The Petitioners' 2017 tax returns doubled the amount of withholding from CCC' W2 which caused their return to have an underpayment of taxes due. The Petitioners concede that this error occurred and admit that they owe the underlying taxes due for 2017. However, despite acknowledging this filing error and underpaying the 2017 tax year, they still argue that the penalties for the 2017 tax year should somehow be waived because of the accountant's error of doubling CCC' withholding on their income tax returns. *See* Transcript pg. 2.

The Respondent counters this argument stating that the Petitioners have a history of underpaying their taxes, have benefitted from waivers from prior tax years, and that their reliance upon their accountants is not reasonable cause to waive penalties and additions. The Petitioners have received at least three waivers for underpayment penalties due to relying on their accountants

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<sup>3</sup> BBB was the only witness for the Petitioners at the evidentiary hearing.

in the past. After receiving these prior waivers, BBB admitted that he did not inform his accountants of these penalties:

JUDGE FLANIGAN: Sure. Those three years that you did get the waivers for, did you ever tell your accountant about that? That you had been penalized and then you had to go and get these waivers?

BBB: I did not.

JUDGE FLANIGAN: You didn't tell your accountant?

BBB: I probably should have, but I did not.

JUDGE FLANIGAN: Okay, because my next question was, what did your accountant, you know, advise you to do going forward, but if you didn't tell them about the penalties, then ---

BBB: The fact that we're sitting here today having this hearing would shock him. They have no knowledge of it.

Hr'g Tr. 41.

This Tribunal is unclear as to why the Petitioners have never mentioned this issue to their accountants. It's as though the Petitioners wanted this issue to resolve on its own because they didn't inform their accountants and then were surprised that they continued to incur the same tax problems. In this appeal, the Petitioners argue that they are relying upon their professional accountants and that reliance should be reasonable cause for additional penalty waivers. There are instances where the Respondent may consider accounting errors as reasonable cause to justify a waiver. However, a taxpayer with continued accounting errors or other errors over several tax periods cannot reasonably expect a waiver. Moreover, a taxpayer cannot withhold necessary information from their accountant, get penalized from the Respondent, and then argue that the

penalties should be waived as reasonable cause because they were relying on their accountant. This argument does not even approach meeting their burden of proof. This Tribunal finds this argument without any merit whatsoever. Accordingly, the Petitioners are responsible for the underlying taxes, interest, and penalties due for the 2009 and 2017 tax years.

In their post hearing brief, the Petitioners argue that the assessment does not provide them with enough notice to contest the penalties/additions. The Notice of Assessment language at the top of the second page of Respondent's exhibit number one states, "[p]ursuant to West Virginia law, this Notice will also serve as an assessment for Personal Income Tax for the periods and amounts indicated below which may include tax, interest, additions to tax, and penalties and remain unpaid. The balance due is shown below." Directly below this statement, the assessment shows six columns with the amounts for the time periods, return due date, tax, penalty/additions, interest, balance for each tax period, and total amount due. Directly below the columns and the grand total amount due is exactly shown as follows:

### NOTICES

You may receive a separate "Statement of Account" letter referencing the balance due on this Notice of Assessment. This assessment may be the result of an estimated assessment for the non-filing of tax return(s). These may be resolved by filing signed and dated tax returns(s) for all periods covered by estimated assessment. Tax returns are available at [www.tax.wv.gov](http://www.tax.wv.gov).<sup>4</sup>

This notice of assessment and its language are standard and typically used by the Respondent. To even a casual observer, it should provide an indication that there is something wrong with the Petitioners' tax returns. The Petitioners argue that the language in the assessment failed to inform them with sufficient particularity as to penalties and additions. The term "sufficient particularity"

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<sup>4</sup> This notification was not only prominently featured in the assessment but also featured in bright, red font.

is not defined in Chapter 11, Article 10 *et seq*, of the West Virginia Code and neither party argued that this statute is ambiguous.

Under the Rules of Statutory Construction, when a statute is not ambiguous then it may be interpreted under its common, ordinary meaning. In applying its common, ordinary meaning, sufficient is defined in Webster's Dictionary as "enough to meet the needs of a situation or proposed end." The term particularity is defined by Webster's Dictionary as "a minute detail." This Tribunal finds that that the two words interpreted together under a common, ordinary meaning would be "enough detail." Thus, the Respondent's Notice of Assessment needs to have enough detail to put any West Virginia taxpayer on notice that issues have arisen with their tax filings.

The Petitioners do not argue what they believe "sufficient particularity" means or what explicit information should be provided by the Tax Commissioner in an assessment. They only argue that this Notice of Assessment fails to meet the statutory requirement of West Virginia Code Section 11-10-18(a). This statute does not require a comprehensive history of the Petitioners' tax filings. The Notice contained the tax periods at issue, underlying tax due, interest due, additions/penalties due, and a grand total for all the tax periods due. This Tribunal finds that the information contained in the Notice of Assessment provides sufficient particularity to the Petitioners. Accordingly, we find this argument without merit.

Moreover, the Notice of Assessment was not the first indication that something was amiss with the Petitioners' tax returns. The Petitioners had received return change letters for the tax periods at issue which serve as further notice that problems existed with their tax returns. However, these issues went unresolved by the Petitioners, which lead to this Assessment. *See* Respondent's Exhibit No. 2.

As discussed *supra*, the Petitioners have previously benefited from waivers for penalties and additions.<sup>5</sup> In 2009, BBB authored a handwritten letter to the Respondent seeking a waiver of penalties and additions from lien and distress warrants for tax years 2002, 2006, and 2007.<sup>6</sup> The Tax Department granted the Petitioner's request on August 24, 2009. The Petitioners continued argument that they were unaware of the additions and penalties associated with underpaying personal income taxes is at a minimum, unconvincing. This Tribunal is further unpersuaded that the Petitioners were underpaying paying taxes for over ten years and were somehow unaware that additions and penalties could be a consequence. In light of the Petitioners' notice argument and their other previously discussed arguments, this Tribunal finds that the Petitioners have failed to meet their burden in this matter.

### CONCLUSIONS OF LAW

Based upon all the above, it **FINDS** and **CONCLUDES** that:

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. W.Va. Code §11-10A-10(e); W.Va. Code R. § § 121-1-63.1 and 69.2.

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<sup>5</sup> This Tribunal notes that any tax year prior to 2009 is not subject to the assessment at issue and is being mentioned *supra*, to illustrate the Petitioners' tax history. The 2008 tax year has a role for the 2009 tax year which has been discussed in accordance therewith.

<sup>6</sup> The Respondent issued a Statement of Account on July 20, 2009, detailing the three lien and distress warrants for the 2002, 2006, and 2007 tax years. That Notice was seemingly enough information for BBB to reach out to the Respondent and seek a waiver of penalties and additions. The Petitioners clearly understood that this Statement of Account was giving them a "heads up" that something was amiss with their taxes but somehow, the current Notice of Assessment on appeal was not enough notice to indicate a tax filing issue.

3. The Petitioners are residents of West Virginia, as the term is defined in West Virginia Code Section 11-21-7, and as such pay West Virginia taxes.

4. West Virginia Code Section 11-10-18 provides for the Tax Commissioner to assess additions to tax when a Taxpayer fails to timely file tax returns and when the Taxpayer fails to pay the amount of tax due on the return.

5. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioners to show that any assessment of tax against them is erroneous, unlawful, void or otherwise invalid. See W.Va. Code Ann. §11-10A-10(e). (West).

6. The Taxpayers have failed to show reasonable cause, as that term is used in the West Virginia Code Section 11-10-18(a), for their failure to file West Virginia personal income tax for the proper amounts for tax years 2009-2015, and 2017-2019.

### **DISPOSITION**

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the June 21, 2019 Assessment, as amended, issued against the Petitioners for a total tax liability of \$xx,xxx.xx is hereby **AFFIRMED**.

Interest continues to accrue on the unpaid taxes until fully paid. W. Va. Code Ann. § 11-10-17(a) (2010).

### **WEST VIRGINIA OFFICE OF TAX APPEALS**

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Crystal S. Flanigan  
Deputy Chief Administrative Law Judge

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Date