BEFORE THE STATE BOARD OF TAX APPEALS STATE OF ARIZONA 100 North 15th Avenue - Suite 140 Phoenix, Arizona 85007 602.364.1102

)

)

)

)

KAY H. REMEIN	١,	EIN	M	E	R	H.	AY	KA	
---------------	----	-----	---	---	---	----	----	----	--

VS.

Appellant,

ARIZONA DEPARTMENT OF REVENUE,

Appellee.

Docket No. 1861-01-I

NOTICE OF DECISION: FINDINGS OF FACT AND CONCLUSIONS OF LAW

The State Board of Tax Appeals, having considered all evidence and arguments presented, and having taken the matter under advisement, finds and concludes as follows:

FINDINGS OF FACT

Through an exchange of information agreement with the Internal Revenue Service ("IRS"), the Arizona Department of Revenue (the "Department") learned that Kay H. Remein ("Appellant"), an Arizona resident, earned income in 1998 but failed to file an Arizona individual income tax return for that year.

Subsequently, the Department issued a proposed assessment of additional income tax, penalties for failure to file a return and failure to file on demand, and interest for tax year 1998. This assessment was based on Appellant's federal adjusted gross income as reported by the IRS.

Appellant timely protested the assessment to the Department's hearing officer who upheld the assessment. Appellant then protested the hearing officer's decision to the Director of the Department who affirmed the hearing officer's decision. Appellant now timely appeals to this Board.

DISCUSSION

2	The issue before the Board is whether the Department's assessment against Appellant is valid.
3	The presumption is that an assessment of additional income tax is correct. See Arizona State Tax
4	Commission v. Kieckhefer, 67 Ariz. 102, 191 P.2d 729 (1948); A.R.S. §§ 42-1108, 1109, 1251.
5	Appellant argues that the assessment issued against her is invalid because the Department's
6	procedures violate the Arizona Administrative Procedures Act ("APA"). Specifically, Appellant contends
7	that: (1) the Department has failed to properly promulgate a rule of practice regarding assessments as
8	required under A.R.S. § 41-1003; and, (2) that a hearing before the Department's own hearing officers
9	does not satisfy the APA requirement that administrative hearings on contested cases and appealable
	agency actions be heard by an independent administrative law judge. A.R.S. § 41-1001(A)(11).
10	The Arizona Legislature has the authority to levy and collect taxes under the Arizona Constitution.
11	

Ariz. Const. art. IX, § 12. Accordingly, the legislature has enacted Titles 42 and 43 of the Arizona Revised Statues and has granted the Department the powers and duties to enforce them. A.R.S. § 42-1004.

These powers and duties include issuing deficiency assessments (A.R.S. § 42-1108), estimating

tax owed (A.R.S. § 42-1109) and resolving protests and holding hearings (A.R.S. § 42-1251).

A.R.S. § 42-1108 states, in part:

- A. If a taxpayer fails to file a return required by this title or title 43, or if the department is not satisfied with the return or payment of the amount of tax required to be paid under either title, the department may examine any return, including any books, papers, records or memoranda relating to the return, to determine the correct amount of tax. This examination must occur within the time periods prescribed by section 42-1104 and may be accomplished through a detailed review of transactions or records or by a statistically valid sampling method.
- B. The department shall give the taxpayer written notice of its determination of a deficiency by mail, and the deficiency, plus penalties and interest, is final forty-five days from the date of mailing. In the case of a joint income tax return, the notice may be a single joint notice mailed to the last known address, but if either spouse notifies the department that separate residences have been established, the department shall mail duplicate originals of the joint notice to each spouse.

A.R.S. § 41-1003 indicates that "(e)ach agency shall make rules of practice setting forth the nature and requirements of all formal procedures available to the public." Emphasis added. Appellant asserts that the use of the term "shall" indicates that the Department is mandated to promulgate rules regarding assessments and without these rules the issuance of assessments is void. However, A.R.S. § 42-1005 provides that the Director of the Department shall "[m]ake such administrative rules, *as he deems necessary and proper* to effectively administer the department and enforce [title 42] and title 43." Emphasis added.

In Hamilton v. State of Arizona , 186 Ariz. 590, 595, 925 P.2d 731 (1996), the court "reject(ed) the taxpayer's contention that because DOR expressed its interpretation of 'adjusted gross income as defined by the department' through Form 140-PTC rather than by a rule promulgated as required by A.R.S. § 41-1003." ... DOR's interpretation was void and could not be applied" The court indicated that the plain meaning of the statute allowed the Department to define "adjusted gross income" and it was not necessary to promulgate a rule to achieve the same purpose. Likewise, the statute governing assessments is clear and it is not necessary to promulgate additional rules.

A.R.S. § 41-1092(1) provides that an "Administrative law judge" means an individual or an agency head, board or commission that sits as an administrative law judge, that conducts administrative hearings in a contested case or an appealable agency action and that makes decisions regarding the contested case or appealable agency action. Appellant argues that this statute requires that a tax protest to the Department be heard by a hearing officer with the Office of Administrative Hearings. A.R.S. § 41-1092.02, entitled "Appealable agency actions; application of procedural rules; exemption from article," provides that

> A. This article applies to all contested cases as defined in section 41-1001 and all appealable agency actions, except contested cases with or appealable agency actions of:

10. The department of revenue regarding income tax, withholding tax or estate tax or any tax issue related to information associated with the reporting of income tax, withholding tax or estate tax.

This statute exempts the Department's hearings on income tax matters from the purview of the Office of Administrative Hearings. Further, the hearing office of the Department's Appeals Section is

physically and organizationally separate from other units within the Department and is not accountable to any enforcement unit and the Department's hearing officers satisfy the pertinent statutory qualifications.

For the foregoing reasons, the Department's assessment is valid; therefore, Appellant is liable for the tax at issue. Further, Appellant has not shown that her failure to timely file an income tax return or to timely file a return on notice and demand of the Department was due to reasonable cause and not willful neglect; therefore, the penalties imposed may not be abated. A.R.S. § 42-1125(A) and (B). Finally, because the interest imposed represents a reasonable interest rate on the tax due and owing and is made part of the tax by statute, it may not be abated. *Biles v. Robey*, 43 Ariz. 276, 286, 30 P.2d 841 (1934).

CONCLUSIONS OF LAW

1. The assessment is valid, and Appellant is liable for the tax assessed. See Arizona State Tax Commission v. Kieckhefer, 67 Ariz. 102, 191 P.2d 729 (1948); A.R.S. §§ 42-1108, 1109, 1251.

2. Because Appellant has not shown that her failure to timely file an income tax return or to timely file a return on notice and demand by the Department was due to reasonable cause and not willful neglect, the penalties imposed may not be abated. A.R.S. § 42-1125(A) and (B).

3. The interest imposed represents a reasonable interest rate on the tax due and owing and is made part of the tax by statute; therefore, it may not be abated. *Biles v. Robey*, 43 Ariz. 276, 286, 30 P.2d 841 (1934).

ORDER

THEREFORE, IT IS HEREBY ORDERED that the appeal is denied, and the final order of the Department is affirmed.

1	This decision becomes final upon the expiration of thirty (30) days from receipt by the taxpayer,						
2	unless either the State or taxpayer brings an action in superior court as provided in A.R.S. § 42-1254.						
3	DATED this 27th day of August , 2002.						
4	STATE BOARD OF TAX APPEALS						
5	Jamie C. Was L						
6							
7	Javice C. Washington, Chairperson						
8	JCW:ALW						
9	CERTIFIED						
10	Copies of the foregoing Mailed or delivered to:						
11	Kay H. Remein c/o 2131 W. Earll Dr.						
12	Phoenix, Arizona 85015						
13	Assistant Attorney General						
14	Civil Division, Tax Section 1275 West Washington Street Phoenix, Arizona 85007						
15							
16							
17							
18							
19 20							
20							
22							
23							
24							
25							
	5						