

1 Appellant now timely appeals to this Board.²

2 DISCUSSION

3 The issue before the Board is whether the Department's assessments against Appellant are valid.
4 The presumption is that an assessment of additional income tax is correct and Appellant bears the
5 burden of overcoming that presumption. See *Arizona State Tax Commission v. Kieckhefer*, 67 Ariz. 102,
6 191 P.2d 729 (1948); A.R.S. §§ 42-1108, 1109, 1251.

7 The Arizona Legislature has the authority to levy and collect taxes under the Arizona Constitution.
8 Ariz. Const. art. IX, § 12. Accordingly, the legislature has enacted Titles 42 and 43 of the Arizona
9 Revised Statutes and has granted the Department the powers and duties to enforce them. A.R.S. § 42-
10 1004.

11 These powers and duties include issuing deficiency assessments (A.R.S. § 42-1108), estimating
12 tax owed (A.R.S. § 42-1109) and resolving protests and holding hearings (A.R.S. § 42-1251).

13 A.R.S. § 42-1108 states, in part:

- 14 A. If a taxpayer fails to file a return required by this title or title 43, or if
15 the department is not satisfied with the return or payment of the
16 amount of tax required to be paid under either title, the department
17 may examine any return, including any books, papers, records or
18 memoranda relating to the return, to determine the correct amount of
19 tax. This examination must occur within the time periods prescribed
20 by section 42-1104 and may be accomplished through a detailed
21 review of transactions or records or by a statistically valid sampling
22 method.
- 23 B. The department shall give the taxpayer written notice of its
24 determination of a deficiency by mail, and the deficiency, plus
25 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.

² Appellant argues that she was denied the right to counsel in this matter. However, the Board did not permit Appellant's representative to participate in the hearing before the Board because he did not qualify under A.R.S. § 42-1253(D).

1 Appellant argues that the assessments issued against her are invalid because the Department's
2 procedures violate the Arizona Administrative Procedures Act ("APA"). Specifically, Appellant contends
3 that: (1) the Department has failed to properly promulgate a rule of practice regarding assessments as
4 required under A.R.S. § 41-1003; and, (2) that a hearing before the Department's own hearing officers
5 does not satisfy the APA requirement that administrative hearings on contested cases and appealable
6 agency actions be heard by an *independent* administrative law judge. A.R.S. § 41-1001(A)(11).

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

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

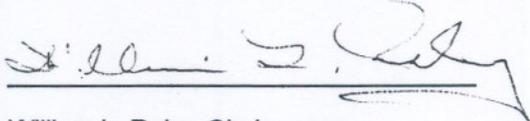
20 A.R.S. § 41-1092(1) provides that an "Administrative law judge" means an individual or an agency
21 head, board or commission that sits as an administrative law judge, that conducts administrative hearings
22 in a contested case or an appealable agency action and that makes decisions regarding the contested
23 case or appealable agency action. Appellant argues that this statute requires that a tax protest to the
24 Department be heard by a hearing officer with the Office of Administrative Hearings. A.R.S. § 41-
25 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:

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 11th day of February, 2003.

4 STATE BOARD OF TAX APPEALS

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6 
7 William L. Raby, Chairperson

8 WLR:ALW

9 CERTIFIED

10 Copies of the foregoing
11 Mailed or delivered to:

12 Linda R. Neal
13 16423 N. 66th Dr.
14 Glendale, Arizona 85306

15 Lisa Woods
16 Assistant Attorney General
17 Civil Division, Tax Section
18 1275 West Washington Street
19 Phoenix, Arizona 85007
20
21
22
23
24
25